UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
WALKER RIVER PAIUTE TRIBE,	:	
Plaintiff-Intervenor,	:	No. 3:73-CV-127-RCJ-WGC
-vs-	:	May 4, 2015
WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,	:	Reno, Nevada
Defendants.	:	

TRANSCRIPT OF MOTION HEARING

APPEARANCES:

FOR THE PLAINTIFF: ANDREW "GUSS" GUARINO
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Denver, Colorado

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FOR THE WALKER RIVER PAIUTE TRIBE: WES WILLIAMS, JR.
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(Appearances continue on next page.)

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FOR MINERAL COUNTY:	SIMEON M. HERSKOVITS and MICHELLE MIANO Attorneys at Law El Prado, New Mexico
FOR MONO COUNTY:	STACEY SIMON Attorney at Law Mammoth Lakes, California
FOR NEVADA DEPARTMENT OF WILDLIFE:	BRYAN L. STOCKTON Deputy Attorney General Carson City, Nevada
FOR SWAINSTON-WIGGINS FARM PARTNERSHIP:	HARRY W. SWAINSTON Attorney at Law Reno, Nevada
FOR CIRCLE BAR N RANCH AND MICA FARMS:	LAURA A. SCHROEDER, THERESE A. URE and MATTHEW J. CURTI Attorneys at Law Reno, Nevada

RENO, NEVADA, MONDAY, MAY 4, 2015, 10:02 A.M.

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THE COURT: We're here once again -- welcome to our quarterly get together, United States versus Walker River. Let's start with appearances, please.

MR. GUARINO: Good morning, your Honor. For the United States, Guss Guarino. I'm also here with counsel for the United States David Negri.

THE COURT: Thank you.

MR. WILLIAMS: Good morning. Wes Williams, Jr., on behalf of Walker River Paiute Tribe.

MR. HERSKOVITS: Good morning, your Honor. Simeon Herskovits here on behalf of Mineral County and the Walker Lake Working Group, and with me is my colleague Michelle Miano.

THE COURT: Thanks so much.

MR. DePAOLI: Good morning, your Honor. Gordon DePaoli on behalf of the Walker River Irrigation District.

MR. FERGUSON: And Dale Ferguson on behalf of the Walker River Irrigation District.

MS. SCHROEDER: Laura Schroeder on behalf of various water users in the Walker River Basin.

MR. SWAINSTON: Harry Swainston on behalf of the owners of Swainston-Wiggins Farms.

MR. STOCKTON: Bryan Stockton on behalf of Nevada Department of Wildlife.

MS. SIMON: Good morning, your Honor.

THE COURT: Good morning.

MS. SIMON: Stacey Simon on behalf of Mono County, and with me today is Tim Fesco, he is our District Forest Supervisor from northern Mono County. His district includes Bridgeport and Antelope Valleys.

THE COURT: Very good. Thank you, sir.

MS. URE: Good morning, your Honor. I'm Therese Ure with Schroeder law office, cocounsel with Laura Schroeder, and we also have Matt Curti in the room with us.

THE COURT: Thank you.

And no one on the phone, right?

THE CLERK: Yes, your Honor.

THE COURT: On the telephone, please.

MS. ALMENDRAS: Good morning, your Honor. This is Annadel Almendras appearing on behalf of the California state agencies, and I believe also on the telephone is Erin Mahaney, staff counsel with the California State Water Resources Control Board.

THE COURT: Thank you. Thank you both.

All right. This is motion to dismiss, several motions, 2160, 61 and 64, in this current subfile 127.

As I've previously explained, of course, we have

several subfiles. Judge Reed had previously only segregated these as subfiles, and administratively he did not consolidate -- he did not separate these on merits issues and therefore we're treating it that way.

We have separate motions to dismiss that we've already heard oral argument on, and, as I told you, I was not taking those items under submission until we had all of them in all of the subfiles argued.

So, for the record, this is the final argument on motion to dismiss in 127. We've already taken the oral arguments on the other subfiles, and it's my intent after oral argument to issue orders in all of those matters.

By the way, I may well issue certification for appeal with all of those orders because I think what we're doing is we're laying out the initial matters of law that we can determine without factual determinations.

And I think it's fully right before we expend -- all of us expend a lot more effort on factual matters, that we certify it, let the Circuit tell us what the law is, as they're wont to do, in both the Ditch Decree and the Alpine Decree and, of course, in the Walker River Decree.

So I think that makes sense to certify them. You'll tell me if you object to that.

And, with that, we'll take the oral arguments, and then all of those will be under submission. I await your

comments on the motions to dismiss, please.

MR. DePAOLI: Good morning, your Honor. Gordon DePaoli on behalf of the Walker River Irrigation District.

Your Honor, the District's motion is directed at the amended counterclaims of the Tribe and the United States, and it goes at the subject matter jurisdiction from two perspectives.

The first perspective is what, if any, jurisdiction does the decree court have by reason of the litigation which resulted in the Walker River Decree, and secondly from the standpoint of what jurisdiction does the Court have based on the other independent grounds alleged in the amended counterclaim for subject matter jurisdiction.

On the first issue, that is, the jurisdiction based upon the Walker River Decree and the action which resulted in the Walker River Decree, the United States and the Tribe take the position that the Court has exclusive and ongoing jurisdiction to hear and determine all additional water right claims, not only to the Walker River and its tributaries, but to all sources of water within the Walker River Basin.

The United States essentially says that this Court has the jurisdiction to determine in the first instance whether additional water rights exist.

As to that argument, the argument based upon the

decree, there is no law, your Honor, which supports the concept that a court which enters a water decree in a quiet title action thereafter acquires the authority to determine all additional claims to water rights, not only from the source that was involved in the decree, but from all sources in the watershed.

The action here and the action in -- the previous action in 1919 which resulted in Decree 731 were *in personam* quiet title actions.

The action which led to this decree was supported by a special statute in effect only for three years, from 1922 to 1925, that essentially gave the court jurisdiction, the Nevada District Court, jurisdiction, personal jurisdiction, over any person who had a claim regardless of whether they were resident within the district.

As I say, there is no case that supports such a broad interpretation of what a court that enters a water decree can do as to additional claims to water.

I think the most important reason why this Court, and really no other court, has that kind of jurisdiction is the fact that there are two sovereign states, Nevada and California, whose law controls how additional water rights are to be established to the Walker River and its tributaries and to other sources of water within the Walker River Basin, and --

THE COURT: Just a quick question.

Assuming you're right, don't I still have jurisdiction at least to declare that there was an implied water right transferred when additional lands were granted to the Tribe?

In other words, even if I agree with you that I don't have authority to declare those rights or to appropriate them unless I'm amending the original decree under a 60(b) standard, don't I at least have jurisdiction to say under a requested amendment of the decree that, yes, additional grants of land are accompanied with an implied transfer of any water rights applicable to those new lands?

MR. DePAOLI: I think, your Honor, that your Honor, sitting as the United States District Court for the District of Nevada, as distinguished from the court which entered the decree, would have the authority to determine whether there is, in fact, an implied reserved right for those added lands and determine what it is and quantify it if it exists.

And then I think your Honor, sitting as the decree court for administration, would have the authority to require that water right as declared in a separate and independent action administered pursuant to your decree in this case.

THE COURT: Go ahead.

MR. DePAOLI: As I say, Nevada and California law, as to state-law-based water rights, require certain actions to be taken before state agencies before those rights can in fact be found to exist and to be perfected.

THE COURT: Well, now, that's true even if I disagree with you, is it not?

In other words, even under the government's approach, I have jurisdiction to declare a transfer of implied rights. But even under Circuit law, it first has to go to the state agencies with regard to appropriation, does it not, even under the government's approach?

MR. DePAOLI: I --

THE COURT: But with review to this court.

MR. DePAOLI: Two things about that, your Honor. I'm not sure that's the government's position.

THE COURT: I'm not sure either, but --

MR. DePAOLI: But I agree with your Honor that if there was a new appropriation to water in the basin, and if it was after the state had acted, it could be brought into the decree for administration.

But we --

THE COURT: So, for example, what I'm suggesting and asking you to contradict or not, is I have jurisdiction to declare that there was a transfer of implied rights, but what those rights were, either pre Nevada statute, pre California

statute, or post, where the state engineer in the case of Nevada, for example, has to entertain a new application, in all events it goes to those state agencies with regard to appropriation especially with regard to new sources.

Is that an inappropriate structure or analysis structure?

MR. DePAOLI: No, your Honor, except that it's not clear that many of these rights that are being claimed under state law, or even under federal law, are rights that would require administration under the Walker River Decree.

They may be for -- and I think in fact are for springs and seeps that probably never reach the Walker River or any of its tributaries at all, and in those cases --

THE COURT: Well, at a minimum don't I have an obligation to -- relative to amending the decree, relative to declaring the priorities?

In other words, if the state engineer were to say, even pre Nevada statute, that there was water beneficially used on those lands more recently transferred to the Tribe, or, at a minimum, if the Tribe is asking for newly-appropriated rights for the transfer of water rights that came impliedly to them, don't they have to go to the state agencies with review by this Court?

Tell me what's wrong with that analysis.

MR. DePAOLI: I don't think -- in the context of

the Orr Ditch litigation, the Alpine litigation, I don't think this Court has the authority to review new appropriations that don't -- in the basin.

THE COURT: Now, the Ninth Circuit recently told Judge George in *Orr Ditch* that his refusal on jurisdiction grounds to entertain the groundwater implications to the Truckee River was wrong and that he had to entertain that because that was within his jurisdiction. It did impact the flow in the river.

MR. DePAOLI: In that case, there were -- the Ninth Circuit drew a distinction between the 1859 right for the Pyramid Lake Reservation that was recognized in the Orr Ditch Decree, and said exactly what your Honor said, that Judge George had the jurisdiction and should determine whether the groundwater -- groundwater appropriation that had been granted would adversely affect that right.

THE COURT: So at a minimum don't I have to hone to the Ninth Circuit's analysis in that case?

MR. DePAOLI: In that situation, yes, your Honor, if there is a claim that there is that kind of interference.

But the other thing that the Ninth Circuit said was -- and the Pyramid Tribe has an appropriation under state law postdecree with, I think, a 1973 priority, and the Ninth Circuit said the *Orr Ditch* court would not have any

jurisdiction to determine if that right was adversely affected by the groundwater decision made by the state engineer.

THE COURT: And that's clear from the Ninth Circuit's discussion.

MR. DePAOLI: I believe so, your Honor.

THE COURT: So at a minimum I need to hone to that analysis.

MR. DePAOLI: Yes. If there is an allegation of interference, yes.

THE COURT: Okay.

MR. DePAOLI: The other ground for that claim of jurisdiction under the decree, your Honor, is paragraph 14 which is a fairly short paragraph where the Court retained jurisdiction of the cause for the purpose of changing the duty of water or correcting or modifying the decree and also for regulatory purposes.

The United States and the Tribe in effect read that provision as if it says the Court retains exclusive jurisdiction to determine all subsequent claims to water, based upon federal or state law, from the Walker River and from all other sources of water within the Walker River Basin.

It cannot be interpreted that broadly. That provision was included in the decree in 1936 by a judge who had ruled that all of the water rights in the decree had to be acquired under state law. It was a judge who had very clearly

recognized that since 1905 in Nevada, and 1914 in California, that people had to go to the state engineer or the California State Water Resources Control Board to appropriate water.

And there are other provisions in the decree where that's recognized. There are numerous permits and applications that were pending before the state engineer which the decree says are subject to final action by the state engineer.

There is a provision in paragraph 8 that says that the permits that the district was seeking was subject to final action by California.

So we think that the construction principles for the word modifying do not provide any justification for that kind of a broad interpretation of it, and our interpretation doesn't render that word meaningless or superfluous.

The Court can and has modified the decree in ways that aren't corrections of it. The argument is that we're reading it to mean only corrections, but modify means to change, and to change can be a change to something that was correct in the first instance.

When the Court approves modifications for new points of diversion and places of use, that's a modification. The Court, when it decided to appoint a six-person board of water commissioners rather than a single water master, in effect modified the decree, and there are provisions in the

1940 amendment to the decree that go beyond the Ninth Circuit mandate that are also modifications.

The Tribe and the United States rely on the *Arizona v California* line of cases to support their position, and we think they actually support our position.

When the first *Arizona v California* case was decided and the decree was issued, the Court expressly recognized that not all aspects of the case were finally resolved by the 1964 decree.

The Court had determined that certain -- that the special master should not have resolved boundary disputes for two reservations and provided in paragraph 2(d) of the decree that the water rights for those two reservations would be subject to appropriate adjustment by agreement or decree in this court in the event that the boundaries of the reservation are finally determined.

The decree also contains a much broader provision in paragraph 14 which allows the parties to apply at the foot of the decree for its amendment, or for further relief, a retention of jurisdiction for any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter of the action.

The United States tries to shoehorn this case into the *Arizona v California* mode by arguing that the judge

in 1936 knew that the United States had an anticipated and obvious claim for storage water not resolved under the decree and therefore retained broad jurisdiction to decide it.

Such a retention of jurisdiction in that case would have been inconsistent with what the judge had already ruled. He had already ruled that the rights of the United States would have to be adjudged, measured and administered in accordance with the laws of the State of Nevada. So in that context he knew that they would have to go to the state engineer for a new appropriation.

In short, your Honor, we don't think there is any subject matter jurisdiction in the decree court over the amended counterclaims, not to say that once rights are finally determined that the decree court would not have some authority and jurisdiction to require that certain of the rights be administered in priority in accordance with the decree.

Because of that, I think that -- we think that the Court is left with either dismissing the amended counterclaims or treating them as if they had been initiated as new and separate actions, and we think that the Court has that authority under the Federal Rules of Civil Procedure Rule 1 and Rule 8(e) which require that the rules be interpreted to secure the just, speedy, and inexpensive determination of every action in proceeding.

And for the Court -- if the Court doesn't have

that power, which we think it does have, the Court would be in the position of saying the last 22 years are for naught, we're going to dismiss everything and everybody has to start over.

And in the situations where the Court can -- when it knows that it would simply require the action to be refiled, the Court can treat the amended counterclaims as a complaint in a new action. At least that is our position, your Honor.

In the context of a new action, our principal disagreement with the United States is over subject matter jurisdiction as it relates to the claims made by the United States for surface water and groundwater based upon state law, and we are trying to address those jurisdictional issues based upon pleadings which are extremely broad, very general and nonspecific about the details of the water rights which are actually being claimed by the United States.

The United States approaches those -- jurisdiction over those claims from two angles. One is supplemental jurisdiction and the other is jurisdiction with the United States as plaintiff.

I address the United States as plaintiff first because I think that without more, 28 USC 1345 does provide subject matter jurisdiction to consider the claims of the United States based upon state law.

However, based upon the pleadings as they exist,

we think that in a number of instances there is a serious question as to whether the claims alleged are actually ripe for any action by the Court in a separate action.

I think there are three contexts where that comes up. The first is with respect to claims made for National Forest lands and BLM lands where the United States alleges it is entitled to appropriate water rights that either have been permitted and certificated under Nevada or California state law, or have applications to appropriate pending before the state engineer and the California State Board.

Until those administrative processes are complete, there really isn't anything for the Court in an independent action to do, if ever.

And I say "if ever," because it is not clear why the United States would need a federal court determination that it holds a certificate of appropriation to surface or groundwater in Nevada, or a license to appropriate surface or groundwater in the state of California. It either has it or it doesn't have it. It doesn't need a federal court blessing of either having it or not having it.

The other area where we think the allegations are insufficient relate to the groundwater claims in California.

Except with respect to the Marine Mountain

Warfare Training Center, we can't tell from the pleadings whether the claims under the overlying groundwater right area in California are actually being exercised.

If they are not being exercised, and because we don't have a groundwater adjudication going on here, there really isn't much for the Court to do in that context either other than to confirm whatever the groundwater law is in the state of California.

The third action is similar with respect to the riparian claims of the United States. Again, we can't tell if those claims involve riparian rights that are actually being exercised, or simply dormant riparian rights, or alleged riparian rights. And, again, if they're not being exercised, it's not clear exactly what the Court ought to be doing.

So in summary, your Honor -- and my thinking on this has evolved as these motions have been briefed and in preparation for this argument. Here is where I come out on state law on jurisdiction over the state law claims under 1345.

In the context of a new action, I think the Court has jurisdiction over the claims of the United States based upon state law for, one, surface water alleged to be appropriated under Nevada law prior to 1905, in other words, no permit required, second, surface water alleged to be appropriated under California law prior to 1914, again, no

permit required, and, thirdly, alleged rights to groundwater alleged to be appropriated under Nevada law prior to the time when Nevada required a permit from the state engineer to appropriate groundwater.

That's how I ultimately come out in the context of treating the amended counterclaims as a new action.

Lastly, your Honor, and this wasn't -- it seemed like we were asked to address what I refer to as the surface groundwater interrelationship issues. There were four of those in the case management order.

The first one was what jurisdiction does the Court have to decide the United States' and Tribe's claims to groundwater. Again, in the context of the new action, the Court has that jurisdiction.

To the extent the claims are based on federal law --

THE COURT: That's a specific area where Judge Reed expressed some concern.

MR. DePAOLI: Yes, your Honor.

THE COURT: Whether he had any jurisdiction. He asked the question, he didn't rule, whether he had any jurisdiction to entertain the implication of new groundwater or groundwater rights as opposed to the Orr Ditch analysis where it affected the flow.

MR. DePAOLI: Yes, and groundwater based on the

vested rights or prepermit requirements in Nevada, and, again, that's in the context of a new action.

The second question was what law governs groundwater on federal reservations, and I think that flows directly from the law in which the groundwater right is based. If it is based on federal law, implied reservation of water doctrine, it's federal law. If it's based on state law, it's state law.

And then there were the two questions about what the Court ought to do about interference -- alleged interference with groundwater -- by groundwater pumping outside a reservation with respect to surface water inside a reservation.

And where we are in that context is that neither of the amended counterclaims makes any allegation that there is any present interference by groundwater pumping with the sole -- the one recognized federal right in the Walker River Decree, the 1859 right for the reservation.

Neither makes any allegation that groundwater pumping outside the boundaries of any reservation will, in fact, interfere with any federal right yet to be determined, and we think that without those allegations the Court has no jurisdiction to delve into whatever is going on with groundwater pumping outside the boundaries of any of these reservations.

I think on the issue of does the Court have to address that at the same time as addressing the question of what other federal surface water rights exist, I think -- based on my reading, I think the United States and the Tribe agree that it does not need to do that, and we agree that it does not need to do that.

But this is not really simply an issue of what the -- what will be in a prayer -- what is in the prayer for relief in the sense that the relief requested is that a groundwater user be enjoined -- groundwater user outside the boundary of a reservation be enjoined from asserting any adverse rights, title, or interest, in or to the federal rights that are ultimately determined.

Those users are entitled to know at some point in time that -- whether or not their pumping could be in violation of any such provision, and they can't know that without some specifics of interference, and they can't know that and deal with that without knowing what the relationship from a priority perspective is with their groundwater rights to any of the groundwater -- or any of the other rights, surface or groundwater, that might be determined by the Court.

So on that issue we agree that the United States doesn't have to prove anything today or going forward right now about interference. However, we think the United States has to at least allege it under the *Orr Ditch* case, and if it

doesn't allege it, which it hasn't, there is no jurisdiction.

That's kind of where I wind up on all those, your Honor. Thank you.

THE COURT: Okay. Thank you so much.

Anybody else want to add on the motions to dismiss?

MR. STOCKTON: Just real briefly, your Honor. Bryan Stockton for Nevada Department of Wildlife.

Our motion was limited to the Orr Ditch Decree that -- or case that you discussed somewhat with Mr. DePaoli, and I agree with your analysis.

The only thing I was a little confused about is you asked a question about this Court setting priorities, and I think as far as to groundwater rights, those priorities are set by the state engineer.

So that's our only motion, is that in this case, if the United States and the Tribe do allege that the groundwater pumping is interfering with their decree rights, that this Court would only determine the extent of that interference and then issue that -- that -- an order to the state engineer to curtail pumping of groundwater to the extent needed to avoid any interference with the Tribe's decreed rights.

So that's all we're asking in that motion.

The other issue that I wanted to talk just

briefly about is the public trust issue which we did not file a motion in the Mineral County case, in the 128 case, against Mineral County. However, Mineral County has incorporated all those arguments into this case through its response to the motions to dismiss.

And the problem there is -- well, just briefly, and I talked about this in my reply, is that we think it's appropriate where it was suggested that this be referred to the Nevada Supreme Court to determine the extent and the parameters of the public trust law in Nevada because public trust is a creature of state law, and the water has to be administered both by state procedural and substantive law.

And the difference between the *Lawrence* case and this case, which Mineral County completely glosses over, is that the developers in Clark County could live without those additional acres of land that were determined to be under the public trust, and the difference is here you've got to balance a lot of issues that are -- involve public policy choices -- well, not -- policy choices, you know, between the other wildlife values that are upstream from Walker Lake, the people on the river that can't live without the water, including the Tribe, and also the values of Walker Lake.

So we disagree with Mineral County's analysis that the public trust law in Nevada is crystal clear.

So, thank you.

THE COURT: Thank you.

All right. Let's call for opposition, please.

California -- by the way, before I cut you off, California had nothing to add? Okay.

UNIDENTIFIED SPEAKER: Unless you have specific questions for us, your Honor, we have nothing to add at this point.

THE COURT: Thank you so much.

MR. GUARINO: My goal is to not spill this.

Good morning, your Honor.

THE COURT: Good morning.

MR. GUARINO: For the record, my name is Guss Guarino, and I represent the United States. I appear in court with Mr. Negri, of course.

And as we've explained to the Court before, my principal role in representing the United States associated with this litigation has to do with the Indian interests that the United States holds. Mr. Negri is primarily tasked with addressing the non-Indian interests.

But with respect to the comments that we have to the Court, I believe my comments will address all of the concerns associated with the United States, and I believe it will also address a lot of the concerns that have been raised by the Tribe as well. But after I speak, of course, Mr. Williams will have an opportunity to come up and speak as

well.

Obviously, my comments here are nothing but a -- but a -- it's not an expansion or divergence from anything we've put in our pleadings, and I think what we've put in our response to the motions to dismiss that have been filed are fairly thorough and detailed relying upon case law that we believe controls the issues that have been raised by the motions to dismiss.

And so the -- my goal in the conversation we're having this morning, your Honor, is to do this. I'd like to step back just a little bit, and I'd like to talk about a couple of big things, because there's a couple of big things, I think, that are moving here that, as the Court takes a look at the circumstances of the motions, the circumstances of this case, and really what are the questions that are being raised by these motions, we think that the answer is fairly clear on what the Court needs to do. At this juncture, it needs to deny the motions to dismiss that have been filed, very simply.

So let me talk just very briefly about the nature of the motions and as Mr. DePaoli has described.

They moved to dismiss a specific element of the water rights claims of the United States, and the Walker River Irrigation District describes that this Court has no jurisdiction, there's no jurisdiction to decide state-law-based water rights claims, but to get there, the

Irrigation District has to -- has to create something.

It describes that the Court does have jurisdiction under federal law to consider the federal-law-based water rights claims of the United States, but to address these -- any of these claims, the Court needs to create a new action.

Now, our water rights claims were not filed in a new action, they were filed in this action, the action that was initiated in 1924, and have always been there, and the notion that this Court has some sort of inherent power to simply inject the United States into another cause of action that it did not believe, we believe the Court does not have such authority.

The United States very clearly has sovereign immunity from being sued or being brought into a lawsuit that it did not initiate, and we just haven't done that, that thing that the Walker River Irrigation District would suggest that's what we would have to do.

But even in such a construct, assuming that such a construct could be constructed, this motion that the Irrigation District has presented says that, in fact, this Court is precluded, is precluded from considering water rights claims brought by the United States that are based upon state law, precluded by state law. That is the way we have addressed or viewed these motions. That's what we think the

motions are asking.

With respect to the second motion that's really in play here, the motion that was presented by the Circle Bar N Ranch Group, they join, of course, the Walker River Irrigation District's motion, but they do something a little different.

They simply say, well, we're not advocating for a construction of a new action, the water rights claims were brought into this -- this action that's existed since 1934, and the United States had no ability to do that, and therefore everything that the United States has filed should be dismissed.

That's where we're starting from. Those are the motions that are before the Court.

I'll address the -- I'll address the Department's motion to dismiss to the extent it's necessary, your Honor, but I think based on the comments from the Irrigation District and from the Department itself, I think a very clear, clean reading of the amended complaint -- amended counterclaims that the United States has filed or relied upon, there's no allegation of interference.

What we ask the Court is to quiet title to our water rights, our additional water rights that we believe exist, and to declare that anybody else making any claim to those water rights that we claim should be quieted.

Okay. We're not claiming that there's an interference going on anywhere, and to the extent such an interference might be going on, the United States needs to take some sort of action to protect the water rights that are found by this Court through these proceedings, we'll take that action at the appropriate time and through the appropriate mechanisms that we have.

But so these are -- the real nature of the motions to dismiss are as I've described, and before I get into actually the two questions that I think are put before the Court, I'd like the Court to consider the nature of these proceedings and how we've gotten here, because it's taken well over a hundred years to get here.

This is not a general stream adjudication. It wasn't initiated as a general stream adjudication. It was initiated as a dispute between water rights holders in the state of Nevada and the state of California at the turn of the century.

And there was a lawsuit filed in the predecessor to this court, in the Nevada Circuit Court then but now the Nevada District Court, in which one group of -- Nevada group of water rights holders came into this court and said we have water rights and those water rights are being interfered with by folks in California, and in California those folks went to their state courts and made the same allegations.

Ultimately injunctions were issued, and that matter percolated right up through the Supreme Court, and through the decision of Justice Holmes, the Court found that it was this Court, and only this Court, that could have jurisdiction over this dispute given the nature of this dispute.

Again, this is not a general stream adjudication. This is not a situation in which this interstate stream system is subject to a compact. This was a creature that was created at the turn of the century under the specific circumstances, but at this point we see that the Court is recognizing that the jurisdiction to resolve such disputes is here.

Subsequent to that, the disputes of the parties were resolved in what we now refer to as Decree Number 731, and in 731 the dispute was resolved and the decree was issued.

The United States was not part of that suit, it could not be made part of that suit at that time. Although the United States was invited to have its water rights decreed under the 730 decree action, the United States did not waive its sovereign immunity and step into court and have its rights determined at that point.

Several years later it initiated this, this action. It initiated this action to address the surface water irrigation rights of the Walker River Tribe, and the lawsuit

ensued.

Ultimately we know where that ended. All of the rights that were decreed in 738, 731 were incorporated into this decree. Those were all state-law-based water rights that were determined by the Court based upon the laws of Nevada and California.

And, in fact, at the time, in 1936, the Court incorrectly found that there were no federal-law-based water rights, that -- and determined that the United States and the Walker River Tribe held what were essentially state-law-based water rights.

So at least back in 1936 the Court definitely had the ability to determine that the United States held state-law-based water rights, and, of course, the Ninth Circuit decision issued and informed the Court that it was incorrect about its decision associated with reserved rights.

Since 1940, this Court has had very broad, very complete, very exclusive jurisdiction over matters associated with water rights, water and water rights in the Walker River Basin. There's only been one court, this court.

When the Court considers what it needs to do in response to these motions, that this Court doesn't have subject matter jurisdiction at all, this Court needs to consider precisely the evolution that has occurred, the very unique evolution that has occurred, in this case.

This case is not a general stream adjudication, as I've said. This case is unlike any other case that is, frankly, in federal court anywhere else. The circumstances are very unique. The Court has secured its jurisdiction in this case.

Now, of course, the United States filed in 1992, along with the Tribe, its claims for additional water rights. It filed them as counterclaims to the petition that the Walker River Irrigation District filed, and in 19 -- and in 1997 it amended those counterclaims and claims for additional water rights to include not only the Walker River Indian Tribe, Walker River Paiute Tribe water rights, but all federal interests that exist in the basin, whether they are other Indian groups that exist in the basin, or the other -- many other federal interests that exist in there.

We claimed both state- and federal-law-based water rights. We did that because we believe this is where jurisdiction lies.

Now, with respect to what questions that this -- these motions to dismiss raise, we believe that they raise, frankly, two questions.

One, what is the nature of the Federal District Court of Nevada's jurisdiction. We believe it is exclusive, and we believe it is exclusive over the subject matter of this case which is the water of the Walker River Basin.

Now, there's been some discussion about interference and about whether or not there's interference with actual stream flows, or interference with -- you know, it raises the question of whether or not there's a groundwater interference to -- groundwater interference to surface water.

But what we know is that when we filed the amended counterclaims that incorporated groundwater claims throughout the basin for both Indian and non-Indian interests, we showed the Court through affidavit that there was connectivity between the surface water and groundwater of the basin.

To the extent that exists, and does it exist in every aspect and at every turn, we don't know yet, of course, because we haven't developed the case to that point to present the evidence to show that connectivity.

So to the extent that any jurisdiction might turn upon whether or not there is connectivity to the surface water streams, or surface water that might be unconnected to some sort of a body of groundwater that we might be utilizing, it's not connected to the surface water streams of the Walker River, we haven't gotten there yet.

But nevertheless what we have here is we have a question of addressing what is the nature of the jurisdiction of the Court, and we've put in our brief and explained our rationale for why we believe it is exclusive.

And we did not make up this phrase, your Honor, we did not invent the notion of exclusive jurisdiction out of the ether. This is the description of the jurisdiction that every court that we have examined seems to describe the jurisdiction of this court in water rights disputes such as this.

In 1910, the Supreme Court looked at the Walker River Basin and said that this court was seized, that it made no sense for -- given the nature of the subject of this case, the flowing waters across the border of California and Nevada, that it was this court to have jurisdiction.

In 1922, the Supreme Court issued its *Kline versus Burke Construction* decision in which this court described the -- the Supreme Court described very clearly that when the matter is one that is *in rem*, that the court that first exercises its jurisdiction over the *res* of the case, the r-e-s of the case, that court gets exclusive jurisdiction going forward.

Now, since those cases have been issued, the Ninth Circuit has examined the jurisdiction of this court as it relates to water rights, water disputes and water rights disputes in the basin. It has described this court's jurisdiction as in the nature of *in rem* which means that the court's jurisdiction over the waters of the basin are exclusive.

That's what we believe that the courts have said, and, in fact --

THE COURT: In what case did they say that?

MR. GUARINO: I would point the Court very specifically to the *United States versus Alpine Land and Reservoir* case issued in 1999.

In that case, the court was describing not just the jurisdiction --

THE COURT: Now, here's the critical question I have there. That was a general decree case, was it not?

MR. GUARINO: As in a general stream adjudication case?

THE COURT: Right.

MR. GUARINO: Okay. Yes.

THE COURT: So logically --

MR. GUARINO: I believe so. I'm not as familiar with that level of circumstance, but I don't -- I think that's correct.

THE COURT: So logically isn't that analysis prohibited in our case which you've already told me was not a general stream adjudication, was just simply an adjudication between rights across states?

MR. GUARINO: I don't believe that's a distinction that makes a difference here, your Honor.

THE COURT: Why?

MR. GUARINO: And the reason is this. When you examine the discussion that the court was having concerning the jurisdiction, it did not make that distinction. What it talked about was the water.

THE COURT: Well, why would it make the distinction if, as my memory reflects, it was a general stream adjudication? It makes sense to say there's *in rem* jurisdiction.

That's a question that I asked right at the outset of my taking over, is there not *in rem* jurisdiction over this case, and it occurs to me that there is, but that's directly contradicted by your suggestion -- logically your suggestion that this case started out not as a general stream adjudication, it was an interstate conflict.

MR. GUARINO: That's correct -- well, your Honor, it was -- as I said, it wasn't started out -- it's not a general stream adjudication. It has evolved into something that has, frankly, never existed in federal jurisprudence before.

But the distinction that you're drawing --

THE COURT: Then how can I use that analysis for *in rem* applicable to *Alpine* in this case?

MR. GUARINO: Because the exclusivity of this court's jurisdiction attaches to the *res* of the case, the r-e-s of the case, and that is the waters of the Walker River

Basin.

THE COURT: But you've just told me that the *res* is not the waters, appropriated or otherwise, of the entire stream, and certainly not the groundwater. The *res* is simply the dispute over those rights adjudicated in the prior decree across state lines.

MR. GUARINO: Your Honor, if I -- if that's the impression of the Court, that's not what I meant to say. The *res* of the case is not the rights, the *res* of the case is the waters.

I've mentioned, only to the extent --

THE COURT: All of the water in the entire basin.

MR. GUARINO: At least --

THE COURT: Okay.

MR. GUARINO: What we don't have is we don't have the circumstances of whether or not there's some body of groundwater that exists in the basin that is wholly and entirely hydrologically disconnected from the river itself, some ancient aquifer that's just -- has some sort of complete disconnect from the river.

And to the extent any issue of this Court's jurisdiction turns on that, we'll get there when that circumstances -- or when that circumstance arises.

What the motions are saying is that --

THE COURT: Boy, it just seems like you're coming at me from two different logical points of view.

You're saying that if and when you have an interference issue, you'll raise it in some other or appropriate court, and you're certainly not waiving your sovereign immunity with respect to those issues.

But, on the other hand, you're telling me I have the *res*, the entire basin, and all sources of water. I don't get the logic of that.

MR. GUARINO: The connection of the logic there would be, your Honor, that if the United States felt that it was -- that its rights were being interfered with, then there's only one place that we would go to seek redress.

THE COURT: This case? Because I have the *res*.

MR. GUARINO: Your Honor, let me make -- let me make a distinction here because that comment actually cuts a very -- cuts a line between what I think the two questions are that are raised by these motions to dismiss.

One is what is the nature of the jurisdiction of this court, the federal district court --

THE COURT: This case.

MR. GUARINO: And then what is the nature of this court's jurisdiction in this case. Okay.

And the nature of the jurisdiction that stems in this case comes from the decree that this court issued, and in

the decree this court said that the court retains jurisdiction of this case for correcting or modifying the decree.

Now --

THE COURT: Sure. That doesn't give me the authority to retain something that that court did not have. I can only retain that jurisdiction that I have.

MR. GUARINO: That is correct, your Honor.

THE COURT: At the time.

MR. GUARINO: Your Honor, but the court had the jurisdiction over the parties, it had jurisdiction over the water. There's nothing left, I believe, for the court to have jurisdiction over.

THE COURT: Okay.

MR. GUARINO: The court has the jurisdiction over the *res* of the case, and it has maintained that jurisdiction in this action, and so --

THE COURT: And I had jurisdiction -- at the time the decree was issued, I had -- this court had *in rem* jurisdiction over all of the issues you're raising now.

MR. GUARINO: Yes, your Honor.

THE COURT: Okay.

MR. GUARINO: And then if -- if the court issued -- if the court issued a different decree back in 1936, then we would not be -- we would not have filed the motion -- the amended counterclaims in this case.

The amended counterclaims and the claims of the United States were brought in this case because the court allows us to do so in this case, and that's what the court contemplated back then.

You know, Mr. DePaoli was describing that the court wouldn't have done such a thing, but as he was saying that, my very simple thought was, look, if the court knew -- it was 1936, the court knew there would be further development, what about all the other rights that are coming into existence through prior appropriation and the application of state law?

The court had the ability to maintain --

THE COURT: Well, certainly -- I'm being a little facetious here, but certainly that court at that time did not have, nor could it retain, the air rights over those lands, right? I mean, that's a far-out example.

MR. GUARINO: I understand the Court's -- yes.

THE COURT: Okay.

MR. GUARINO: So -- so -- you know, what -- the second question of what's the nature of this court's jurisdiction in this case, I believe the Court needs to look at the decree that was issued.

And I think all the parties in their pleadings have agreed that the Court needs to use the plain language that the court used back in 1936 to decide whether or not the

United States has any ability to do anything up to -- to file the counterclaims that it's filed in this case. We believe that's what paragraph 14 allows us to do, this modification.

And the example I was using in preparation for this oral argument to the Court is this: You know, if you and I engaged in a contract for whatever, to purchase something, or to provide services or something like that, we could come to terms on a contract. If we want to come back later and modify the contract, we can do that, too.

A modification is a change to the contract. I think -- or is a change. Mr. DePaoli just described that in oral argument very clearly, modification is a change.

Now, what the defendants seem to want to do is they say pretty much any change is fine except for what the United States is asking the Court to do.

So new water rights, no, there's a preclusion, there's a state law preclusion that's going on that the Court has no longer the ability to even determine what state-law-based water rights are, but for anything else -- for anything else, we can bring -- modifications can be made to the decree.

In fact, decisions can be made by other state agencies in some other adjudicative process, and then those decisions can be brought up and brought back into this decree. The Court has the ability to do that, but not in the first

instance to make a decision for itself.

We're asking the Court to make the decision. We believe the Court has both the exclusive jurisdiction and the jurisdiction within this case to do precisely -- precisely that.

Now, with respect to the discussion about interference, whether we claim interference or not does not strip this Court of jurisdictional bases to hear a claim.

We don't have -- there's no -- the Walker River Irrigation District provides no bases to say that irrigation is required to be alleged for the Court to consider any element of the claims that we're asking the Court to decide in the first instance.

With respect to the motion to dismiss that the Department -- the Department has presented, it's based upon the premise that we're alleging in this -- in this -- in these circumstances interference. We're not doing that.

In our prayer for relief, we very clearly say that we're asking the Court to quiet title to water rights that we believe -- the additional water rights that we believe we have and to declare that no one else has those water rights.

It's not an interference matter, but it's a -- if somebody has a claim --

THE COURT: You're not asking for an injunction

against such interference.

MR. GUARINO: I believe our amended counterclaim speaks for itself, your Honor, and so I don't believe that this Court should make any decision at all based upon potential interference or how potential claims for interference may affect the jurisdiction of the Court. It is, at a minimum, premature.

Your Honor, at this point those are my prepared comments.

THE COURT: Thank you so much.

MR. GUARINO: And if the Court has other questions, of course, you can call me back.

I did not spill my water.

THE COURT: Mr. Williams.

MR. WILLIAMS: Good morning, your Honor.

THE COURT: Good morning.

MR. WILLIAMS: Wes Williams, Jr., on behalf of the Walker River Paiute Tribe.

I would just like to join Mr. Guarino's comments, and I only have one simple --

THE COURT: Please.

MR. WILLIAMS: -- item to point out, and that is, as far as Mr. DePaoli was mentioning the -- arguing regarding the state law claims that were alleged in the United States' counterclaim in the complaint, the Tribe's complaint

alleges -- it has three claims, and they're all federal-law-based claims. The Tribe doesn't rely on any state law claims, and that's simply the thing I wanted to add.

THE COURT: It's an important distinction, I understand that.

MR. WILLIAMS: Thank you.

THE COURT: Thank you. From Mineral County.

MR. HERSKOVITS: Yes, your Honor. Thank you. Good morning again. Simeon Herskovits for Mineral County, also representing the Walker Lake Working Group.

I really have only a couple of remarks. This is the motion -- the hearing on the motions to dismiss in the 127 case relating to the claims of the United States and the Walker River Paiute Tribe.

As far as the issue raised by Mr. Stockton regarding the Public Trust Doctrine and the state of the law under it, we are comfortable resting on our discussion of that issue in our briefs and at the previous oral argument.

I just want to clarify that in our very limited response to these motions to dismiss, we incorporated only the portion of our brief that related to this question of the scope of the decree and the retained jurisdiction over different sorts of claims.

We did not address the Public Trust Doctrine, but I think our briefs address the issues that Mr. Stockton

touched on, and there seems to be some agreement that should the Court believe the issue is unclear, the state of the law is so unclear, that you cannot --

THE COURT: Refer it.

MR. HERSKOVITS: -- apply it yourself, that the procedure under Nevada Rule of Appellate Procedure 5 to certify the question to the Nevada courts is appropriate.

THE COURT: Okay. Thank you.

MR. HERSKOVITS: Thank you.

THE COURT: Please, responses.

MR. DePAOLI: Just briefly, your Honor. Gordon DePaoli on behalf of the Walker River Irrigation District.

If your Honor does not have the authority to treat these amended counterclaims as a new and independent action under the federal rules, then I think your Honor has to dismiss the claims because there is no jurisdiction absent treating them as a separate action.

THE COURT: Well, do I not have that authority?

In other words, even if I agree with you, do I not have the authority to keep the complaint alive as, in essence, raising a new claim, and I have jurisdiction to do that, and, of course, even if I agree with you that there's incomplete pleading, I have to give them an opportunity to amend to fully set it out.

Don't I have that authority?

MR. DePAOLI: I think you would have the authority to give them the opportunity to amend, but if their -- if they --

THE COURT: Don't I have the authority jurisdiction to entertain a new lawsuit subsumed in or incorporated in their counterclaim?

MR. DePAOLI: Yes. That's -- I think that's what I'm saying, your Honor, is you have the ability to treat them as new lawsuits which are their claims.

THE COURT: You're just simply saying that if I agree that it is a new lawsuit, and if I agree that I don't have jurisdiction to entertain it, then I just have to dismiss totally. That's all you're saying.

MR. DePAOLI: Yes.

In terms of the argument that Mr. Guarino made that this Walker River action is absolutely unique, that there is nothing like it anywhere, there is really no difference between this litigation that resulted in the Walker River Decree and the Orr Ditch Decree.

As a matter of fact, the Orr Ditch Decree only adjudicated, I think, only one water right in California on the Truckee River at all and that was the rights to water from -- rights to water from Lake Tahoe.

The other water rights to the Truckee River in California, both before the Orr Ditch Decree and after, and in

Nevada after the decree, have never been part of the Orr Ditch Decree at all.

And so the -- there is nothing unique about this case that says this Court has to have exclusive jurisdiction over all water sources within the Walker River Basin.

The *Kline v Burke* case was a case that involved two different *in personam* actions, and the Court said that both could proceed. It did have dicta in there about two courts could not have *in rem* jurisdiction over the same property, but that wasn't the issue.

And this is not -- this is not and never has been an *in rem* jurisdiction case in the true sense of *in rem* jurisdiction.

The Walker River and all the sources of water within the Walker River Basin are not like some ship over which people are making claims to, or not even like some piece of property where people are making competing claims to.

What the actions involved was quiet title over the rights to use water from the Walker River and its tributaries.

THE COURT: But didn't the Supreme Court so hold impliedly when it told California you cannot proceed with your cases, which clearly had jurisdiction over all of the sources of water, I suppose -- I guess all that was asserted there was appropriative rights. But didn't the Supreme Court impliedly

say so that -- when they stopped the California court, that this court had, in essence, *in rem* jurisdiction over all of it?

MR. DePAOLI: I don't think so, your Honor. I think all of the *Rickey* cases recognized that the courts --

THE COURT: There's another way to see it, and that is they were telling the California court you could not proceed with respect to those *in personam* issues that were pending in this court --

MR. DePAOLI: Yes.

THE COURT: -- because those issues included interstate issues.

MR. DePAOLI: Essentially that case was simply the first filed case ought to proceed. You had the case first filed in Nevada with everybody appearing, and then you had the California defendants go file two other cases in California that they wanted to pursue, and the Supreme Court just said the first case filed proceeds, which is not an unusual rule.

THE COURT: You're not saying that that's not on the basis -- that is not on the basis of *in rem* analysis, that's simply on the basis of competing claims in different courts.

MR. DePAOLI: Yes, that's what I'm saying, competing claims in different courts.

The *Alpine* case that Mr. Guarino referred to,

what happened there was that a water right recognized by the Alpine Decree was being changed through the state engineer.

The state engineer made a decision, and what happened is some parties asked the Nevada state court to review that state engineer decision. Based upon that, the parties who had obtained the change went to the Alpine court and said, no, you have jurisdiction over this water right by reason of the fact that you adjudicated it, it's subject to your decree, therefore you have the exclusive jurisdiction to review that state engineer decision.

And that's really all that that case stands for, your Honor. It doesn't stand for a determination that the *Alpine* court has jurisdiction over all sources of water in Nevada and California within the entire Carson River Basin. It doesn't say that or even suggest that.

It's simply a matter of the court that issued the decree has the power to enforce it and prevent interference with its decree which is what was going on by trying to get a ruling of the state court on the state engineer's change to that Alpine Decree water right.

Lastly, your Honor, we -- Mr. Guarino says there is no real issues of interference here, they haven't been alleged, and I agree with that.

What I don't agree with is this idea that the Court, in quieting title to the water rights that are being

claimed, can essentially prevent others from making claims as to those water rights, and I don't think that's what anybody would be doing.

The problem with -- that makes water different from quiet title action to real estate, for example, to land, is that when the water source is common, what you need to know is the relative rights. Because when someone pumps groundwater that, as he says, may have a connectivity to somewhere else, you can't say you're enjoined from pumping that without at least at some point determining what that connectivity is and knowing what the relationship between that groundwater right is and what the court has determined to be the federal rights.

And so -- and we may all be in agreement here that the interference issue is not before the Court at the present time and should not be, but an injunction that says you're enjoined from doing anything that does anything to that right cannot be so broad as to, in effect, deal with that interference issue silently.

THE COURT: Well, counsel has disclaimed that he's asking for such an injunction in any event.

MR. DePAOLI: Yes.

That's all I have, your Honor.

THE COURT: Okay. Thank you.

Any other replies?

All right. This matter is submitted.

I appreciate your comments. I think I got it, and I'll just have to determine in my own mind what law applies.

I'll issue these decisions pretty quickly here, and I think I will certify them because we need a basic understanding from the Circuit before we go a lot further as to what law applies.

So I'll take them under submission, all of them. I appreciate so much your coming, and, of course, I'll welcome you back, I'm sure, in the near future. Thanks again.

-o0o-

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Margaret E. Griener 8/10/2015
Margaret E. Griener, CCR #3, FCRR
Official Reporter

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/s/Margaret [1] - 50:16

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