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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE ROBERT A. MCQUAID, JR.
MAGISTRATE JUDGE

UNITED STATES OF AMERICA,	:	IN EQUITY NO. C-125-ECR
	:	Subproceeding: C-125-B
Plaintiffs,	:	3:73-CV-0127-ECR-RAM
	:	
vs.	:	and
	:	IN EQUITY NO. C-125-ECR
WALKER RIVER IRRIGATION, et	:	Subproceeding: C-125-C
al.,	:	3:73-CV-0128-ECR-RAM
	:	
Defendants.	:	Reno, Nevada
	:	

TRANSCRIPT OF STATUS CONFERENCE

December 3, 2008

APPEARANCES:

For the Plaintiff:	GREGORY W. ADDINGTON U.S. Attorney's Office SUSAN L. SCHNEIDER U.S. DOJ
For NV Dept of Wildlife:	MARTA ADAMS Deputy Attorney General Carson City, Nevada
For Circle Bar N Ranch Borsini Ranch:	LAURA A. SCHROEDER WYATT ROLFE (Telephonically) Attorney at Law
For Walker River Irrigation District:	DALE FERGUSON GORDON DePaoli Attorneys at Law
For U.S. Board of Water Commissioners:	KAREN A. PETERSON Attorney at Law

1 For Walker River WES WILLIAMS, JR.
Paiute Tribe: Attorney at Law

2

3 For Mineral County: SIMEON M. HERSKOVITS
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4 For Joseph Landolt: JOHN W. HOWARD
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1 RENO, NEVADA, DECEMBER 3, 2008, 10:05 A.M.

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3 P R O C E E D I N G S

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5 THE COURT: Be seated, please.

6 THE CLERK: This is the date and time set for
7 a status conference in case numbers 3:73-CV-127-ECR-RAM,
8 and 3:73-CV-128-ERC-RAM, United States of America versus
9 Walker River Irrigation and others.

10 Present in the courtroom are Marta Adams, Laura
11 Schroeder, Dale Ferguson, Gordon DePaoli, Karen
12 Peterson, Susan Schneider, Wes Williams, Jr., Greg
13 Addington, Simeon Herskovits and John Howard.

14 Present telephonically are Stacey Simon, Donald
15 Mooney, Wyatt Rolfe and Michael Neville.

16 THE COURT: Good morning. Let's start with
17 the agenda as usual. Ms. Schneider.

18 MS. SCHNEIDER: Good morning, Your Honor.
19 Looking at the status -- the proposed agenda items, the
20 first item is the status of service efforts and plans to
21 file additional service -- status reports on service and
22 other issues relating to service.

23 We believe that we may have sent out the last
24 mailing on service on Tuesday, November 25th. We think
25 that's it. We're not sure. There may be some cleanup,

1 but we've mailed service packages to all potential
2 persons and entities that we've identified so far.

3 We have a couple of old certificates from the
4 1920s and have not yet determined what happened to
5 those. They're still on the books, but some of them
6 appear to have been the land has been turned into
7 subdivisions, and we can't really figure out who owns
8 what at this point. And so that's the kind of issue,
9 among perhaps some others, that would likely to be
10 addressed in a publication motion.

11 Our next report to the Court we would anticipate
12 adding about maybe 200 or so to the service list but
13 also anticipate a significant number of dismissals and
14 substitutions.

15 We have not filed a service report after report
16 number 13 for which the Court's already issued an order
17 of approval. I had stated at the last status conference
18 that we had intended to do 14 very shortly thereafter.
19 We were delayed doing that simply because we were going
20 to focus on getting the mailing out before we did
21 anything else.

22 Service report 14 will be done sometime in
23 December. And there will also be a report 15 which we
24 anticipate would be probably in January. I'm uncertain
25 at this point if there will be others, but suffice it to

1 say that at some point we're going to move into the
2 cleanup mode.

3 Our process server is continuing to serve. We
4 anticipate that some percentage --

5 THE COURT: Let me just interrupt you just for
6 a second.

7 At some point we are going to get into the
8 cleanup mode. Do you have any estimate of what that
9 point is? Because that's an important point. Because
10 once the service gets cleaned up, then we move into
11 deciding the threshold issues.

12 MS. SCHNEIDER: I think perhaps the way to
13 answer that is to talk about the kinds of issues that
14 need to be addressed for case management. As I was
15 trying to think about the threshold issues and case
16 management -- and I do think that they're inextricably
17 intertwined -- I had made a list of things that I thought
18 needed to be addressed. And I was going to suggest that
19 I could go over that list in a couple of minutes.

20 THE COURT: Okay.

21 MS. SCHNEIDER: And that might be a more
22 general way of trying to answer Your Honor's question.

23 THE COURT: All right.

24 MS. SCHNEIDER: We certainly are going to have
25 to do more process serving. That is continuing right

1 now. It will go into January. Again, that also should
2 be in more of a cleanup mode at -- during this time as
3 well.

4 We also just point out to the Court that there
5 was a filing in October regarding a mixup that we made
6 in identifying domestic wells. We served -- sent
7 packages to people in the Douglas County area who are
8 not in the case management order on the basis of
9 domestic wells only.

10 And once we realized that, we got a -- did a
11 filing with the court immediately and did a mailing to
12 all the people involved that they would be dismissed.
13 And we filed that a couple months ago.

14 To the extent that anybody in that group, and not
15 that very many -- not many of them, but to the extent
16 that any of them filed a waiver and/or a notice of
17 appearance, we won't be including them in any service
18 reports to ask the Court to have them deemed served.
19 They're simply not a part of this.

20 We had given -- we sent a letter and a copy of
21 the filing that we made to the Court to all the people
22 involved. And if the Court wants to see that, I also
23 have a copy here of the cover letter that we sent
24 because I don't think we filed -- I don't remember
25 whether we filed that with the Court as well.

1 On that particular issue, I don't think that
2 there's anything more to be done. It took some time to
3 clean this up, and that's partly why we didn't get to
4 report number 14.

5 But I think what this shows, as a general matter
6 or an overall matter, is that we're nearing the end of a
7 multi-year effort to serve the individuals, the persons
8 and entities that were identified in case management
9 order in the nine categories of persons and entities
10 that the Court directed us to serve, following extensive
11 pleadings and briefings and argument over the nature of
12 the case, the kinds of issues that needed to be
13 addressed and who needed to be included.

14 And suffice it to say -- and I know we'll get
15 into this probably a little later, but the bulk of the
16 time that we spent and the bulk of the money that we had
17 to spend was really dealing with trying to identify
18 persons with ground water. And that's really the large
19 number of the effort here.

20 And that certainly was done because the Court and
21 many of the defendants in this room took the position
22 that we needed to be sure to serve all of those people
23 and serve them personally and make sure that they were
24 included in this case in a timely fashion so that they
25 could participate in this case to represent their

1 interests.

2 If I could, then, Your Honor, move on and talk
3 about some more -- some of the service issues that I see
4 coming up here.

5 On item number two on the agenda list I have some
6 issues identified. And as I thought about it some more,
7 I actually came up with some additional issues as well.
8 And they may not be necessarily in complete order, but
9 this is -- these are the issues that I see coming up.

10 One issue is to ascertain cutoff dates regarding
11 service, including the new wells and ownership changes
12 from 2008 and beyond.

13 Now, that is an issue that I had identified at
14 our previous status conference. And Your Honor
15 suggested that I raise it today. I've gotten a letter
16 from Mr. Howard on the issue. I don't think he quite --
17 I don't think that his suggestions quite meet the
18 concerns that I had raised, but I think that that's an
19 issue that we need to resolve.

20 In the -- I have given the Court previously some
21 copies of some orders in the Zuni adjudication. And
22 that served as a model for some ways of handling
23 pleadings which the Court used about a year ago in
24 trying to figure out how the clerk's office might be
25 able to curtail service.

1 In that particular case recently one of my
2 colleagues filed a motion dealing with a similar issue,
3 how do you cut off the point of service? When do you
4 stop?

5 And what I wanted to suggest is that I put
6 together a similar motion and order and circulate it to
7 the parties and see how they -- what their reaction is
8 to it.

9 In the Zuni case what the suggestion was to the
10 Court and the proposed order there is that services
11 would be cut off as of the date of the Court's order.
12 So that would then mean for us -- if we did that here,
13 it would mean that there would be a backlog of wells
14 that we would have to try to find and serve. And that
15 may or may not work here because of the interest in
16 trying to get into -- further along and move into the
17 case management order.

18 The wells -- the identification of wells is about
19 six months behind. And it has to be researched. It's
20 not necessarily information -- it's not information that
21 the state necessarily maintains. And so there would be
22 a lag. And so the question that I would want to raise
23 with the defendants and with the Court would be if we
24 pick a cutoff date, is it a date that requires continued
25 investigation and service as we do whatever else we have

1 to do to get ready to move into the threshold issues, or
2 do we consider picking a date that's already passed so
3 that that effort could come to a close. And I don't
4 have a position on it right now. So that's one issue.

5 A second issue, which I've already touched on, is
6 the completion of service reports and personal service.

7 A third issue dealing with whether service is
8 complete would be the completion of the case caption.
9 That should be relatively quick to do; nevertheless,
10 it's something that needs to be done, and I think the
11 case caption has to be submitted to the parties for them
12 to take a look at and see if they approve it.

13 An additional issue here might be the inclusion
14 of the California issue that Mr. Neville identified in
15 his proposed threshold issues regarding unnamed senior
16 water rights holders in California who have dormant or
17 unexercised water rights. And I think that that may be
18 an appropriate issue to consider as the Court tries to
19 consider whether service is complete.

20 One additional issue -- I'll come back to that in
21 a moment.

22 The second general area that I think that we're
23 going to have to take a look at would be whether and how
24 publication should occur. The federal rules and the
25 case management order contemplate publication under

1 certain circumstances. It's addressed at the case
2 management order in paragraph 5 and obviously in Rule 4.

3 And so the question that we would have to address
4 is whether there should be publication, how it should be
5 done, whether it's complete, whether it's adequate under
6 applicable law; applicable law here being California and
7 Nevada law. So that's an additional issue that I think
8 comes in under the general category of service issues
9 and completing service.

10 In addition, I think that when you're looking at
11 the issue of whether service is complete, there may be
12 challenges to service or challenges to a number of
13 different issues. It could be challenges to such things
14 as the manner and extent of service, the case caption,
15 the parties and entities who are identified and served
16 and even the parties and entities that were dismissed.

17 Paragraph 9 of the case management order raises
18 this issue. In fact, we have it. We looked at
19 paragraph 9 quite a few years ago, when the United
20 States was in the process of trying to investigate and
21 determine the list of parties that they intended to
22 serve.

23 And as we went back -- as Mr. Williams and I went
24 back and looked at the case management order, it seemed
25 to us that there may be a question again as to whether

1 any other scrutiny needs to be done under -- pursuant to
2 paragraph 9.

3 And then in addition --

4 THE COURT: That's not objection as to the
5 form of service, that's just objections -- as I look at
6 paragraph 9, isn't it just objections that the parties
7 to the case may have about your list of people to be
8 served?

9 MS. SCHNEIDER: That's correct. I think this
10 all fits under the general rubric of whether service is
11 complete: Have we served -- have we identified and
12 served all the proper persons and entities and do we --
13 are there any problems with the actual form or efforts
14 in service?

15 And then in addition, this is certainly an
16 appropriate time for challenges to person -- excuse me,
17 challenges to personal jurisdiction. And that, of
18 course, would be done pursuant to Rule 12. And this may
19 be a time as well as to whether there will be other Rule
20 12(b) motions filed.

21 A lot of what I'm suggesting here I think falls
22 under the general category of Rule 12, and that should
23 be addressed at this point. So that's an additional
24 issue that I think needs to be considered and factored
25 in here.

1 There are two other issues that I wanted to
2 mention and just identify and then see what we might
3 want to do about them in the future.

4 In the case management order at paragraph eight,
5 there's a -- it states that the United States and the
6 tribe may seek costs of service pursuant to Rule 4(d)
7 during their service efforts under the case management
8 order.

9 As I look at Rule 4 it does not say that the
10 effort to seek cost has to be during service efforts, it
11 may actually be something that we look into at a
12 subsequent time. It just simply hasn't been timed to do
13 all of that.

14 But I wanted to just clarify with the Court that
15 it would be possible for the United States and the tribe
16 to seek costs subsequent to their completion of service
17 efforts.

18 And then one other issue that I looked at under
19 completion of service -- and also this factors into the
20 future as well -- is under paragraph 7, there have
21 been -- there have been through the years information
22 provided to the United States from the State of Nevada
23 and the Irrigation District and also from the U.S. Board
24 of Water Commissioners on changes in ownership and
25 different filings related to the ownership of water

1 rights.

2 And we have used that information in conducting
3 our investigation and doing updates and doing service,
4 but also in providing updates to the Court on changes of
5 ownership. That we've looked at in connection as well
6 with the required filings that the Court -- the required
7 filings that the Court wants to see from persons who
8 have been served if they transfer their ownership.

9 As I've looked at paragraph 7, it seems to
10 contemplate that this kind of information might only be
11 given to us during the period -- during the time that
12 we're doing service and might not continue after service
13 is complete. But looking down the road and trying to
14 figure out overall case management, I want to make sure
15 that that information would still be coming to us.

16 While we're not saying and have never said that
17 we would take the responsibility for making sure that we
18 have -- we've kept track of every change out there,
19 because of course it's dependent on people giving the
20 information to us, to the extent that we can, we've been
21 trying to do that. And I think that that's an effort we
22 should continue to do.

23 Now, moving on from purely service issues to some
24 other case management issues that I think we need to --

25 THE COURT: Let me back up for just a second

1 and ask does anybody have anything they want to add or
2 say concerning service issues at this point?

3 (No response.)

4 THE COURT: Okay. Hearing none, go ahead.

5 MS. SCHNEIDER: The other case management
6 issues -- the case management order directs the Court to
7 address a number of case management issues for the
8 efficient management of the litigation given the number
9 of the parties, and that's to have been following the
10 completion of the service of process of the
11 counterclaims. I'm looking at paragraph 10 of the case
12 management order.

13 That paragraph suggests such tools as common
14 counsel, special procedures for service of pleadings,
15 mechanisms to reduce the burden for the Court and the
16 parties and so forth.

17 We have talked about some of these issues
18 previously, but I think we need to think about it some
19 more and begin to probably institute some additional
20 procedures as well.

21 The Court already issued the order, it's document
22 1300, February 1st, 2008, dealing with service during
23 the preliminary case management efforts. But because
24 we're nearing the end of preliminary case management
25 efforts; that is with service, I think that order

1 probably needs to be revised and it needs to probably
2 move along the lines of the Zuni order, that I gave to
3 the Court and the parties some months ago, in which the
4 Court informed counsel about the requirement for
5 electric -- for e-filing but also informed pro se
6 parties of their opportunity to do e-filing and also
7 sought from them an occasion to whether they wanted to
8 continue actively in the case or simply to monitor it.
9 I think that that order should be done in conjunction
10 for setting orders for answers in a point that I wanted
11 to get to in a bit.

12 The third issue that I thought about immediately
13 under this general category of subsequent case
14 management is the development and implementation of the
15 website that we had talked about from time to time. Our
16 intention -- and it's -- I do not yet have official
17 permission to do this. There's some cost involved, and
18 I'm going to have to make sure that I have this
19 approved. But I have looked into and gotten some
20 proposals as to how a website would function.

21 We talked about doing a website that had just the
22 pleadings that were filed so that parties who had
23 decided that they didn't want to actively participate,
24 who had an opportunity to but decided not to actively
25 participate, could monitor the case if they wanted to by

1 just going and looking at the pleadings on a website.

2 I had thought that -- and I still think, that
3 this should include pleadings going back to roughly
4 January or February of last year in conjunction with the
5 Court's order of February 1st, 2008, so that all those
6 pleadings would be available and that we would continue
7 to do so. And that's the extent of what I'm thinking
8 about in terms of a website.

9 An additional -- moving on to another category of
10 case management, as I -- there certainly would be a
11 period of time under any case management order for
12 allowing any amendments to the -- to claims that were
13 filed. Our claims were filed in 1992 and amended in
14 1997.

15 And I think that at this point, there may be some
16 additional amendments and clarifications that might be
17 necessary. I'm not sure at this point, but I simply
18 wanted to mention that as another case management issue
19 that needs to be addressed. And certainly as we know
20 from any other case, that's a common thing to happen in
21 case management.

22 And another issue that I think we need to address
23 is the issue of answers. Certainly the Court's seen
24 from the pleadings on threshold issues that the
25 defendants take issue with their requirement that all

1 parties be required to file answers. But what I -- and
2 the United States and the Tribe certainly think that
3 answers should be required here.

4 THE COURT: I don't think -- you know, I
5 just -- I'm not ruling on the case -- on the threshold
6 issues now, but my reading of the case management order
7 does not require answers to be filed before threshold
8 issues are determined; in fact, it's just the contrary.

9 I'll address that issue in more detail later,
10 but, I mean, that's just my initial feeling reading
11 this. And I've read all the parties' briefs on the
12 threshold issues, and I thank you, everybody, for that.
13 They have been very helpful.

14 But we'll have further argument on that and make
15 some decisions at some point down the road, but --

16 MS. SCHNEIDER: On the issue -- I'm sorry.

17 THE COURT: -- I just don't think -- I guess I
18 could be convinced otherwise, but my feeling is that
19 answers are not required before we deal with these
20 threshold issues. But go ahead.

21 MS. SCHNEIDER: I think the Court needs to
22 think about issuing an order that sets out a deadline
23 for answering the case. And here I would say the
24 answers only need to be to the counterclaims, and
25 probably just to the tribal claims, because this issue

1 has been -- this case has been bifurcated.

2 All litigation -- all other litigation in the
3 case has been stayed. The analogy here is to set
4 proceedings in an adjudication such as the Zuni
5 adjudication where there are various subproceedings
6 ongoing. Some deal with tribal claims, some deal with
7 individual claims. Here we have it in phases.

8 The Zuni order that I attached to one of the
9 pleadings that we filed more recently does talk about
10 how answers -- how and when answers are to be filed, and
11 it makes it clear that the answers in that particular
12 instance to the tribal claims are limited to just those
13 claims and don't affect any other aspect of the
14 proceeding, including the -- any claims that the
15 non-Indians might be making or other people might make
16 in the separate subproceedings. And I think that's a
17 very similar issue that we have here.

18 What I think that that order should do would be
19 to set out a deadline, address the consequences of
20 failure to answer, and address the fact that there would
21 be future phases of litigation and the potential for
22 additional filings and dealing with issues in subsequent
23 phases that are not addressed in this phase.

24 In conjunction with this issue, the case
25 management order requires that parties file a statement

1 as to any defenses or issues they intend to assert,
2 that's paragraph 11(e) in the case management order, so
3 that each party who wishes to assert such defenses must
4 file -- must both file the above statement, and at some
5 point they have to assert their defenses in an answer.
6 Certainly it seems more efficient at this point to do --
7 to require that in the answer.

8 This requirement in the case management order is
9 of parties now or hereafter appearing. And so that,
10 therefore, contemplates such a filing from all parties.
11 And it seems to me that what we've done so far is that
12 we have gotten filings -- some defenses and a list of
13 issues -- excuse me, list of threshold issues and
14 potential defenses from many of the parties who are here
15 today. That might at some extent meet that requirement.
16 But we don't have anything in front of us from all the
17 other parties because it has to be from parties now or
18 hereafter appearing.

19 And so it seemed to me that that should be --
20 that requirement could be compressed into the
21 requirement for an answer so that the parties who are
22 out there who have not yet come in to talk initially
23 about threshold issues and defenses would be able to do
24 so only at one time, would only be required to do so at
25 one time, and that would be in conjunction with the

1 filing of the answer.

2 Now, following the issue dealing with -- which I
3 think is -- would be dealing with answers and
4 identifying defenses and other issues to be raised, we
5 would then be in a position with all the parties to
6 resolve an identification of the threshold issues.

7 One other issue that I think has to be --

8 THE COURT: Let me just ask a question. Do
9 you really think that if we required answers and if we
10 required everybody that's been served that wants to to
11 submit their defenses, that there's going to be any
12 appreciable differences to what's already been asserted
13 in this case and that's going to raise any additional
14 threshold issues that have not been identified by the
15 various parties that have already spoken up in this
16 matter?

17 MS. SCHNEIDER: We don't know. But the reason
18 that we spent 1.2 million dollars to serve all these
19 people was to give them an opportunity to participate.
20 And if we have now spent all these years to go after
21 serving all of these people and don't give them an
22 opportunity to participate, we are not acting in
23 compliance with what the Court ordered and what the
24 parties argued for.

25 If we -- it seems to me, though, as a practical

1 matter, that we would have to go through this exercise
2 of getting -- requiring answers from people. If they
3 don't answer, then they are deferring to the other
4 parties, and they are waiving their rights to actively
5 participate in this phase of the adjudication.

6 And what that does is it tells us that they've
7 had an opportunity to participate and they decided not
8 to. And that fits, I think, in -- meshes with the order
9 that I talked about previously, the one that was done in
10 Zuni, to try to identify which parties are going to
11 actively participate and which aren't.

12 And in addition, I'd have to say that Zuni is
13 also requiring answers of parties, of all the parties.
14 They had quite an amount of time to do it. But the
15 Court has required that that be done.

16 And what that does is it means that even if you
17 have lots of people who don't answer or lots of people
18 who come up with the same kinds of issues, you have
19 now -- you have them bound. And there's a danger that
20 if they don't have an opportunity to answer and issues
21 are decided that they want to relitigate that they want
22 to have an opportunity to relitigate it at another time,
23 they may not be bound by this.

24 Because one of the key issues that the Court
25 stressed and the parties, particularly the Irrigation

1 District, stressed repeatedly was that there was a need
2 to bind everyone. And that's partly why we have gone
3 through this extremely excruciating and very expensive
4 exercise of trying to identify and include people.

5 Now, if you go back and you look at the paragraph
6 10 in the case management order, it's the one that
7 starts to talk -- that raises the issue of trying to
8 find ways to handle this case in a more efficient
9 fashion. The suggestion there is the use of common
10 counsel and special procedures for service. This
11 contemplates including all of the defendants in this
12 case but trying to figure out various ways to manage
13 them.

14 Now, so I think that we run a real -- and we can
15 talk about this later in conjunction with threshold
16 issues, but I think we run a real danger of putting
17 ourselves -- if we don't have answers from everybody,
18 putting ourselves in the position of having to repeat a
19 lot of the litigation that is going to happen in the
20 threshold issues.

21 What I have seen in other instances with a lot of
22 pro se claimants and defendants is that they will file
23 pleadings that raise a lot of extraneous issues. And a
24 motion to strike is necessary to try to deal with that.
25 And so it would be necessary to try to go through

1 answers and take -- try to corral them and organize
2 them.

3 But at the end of the day we'll probably come up
4 with the same issues, most of the same issues that these
5 defendants are raising, but we will have bound everyone
6 else. And that is such a fundamental issue here that
7 it's hard to believe that we would not go through that
8 exercise having had to go through, I don't know, six,
9 seven years of service and all the work that we've done
10 so far. I wouldn't want to see that go down the drain
11 and have to then come back and repeat issues.

12 One other case management issue that I wanted to
13 raise, and again I want to just -- I want to put this
14 out basically because I don't have any specific
15 positions on it, but I have noticed that the local rules
16 and the Federal Rules of Civil Procedure have changed
17 since the issuance of the case management order.

18 We now have mandatory disclosures, we have
19 requirements for discovery plans and a variety of
20 requirements that were not in existence back in April of
21 2000, at least my understanding when the Court issued
22 the case management order. I'm not prepared to address
23 them today, other than just to note that this may impact
24 the case management order and we probably need to think
25 about it.

1 THE COURT: I don't think it will. And the
2 reason I don't think it will is because I think the
3 Court has discretion to say those provisions are not
4 going to apply to this case or that case or -- and to
5 me, making those mandatory disclosures and the discovery
6 plan and scheduling order simply doesn't work in this
7 case.

8 This is not the run-of-the-mill case by any
9 stretch of the imagination. And so when we get to that
10 bridge, my initial feeling is that those provisions,
11 both the federal rules and the local rules, are not
12 going to apply to this case. This case is going to be
13 run differently. It's going to be governed by the case
14 management order and the orders of me.

15 MS. SCHNEIDER: That's all I have, Your Honor,
16 on the first two issues on the agenda.

17 THE COURT: Okay. Does anybody want to say
18 anything about these case management issues?

19 Mr. DePaoli.

20 MR. DEPAOLI: Gordon DePaoli for the Walker
21 River Irrigation District, Your Honor.

22 I want to say something just so that not saying
23 something is not misconstrued. I guess I need to start,
24 and this is a theme that is in the briefs on threshold
25 issues, but service of process here is the result of

1 what the constitution of the United States requires, and
2 the magnitude of it and the time that it has taken have
3 been based on the claims that the United States and the
4 tribe sought to assert. And so the service here is not
5 something that just the defendants require, but it's
6 simply what the law requires.

7 Obviously we need to get to a point in this case
8 where we can move forward. And if that's what counsel
9 means by a cutoff date for service, then it seems to me
10 we need to get to that point.

11 But the world is not going to stop out there
12 because this litigation proceeds or because this
13 litigation is filed. There are going to be properties
14 sold and bought and new wells drilled and everything as
15 the case goes on, and we may need at some point to
16 revisit what has happened since we decided to move
17 forward getting to the merits of this litigation,
18 particularly if we ever get to what I would consider a
19 true adjudication involving adjudication of all the
20 underground water rights in this basin as well as rights
21 that may have been established since the decree was
22 entered. But we can't simply not do anything until we
23 think we are there. So --

24 THE COURT: No, I agree with that. And I
25 think we raised that and I discussed it last time. I

1 think there need be a date certain that this is a date
2 that service ends and then we move on.

3 Now, I don't disagree with you that at some point
4 we might have to revisit the issue, but we can't simply
5 wait until every new well is drilled. It will go on
6 forever.

7 MR. DEPAOLI: Yes, Your Honor. So I think if
8 counsel wants to make a proposal or a motion to that
9 effect, or see if we can reach a stipulation, that would
10 be fine. And publication again, it seems to me that
11 publication is something that the plaintiffs need to put
12 forth through a motion and so we can move on with it.

13 In terms of challenges to personal jurisdiction,
14 I'm not aware of any that have been filed based on the
15 service that has taken place to date. And, again, I
16 don't know how you can force somebody to file something
17 if they don't intend to do that.

18 In terms of providing information that we have
19 provided as to changes in ownership, then information on
20 our records, I think there's -- there will not be a
21 problem continuing to provide that as this litigation
22 progresses.

23 In terms of -- I don't have any specific comments
24 on development of a website. That's probably because
25 I'm technologically challenged for one thing. In terms

1 of amendments to the claims, we've been here a long
2 time, and I don't know that the claims need to be
3 amended at this point in time. It seems to me if they
4 are not the way they ought to be by now, I don't know if
5 we're ever going to get to that point.

6 I agree with Your Honor on answers. I think some
7 of the case -- or some of the things that are referred
8 to by the United States about that is not this
9 situation. We are not dealing with an adjudication.
10 There was an adjudication that was finished in 1936.
11 We're dealing with claims that the Tribe and the United
12 States want to raise now that they didn't raise then.

13 And whether we ever get to a ground water
14 adjudication remains to be seen, and that, it seems to
15 me, will be an appropriate time to make determinations
16 about answers or at least after we get through some of
17 the threshold issues.

18 In terms of people being able to participate on
19 threshold issues, it seems to me that we are at a point
20 where the Court may be able to come up with what it
21 believes ought to be the list of threshold issues to be
22 decided at the outset of the litigation. We have -- the
23 case management order has required persons who have been
24 served to file notices of appearance and intent to
25 participate, which include addresses.

1 Once we get to a point where the Court is of the
2 view that this is, in fact, a list of threshold issues
3 that are going to be addressed, that can be provided,
4 and those persons, if they think they have something to
5 add or subtract, can come forward; otherwise we can go
6 forward. And the Court at the same time, or after that,
7 can indicate what the schedule is for dealing with that.
8 And people have the opportunity to participate. They
9 have that opportunity. They don't need to file an
10 answer in order to get that opportunity.

11 And, yes, we probably ought to at some point
12 begin to address the things in paragraph 10. Well, one
13 of the -- paragraph 10 really was dealing with service
14 of pleadings after service of process so that when the
15 district, for example, filed some sort of a brief or a
16 motion on threshold issues, the question's going to be
17 does it need to -- in addition to the e-filing that goes
18 with it, does it need to be mailed to everyone else who
19 has filed a notice of appearance. And, yes, we need to
20 address those. But the bottom line is we need to begin
21 to move forward with this case as soon as reasonably
22 possible.

23 THE COURT: Okay. Thank you. Anyone else?

24 Mr. Howard.

25 MR. HOWARD: I just want to comment very

1 briefly on the matter of answers. It seems to me the
2 idea that you're -- that people would be required to
3 file answers when in fact 12(b)(6) motions are probable,
4 especially after you've seen what people are talking
5 about in terms of the threshold issues, makes no sense
6 since 12(b)(6) specifically says you're not to do that.
7 So I think answers are premature, and even discussing
8 filing answers at this point are premature.

9 THE COURT: Thank you.

10 Ms. Schneider, you want to move on to item number
11 three.

12 MS. SCHNEIDER: Your Honor, this is the -- I
13 think the longer part of our appearance before you
14 today. I want to suggest that we go through the rest of
15 the agenda and then come back to that.

16 I don't have anything else to add on item number
17 four or item number six, and the only one that I would
18 defer to others on would be the status of C-125C, and
19 that I would defer to Mr. Herskovits.

20 THE COURT: All right.

21 Mr. Herskovits, you want to talk about service
22 issues on 125-C.

23 MR. HERSKOVITS: Yes. Good morning, Your
24 Honor.

25 As the Court and the other parties are aware,

1 motion for an extension of time that was unopposed was
2 filed by the Walker River Irrigation District for their
3 responsive pleading which was served shortly before
4 Thanksgiving.

5 I've spoken with Mr. Ferguson, one of the two
6 lawyers representing the Walker River Irrigation
7 District, and -- about seeking an additional extension
8 for the filing of Mineral County's reply brief, given
9 the development of other deadlines and requirements that
10 weigh on my schedule and the proximity of the holidays.

11 Mr. Ferguson has said that the Irrigation
12 District doesn't oppose to that. And I sent an email
13 this morning around to other counsel asking them by the
14 end of the week to let us know if there are any
15 objections. If there are not, we're going to propose
16 that the reply date be moved to January 23rd, which is a
17 Friday.

18 And then my suggestion would be that some
19 reasonable time after that be set as the date for --

20 THE COURT: Let me just short stop that.

21 Does anybody present today have any objections to
22 extending the time for the reply to January 23rd?

23 Why don't you just submit a proposed order then.

24 MR. HERSKOVITS: Very well, Your Honor, we
25 will do that.

1 And then we would suggest today, or if today is
2 not an opportune time, then upon completion of the
3 briefing, that a date be set for a status conference to
4 address that issue in C-125C. It would seem to us that
5 probably -- well, it really depends on the Court's
6 schedule and convenience. But a month or two following
7 the close of briefing would seem to be a reasonable time
8 for a date to be set to consider those issues.

9 THE COURT: We'll set a date when we get your
10 reply.

11 MR. HERSKOVITS: Okay. Thank you, Your Honor.

12 THE COURT: Ms. Schneider.

13 MS. SCHNEIDER: Your Honor, the remaining
14 issue is threshold issues.

15 What I'd like to try to do is to talk briefly
16 about threshold issues from our perspective and leave
17 some of the -- unless the Court has questions, leave
18 some of the specifics that are raised by some of these
19 dependents go until after they've made their
20 presentations.

21 The focus -- I'm sorry, Your Honor?

22 THE COURT: You know I was not going to hear
23 argument on that today. The way I read the case
24 management order, I'm not supposed to finally decide
25 what the threshold issues are until service has been

1 completed and all the parties are joined.

2 My thought was that -- we got the briefing done,
3 so, you know, people set forth what they thought -- what
4 they considered to be threshold issues so that would get
5 done and not delayed until after service. I think that
6 was the thought when we did that.

7 But my thinking on how to go forward in this, and
8 I'll hear from everybody, is that when service gets
9 complete or we have a date that we believe that service
10 is going to be complete, we'll then have a hearing and
11 argue and give everybody an opportunity to set forth
12 oral arguments in addition to these briefs I already
13 have about what they think the initial threshold issues
14 are, and then I will say here's what I think and here's
15 what I determine they are.

16 Once that order is done, then there will be a
17 briefing schedule on those issues, and a decision will
18 then be made on those threshold issues. That's how I
19 perceive the way things should go according to the case
20 management order.

21 Does anybody have anything to add or to -- I'll
22 be glad to hear that I'm wrong but --

23 MS. SCHNEIDER: I'll defer to the other
24 parties. Although I do want to -- either today or if
25 Your Honor would like subsequent filing, address the

1 issue of the answers because I do disagree with the
2 Court's reading of the case management order and the
3 impact of not having answers in a timely fashion in this
4 case. I think that poses real problems.

5 And so I don't know whether the Court wants to
6 hear that today or whether you would just prefer to have
7 me put it in writing.

8 THE COURT: Well, I think you ought to
9 probably put it in writing. And let me just suggest
10 that -- and I don't know that we need to have a
11 back-and-forth briefing schedule for that. Why don't
12 everybody within 30 days file a brief on their position
13 when answers need to be filed in this matter.

14 MS. SCHNEIDER: Is it with the issue being
15 whether and when issues -- answers are to be filed, or
16 are we saying that we will just never file answers?

17 THE COURT: No, no, whether and when. Oh, I
18 think answers have to be filed. I think the case
19 management order contemplates orders. It's when do they
20 have to be done. That seems to me to be the relation
21 between the parties. The United States thinks they have
22 to be done before the threshold issues are decided. It
23 seems to me the rest of the parties' position is that
24 they do not have to be filed before the threshold issues
25 are decided. And it seems to me that that's the line in

1 the sand here.

2 MS. SCHNEIDER: I'm concerned for a number of
3 reasons, including the fact that it leaves the United
4 States in a position where we can't use 12 -- Rule
5 12(b), Rule 12 to get rid of defenses, we can't try to
6 narrow the case ourselves. We're basically at the mercy
7 of whatever the defendants do because nobody has filed
8 answers and so threshold issues become preliminary phase
9 to even the application of the rules.

10 And while it may be that Rule 12 -- and I agree
11 with Mr. Howard that filings of pleadings under Rule
12 12(b) would stay the filing of answers, if we follow the
13 rules, which is what we should be doing in conjunction
14 with the pleadings, with the case management order, that
15 we all have an opportunity to use Rule 12 and then move
16 on and have answers and then go at it -- go at the case
17 with answers in hand.

18 But, again, I'll put what I have to say in
19 writing.

20 THE COURT: Okay. And if those briefs get
21 filed in the next 30 days, then I'll -- when do we want
22 to schedule another status conference? And I'll hear
23 that issue then. I'll hear argument on that issue at
24 that point, once I have the briefs in hand.

25 And that will give somebody time to take it

1 upstairs if they want to.

2 Does anybody on the phone have anything they want
3 to add? You should have -- you could have spoken up, if
4 you wanted to, any time. But I'm not leaving you out.

5 MR. NEVILLE: Your Honor, this is Mike Neville
6 with City of California Attorney General's Office.

7 Just a point of clarification. The simultaneous
8 briefing on the timing of the answers would be January
9 5th; is that correct?

10 THE COURT: Probably. And if that's too short
11 of time with the intervening holidays, somebody let me
12 know and we could extend it some.

13 MR. NEVILLE: That was my only concern is that
14 plans to be out of town during a portion of that time.

15 But would January the 12th be acceptable --

16 THE COURT: Sure. How about that?

17 MR. NEVILLE: -- or to parties?

18 THE COURT: Mr. DePaoli.

19 MR. DEPAOLI: Your Honor, I don't completely
20 understand exactly what the United States' position is,
21 and what I was going to suggest is that maybe it might
22 be more appropriate to allow the United States to file
23 an initial pleading so that we can get a better handle
24 on what problem they see without answers at this time
25 and then respond to that without a reply.

1 I'm just -- I've said a lot already about why
2 answers aren't required, and I'm not sure I know what
3 the United States is driving for here.

4 THE COURT: Okay. When do you want to get
5 your brief filed, Ms. Schneider? And give yourself
6 adequate time with the holidays.

7 MS. SCHNEIDER: I would suggest January 14th.
8 But I do think we might as well have the simultaneous
9 briefings. This just makes it go on longer. And then
10 we would have argument. What I was going to suggest was
11 that if we had briefs due on January 14th, we could then
12 have an argument and a status conference some time in
13 February. If we don't, this will push it off probably
14 until April.

15 THE COURT: What do any of the parties other
16 than the -- any defense think about whether the briefs
17 should be simultaneous? I just said that because it
18 seemed to me that it could be. Maybe what Mr. DePaoli
19 said makes some sense. I don't know. What does anybody
20 else think?

21 Mr. Howard, how about you? You always have
22 something to say.

23 MR. HOWARD: I'm as confused as Mr. DePaoli is
24 on what the problem is that the government has with this
25 answer question. I mean, as I pointed out in my earlier

1 argument, 12(b)(6) not only doesn't require it, doesn't
2 allow it.

3 So we're in a situation where they're saying,
4 well, you've got to file an answer, in which case we
5 can't file 12(b)(6) motion. But you need to file an
6 answer so we can file a 12(b)(6) motion. It's just --
7 it doesn't make any sense. So we kind of, I think, need
8 some direction from the government to figure out what it
9 is they're thinking.

10 THE COURT: All right. The United States will
11 file their brief by Friday, January 16.

12 The defendants will file their briefs -- how long
13 do you need?

14 MR. DEPAOLI: Thirty days would be fine, Your
15 Honor.

16 THE COURT: All right. February 17th, 16th
17 being a holiday, I believe.

18 And then I'll hear arguments at the next status
19 conference, which will be -- what do you suggest,
20 Ms. Schneider? You had your calendar out.

21 You'll probably have another report for us by
22 then, maybe two.

23 MS. SCHNEIDER: I think so. I was thinking
24 perhaps March 16th or 17th.

25 THE COURT: What's our calendar looking like?

1 THE CLERK: Those days are full right now.

2 MS. SCHNEIDER: Or else the previous week, the
3 week of March 9th.

4 THE CLERK: Your Honor, there's a jury trial
5 that week.

6 THE COURT: What about the 23rd, that week?
7 Is there any days the week of the 16th?

8 MS. SCHNEIDER: I'm not available the week of
9 the 23rd.

10 THE COURT: How about Monday or Tuesday of the
11 next week, 30th or 31st?

12 THE CLERK: Those are both open.

13 THE COURT: Do you prefer Monday or Tuesday?
14 Any preference for a morning or afternoon? Any
15 preference?

16 MS. SCHNEIDER: I think the afternoon would be
17 better. And how about the 31st?

18 THE COURT: 31st?

19 MS. SCHNEIDER: Yes, please.

20 THE COURT: 1:30 the 31st. And it will be a
21 status conference and arguments on the answer issue.

22 Anything else we need to do today?

23 MR. NEVILLE: This is Mike Neville one more
24 time. Sorry I was a little slow on the uptake. I can
25 do March 31st, but if -- the following day would be

1 better, if it meets the Court's needs, Wednesday April
2 1st.

3 THE CLERK: It is open.

4 MS. SCHNEIDER: That's difficult for me. I
5 have a trial starting the next week. It's hard enough
6 for me to travel that week. Would the 30th perhaps work
7 instead?

8 MR. NEVILLE: 30th would be better. Monday,
9 the 30th of March.

10 THE COURT: Is that all right with you,
11 Ms. Schneider?

12 MS. SCHNEIDER: That would be fine. If we can
13 do it in the afternoon, I can make it a day trip.

14 THE COURT: All right. 1:30 on Monday the
15 30th instead of the 31st.

16 Okay. Anything else today we need to do?

17 MS. SCHROEDER: Your Honor, Laura Schroeder.
18 I heard the United States suggest that they were ready
19 to do a cutoff date. Since we're not going to meet
20 again until March --

21 THE COURT: Oh, you know -- yes,
22 Ms. Schneider, you said you were going to prepare a
23 motion and a proposed order, but I don't know that you
24 might prepare a proposed stipulation and send it around
25 and see if you can get people to agree to it. And if

1 they -- if you can't agree to it, then maybe you need to
2 do a motion. But it seems easier -- I'm just trying to
3 ease your workload a little bit. That might be easier.
4 I don't know. Or if you have a motion already
5 prepared --

6 MS. SCHNEIDER: I don't have a motion. I was
7 going to circulate the motion and see if they approved
8 it. But one way or the other I was planning on
9 circulating it before I filed it.

10 THE COURT: Okay. And that's -- if -- well, I
11 think that's all right. That -- we can deal with that a
12 little bit later because we're going to have to -- and
13 I'm just thinking out loud. In the event that you say
14 personal service is done when we meet in March, we're
15 still going to have to address the issue of publication
16 I think. So that we can address the final service date
17 after that. I think that will work.

18 MS. SCHNEIDER: Your Honor, actually if I
19 could clarify something then. We would then in March be
20 trying to figure out a cutoff date on service, and then
21 we would be dealing with publication thereafter; is that
22 correct?

23 THE COURT: Oh, I think so. I mean, I think
24 that's how publication works. You have to say I've
25 served everybody that I know of, and that's -- I mean

1 that's one of the problems we had in the C case. They
2 did a lot of personal service, but they never could get,
3 my recollection is, a competent affidavit to justify
4 publication. And I think that's what we need to come up
5 with.

6 MS. SCHNEIDER: All right. Thank you.

7 THE COURT: Okay.

8 MS. SCHROEDER: Your Honor, one other thing.
9 The United States did mention that under paragraph 5
10 they were asking for a change. I see it in the language
11 so that they could ask for fees subsequent. And the
12 language is during.

13 So I would think that a motion probably to change
14 the -- or amend the case management order would be
15 required because it is very specific about during. If
16 they want to proceed with asking for attorney's fees
17 later. I just didn't want to be silent on the matter.

18 THE COURT: Okay.

19 MS. SCHNEIDER: Does the Court need a motion
20 on that? I mean, couldn't it just be something that the
21 Court could clarify right now?

22 There was a point, for example, where in
23 paragraph 3(e) on page 5 the original case management
24 order said all users of ground water for irrigation, and
25 the Court simply made a correction at a later time that

1 it would be in California. I'm not sure that this is
2 something that really needs to have a motion, but I
3 would defer to the Court's judgment on that.

4 THE COURT: Well, you haven't decided whether
5 you're going to move or not.

6 MS. SCHNEIDER: No, but I'd like to keep the
7 opportunity out there. And I think that's consistent
8 with the rules. I think all that really has to happened
9 is that the paragraph has to have a period after 4(d)
10 and just be done with it. And delete the rest of that
11 sentence. So that it would just say that the U.S. and
12 Tribe may seek cost of service pursuant to the
13 requirement of Federal Rule of Civil Procedure 4(d)
14 period.

15 THE COURT: Any objection to that?

16 MS. SCHROEDER: May I confer with Mr. DePaoli?

17 THE COURT: Sure.

18 MS. SCHROEDER: Because I wasn't present when
19 this was written, and I don't know why it says during.

20 MR. DEPAOLI: Your Honor, what paragraph --

21 THE COURT: I wasn't either. It's on page 8
22 of the case management order. And it's paragraph number
23 8 right at the top. It says "The U.S. and Tribe may
24 seek costs of service pursuant to the requirement of
25 Federal Rule of Civil Procedure 4(d) during their

1 service efforts under this Case Management Order."

2 MR. DEPAOLI: Your Honor, I can't say that I
3 know what Judge Reed had in mind there, but it seems to
4 me what he was saying is later he says everything else
5 is stayed. I think he was creating an exception to
6 everything is stayed there. That would be my
7 interpretation of it.

8 MS. SCHNEIDER: I'm sorry, I --

9 MR. DEPAOLI: My interpretation of this would
10 be that Judge Reed was just making it clear that such
11 motions could be filed during this period when pretty
12 much everything else was stayed.

13 THE COURT: But that doesn't preclude them
14 from filing after service.

15 MR. DEPAOLI: Right.

16 THE COURT: That's what I think. I don't
17 think it precludes you from filing after service.

18 MS. SCHNEIDER: With that interpretation I'm
19 fine with that. As just pointed out to me, I'm not
20 going to know my cost of service until publication is
21 finished anyway.

22 THE COURT: I understand that. So that's why
23 it doesn't make any sense to me that you can only make
24 your motion during the time of service because you don't
25 know what --

1 MS. SCHNEIDER: That clarification satisfies
2 me. Thank you.

3 THE COURT: All right. Anybody else? Okay.
4 Thank you very much.

5 (The proceedings were concluded at
6 11:07 a.m.)

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



1/14/11

Donna Davidson, RDR, CRR, CCR #318
Official Reporter

Date