

IGNACIA S. MORENO
Assistant Attorney General
DANIEL G. BOGDEN
United States Attorney
Greg Addington, Assistant U.S. Attorney
Susan L. Schneider, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Div.
999 – 18th Street,
Suite 370, South Terrace
Denver, Colorado 80202
(303) 844-1348
susan.schneider@usdoj.gov
Attorneys for the United States of America

Wes Williams, Jr., Nevada Bar No. 06864
3119 Lake Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
(775) 773-2838
wwilliams@stanfordalumni.org
Attorney for the Walker River Paiute Tribe

Simeon Herskovits, Nevada Bar No. 11155
Advocates for Community and Environment
P.O. Box 1075
El Prado, New Mexico 87529
(575) 758-7202
simeon@communityandenvironment.net
Attorney for Mineral County, Nevada

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

| | | |
|-----------------------------------|---|-----------------------------------|
| UNITED STATES OF AMERICA, |) | IN EQUITY NO. C-125-ECR |
| |) | Subproceedings: C-125-B & C-125-C |
| Plaintiff, |) | 3:73-CV-00125-ECR-WGC |
| |) | 3:73-CV-00127-ECR-WGC & |
| WALKER RIVER PAIUTE TRIBE, |) | 3:73-CV-00128-ECR-WGC |
| |) | |
| Plaintiff-Intervenor, |) | |
| |) | |
| vs. |) | |
| |) | PLAINTIFF PARTIES' STATUS |
| WALKER RIVER IRRIGATION DISTRICT, |) | REPORT |
| a corporation, et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |
| MINERAL COUNTY, |) | |
| |) | |
| Proposed-Plaintiff-Intervenor, |) | |
| |) | |
| vs. |) | |
| |) | |
| WALKER RIVER IRRIGATION DISTRICT, |) | |
| a corporation, et al., |) | |
| |) | |
| Proposed Defendants. |) | |
| |) | |

TABLE OF CONTENTS

| | |
|--|-----------|
| I. General Overview of the History of C-125 and Subproceedings C-125-B and C-125-C. | 1 |
| A. C-125 and the Walker River Decree: | 2 |
| B. Subproceeding C-125-B: Counterclaims and Cross Claims of the Tribe and the United States. | 3 |
| 1. The Tribe’s and the United States’ Claims in C-125-B: | 3 |
| 2. Procedural History and Early Service Efforts in C-125-B: | 5 |
| C. Subproceeding C-125-C: Motion and Petition to Intervene by Mineral County. | 8 |
| 1. Mineral County’s Claim in C-125-C: | 8 |
| 2. Procedural History and Early Service Efforts in C-125-C: | 10 |
| D. Court-Ordered Mediation and Other Settlement Efforts: | 12 |
| 1. Court-Ordered Mediation: | 12 |
| 2. More Recent Settlement Efforts: | 14 |
| a. Walker Basin Restoration Program: | 14 |
| b. Tribal and Other Efforts: | 14 |
| II. Primary Issues Presented by and Remaining in this Litigation | 15 |
| A. The Issues Under C-125-B and C-125-C Arise Within the Context of the Overarching C-125 Proceeding: | 15 |
| B. Primary Issues in C-125-B’s Litigation of the Tribal Claims: | 16 |
| C. Primary Issues in C-125-C: | 17 |
| D. Service Issues in Subproceedings C-125-B and C-125-C: | 17 |
| 1. Service Issues Common to Both Subproceedings: | 18 |
| 2. Service Issues in C-125-B: | 20 |

| | |
|--|----|
| a. Service Cut-Off Order:..... | 21 |
| b. Remaining Service Issues in C-125-B: | 21 |
| 3. Service Issues in C-125-C:..... | 22 |
| a. Mineral County’s 2008 Service Report: | 22 |
| b. Remaining Service Issues in C-125-C: | 23 |
| E. Recurring Issues in the Court’s Exercise of Ongoing Equity Jurisdiction in C-125: | 23 |
| 1. Role of the U.S. Board of Water Commissioners and Its Attorney: | 23 |
| 2. Annual Plan of Distribution:..... | 24 |
| a. Accurate Measurement of the Tribe’s Water Right:..... | 25 |
| b. Point of Measurement of the Tribe’s Water Right: | 25 |
| c. Fallowing Program: | 25 |
| 3. Modifications to the Decree: | 26 |
| 4. Possible Amendments to the Rules:..... | 27 |
| 5. Certificate of Service Issues: | 27 |
| III. Matters of Factual and Legal Importance Within this Court’s Jurisdiction, Including Additional Case Management Issues | 27 |
| A. The Magistrate Judge’s Authority: | 27 |
| B. Additional Case Management Issues: | 28 |

Pursuant to the Court's Orders of December 23, 2011, and January 10, 2012, (C-125-## 1047, 1049, 1050; C-125-B-##1675, 1680, 1681; C-125-C-##567, 571, 572),¹ the Walker River Paiute Tribe ("Tribe"), the United States of America ("United States"), and Mineral County (collectively "Plaintiff Parties") hereby submit the following status report on the Walker River litigation, which includes C-125 and subproceedings C-125-B and C-125-C. The United States and the Tribe are, respectively, the Plaintiff and Plaintiff-Intervenor in C-125 and all of its subproceedings. Mineral County is the Proposed Plaintiff-Intervenor in subproceeding C-125-C. Below we have summarized the evolution of and principal issues in these ongoing interstate stream adjudication proceedings, including the overarching Walker River Decree administration under file number C-125 and the more narrowly targeted subproceedings under subfile numbers C-125-B and C-125-C.

I. General Overview of the History of C-125 and Subproceedings C-125-B and C-125-C.

The Walker River is an interstate stream system that begins in California and flows into Nevada and through the Walker River Paiute Reservation ("Reservation"), just before ending in Walker Lake, which is a rare terminal lake. This federal court litigation over rights to and the administration of the Walker River system began in 1924, when the United States sued the Walker River Irrigation District ("WRID") and others to quiet title to a federal reserved water right claim for the Reservation and to determine the relative rights to water of parties in Nevada and California. Case C-125 includes the underlying case and three subproceedings (C-125-A; C-125-B; C-125-C) (subproceeding C-125-A concluded a number of years ago), all of which concern rights to and the administration of water in the Walker River system.

¹ C-125-B documents are prefaced "B-" and C-125-C documents are prefaced "C-".

C. C-125 and the Walker River Decree:

The United States filed the underlying equity proceeding in 1924 when upstream users prevented water from reaching the Reservation. The United States sought a federal reserved water right for the Reservation under *Winters v. United States*, 207 U.S. 564 (1908), and related cases establishing that when the United States withdraws and reserves its lands for a federal purpose, the federal government, by implication, also reserves an amount of then-unappropriated water needed to accomplish the purpose of the reservation. On April 14, 1936, following trial, the Federal District Court for the District of Nevada entered a judicial Decree in *United States v. Walker River Irrigation Dist.*, No. C-125 (3:73-cv-125) (D. Nev.) (commonly referred to as “C-125”). The Decree (April 14, 1936), modified, *Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (April 24, 1940) (“Decree”), addresses all of the rights of the parties to the suit and their successors-in-interest to the waters of Walker River and its tributaries as of April 14, 1936. Decree at 72, ¶XII. The 9th Circuit reversed, in part, because the Court did not decree the right awarded the Reservation as a federally reserved water right. *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939). On April 24, 1940, the Court amended the Decree to address the 9th Circuit’s ruling and incorporate the parties’ stipulation that:

This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries as of the 14th day of April, 1936

Decree at ¶XII, p. 72.

Under the Decree, as modified, the Tribe is entitled to 26.25 cubic feet per second (“cfs”) of direct flow water from the Walker River during a 180-day irrigation season to irrigate 2,100 acres of land on the Tribe’s Reservation as it existed as of April 14, 1936. The Decree also provides that the Tribe is entitled to sufficient water for domestic, stockwatering and power

purposes. The Tribe's November 29, 1859, priority date is the most senior on the Walker River.

The Court retained jurisdiction "for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . ." *Id.* at 72-73, XIV. Thereafter, it has exercised ongoing authority over and supervision of these proceedings, including approving administrative rules to implement and amend the Decree, addressing change applications that seek to amend the Decree, appointing Water Masters and members of the U.S. Board of Water Commissioners to administer the Decree, and designating and handling three subproceedings. In September 1987, the Tribe moved to intervene, and the Court approved its request in March 1988. (##68, 86).

The Tribe, the United States, and Mineral County have requested that the Federal District Court address additional claims to water from the Walker River system under the Court's continuing jurisdiction to administer the Decree. These additional claims have been designated as subproceedings C-125-B and C-125-C.²

B. Subproceeding C-125-B: Counterclaims and Cross Claims of the Tribe and the United States.

1. The Tribe's and the United States' Claims in C-125-B:

In subproceeding C-125-B, the Tribe and the United States each assert three claims to federal reserved water rights for: (1) Weber Reservoir; (2) lands restored and/or transferred to the Reservation after April 14, 1936; and (3) groundwater associated with the entire Reservation. The United States also asserts eight claims for federal reserved water rights for other tribal and non-tribal federal interests in the basin that were not addressed in the underlying C-125

² Subproceeding C-125-A addressed WRID's petition for relief after the State of California issued administrative orders regarding instream and minimum pool objectives at WRID's Topaz and Bridgewater reservoirs. (A-#3). WRID argued California was acting inconsistently with the Decree and interfering with the federal court's retained jurisdiction. These claims were settled.

litigation: Hawthorne Army Ammunition Plant, Toiyabe National Forest, U.S. Marine Corps Mountain Warfare Training Center, Bureau of Land Management, Yerington Paiute Indian Reservation, Bridgeport Paiute Indian Colony, and a series of Indian allotments. These rights should be adjudicated and incorporated into the Decree.

The United States and the Tribe filed preliminary legal theories in support of these claims in 2007. *Submission of Preliminary Legal Theories by the Walker River Paiute Tribe and the United States of America* (Jan. 8, 2008, B-#1290). In brief, the Reservation, including its various additions, was established as a permanent homeland for the members of the Walker River Paiute Tribe to achieve the “twin goals of Indian self-determination and economic self-sufficiency.” *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. And Source*, 35 P.3d 68, 76 (Ariz. 2001). First, the Tribe and the United States are entitled to store water in Weber Reservoir, which is located entirely within the Reservation, for all purposes recognized under federal law. Weber Dam and Reservoir serve as a regulatory mechanism to deliver the Tribe’s decreed water with its priority date of November 29, 1859, and to store water to irrigate lands in addition to the 2,100 acres of Reservation land adjudicated under the Decree, with a priority date as early as April 15, 1936. The United States constructed the Congressionally-authorized Weber Dam and Reservoir, completing portions in 1935 and adding the floodgates in 1937. The use of Weber Reservoir for storage, independent of the decreed natural flow right, is a matter of federal law that has also been common knowledge for over 70 years and was recognized by Nevada and California and water users when they negotiated the Nevada-California Interstate Compact.

Second, the United States and the Tribe seek federal reserved water rights for lands restored to and/or added to the Reservation after April 1936. These lands were transferred to the Reservation pursuant to the authority of the Act of June 22, 1936 (Pub. L. 748, 74th Cong.)

(“1936 Act”), and implemented pursuant to Executive Order 4668, An Order Adding Certain Public Domain Lands to the Walker River Indian Reservation. Because the 1936 Decree established rights of the parties as of April 14, 1936, it neither included nor addressed water rights for any land transferred to the Reservation at any time thereafter.

Finally, the United States and the Tribe seek federal reserved rights to groundwater underlying and adjacent to all Reservation lands. Groundwater was not addressed in the underlying litigation in C-125. The State of Nevada has contended that there is no connection between surface and groundwater in the Walker River Basin. The United States and the Tribe disagree with this position, which has also been discredited in a variety of more recent studies.

2. Procedural History and Early Service Efforts in C-125-B:

The Court designated subproceeding C-125-B in 1992, stating that it “is part of [a] larger case concerning rights to the water in the Walker River,” Order at 1 (Oct. 27, 1992, B-#15), after the Tribe filed a cross-claim against WRID and other defendants and a counterclaim in subproceeding C-125-A (A-#12E), seeking a water right for lands restored to the Tribe’s Reservation after entry of the Decree, a storage water right in Weber Reservoir, and adequate protection of the Tribe’s existing water rights. The United States made a similar filing on the Tribe’s behalf in its trust capacity. (July 22, 1992, B-#3).

WRID moved to dismiss or require joinder and service on all existing claimants to water in the Walker River Basin. (Aug. 3, 1992, B-#5). The Court determined that “[i]n accordance with Rule 19, all [existing] claimants to the waters of the Walker River and its tributaries must be joined as parties to the claim” and served under Rule 4. Order at 6 (Oct. 27, 1992, B-#15) (“1992 Order”). The Court also determined that the counterclaims were cross-claims since they arose out of the same transaction or occurrence regarding property that is the subject of the

original action. *Id.* at 4-5. In April 1994, following a series of stipulated extensions for the United States to investigate, identify, and serve the necessary additional parties, the United States sought instruction whether it was required to serve groundwater users. (April 7, 1994, B-#23). In July 1994, the Court determined the information before it did not require joinder of groundwater claimants under Rule 19. *Order* (July 8, 1994, B-#30). In 1997, the Tribe and the United States filed First Amended Counterclaims to add claims for groundwater under and adjacent to the present day Reservation and the United States claimed rights for the other federal interests not addressed in the underlying C-125 litigation.³

The Tribe and the United States are in the process of completing service of their First Amended Counterclaims and a related service package on water rights holders in the Walker River Basin, as directed by the Court, including groundwater rights holders. No party has yet filed an answer to the First Amended Counterclaims. On April 18, 2000, following extensive briefing, the Court entered a Case Management Order (“CMO”) that governs the subproceeding. (April 18, 2000, B-#108). Among other things, the CMO bifurcated the claims related to the Tribe (“Tribal Claims”) from the other claims made by the United States. The Tribal Claims will be determined first; Phase I of this litigation involves the identification and resolution of Threshold Issues and Phase II addresses the “completion and determination on the merits of all matters” relating to the Tribal Claims. *Id.* at 9, ¶¶ 11, 12. The CMO requires the “U.S./Tribe” to effect service pursuant to Rule 4, Fed. R. Civ. P., on nine categories of persons and entities, including successors to all water rights holders in the 1936 Decree and holders of permits or certificates to pump groundwater in specific sub-basins, and requires the parties to identify

³ *First Amended Counterclaim of the Walker River Paiute Tribe; First Amended Counterclaim of the United States of America* (July 31, 1997, B-##58, 59).

threshold legal issues. *Id.* at 5-6, 9, ¶¶3, 11. Based on the CMO, in 2007, Magistrate Judge McQuaid ordered the Tribe and the United States to disclose the legal basis of their claims and ordered the primary defendants to disclose the legal basis of their defenses. (B-##1284 (Mineral Co.); 1290, 1291 (U.S./Tribe)).⁴ In 2008, Magistrate Judge McQuaid also ordered the parties to file their proposed lists of threshold issues, followed by a briefing of the issues, that will need to be decided once service has been completed. (B-##1361, 1411, 1442, 1452 (U.S./Tribe), 1362, 1412, 1441, 1455 (Mineral Co.)).⁵ The CMO provides, however, that the list of Threshold Issues for Phase I “will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined.” CMO at 9, ¶¶11, 12.

Before the United States was authorized to commence service, the Magistrate Judge and other parties reviewed and approved a set of documents to be included in a service package. Following the Magistrate Judge’s approval in July 2003 of the last portion of this package, the United States began service efforts in phases, based on the categories of persons and entities to be served pursuant to the CMO. Those efforts are continuing, but have been nearly complete pending decisions by the Court on a number of service-related issues. In 2009, Magistrate Judge McQuaid withdrew from the case. Magistrate Judge Leavitt was assigned, and service related issues were presented to him. In August and September 2011, Magistrate Judge Leavitt issued Orders addressing service issues regarding parties who have been served and a cut-off date for service. (B-##1649, 1650, 1656; C-##540; 542, 547). WRID filed objections to these Orders, which are pending before Judge Reed.

⁴ Defendants either filed or exchanged this information. (B-##1277 (Nev.), 1279 (Walker Lake GID), 1280 (Mono Co.), 1283 (Calif.), 1285 (Lyon Co.), 1282 (WRID), 1288 (Landolts)).

⁵ Defendant filings include: B-##1359 (Calif.), 1413 (Nev.). 1414 (Landolts), 1415 (Circle Bar N Ranch), 1416 (WRID), 1439 (Nev.), 1443 (WRID), 1453 (WRID), 1454 (Circle Bar N Ranch).

C. Subproceeding C-125-C: Motion and Petition to Intervene by Mineral County

On October 25, 1994, Mineral County filed a Motion and Petition to Intervene in the C-125-B subproceeding (B-##31-32), for which the Court created subfile C-125-C. *Minutes of the Court*, at 1 (Jan. 3, 1995, B-#46; C-#1). When the Court established subproceeding C-125-C for “the purposes of receiving the filing of all documents” pertaining to the motion to intervene and associated claim, it explained that C-125-C was part of the same overall ongoing proceeding:

The entire case, including all of the sub files, C-125, C-125-A, C-125-B, and C-125-C constitute one action. All of these issues and claims also constitute a single law suit. The issues may overlap between the various claims and files which have been established.

No claims are to be prejudiced in any way because of their separation into a separate subfile. The separation of the files is for record keeping purposes only.

Minutes of Court (Jan. 3, 1995, B-#46; C-#1).

1. Mineral County’s Claim in C-125-C:

Mineral County’s claim is straightforward: that the public trust doctrine creates an obligation, which takes priority over any appropriative water rights in the Walker River System, to restore and maintain Walker Lake in a reasonable state of ecological health and sustain its historical and immeasurable values as a wildlife habitat resource, a recreational resource, an economic resource, an environmental resource, and a scenic resource.⁶

⁶ On June 26, 2000, separately from the public trust claim asserted in this federal case, Mineral County and the Walker Lake Working Group sought a Writ of Mandamus from the Nevada Supreme Court, ordering the State of Nevada to recognize and apply the public trust doctrine to Walker Lake and the Walker River. Although the Nevada Supreme Court found that “the federal court is the proper forum in which to resolve this dispute,” *Mineral County v. State*, 20 P.3d 800, 806 (Nev. 2001), Justices Rose and Shearing addressed the existence and parameters of the public trust doctrine in Nevada:

Specifically, Mineral County claims that the public trust doctrine requires the State of Nevada and the Walker River Decree Court to ensure that there is adequate inflow from the Walker River Basin to restore Walker Lake's ecological health and recreational values and maintain the Lake's quantity and quality of water at a level sufficient to sustain its ecological health and its recreational, scenic and other public trust values.

Central to this claim is Mineral County's assertion that the Nevada State Engineer and the Walker River Decree Court historically have failed to fulfill this clear public trust duty by permitting the severe over-appropriation of water in the Walker River Basin, resulting in the catastrophic depletion of inflow into Walker Lake and the impermissible devastation of Walker Lake's many values as a public trust resource. More particularly, Mineral County maintains that the severe deficiency of inflows to Walker Lake over the past several decades has dramatically reduced the Lake's water level and water quality. This strangling of Walker Lake has devastated

[T]he existence of the public trust doctrine in Nevada appears to be beyond debate. . . . If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not "substantially impair the public interest in the lands and waters remaining." "[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of the right is consistent with the purposes of the trust." Our dwindling natural resources deserve no less.

Id. at 808-09 (citations omitted). In finding that "the public trust doctrine operates simultaneously with the system of prior appropriation," the concurrence stated that Walker Lake "itself is arguably the first actual appropriation." *Id.* at 808. More recently, in *Lawrence v. Clark County*, 127 Nev. Adv. Op. 32, 254 P.3d 606 (2011), the Nevada Supreme Court expressly affirmed the Public Trust Doctrine's existence as a governing principle in Nevada law, citing the concurrence in *Mineral County* as one of the bases for its analysis and affirmation of the Doctrine. *See* 254 P.3d at 610-611, 613.

the Lake's Lahontan cutthroat trout and tui chub fisheries and the local economy of Mineral County, which are largely dependent on the environmental, scenic, historic, and recreational uses for which Walker Lake is famous, such as fishing, bird watching, boating, and swimming. The deficiency of water flowing into Walker Lake due to the over-appropriation of water in the Walker River Basin has gravely damaged, and continues to damage, Walker Lake's ecosystem and the communities that are dependent on the Lake. Mineral County asserts that the public trust doctrine requires that the allocation and management of water rights in the Basin be modified in a manner sufficient to reverse the ecological and economic damage done by the insufficiency of water flowing into Walker Lake over the past several decades.

Mineral County's claim arises from the premise that the public trust doctrine underlies the entire system of prior appropriation in Nevada and acts as a basic constraint on that system and the amount of water that is available for appropriation from the Walker River Basin under Nevada State law. Accordingly, the public trust doctrine requires that the waters of the Walker River Basin be allocated and managed in such a manner as to ensure that sufficient flows reach Walker Lake to protect the Lake's navigability, fisheries, other wildlife, recreation uses, and its environmental, scenic and historic values *before* any water in the Basin can be appropriated for other uses.

2. Procedural History and Early Service Efforts in C-125-C:

On February 9, 1995, the Court ordered Mineral County to file and serve revised filings on all claimants to the waters of the Walker River and its tributaries pursuant to Rule 4, as further defined in its Order. *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶¶ 2, 3 (Feb. 9, 1995, C-#19). Mineral County filed its *Amended Complaint in Intervention* on March 10, 1995. *Mineral County's*

Amended Complaint in Intervention (Mar. 10, 1995, C-#20). In the Motion for Preliminary Injunction Points and Authorities that accompanied Mineral County's Amended Complaint in Intervention, Mineral County requested 260,000 afy until the Lake reaches 3,946 feet above mean sea level in calendar year 1995, and after that 240,000 afy until the Lake reaches 3,950 feet above mean sea level, and for each year thereafter in order to maintain Walker Lake at 3,950 feet above mean sea level, 117,000 afy. At the time of the motion, Walker Lake was at 3,941.2 feet above mean sea level with TDS levels of 14,000 parts per million. Approximately 83% of Walker Lake inflow comes from the Walker River. Motion for Preliminary Injunction, Points and Authorities at 7 n.4 (C-#22). The Points and Authorities note that no meaningful flow had reached the Lake since 1987. *Id.* at 5. In September 1995, the Court clarified the documents that Mineral County was required to include in its service effort, and reiterated that persons or entities that are served or waive personal service, but do not appear and respond will be deemed to have notice of all subsequent filings with the Court. *Order*, at 2, 4 (Sept. 29, 1995, C-#48).

Pursuant to Orders of the Court, Mineral County compiled the list of claimants to waters of the Walker River and its tributaries by reviewing records at the county and State level, such as the County Recorders' offices and State Engineer's files. The sheer number of claimants, combined with the fact that few records and databases consulted or lists received were initially accurate, made the task time consuming, expensive, and difficult. In this effort, which preceded the United States' service efforts in subfile C-125-B, the Court directed Mineral County to identify the persons and entities to be served and then reach consensus with the other parties on the proper list of persons and entities to be served. *Minute Order* (Oct. 24, 1997, C-#156). This effort took several years. On January 12, 1998, the Court issued the caption that has been the basis of Mineral County's service efforts, and on May 13, 1998, issued an Order indicating that

the Court and parties had agreed upon the list of defendants to be served. *Order* at 2 (May 13, 1998, C-#196).

Thereafter, Mineral County dedicated significant time and resources to conduct service as directed by the Court, particularly given its size and budget constraints. The difficulties and costs associated with this effort were substantially increased by interference and evasion by upstream claimants, which led to complications and delays that otherwise could have been avoided. *See Points and Authorities in Opposition to WRID's Motion to Vacate Schedule and in Support of Counter Motion for Sanctions* (July 6, 1995, C-#31); *Mineral County's Points and Authorities in Reply to WRID's Response and Request for Hearing* (Aug. 4, 1995, C-#42). No party has yet filed an answer to Mineral County's Amended Complaint in Intervention.

D. Court-Ordered Mediation and Other Settlement Efforts:

1. Court-Ordered Mediation:

On May 27, 2003, following lengthy discussions and the negotiation and execution of a Mediation Process Agreement by the primary parties,⁷ Magistrate Judge McQuaid signed an *Order Governing Mediation Process* to initiate a mediation process in both the C-125-B and C-125-C subproceedings. (May 27, 2003, B-#574, C-#430). That Order stayed litigation and all other matters during the mediation process, except for service-related matters. The stated goals of the mediation were to resolve the litigation in C-125-B and C-125-C, the interstate allocation of water from the Walker River between California and Nevada, and certain other issues that may affect the allocation and use of the water of the Walker River. *Mediation Process Agreement* at 1-2 (Attachment 2 to *Joint Motion for Entry of Order Governing Mediation*

⁷ The United States, the Tribe, the States of Nevada and California, Mono County in California, Lyon and Mineral Counties in Nevada, WRID, and the Walker Lake Working Group.

Process (May 9, 2003, #566). The Plaintiff Parties devoted significant efforts and resources to what turned out to be an unfruitful mediation.⁸

By the summer of 2006, after more than three-and-a-half years of negotiations and more than four years of being committed to the mediation process, the parties had not agreed on any of the basic issues, such as resolving the Tribe's and the United States' pending claims, the appropriate amount of additional inflows to Walker Lake, a reliable implementation plan for any measures or commitment to cooperative implementation, or the nature of enforcement and administration required in the Walker River system. Consequently, the Tribe withdrew from the mediation process in July 2006. *See Minutes of Status Conference* (Sept. 15, 2006, B-#984). In September 2006, Mineral County formally withdrew from the mediation process so that it could focus its resources on service efforts and pursuing the merits of its claim. (Sept. 15, 2006, B-#988). *See Final Joint Report of Mediating Parties* (Dec. 8, 2006, B-#1044).

The Mediation Process Agreement, which the parties had made public and filed with the Court (Att. 2 to #566), continues to govern use of information exchanged and work produced in the mediation. For example, while technical personnel with the mediating parties prepared a model, not all mediating parties subsequently agreed to produce the mediation model to the University of Nevada and the Desert Research Institute when personnel at these institutions began to work on their own model of the basin in the Walker Basin Restoration Program, discussed below.

⁸ Among other things, the United States paid 43.8% of the Mediator's fees and expenses, in addition to funding staff and experts to support these settlement efforts. *Mediation Process Agreement* at §3.2.1.1, Att. 2 to #566).

2. More Recent Settlement Efforts:

a. Walker Basin Restoration Program:

In the wake of the mediation effort's breakdown, Senator Harry Reid designated congressional funds to support the conservation of desert terminus lakes and a number of measures to be implemented through a Walker Basin Restoration Program managed by the National Fish and Wildlife Foundation ("NFWF"). The goal of this initiative and program is to provide an additional path toward settlement of the issues presented in the C-125-B and C-125-C subproceedings, restoring Walker Lake's health, and bringing the management of water in the Walker River Basin into sounder balance. The Walker Basin Restoration Program includes a water acquisition program; a water leasing program, related research, program evaluation and decision support activities at the University of Nevada-Reno and the Desert Research Institute; and a conservation and stewardship program. NFWF recently completed its first acquisition of 7.745 cfs of decreed surface water rights and is pursuing a change application before the Nevada State Engineer for the benefit of Walker Lake. WRID has filed a protest to that application and similarly has worked to obstruct the other components of the Walker Basin Restoration Program. WRID's opposition to the Walker Basin Restoration Program is consistent with its efforts to obstruct any forward movement in this case and any effort to deliver more water to Walker Lake. In fact, while WRID works to stall this litigation, WRID's primary argument before the Nevada State Engineer on NFWF's change application is that no decision should be made on such applications until this litigation is resolved.

b. Tribal and Other Efforts:

In June 2010, the Tribe began discussions with the States of Nevada and California regarding possible settlement options to resolve the Tribe's pending claims that may not have

been explored during the past mediation efforts. A number of circumstances have changed over the past few years that have led the Tribe to believe a settlement may be possible. These discussions are continuing and the Tribe has sought to join certain other entities within the Basin that could be affected by a settlement, including Mineral County and Lyon County, Nevada, Mono County, California, and WRID.

II. Primary Issues Presented by and Remaining in this Litigation

A. The Issues Under C-125-B and C-125-C Arise Within the Context of the Overarching C-125 Proceeding:

As explained above, the Court has recognized that C-125 and its subproceedings constitute one case, and that the issues before the Court pursuant to the C-125-B and C-125-C subproceedings can be understood only in the context of the ongoing, overarching C-125 proceeding. The C-125 case comprises the interstate stream adjudication and administration of the Walker River System under the continuing equity jurisdiction of this Court.

Thus, this Court retained jurisdiction under the Walker River Decree “for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . .” Decree at 72-73, XIV. *See also* 28 U.S.C. § 1651. The unified nature of these proceedings has been further attested to by the Nevada Supreme Court in *Mineral County v. State Dept. of Conservation and Natural Resources*, where the State Supreme Court deferred resolution of Mineral County’s public trust claim to this Court in recognition of this Court’s “continuing involvement in the monitoring of the Walker River for more than eighty years.” 117 Nev. 235, 245, 20 P.3d 800, 807 (2001). *See also, e.g., United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012 (9th Cir. 1999) (A court with jurisdiction over property in an *in rem* proceeding has the exclusive right to control and administer it.). Accordingly, the specific

claims raised in subproceedings C-125-B and C-125-C arise within the context of the Court's exercise of its continuing equity jurisdiction to administer the interstate stream system, and resolution of the issues involved in C-125-B and C-125-C is central to the Court's responsibility to ensure that the system is properly allocated, adjudicated, and administered.⁹

B. Primary Issues in C-125-B's Litigation of the Tribal Claims:

Following on the description offered in the background portion of this Status Report, the primary issues presented by the Tribal Claims asserted by the United States and the Tribe are whether the United States, acting for the benefit of the Tribe, is entitled to a federal reserved right: (1) for regulatory and storage rights in Weber Dam and Reservoir, and if so, for what amounts and priority dates; (2) for water for the lands restored to and/or added the Reservation after entry of the Decree, and if so, for what amounts and priority dates; (3) for groundwater underlying and adjacent to the Reservation, and if so, for what amounts and priority dates; and (4) what administrative steps should the Court implement to protect these and the Tribe's decreed rights.

Phase I of the litigation of the Tribal Claims addresses the resolution of Threshold Issues. The CMO requires the Magistrate Judge to "consider and make a preliminary determination of threshold issues to be addressed at the outset of the litigation on the U.S./Tribe counterclaims." CMO at 9, ¶11. The CMO identifies certain potential Threshold Issues, including the scope of this Court's jurisdiction. *Id.* at 9-11, ¶11. In briefing the Threshold Issues, the United States and Tribe proposed certain additional Threshold Issues, as did the primary defendants. (B-##1361,

⁹ This Court has long recognized that this case is *in rem* and that it is the "only forum within which to resolve disputes." Order at 4 (Mar. 2, 1999; C-#257).

1411, 1442, 1452 (U.S./Tribe), 1362, 1412, 1441, 1455 (Mineral Co.)).¹⁰ The United States and Tribe, however, believe that many of the issues proposed by the defendants seek to litigate the merits of their claims, which the CMO expressly reserves for Phase II of the litigation. An issue should not be designated a Threshold Issue as a means to litigate by short-cut and avoid the requirements of the Federal Rules of Civil Procedure. The prior Magistrate Judges did not make the required preliminary determination of Threshold Issues because the CMO requires that the list of Threshold Issues for Phase I “will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined.” CMO at 9, ¶¶11, 12.

C. Primary Issues in C-125-C:

Following on the description offered in the background portion of this Status Report, the primary issues presented by Mineral County’s claim are: (1) whether the public trust doctrine exists under Nevada law; (2) whether the public trust obligation imposes an obligation, which takes priority over any appropriative water rights in the Walker River System, to restore and maintain Walker Lake in a reasonable state of ecological health and sustain its historical and immeasurable values as a wildlife habitat resource, a recreational resource, an economic resource, an environmental resource, and a scenic resource; (3) what level of inflow from the Walker River System is required in order to restore and maintain Walker Lake’s ecological health and other public trust values; and (4) how the level of required inflow to Walker Lake will be met.

D. Service Issues in Subproceedings C-125-B and C-125-C:

One of the key issues pending before the Court is the completion of service in both

¹⁰ Defendant filings include: B-##1359 (Calif.), 1413 (Nev.), 1414 (Landolts), 1415 (Circle Bar N Ranch), 1416 (WRID), 1439 (Nev.), 1443 (WRID), 1453 (WRID), 1454 (Circle Bar N Ranch).

subproceedings. The merits of the subproceedings cannot be addressed until service is complete.

A related issue, discussed in the next section, is the organization of the litigation for subsequent communication by the Court and parties, which could include such measures as broader use of the CM/ECF e-file system and a website.

1. Service Issues Common to Both Subproceedings:

Plaintiff Parties are on the verge of completing service of process in their respective subproceedings. Despite difficulties inherent in conducting the necessary investigations and extensive service, including interference by upstream claimants,¹¹ this process is nearly complete. In this effort and to address future case management, following a status conference on October 19, 2010, Plaintiff Parties submitted a proposed order to Magistrate Judge Leavitt to address treatment of successors-in-interest following *inter vivos transfers* and the death of a defendant.¹² WRID objected and submitted its own proposal.¹³ Plaintiff Parties responded in detail, modified their proposed Order, and requested that the Magistrate Judge approve procedures that are consistent with the Federal Rules of Civil Procedure and due process, do not create unreasonable burdens and obstacles for Plaintiff Parties, and allow the Court to reach the

¹¹ Among other things, WRID advised its members not to return waivers in C-125-C; the Walker River Water Users Association, whose board is appointed by WRID and the Bridgeport Valley Land Owners Association, sent its members a letter warning them of the impending federal service; hostile articles, including one in which a defendant advised that no one return waivers in C-125-B, ran in local newspapers; and one individual, after being served, chased after the federal process server in his truck and repeatedly tried to run the process server's vehicle off the road. See e.g., *Points and Authorities in Opposition to WRID's Motion to Vacate Schedule and in Support of Counter Motion for Sanctions* (July 6, 1995, C-#31); *Mineral County's Points and Authorities in Reply to WRID's Response and Request for Hearing* (Aug. 4, 1995, C-#42).

¹² *Submission of Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* (Nov. 30, 2010, B-#1614, C-#516).

¹³ *Walker River Irrigation District's Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served and to Proposed Order Concerning Service Cut-off Date* at 26 (Jan. 7, 2011, B-#1621).

merits.¹⁴

In late August and early September, 2011, Magistrate Judge Leavitt entered several Orders addressing various service issues that need to be resolved prior to completing service, including identical Orders in each subproceeding regarding the treatment of successors-in-interest following an *inter vivos* transfer from or the death of a served defendant. *Order Approving Revised Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served*.¹⁵ The Successor-in-Interest Orders provide an efficient and reasonable procedure for providing notice to successors-in-interest to defendants' water right claims, and an equitable, workable procedure for substitution of those successors-in-interest who wish to enter the case, while maintaining that successors-in-interest are nevertheless bound before or after judgment, regardless of substitution. The Successor-in-Interest Orders are consistent with the Federal Rules of Civil Procedure, including Rule 25, and due process. WRID would require the Plaintiff Parties to track defendants' transfers continuously and move to substitute successors, and to track defendants' continued existence and move to substitute successors as a result of death.

WRID filed objections to the Successor-in-Interest Orders that are currently pending before Judge Reed, and the Plaintiff Parties have responded to these objections. (B-##1652,

¹⁴ *Reply to Walker River Irrigation District's Objections to Proposed Order Concerning Service Issues Pertaining To Defendants Who Have Been Served* (Feb. 23, 2011, B-#1639, C-535).

¹⁵ On August 24, 2011, the Magistrate Judge issued identical *Revised Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served* in C-125-B and C-125-C. (B-#1649, C-#540). On August 26, 2011, he issued an *Amended Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* in C-125-B, (B-#1650), and on September 6, 2011, issued an identical *Amended Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* in C-125-C. (C-#542). The amended Orders (collectively "Successor-in-Interest Orders"), contain attachments omitted from the initial Orders, but are otherwise identical.

1653; C-##543, 544; B-#1674, C-#564). Judge Reed has scheduled oral argument on these objections for February 21, 2012. (B-# 1682; C-#573). If affirmed, the Successor-in-Interest Orders will require further clarification and implementation by the Magistrate Judge, who is charged with addressing service and case management. Thereafter, Plaintiff Parties are prepared to complete service and move to the merits of the respective subproceedings.

2. Service Issues in C-125-B:

As the Court predicted,¹⁶ implementing service as required by the CMO has been neither economical nor easy. The United States spent significant time and resources (over \$1.5 million) serving the categories of persons and entities it was directed to identify and serve under Rule 4, Fed. R. Civ. P. The United States mailed over 3,850 service packages, personally served over 1,500 persons and entities, and obtained review and approval of its efforts by the Court and Defendants in sixteen Service Reports and five proofs of service by process servers. In response to Defendants' concerns, the United States worked to complete service by the end of 2008¹⁷ and continued its efforts in 2009 after Magistrate Judge McQuaid's recusal. (Mar. 12, 2009, B-#1510; C-#499). But for questions regarding successors and a service cut-off date, no one has claimed that service has not been accomplished on the categories of persons and entities that the Court directed to be served.¹⁸ As a result of these efforts, there are currently over 3,000 defendants in C-125-B.

¹⁶ When it required Rule 4 service, the Court stated: "We are sympathetic to the struggles of the United States and the Tribe to serve parties for C-125-B. . . . Altering water rights on a river system divided more than sixty years ago is no easy task. There will be considerable time and expense in pursuing an action." *Order* at 6, 8 n.2 (June 11, 2001, B-#522).

¹⁷ This does not include such issues as challenges to service, publication, and any determination whether service is complete.

¹⁸ One issue remaining before the Court is whether certain persons and entities belong in the categories to be served. *See Sixteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities and Request for Guidance* (Oct. 14, 2010, #1609).

a. Service Cut-Off Order: One issue discussed with both prior

Magistrate Judges, was the need to identify a service cut-off date so litigation can proceed.

Under the CMO, the list of Threshold Issues for Phase I of the litigation cannot be resolved and addressed until “all appropriate parties” are joined. CMO at 8 (B-#108). Plaintiffs proposed that C-125-B address water rights in existence as of December 31, 2009. *Submission of Proposed Order Concerning Service Cut-Off Date* (Nov. 30, 2010, #1613). WRID objected, but agreed to “us[e] December 31, 2009 as the date for considering established water rights whose owners should be served for purposes of Phase I of the Tribal Claims.”¹⁹ Plaintiffs revised their proposed Order to clarify that the service cut-off date of December 31, 2009 was for the litigation of Phase I to resolve the Threshold Issues regarding the Tribal Claims. *Reply of the United States of America and the Walker River Paiute Tribe: Proposed Order Concerning Service Cut-Off Date* (Feb. 23, 2011, #1639).

Magistrate Judge Leavitt issued the Cut-Off Order on September 19, 2011, which states: “The service cut-off date for Phase I of the Tribal Claims is December 31, 2009, and includes water rights in existence as of that date.” (Sept. 19, 2011, #1656). WRID filed objections to the Service Cut-Off Order and the Tribe and United States filed a response. (B-##1663, 1664, 1673). Judge Reed has scheduled oral arguments for these objections on February 21, 2012.

b. Remaining Service Issues in C-125-B:

After resolution by Judge Reed of the issues presented by WRID’s objections to the Magistrate Judge’s Successor-in-Interest and Service Cut-Off Orders, the United States and the

¹⁹ *Walker River Irrigation District’s Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served and to Proposed Order Concerning Service Cut-off Date* at 26 (Jan. 7, 2011, #1621).

Tribe intend to proceed with final service efforts, including moving for publication and addressing the implementation of the Successor-in-Interest and Service Cut-Off Orders.

3. Service Issues in C-125-C:

To date, Mineral County has served well over a thousand claimants and its list of unserved claimants is relatively short. Although the process took significant time and resources and met numerous obstacles, the Court commended the County's efforts more than once and ratified service on most claimants listed in the approved caption or their substituted successors.²⁰ At no time did WRID or Nevada provide Mineral County with the ownership updates they provided the United States.

a. Mineral County's 2008 Service Report:

In 2008, Mineral County filed a service report requesting that the Court amend certain names in the caption, strike certain names from the caption and substitute other names in their stead, ratify service efforts for several proposed defendants, and clarify the status of service on several proposed defendants. *Mineral County Report Concerning Status of Service on Proposed Defendants* (Aug. 29, 2008, C-#479). *See also* WRID Response (Nov. 21, 2008, C-#488); Mineral County Reply (Jan. 23, 2009, #C-496).

On September 27, 2011, after ruling on the related successor-in-interest issues, Magistrate Leavitt issued an Order Concerning Service Issues in C-125-C, which granted Mineral County's Service Report requests (C-#547) ("Service Report Order"). Among other things, the Service Report Order confirms the short list of water rights holders remaining to be served. On October 14, 2011, WRID filed objections to the Service Report Order. (C-##552,

²⁰ *Order*, at 2 (June 4, 1998, C-#210); *Order Concerning Status of Service on Defendants* (Apr. 3, 2000, C-#327); *Order* (Dec. 19, 2001, C-#397); *Order* (June 18, 2002, C-#414).

553). Those objections and Mineral County's response currently are pending before Judge Reed. On September 28, 2011, Magistrate Judge Leavitt filed a related Order directing Mineral County to update the Court regarding updates to the caption consistent with the Service Report Order. (C-#548). Given that WRID's objections pending before Judge Reed may affect the update Mineral County has been directed to file with the Court, Mineral County intends to file an update pursuant to the Court's Order of September 28, 2011, after resolution of WRID's objections to the Service Report Order and Magistrate Judge Leavitt's Successor-In-Interest Orders. After resolution of service issues by Judge Reed, Mineral County is prepared to complete service and move to the merits of its case without further delay. Judge Reed has scheduled oral arguments for these objections on February 21, 2012.

b. Remaining Service Issues in C-125-C:

After resolution by Judge Reed of the issues presented by Mineral County's Service Report and WRID's objections to the Magistrate Judge's Successor-in-Interest and Service Report Orders, Mineral County intends to proceed with final service efforts. Before commencing this effort, Mineral County intends to present a service packet to the Court for approval. After Mineral County has completed service on the final list of Defendants, and any objections to that service have been resolved, Mineral County intends to move for publication on a limited number of unknown Defendants.

E. Recurring Issues in the Court's Exercise of Ongoing Equity Jurisdiction in C-125:

1. Role of the U.S. Board of Water Commissioners and Its Attorney:

The Court created the U.S. Board of Water Commissioners ("Board") in 1937 to distribute the waters of Walker River pursuant to the C-125 Decree. From the beginning, the

Board and WRID shared a close relationship, which in recent years (if not earlier) extends to shared offices. For over 50 years, until 1990, the Board and WRID were represented by the same attorney. After the Tribe and the United States objected that this relationship constituted a continuing conflict of interest, the Court ruled that the Board and its attorney are “bound by the Code of Judicial Conduct, and [are] obligated to conduct [themselves] in an impartial, unbiased manner.” *Order* at 4 (Feb. 13, 1990, #162) (“Order of Feb. 13, 1990”) (It is inappropriate for the same attorney to continue representing both WRID and the Board.). The Board must avoid the simple appearance of impropriety or partiality. *Id.* at 5.

The proper role of the Board, the Water Master it employs, and their attorney may require closer examination. The Board is not a party in this action and should not act in an adversarial role in any portion of C-125. Recently, however, it appeared in and filed a four-page single-spaced list of detailed issues that it advocates should be addressed in proceedings before the Nevada State Engineer regarding the National Fish and Wildlife Foundation’s change application, discussed above, even though we have no information that the Board has ever appeared in other such proceedings, did not file a protest to this change application, and does not appear to be a proper party to this proceeding.²¹ This action appears sanctioned in part by the Court’s Administrative Rules, discussed below, but is in direct conflict with the Court’s Order of Feb. 13, 1990.

2. Annual Plan of Distribution:

The Board issues an annual budget and plan of distribution controlling the

²¹ In its List of Issues, dated October 21, 2011, which was served on the parties of record, the Board also notes that it corresponded previously with the State Engineer by letter dated July 15, 2011.

delivery of decreed water rights on the Walker River. Among other things, the plan of distribution states the start date for the delivery of the Tribe's decreed water rights. In the past, the start date has varied, depending on whether the water outlook for the year was expected to be more or less than 70% of average and based on the storage capacity of Weber Reservoir. The Tribe's start date has typically been either April 1 or April 15. The difference affects the amount of water available for the latter part of the irrigation season when water may be scarce. The Board's annual filing has raised several issues that remain unresolved:

a. Accurate Measurement of the Tribe's Water Right: From 1993 to the present, the Tribe and the United States objected to the annual plan because it designates a gaging station (the Wabuska gage) for the Tribe's water right that the Tribe asserts does not accurately measure its water right. The Wabuska gage is located above Weber Reservoir just outside the Reservation boundary. The Reservation's irrigation diversion structures are located approximately four miles downstream of Weber Dam. The Tribe and the United States have proposed an on-Reservation gage site, but studies are continuing as to that site's accuracy. The Tribe and U.S. anticipate filing continuing objections to the point of measurement of the Tribe's water right at the Wabuska gaging station until sufficient information is available to allow the Court to review this issue.

b. Point of Measurement of the Tribe's Water Right: The Tribe and the United States objected to the Board's plan of distribution for 2005 to the present, based on use of the Wabuska gage to measure the Tribe's water right, also stating that so long as the Board measures the Tribe's water right at the Wabuska Gage, it must deliver more than 26.25 cfs to compensate for carriage losses.

c. Fallowing Program: During the 2007, 2008, 2009, and 2010

irrigation seasons, the Tribe did not irrigate its lands on the Reservation, but, instead, initiated a fallowing program that dedicated the Tribe's water to instream flows. This program coincided with major construction activity at Weber Dam to rebuild and realign the dam structure, rebuild the outlet works and construct a fish passage around the Dam. To temporarily change the manner of use of the Tribe's water rights to instream flows, the Tribe and the United States filed change applications with the Nevada State Engineer and this Court. (July 6, 2007, C-125 #857; July 13, 2007, #860; July 3, 2008, #921; July 2, 2009, #961; May 5, 2010, #993). During the first year of the program, a number of parties opposed these changes, but the State Engineer and this Court approved the applications. *See various Orders* (Aug. 22, 2007, #883; July 24, 2008, #927; July 6, 2009, #963; June 17, 2010, #1003). In 2011, the Tribe used its water for irrigating Reservation lands and plans to do so in the future.

3. Modifications to the Decree:

The Court reviews all change applications involving Decreed rights, with certain enumerated exceptions applicable to the Walker River Reservation and WRID, pursuant to the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and Its Tributaries and Regarding Compliance With California Fish and Game Code Section 5937 and Other Provisions of California Law* ("Administrative Rules"), which it issued in 1988 and most recently amended in 1996. As a basic matter, change applications are first addressed by the applicable State agency and then reviewed by this Court, which determines whether to amend the Decree. Over the years, the Court has approved numerous amendments of the Decree before and after approving these Rules.

Currently, one change application is pending; a hearing on that application is set for January 20, 2012, before Judge Reed. (Nov. 15, 2011, #1042). In addition, as noted above,

NFWF has a change application pending before the State Engineer that is designed to transfer a quantity of water downstream to Walker Lake to assist in the restoration of the Lake's health. WRID and certain other upstream parties oppose this application, *inter alia*, on the ground that no such change application should be acted on until this litigation has been resolved.

4. Possible Amendments to the Rules: From time to time various parties have suggested that the Court review and possibly amend the various rules that address the implementation of the Decree.

5. Certificate of Service Issues: There is an ongoing need for periodic updates of the certificates of service in C-125 and its subproceedings.

III. Matters of Factual and Legal Importance Within this Court's Jurisdiction, Including Additional Case Management Issues

A. The Magistrate Judge's Authority:

As a general matter, the Magistrate Judge's jurisdiction is set forth in 28 U.S.C. § 636. *See also* Fed. R. Civ. P. 72; LR-Part IB. Over the years, the Magistrate Judge has determined non-dispositive matters, as well as issued proposed findings and recommendations on dispositive matters for Judge Reed's *de novo* review pursuant to 28 U.S.C. § 636(b)(1). Magistrate Judges may also be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

In C-125-B, the Magistrate Judge has a significant role in implementing the CMO. The CMO authorizes the Magistrate Judge to "consider and decide all issues . . . pertaining to service of process," including scheduling its completion, adjusting the categories of persons and entities to be served, addressing publication and whether service efforts are adequate and complete, and determining how the U.S./Tribe shall obtain information to identify defendants and "the

responsibilities of the respective parties to provide such information and at whose cost.” *Id.* at 3, 6-8, ¶¶4-9.²²

B. Additional Case Management Issues:

The following are case management issues raised in one or both of subproceedings C-125-B and C-125-C that Plaintiff Parties believe are within the Magistrate Judge’s authority to address:

1. Implementation of Judge Reed’s resolution of WRID’s objections to Magistrate Judge Leavitt’s 2011 Successor-in-Interest Orders.

2. Issues in C-125-B:

a. Implementation of Judge Reed’s resolution of WRID’s objections to Magistrate Judge Leavitt’s 2011 Service Cut-Off Order.

b. Any additional Service or other Reports by the United States to obtain the Magistrate Judge’s approval of service on specific persons and entities that were required to be served under the CMO.

c. Resolution of issues raised in the *Sixteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities and Request for Guidance* (Oct. 14, 2010; B-#1609): The pending issue raised in this Service Report is whether groundwater users in California deemed “transient non-community water systems” and other similarly situated users in California should be served and joined as parties to this action pursuant to the CMO. The United States tried, but was unable to resolve this issue informally with the Primary Defendants. Once the Magistrate Judge addresses this issue, the United States will prepare and file a 17th Service Report that, among other things, will apply the determination of this issue to

²² Over the years, the Magistrate Judges have determined whether service on specific persons and entities has been accomplished. *E.g.*, *Thirteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities* (Mar. 26, 2008, #1316); *Minutes of the Court*, (July 25, 2008, #1381) (reviewing and determining to enter order approving 13th Report); *Order Concerning Thirteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities* (July 28, 2008, #1382) (collectively outlining service efforts, identifying persons and entities served, and requesting and determining that service be deemed complete). This effort includes a review whether a person or entity is within any of CMO’s nine categories.

persons and entities identified in the 16th Service Report, as well as other similarly situated persons and entities.

d. Whether and when an Answer is required: This issue has been briefed and is pending decision by the Magistrate Judge (B-##1442, 1497, 1499, 1500, 1501).

e. The identification of “Threshold Issues” pursuant to the CMO, as briefed (B-##1361, 1411, 1442, 1452 (U.S./Tribe), 1362, 1412, 1441, 1455 (Mineral Co.)),²³ and as the Magistrate Judge and Court may further direct.

3. Issues in C-125-C:

a. Implementation of Judge Reed’s resolution of WRID’s objections to Magistrate Judge Leavitt’s 2011 Service Report Order.

b. Approving a service packet for use by Mineral County in the completion of service.

c. Any Additional Service Reports.

d. Briefing and resolution of Mineral County’s Motion to Intervene:

4. Potential Issues and Efficiencies in Subsequent Service of Documents by the Court and Parties:

a. Use of the Court’s CM/ECF electronic filing system by *pro se* defendants.

b. Use of a website to provide public access, including parties that did not appear in either subproceeding, to filings in the Court docket and various forms.

c. Addressing the status of Magistrate Judge McQuaid’s Order limiting service pending completion of service, (Feb. 1, 2008, B-#1300) and possible application in both subproceedings.

d. Possible application of Judge Reed’s September 29, 1995 Order in C-125-C regarding the status of persons and entities who are served but do not appear (Sept. 29, 1995, C-#48) to both subproceedings.

5. Completion of Service in each Subproceeding:

a. Publication.

²³ See also Defendant filings: B-##1359 (Calif.), 1413, 1439 (Nev.). 1414 (Landolts), 1415, 1454 (Circle Bar N Ranch), 1416, 1443, 1453 (WRID).

b. Addressing any challenges to service.

c. Amended captions.

6. Settlement Oversight: This issue identifies for future discussion, the question of what, if any, role the Magistrate Judge should take regarding any ongoing or future efforts to settle any portion of this litigation.

7. Updating the Certificates of Service.

Dated: January 23, 2012.

Respectfully submitted,

By /s/ Susan L. Schneider
SUSAN L. SCHNEIDER
Attorneys for the United States of America

Dated: January, 2012

Respectfully submitted,

By /s/ Wes Williams Jr.
WES WILLIAMS JR.
Attorney for the Walker River Paiute Tribe

Dated: January, 2012

Respectfully submitted,

By /s/ Simeon M. Herskovits
SIMEON M. HERSKOVITS

OF COUNSEL FOR THE UNITED STATES:

Chris Watson, Attorney-Advisor
U.S. Department of the Interior
Office of the Solicitor
Division of Indian Affairs
Mail Stop 6513
1849 C St., NW
Washington, DC 20240
(202) 208-3401

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2012, I electronically filed the foregoing **PLAINTIFF PARTIES' STATUS REPORT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case;

and I further certify that I served a copy of the forgoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 23rd day of January, 2012:

Athena Brown, Superintendent
Bureau of Indian Affairs
311 E. Washington Street
Carson City, NV 89701-4065

Allen Biaggi/Leo Droz
Dept. of Conservation & Natural Res.
State of Nevada
901 S. Stewart St.
Suite 1003
Carson City, NV 89701

State Engineer - Division of Water
Resources
State of Nevada
901 S. Stewart St.
Carson City, NV 89701

Dist. Attorney for Lyon County
31 South Main Street
Yerington, NV 89447

William J. Shaw
Brooke & Shaw, Ltd
P.O. Box 2860
Minden, NV 89423

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

George M. Keele
1692 County Road, Ste. A
Minden, NV 89423

Walker Lake Water Dist. G.I.D.
Walker Lake GID
175 Wassuk Way
Walker Lake, NV 89415

Gary Stone
Water Master
290 South Arlington Ave.
Reno, NV 89501

Mary Rosaschi
P.O. Box 22
Wellington, NV 89444

Arden O. Gerbig
106629 US Highway 395
Coleville, CA 96407-9538

Michael Axline
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97405

George N. Bloise
34 Artist View Lane
Smith, NV 89450

Courtney Brown
Pro hac vice
PO Box 1507
Taos, NM 87571

Arthur B. Walsh
Los Angeles City Attorney's Office
PO Box 51-111
111 North Hope Street, Suite 340
Los Angeles, CA 90054

/s/ Eileen Rutherford
Eileen Rutherford, Senior Paralegal
USIS/Labat for USDOJ