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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125 SUBFILE NO. C-125-B
WALKER RIVER PAIUTE TRIBE, Counterclaimant, vs. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	**WALKER RIVER IRRIGATION DISTRICT'S MOTIONS TO DISMISS COUNTERCLAIMS; TO REQUIRE JOINDER OF PARTIES; AND TO REQUIRE SERVICE OF PROCESS IN ACCORDANCE WITH RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Pursuant to Rules 13, 19, 25 and 4 of the Federal Rules of Civil Procedure, the Walker River Irrigation District moves the Court for the following orders:

1. An order dismissing without prejudice the "Counterclaim" of the Walker River Paiute Tribe (the "Tribe") filed herein on

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March 17, 1992 and any "counterclaim" filed by the United States of America pursuant to its motion dated July 22, 1992. This motion is based upon the ground that the "Counterclaims" are not stated against an "opposing party" as required by Rule 13(a) or (b) of the Federal Rules and are amendments or supplements to the original complaint filed herein on July 3, 1924, which amendments or supplements cannot be filed without seeking and obtaining prior court approval under Rule 15 of the Federal Rules.

2. An order requiring joinder and/or substitution of all persons or entities claiming a right to use water from the Walker River or its tributaries in Nevada and California, whether such claims are based upon the Walker River Decree or on subsequent appropriations. This motion is based upon the ground that in the absence of such joinder and/or substitution complete relief cannot be accorded among those already parties; and the interest of such claimants is such that their absence may as a practical matter impair or impede their ability to protect that interest and will leave persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations.

3. An order requiring that all persons or entities to be joined or substituted as parties be served in accordance with the requirements of Rule 4 of the Federal Rules. This motion is based upon the ground that parties joined pursuant to Rule 19 of the Federal Rules or substituted pursuant to Rule 25 of the Federal Rules are required to be served in accordance with the requirements of Rule 4 of the Federal Rules.

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These motions are made and based upon all of the pleadings and papers on file in this matter, including those on file in Equity No. C-125, and subfile no. C-125A and C-125B and the points and authorities attached hereto.

DATED this 3rd day of August, 1992.

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CERTIFICATE OF SERVICE BY MAIL

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WALKER RIVER PAIUTE TRIBE, Counterclaimant, vs. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	**WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS TO DISMISS COUNTERCLAIMS; TO REQUIRE JOINDER OF PARTIES; AND TO REQUIRE SERVICE OF PROCESS IN ACCORDANCE WITH RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

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I. PREFACE

This subproceeding involves claims asserted by the Walker River Paiute Tribe (the "Tribe") in a pleading filed March 17, 1992 and designated as a "Counterclaim". Pursuant to this Court's orders of May 18, and June 17, 1992, the United States of America ("United States") was given until July 24, 1992 in which to state its position with respect to the Tribe's Counterclaim. On or about July 22, 1992, the United States filed its Motion for Leave to File Counterclaim. The counterclaim which it proposes to file is virtually identical in substance and purpose to the Tribe's Counterclaim. The Tribe's Counterclaim and the proposed counterclaim of the United States are referred to herein as the "Counterclaims."

The May 18, 1992 order set a filing deadline of August 1, 1992 for preliminary threshold motions relating to issues of whether additional parties are required.[1] Additional threshold motions are to be filed within sixty (60) days after final disposition of the preliminary threshold motions, unless the schedule is otherwise adjusted by the Court.

The Walker River Irrigation District (the "Irrigation District") has filed preliminary threshold motions to dismiss the Counterclaims; to require joinder of parties; and to require service of process in accordance with Rule 4 of the Federal Rules

[1] Because August 1, 1992 was a Saturday, pursuant to Rule 6 of the Federal Rules of Civil Procedure, the preliminary threshold motions were due on Monday, August 3, 1992.

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of Civil Procedure.[2] Because the merits of the "Counterclaims" may in part turn on whether the claims asserted therein are viewed as a new action, an amendment or supplement to the original action or something else, it is important that consideration be given as a threshold matter to whether they are properly asserted as a "counterclaim." Moreover, by placing those claims in their proper procedural context one is better able to understand the issues related to joinder, substitution and service of process.

II. STATEMENT OF FACTS

A. Background.

1. Early Attempts to Determine Claims to the Waters of the Walker River - Miller & Lux v. Rickey; Pacific Livestock v. Rickey.

The history of litigation involving claims to the waters of the Walker River and its tributaries illustrates the need for careful consideration of the issues presented by the Irrigation District's motions. On June 10, 1902, Miller & Lux brought an action in the United States District Court for the District of Nevada against Rickey and others to enjoin interference with its use of water of the Walker River in Nevada. On October 15, 1904, Rickey Land & Cattle Co. began two actions in a California state court against Miller & Lux to quiet its title and to establish its prior right to waters on the East and West Forks of the Walker River. See, Rickey Land & Cattle Company v. Miller & Lux, 218 U.S. 258 (1910); see also, Miller & Lux v. Rickey, 127 F. 573 (D.Nev. 1904); Miller & Lux v. Rickey, 146 F. 574 (D.Nev. 1906);

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[2] By separate filing the Irrigation District has opposed the United States' motion for leave to file counterclaim on the same grounds that it seeks dismissal of the Counterclaims.

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Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11 (9th Cir. 1907).

In 1906, Miller & Lux and other defendants sought to enjoin the proceedings in the California actions on the grounds that the United States District Court for the District of Nevada had acquired prior jurisdiction. The Supreme Court of the United States agreed and prosecution of the California actions was enjoined. Rickey, 218 U.S. 258. Ultimately, a final decree (the "Rickey Decree") was entered by the United States District Court for the District of Nevada in 1919. See, Pacific Livestock Company v. Thomas Rickey, et al., No. 731, Final Decree (D.Nev. 1919).

2. The Walker River Decree - United States of America v. Walker River Irrigation District et al.

The United States, the Tribe and many other claimants to the waters of the Walker River had not been joined as parties in the Rickey litigation. Their rights were not determined by the Rickey Decree.

On July 3, 1924, the United States commenced United States of America v. Walker River Irrigation District, et al., in the United States District Court for the District of Nevada, In Equity No. C-125. An amended complaint was filed on March 19, 1926. Some 253 defendants, all appropriators and users of waters of the Walker River, East Walker River, West Walker River and the tributaries thereof were named as defendants. See, United States v. Walker River Irrigation District, et al., 11 F.Supp. 158, 159 (D.Nev. 1935). The complaint included persons and entities who had been parties to or were successors to parties to the Rickey

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litigation. It also included persons who had not been parties to the Rickey litigation although they clearly had established rights to waters of the Walker River prior to the commencement of the Rickey litigation. Finally, the complaint included persons who had acquired rights to the waters of the Walker River after commencement of the Rickey litigation. See, Walker River Decree at 10-50; 50-63A; and 63A-70.

The United States alleged that because of its ownership of the Walker River Indian Reservation, which had been reserved and set aside for the Walker River Paiute Tribe, it was the owner of 150 cubic feet per second of waters of the Walker River and its tributaries. It sought to quiet title thereto and to restrain defendants from interfering with that alleged right. 11 F.Supp. at 159. Issues raised by the pleadings were referred to a special master who took testimony intermittently from March 22, 1928 through December 30, 1932. Commencing May 22, 1933, hearings were held before the court on exceptions to the report and findings of the special master. 11 F.Supp. at 162.

The United States relied upon the ruling of the Supreme Court in Winters v. the United States, 207 U.S. 564 (1908). The trial court ruled that the United States' claims to water for the Walker River Indian Reservation had to be adjudged, measured and administered in accordance with the laws of appropriation as established by the State of Nevada. 11 F.Supp. at 167; see also, United States v. Walker River Irrigation District, 14 F.Supp. 11 (D.Nev. 1936).

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On June 6, 1935, the Walker River Decree was entered in this action and an appeal followed to the Ninth Circuit Court of Appeals. That court held that the rule of law established in Winters v. United States applied and that there had been an implied reservation of water at the time the Reservation was set aside. The Court of Appeals accepted the original report of the special master with respect to the quantity of water reserved. See, United States v. Walker River Irrigation District, 104 F.2d 334, 339-40 (9th Cir. 1939). The Walker River Decree was amended to conform to the mandate of the Court of Appeals on April 24, 1940.

B. Intervention by Tribe.

On or about September 30, 1987, the Tribe sought permission to intervene in this action in connection with the then pending petition to establish rules and regulations concerning change applications under the Walker River Decree. By Order entered March 2, 1988, the Tribe was granted permission to intervene as a matter of right. Because its intervention was based upon the water right which the United States had established for the benefit of its Reservation under the Walker River Decree, the Tribe has been recognized as a "plaintiff-intervenor."

C. The Petition of the Walker River Irrigation District.

On January 9, 1991, the Irrigation District filed its Petition for Declaratory and Injunctive Relief; Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion against the California State Water Resources Control Board and its members. That Petition is subfile No. C-125-A. A

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First Amended Petition was filed and a scheduling and planning conference was held on January 3 1992. At that scheduling and planning conference, all proceedings on the alternate claim for relief were stayed.

The only named respondents to the First Amended Petition are the California State Water Resources Control Board and its individual members. The Irrigation District's first claim for relief involves three orders issued by the California State Water Resources Control Board with respect to water rights licenses for Bridgeport and Topaz Reservoirs. The Irrigation District contends that those orders are contrary to and inconsistent with the Walker River Decree and seeks a declaration from the Court to that effect. It also seeks a declaration that the respondents lack the power to enter and enforce orders which are contrary to and inconsistent with the Walker River Decree and which interfere with the jurisdiction of this Court. The Irrigation District seeks an injunction permanently enjoining the Board and its members from enforcing those portions of the orders which the Court finds inconsistent with and contrary to the Walker River Decree or interfere with the jurisdiction of the Court.

The First Amended Petition seeks no relief and states no claim against anyone other than the California State Water Resources Control Board and its members. It seeks no relief against the Tribe or the United States. It specifically seeks to enforce the Walker River Decree, which recognizes the existing right of the United States and Tribe.

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D. The Counterclaims.

The Tribe served an answer, counterclaim and cross-claim in response to the Irrigation District First Amended Petition. The United States has filed a motion for leave to file counterclaim. The Counterclaims seek recognition of a right to store water in Weber Reservoir for use on lands of the Walker River Indian Reservation and of a federal reserved water right to use water on lands added to the Reservation in 1936. These claimed rights are alleged to be in addition to the right awarded to the United States for the benefit of the Reservation by the Walker River Decree. All water users on the Walker River and its tributaries are alleged to be counterdefendants, although they have not been individually named, identified or served.

E. The Relationship of the United States and the Tribe and Other Parties With Respect to These Proceedings.

In the original Walker River action and under the Walker River Decree, the United States and the Tribe are plaintiffs and the other named parties are defendants. With respect to the Irrigation District's First Amended Petition, the United States and the Tribe simply have one of many established water rights recognized by the Walker River Decree and thus have an interest in the enforcement of and non-interference with that Decree. Neither the Irrigation District nor any other person participating in the proceedings on the Irrigation District's First Amended Petition have attempted to state a claim against the Tribe or the United States. The only claim stated is that of the Irrigation District against the California State Water Resources Control Board and its individual members.

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III. THE COUNTERCLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE

A. The Counterclaims Should be Dismissed Because With Respect to the Irrigation District's First Amended Petition Neither the Irrigation District Nor Any of the Unnamed Claimants to Water Rights on the Walker River and Its Tributaries are Opposing Parties to the Tribe and the United States.

It is clear that the Counterclaims are submitted in response to the First Amended Petition. Equally clear is the fact that had the First Amended Petition not been filed the United States and the Tribe could not have asserted their claim for additional water as a counterclaim.

Rule 13 of the Federal Rules of Civil Procedure only permits counterclaims to be asserted against "opposing parties". See, 3 J. Moore, J. Lucas, Moore's Federal Practice, ¶13.06(1) at 13-27, (2d ed. 1992); 6 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, § 1404 at 18 (1990). A counterclaim which is not against an opposing party must be dismissed. Under Rule 13 an "opposing party" is one who asserts a claim against the prospective counterclaimant in the first instance. The very concept of a counterclaim, presupposes the existence or assertion of a claim against the party filing it. See, e.g., First National Bank in Dodge City v. Johnson County National Bank and Trust Co., 331 F.2d 325, 327-28 (10th Cir. 1964);[3] Hilltop-West Liberty Lumber Co. v. Aetna Casualty & Surety Co., 208 F.Supp. 108 (W.D.Pa. 1962); United States v. Timber Access Industries Co., 54

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[3] In Liberty Nat. Bank & Tr. Co. v. Acme Tool, 540 F.2d 1375 (10th Cir. 1976), the Tenth Circuit overruled First National Bank v. Johnson County National Bank and Trust Co., to the extent that it could be read to prohibit absolutely the interposing of a counterclaim in an interpleader action. 540 F.2d at 1381. It did not however, change the basic definition of an "opposing party".

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F.R.D. 36, 39-40 (D.Or. 1971); Frederick County Fruitgrowers Association Inc. v. Dole, 709 F.Supp. 242, 245-46 (D.D.C. 1989).

In Kearney v. Ahearn, 210 F.Supp. 10 (S.D.N.Y. 1961), the original plaintiff in an action sought permission to file a "counterclaim" against the original defendant. Denying that permission, the court concluded that because the defendant had not sought affirmative relief against the plaintiff a counterclaim could not be asserted. In order to have a counterclaim there must be a claim against the party asserting the counterclaim. 210 F.Supp. at 20.

An important factor in determining whether persons are "opposing parties" is whether the person against whom the counterclaim is asserted is actually a party to the litigation. If that person is not a party to the litigation, a claim asserted against him is not within the scope of Rule 13. See, Chemetron Corp. v. Cervantes, 92 F.R.D. 26, 28 (D.PR. 1981); Cincinnati Millacron Industries, Inc. v. Aqua Dyne Inc., 592 F.Supp. 1113, 1115 (S.D. Oh. 1984). Moreover, the provisions of Rule 13(h) which allow for joinder of additional parties to a counterclaim may not be invoked unless a valid counterclaim has been asserted in the first instance. See, Hilltop-West Liberty Lumber Co., 208 F.Supp. at 110.

In the context of the Irrigation District's First Amended Petition against the California defendants, the Tribe and the United States and the Irrigation District are not opposing parties. The Irrigation District has not asserted any claim against the Tribe and the United States in the first instance.

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Because Rule 13 presupposes the existence or assertion of a claim against the party filing it, the Counterclaims are not within the purview of Rule 13 and should be dismissed.

The Counterclaims should be dismissed as to other claimants to the waters of the Walker River for two reasons. First, those claimants have not filed a claim against anyone, including the Tribe and the United States. Second, as is discussed in greater detail below, many of those claimants are not actually parties to the main action and this subproceeding and therefore a counterclaim may not be asserted against them. Finally, because there is no valid assertion of a counterclaim against the Irrigation District, these nonparties cannot be joined under the provisions of Rule 13(h).

B. The Counterclaims Should be Dismissed Because in Reality They are Either an Amended or Supplemental Complaint Filed Without the Prior Court Permission Required by Rule 15 of the Federal Rules.

This action was originally brought by the United States to quiet title to a water right from the Walker River and its tributaries which it claimed as a result of the creation of the Walker River Indian Reservation. See, Statement of Facts, supra. at 3 - 5. The claims which the Tribe and the United States seek to assert in their "counterclaims" are claims for additional water from the Walker River and its tributaries for the benefit of the Indian Reservation. Although at this early stage it is not entirely clear, it may be that the bases for both of these claims

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arose after the filing of the original complaint in 1924.[4] In any event, it is apparent that the Tribe and the United States are effectively seeking to amend and/or supplement the original complaint in this action. They are not seeking to state counterclaims arising out of the Irrigation District's First Amended Petition against the California respondents.

Under Rule 15, the Tribe and the United States may not file an amended complaint in this action except upon leave of court or by written consent to the adverse parties. Similarly, they may not file a supplemental complaint setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented without Court permission. See, Fed.R.Civ.P., Rule 15(a); Rule 15(d).

The United States and the Tribe cannot be permitted to circumvent the serious issues which will arise under a Rule 15 motion to amend or supplement the original complaint in this action by the simple device of designating their pleading as a "counterclaim." Serious questions arise where a Rule 15 motion is made 68 years after an action began, 56 years after entry of a final judgment, 53 years after an appeal from that judgment, 52 years after the judgment was amended, 56 years after all facts required to sustain the claim had to have been known and after trial court proceedings lasting nearly 12 years and an appeal lasting three years. See, e.g., United States of America,

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[4] At this time it is not clear that the United States could not have asserted these new claims before the Walker River Decree was entered in 1936 and amended in 1940. Those issues remain to be considered in another context.

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Plaintiff and Pyramid Lake Paiute Tribe of Indians, Plaintiff-Intervenor vs. Truckee-Carson Irrigation Dist., et al., Defendants, in the United States District Court for the District of Nevada, CV. No. R-2987-RCB, Opinion of Belloni, J. (Sept. 18, 1985) and cases cited therein. Because those issues have not been confronted and court permission under Rule 15 has not been sought or obtained, the Counterclaims should be dismissed.

IV. WHETHER THE CLAIMS PROCEED AS A COUNTERCLAIM, A SEPARATE ACTION, OR AS A SUPPLEMENT OR AMENDMENT TO THE ORIGINAL COMPLAINT FILED BY THE UNITED STATES IN 1924, THE COURT MUST REQUIRE THAT ALL CLAIMANTS TO THE WATERS OF THE WALKER RIVER AND ITS TRIBUTARIES BE JOINED AS PARTIES.

A. Introduction.

The Tribe and the United States seek to establish two new rights to water from the Walker River which are not recognized by the Walker River Decree. One is a right to store water in Weber Reservoir and the other is a right to water for lands allegedly added the Reservation in 1936. As this Court well knows, water rights on a stream system like that of the Walker River are interdependent with respect to all water rights and all water users. See, e.g., California v. United States, 235 F.2d 647, 663-664 (9th Cir. 1956); United States v. Dist. Ct., 401 U.S. 520, 525-526 (1971).

The United States and the Tribe recognize that fact in asserting that their claim is against all users of water on the Walker River system. The previous history of proceedings concerning claims to the waters of the Walker River highlight the need to carefully include as parties all existing claimants to those waters. See, Statement of Facts, supra. at 2 - 3.

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Except for the United States and the Irrigation District, existing claimants to the waters of the Walker River include two groups. The first group consists of transferees from the original parties to this action. As is discussed below transferees from original parties either must be substituted in accordance with the requirements of Rule 25 or joined in accordance with the requirements of Rule 19. The second group consists of claimants who have established water rights under California or Nevada law after the date of the Walker River Decree.

B. Transferee's from the Original Parties to this Action Must be Substituted as Parties in Accordance with the Requirements of Rule 25 or Joined as Parties in Accordance with the Provisions of Rule 19.

Although Rule 25(c) allows an action to be continued against an original party after that party's interest has been transferred and although transferees from original parties to this action are bound by the Walker River Decree, substitution or joinder of transferees should be required with respect to the new claims which the Tribe and the United States propose to assert here. First, it is apparent that most, if not all, of the original individual defendants named in 1924 and 1926 are dead. Rule 25(a) requires that successors to deceased parties either be substituted or that the action be dismissed as to the dead party. Here, in the typical situation absent substitution there is no one to represent the interests of the transferees.

Second, here the Tribe and the United States propose to assert new claims. Their claims are not merely a continuation of the claim asserted against the original defendants in 1924. In

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this situation the transfer of interest effectively occurred prior to the commencement of the action. In such a case the provisions of Rule 25(c) do not apply. See, Hilbrands v. Far East Trading Company, Inc., 509 F.2d 1321, 1323 (9th Cir. 1975). With respect to possible defendants who acquire an interest before an action is commenced the provisions of Rule 19 governing joinder apply rather than the provisions of Rule 25. Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 634 (1st Cir. 1989), As is discussed below, here Rule 19 requires joinder of all claimants to the waters of the Walker River.

Even if Rule 25(c) applies here, the Court should exercise its discretion to require substitution of all transferees of water rights adjudicated by the Walker River Decree. Where an absent defendant could have a burden of liability as a result of the transfer of interest or where a multiplicity of lawsuits may be avoided if absent defendants are substituted, the court should order substitution. See, e.g., Wainwright v. Kraftco Corp., 58 F.R.D. 9, 14 (N.D.Ga. 1973). Substitution is appropriate where the transferor has for all practical purposes ceased to exist. See, First American Savings Bank v. Westside Federal Savings and Loan Association, 639 F.Supp. 93, 95-96 (D.Wa. 1986).

Here, it is clear that if absent transferees are not substituted, there will be a multiplicity of lawsuits. See, section IV, C infra. at 14-16. It is also clear that most

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transferors have "ceased to exist". Therefore, substitution should be required.[5]

C. All Existing Claimants to Waters of the Walker River Must Be Joined Because in Their Absence Complete Relief Cannot Be Accorded Among Those Already Parties.

Rule 19(a)(1) requires joinder of a person if "in the his absence complete relief cannot be accorded among those already parties."[6] Fed.R.Civ.Proc., Rule 19(a)(1). This part of Rule 19 requires the presence of all persons who have an interest in the litigation so that any relief granted will provide effective and complete relief and repeated litigation involving essentially the same subject matter will be avoided. See, Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983); 7 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, §1604 at 42-46 (1986).

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[5] Notice of substitution may be served in any judicial district. Ransom v. Brennan, 437 F.2d 513, 519 (5th Cir.) cert. den. 403 U.S. 904 (1971).

[6] If a person is subject to service of process and the his joinder will not deprive the court of subject matter jurisdiction, Rule 19(a) requires his joinder if the requirements of Rule 19(a)(1) or (a)(2) are satisfied. If joinder is not feasible because the person is not subject to service of process or because joinder will result in a loss of subject matter jurisdiction, the court must then consider the factors set out in Rule 19(b) to determine whether the action should proceed or be dismissed. All claimants to the waters of the Walker River can be joined here. First, subject matter jurisdiction will not be lost by their joinder. Second, most claimants reside in the State of Nevada or have sufficient contacts with Nevada to be subject to service under Nevada's long arm statute. Third, claimants who reside in California can nevertheless be served with process under the "bulge" service provisions of Rule 4(f). See, Fed.R.Civ.Proc. Rule 4(f); 2 J. Moore, J. Lucas, Moore's Federal Practice, ¶4.42 [2.-3] at 4-396 - 4-398 (2d ed. 1992); Sprow v. Hartford Ins. Co., 594 F.2d 412, 416-417 (5th Cir. 1979).

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Here, if the claims of the Tribe and the United States proceed to judgment in the absence of joinder of all claimants to waters of the Walker River and its tributaries, the unjoined claimants will not be bound by the judgment. A judgment involving less than all of the claimants to waters of a stream system will not provide effective and complete relief and will almost certainly lead to multiple litigation.[7] The Rickey litigation here is an excellent example. Thus, Rule 19(a)(1) requires joinder of claimants to the waters of the Walker River.

D. All Existing Claimants to the Waters of the Walker River Must be Joined Because They Claim an Interest in the Subject Matter of the Action and are so Situated that its Disposition in their Absence May as a Practical Matter Impair or Impede their Ability to Protect that Interest.

Rule 19(a)(2)(i) requires joinder of a person who claims an interest in the subject matter of the action, if disposition of the action in his absence may prejudice his ability to protect that interest. Fed.R.Civ.Proc., Rule 19(a)(2)(i); see also, 7 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, §1604 at 49 (1986). Where the relationship between a party and a non-party is sufficiently close that the latter might arguably be collaterally estopped from relitigating issues decided against the party, the non-party must be joined under this provision of Rule 19. See, Takeda v. Northwestern Nat. Life Ins. Co., 765 F.2d 815, 819-821 (9th Cir. 1985).

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[7] Although the decision in California v. United States, 235 F.2d 647 (9th Cir. 1956) was not based upon Rule 19 principles, it recognizes that when rights on a stream are adjudicated "all owners of lands on the watershed and all appropriators who use water from the stream" should be "in court at the same time." 235 F.2d at 663.

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Here, it may be argued that the interests of all non-party claimants to the waters of the Walker River are sufficiently close to those of existing parties so that issue preclusion would prevent them from relitigating issues decided against those parties in subsequent litigation between the non-parties and the United States and the Tribe. This court need not determine how issue preclusion may operate in future litigation because Rule 19 speaks to possible, not certain, harm. Id. at 821. Therefore, non-party claimants to the waters of the Walker River must be joined under Rule 19(a)(2)(i).

E. All Existing Claimants to the Waters of the Walker River Must Be Joined Because the Disposition of the Action Will Leave Those Already Parties Subject to a Substantial Risk of Incurring Double, Multiple or Otherwise Inconsistent Obligations By Reason of Their Claimed Interest.

Rule 19(a)(2)(ii) requires joinder of a person who claims an interest in the subject matter of an action, if disposition of the action in that person's absence may prejudice those already parties. Fed.R.Civ.Proc., Rule 19 (a)(2)(ii); see also, 7 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, §1604 at 49 (1986). Rule 19(a)(2)(ii) limits the power of plaintiffs to determine who shall be parties to lawsuits they institute. It is intended to protect the interests of the named defendants and of the orderly and expeditious administration of justice. See, U-Haul Intern, Inc. v. Jartran, Inc., 793 F.2d 1034, 1039 (9th Cir. 1986). Where an absent defendant may not be bound by the judgment rendered by the court, the interests of the present defendant and society in general are not protected because of the possibility of multiple litigation.

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Here, absent claimants to the waters of the Walker River will not be bound by the judgment of the court on the new claims of the Tribe and the United States. This may expose the Irrigation District to potential inconsistent obligations with respect to the relationship among its rights, those of absent defendants and the new claims of the Tribe and the United States. Because additional controversies are almost certain to arise, the interest of the orderly and expeditious administration of justice is not served. Therefore, non-party claimants to the waters of the Walker River must be joined under Rule 19(a)(2)(ii).

V. ALL PERSONS OR ENTITIES TO BE NAMED AS PARTIES IN A NEW ACTION OR JOINED OR SUBSTITUTED ON THE COUNTERCLAIMS MUST BE SERVED IN ACCORDANCE WITH RULE 4.

If the Tribe and the United States choose to assert the new claims by the filing of a separate action, all named defendants must be served with process in accordance with the requirements of Rule 4. It is basic that before a court can entertain a case a defendant must be properly before it and no defendant can be brought properly before a court unless there has been a proper service of process on the defendant. North Alleghany J. School System v. Secretary of Health, 196 F.Supp. 144 (W.D. Pa. 1961).

The provision in Rule 19(a) that the persons described be ordered joined "if subject to service of process" is a reference to service under Rule 4. See, 3A J. Moore, J. Lucas, Moore's Federal Practice, ¶ 19.01 [5.-7] at 19-38 - 19-39 (2d ed. 1992). Thus, where parties are joined pursuant to Rule 19, service of process requirements under Rule 4 must be met. See, Lamar v. America Basketball Association, 468 F.Supp. 1198 (S.D.N.Y. 1979).

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To the extent that the court determines that consideration must be given to substituting transferees from original defendants in this action, those persons are entitled to be served with notice of the proposed substitution "in the manner provided in Rule 4." See, Fed.R.Civ.Proc. Rule 25(c) and Rule 25(a); 7 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, §1956 at 550-51 (1986); Ransom v. Brennan, 437 F.2d 513, 518 (5th Cir.) cert. den. 403 U.S. 904 (1971).

The method of service proposed by the Tribe and the United States consisting of notice by publication and posting notice at various sites is inadequate. It is not consistent with the methods of service set forth in Rule 4(d)(1)-(6). The Tribe and the United States must serve all claimants to waters of the Walker River system who are not presently parties to this action as required by Rule 4.

VI. CONCLUSION

The Counterclaims must be dismissed without prejudice. They are not against an opposing party and in reality are amendments or supplements to the original complaint filed herein on July 3, 1924. Required court approval under Rule 15 has not been sought or obtained.

Irrespective of whether the claims alleged by the Tribe and the United States proceed as a separate action, a counterclaim or as a supplement or amendment to the original complaint in this action, all claimants to the waters of the Walker River or its tributaries in Nevada and California must be joined and/or

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substituted as defendants and they must be served in accordance with the requirements of Rule 4 of the Federal Rules.

The Court should grant the Irrigation District's motions.

DATED this 3rd day of August, 1992.

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CERTIFICATE OF SERVICE BY MAIL

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