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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-B-ECR **RESPONSE OF THE WALKER RIVER PAIUTE TRIBE TO THE WALKER RIVER IRRIGATION DISTRICT'S AND THE STATE OF NEVADA'S PRELIMINARY THRESHOLD MOTIONS**
WALKER RIVER IRRIGATION DISTRICT, Petitioner, STATE OF NEVADA, Petitioner-Intervenor, vs. CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, W. DON MAUGHAN, EDWIN H. FINSTER, ELISEO M. SAMANIEGO, JOHN CAFFREY and DARLENE E. RUIZ, Members of the California State Water Resources Control Board, Respondents, CALIFORNIA TROUT, INC., Respondent-Intervenor.	

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I. INTRODUCTION

In response to the First Amended Petition for Declaratory and Injunctive Relief and Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion to Storage of Water from California to Nevada dated January 3, 1992 ("First Amended Petition") by the Walker River Irrigation District ("WRID" or "the District"), the Walker River Paiute Tribe ("the Tribe") filed its Answer to First Amended Petition, and Counterclaim and Cross-claim of the Walker River Paiute Tribe. The Tribe's response to the First Amended Petition is straightforward: no matter what the extent of the Control Board's authority over the District, the reservoirs may not be operated in a way that interferes with either the Tribe's decreed rights or the Tribe's claimed rights to store water in Weber Reservoir and to use water on lands restored to the Reservation after the time period covered by the Decree in this case. To the extent the District seeks to transfer its storage rights to Nevada, the Tribe similarly claims that WRID may not do so in a fashion that interferes with either the Tribe's decreed rights or its claimed, but unrecognized entitlements.

As a practical matter, by raising the issues of reservoir releases, minimum pools, instream flows, and change of diversion points, the First Amended Petition put into question the entire operation of the Walker River. Nevertheless, WRID and the State of Nevada argue that despite the long history of antagonism between the District and the Tribe, that the District is not an "opposing party" to the Tribe and thus that the Tribe's

counterclaim should be dismissed. WRID and the State of Nevada further contend that the Tribe may not utilize the same procedures followed by WRID for its First Amended Petition. Instead, according to the District and Nevada, the Tribe must join all users of water from the River in order to proceed with its counterclaim. Finally, the District and Nevada insist that in order to file its claims, the Tribe must invoke Fed. R. Civ. P. 15 and amend the complaint in this case. WRID and Nevada are wrong on all counts.

II. BACKGROUND

A. THE WALKER RIVER RESERVATION

The Walker River Paiute Tribe is a federally-recognized Indian Tribe organized under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, Act of June 18, 1934, 48 Stat. 987, ch. 576, § 16. The Tribe's Reservation was created by a November 29, 1859 letter from the Commissioner of Indian Affairs to the Commissioner of the General Land Office. A subsequent Executive Order dated March 19, 1874 confirmed the establishment of the Reservation. As initially created, the Reservation contained approximately 320,000 acres. See United States v. Walker River Irrig. Dist., 104 F.2d 334 (9th Cir. 1939).

Pursuant to the Act of May 27, 1902, 32 Stat. 260, the Secretary of the Interior allotted 20 acres to the head of each family residing on the Reservation. In addition, approximately 38,000 acres of grazing lands, and 3,355 acres of timber land were retained in the Reservation. By Secretarial Order dated

September 25, 1936, 167,460 acres were restored to the Reservation. The remaining Reservation lands were to be opened for non-Indian settlement. The legislation required the federal government to secure water rights for 504 of the 20-acre allotments of irrigable land and to build an irrigation system.

The Act of June 22, 1936, 49 Stat. 1806, authorized the Secretary of the Interior to set aside certain lands as an addition to the Reservation.

B. LITIGATION OF THE WALKER RIVER

The opinion in United States v. Walker River Irrig. Dist. provides an easily visualized description of the Walker River:

> Walker river is a non-navigable, interstate stream. It consists of two main branches, East and West Walker, which are fed by many small streams rising high on the eastern slopes of the Sierra Nevada Mountains in Mono and Alpine counties, Cal. The West Walker in the course of its descent flows through Leavitt and Pickle Meadows, two high mountain valleys, thence through a canyon with practically no cultivated area, thence northerly and northeasterly through Antelope Valley into the state of Nevada, thence through Smith Valley to the head of Mason Valley where it joins the East Walker river. The principal streams forming the East Walker river combine in Bridgeport Meadows, which is a large area devoted to the raising of wild grasses and pasturage at an elevation of 7,000 feet above sea level. The East Walker river flows thence northerly and northeasterly through canyons and sparsely populated valleys to Mason Valley where it unites with the West Walker river and forms the main Walker river. This river flows northerly and northeasterly, descends through the latter valley to near the town of Wabushka, where it turns abruptly to the southeast and flows through the Walker River Indian Reservation thence unto Walker Lake.

United States v. Walker River Irrig. Dist., 11 F. Supp. 158, 160 (D. Nev. 1935), rev'd, 104 F.2d 334 (9th Cir. 1939).

Because the River is the primary water supply for the reservation, the United States filed suit to protect the Tribe's water rights in 1924. At that time, the reduced Reservation consisted of approximately 80,000 acres. United States v. Walker River Irrig. Dist. was not the first effort to adjudicate rights on the River. Extensive litigation over water rights from the River had occurred in the first two decades of the 20th Century, but without the participation of the United States. See Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910); see also, Miller & Lux v. Rickey, 127 F. 573 (D. Nev. 1904); Miller & Lux v. Rickey Land & Cattle Co., 146 F. 574 (D. Nev. 1906), aff'd, Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910); Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11 (9th Cir. 1907), aff'd, Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910); and Pacific Livestock Co. v. Thomas Rickey, et al., No. 731, Final Decree (D. Nev. 1919). Rather than join the Rickey adjudication, the United States filed a separate adjudication. "The United States brought suit to restrain the appropriators of the waters of the Walker River and its tributaries from interfering with the natural flow of the stream, to the extent of 150 cubic feet per second, to and upon the Walker River Indian Reservation in Nevada." United States v. Walker River Irrig. Dist., 104 F.2d at 335. As explained by the Court of Appeals, "it [was] the position of the Government that there was an implied reservation of the water. The contention is

bottomed on the holding to this effect in *Winters v. United States,* 207 U.S. 564 . . . ." Id. at 335-36. The purpose of the United States' suit was to ascertain the nature and scope of the rights it then held for the use on the reservation and to halt interference with those rights.

The present decree reflects the opinion of the court of appeals, reversing the district court. The appellate court held that the Walker River Paiute Reservation was entitled to reserved water rights with a date of reservation at the time of the creation of the Reservation. United States v. Walker River Irrig. Dist., 104 F.2d 334. Despite finding that the Reservation had a reserved right to the waters of the Walker River, the court rejected the United States' assertion that the water rights should be determined by irrigable acreage.

> The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience.

Id. at 340. The Court found that "[t]he report of the master states that 'the number of Indians is not increasing and it has not been shown that there is the necessity or demand for the cultivation of a larger area than 2100 acres.'" Id.

The Decree was amended in 1939 to reflect the opinion of the Court of Appeals. The Decree set out the priorities and quantities of the various parties to the adjudication, and terms

by which the water would be administered. The Decree expressly stated that the court retained jurisdiction "for the purpose of changing the duty of water or for correcting or modifying this decree; also for other regulatory purposes, including a change of the place of use of any water user . . . ." See United States v. Walker River Irrig. Dist., No. C-125, Decree at 72-73 (D. Nev. April, 14 1936), as amended by, Stipulation and Agreement for Entry of Amended Final Decree Pursuant to Writ of Mandate of the Circuit Court of Appeals - Ninth Circuit - and also Amended Decree entered herein on April 15, 1936 to Clarify Certain Provisions Thereof (hereinafter " Amended Decree") and Order for Entry of Amended Final Decree to Conform to Writ of Mandate, etc. dated April 24, 1940. The Amended Decree also states that:

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

Decree at 72 and Amended Decree at 3. The provision limiting the Decree to rights in effect as of April 14, 1936, was inserted in 1940 in order to ensure that the federal interest in obtaining a water right for Weber Reservoir was not prejudiced by the language of the decree. The circumstances surrounding the insertion of that language establish that it was intended to protect any water rights perfected subsequent to the close of evidence in the litigation on April 14, 1936.

C. THE PRESENT CONTROVERSY

In 1990, the California State Water Resources Control Board (hereinafter "the Control Board") issued orders requiring that

WRID comply with the California Fish and Game Code. Specifically, the Control Board ordered the WRID to comply with § 5946 of the California Fish and Game Code. CAL. FISH & GAME CODE § 5946 (West 1984).[1] See Order No. WR 90-9 entered June 21, 1990; Order No. WR 90-16 entered November 7, 1990; Order No. WR 90-18 entered December 10, 1990, which are attached to WRID's First Amended Petition as Exhibits A, B, and C, respectively. The Control Board asserted its authority over WRID because the licenses for the water were issued by the Board or its predecessor. The Control Board did not seek to invoke the authority of the Court to enforce its orders, but simply directed the District to comply with the orders. WRID filed its First Amended Petition to clarify the authority of the Board. See First Amended Petition.

In its petition, WRID indicates that the orders of the Control Board will:

> (i) require the release of water from Bridgeport Reservoir and the bypassing of water around Topaz Reservoir when the Final Decree allows for the storage of that water

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[1]Section 5946 provides:

> No permit or license to appropriate water in District 4 1/2 shall be issued by the State Water Rights Board after September 9, 1953, unless conditioned upon full compliance with [Fish & Game Code] Section 5937.

CAL. FISH & GAME CODE § 5946 (West 1984). Section 5937 requires the owner of any dam to allow water at all times to pass through a fishway, or in the absence of a fishway, to pass over, around or through the dam, sufficient to keep in good condition any fish that may be planted or exist below the dam. CAL. FISH & GAME CODE § 5937 (West 1984).

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> in Bridgeport Reservoir and Topaz Reservoir; (ii) require the release of stored water from Bridgeport Reservoir when it cannot be delivered to the beneficial owners for use on their lands as required by the Final Decree; (iii) prohibit the release of water from Bridgeport Reservoir when the Final Decree requires its release and delivery to its beneficial owners; and (iv) result in the storage of water at times when the water could otherwise be passed through the Bridgeport Reservoir and Topaz Reservoir for use by direct diversion.

Id. at ¶ 19. As a result, WRID requests this Court to direct that "[t]he Board and Board Members may not enter or enforce orders concerning the operation of Bridgeport Reservoir and Topaz Reservoir which are inconsistent with and contrary to the Final Decree and which interfere with the jurisdiction of this Court over the waters of the Walker River and its tributaries." Id. at ¶ 21.

The District also made an alternative claim to change its point of diversion for the two reservoirs in dispute to Nevada for underground storage. Id. at ¶ 29. That portion of the District's claim was stayed pending resolution of its first claim. See Notice of Filing and Schedule of Proceedings Concerning First Amended Petition for Declaratory and Injunctive Relief and Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion to Storage of Water from California to Nevada (hereinafter "Notice of Filing and Schedule of Proceedings") dated January 15, 1992 at 2.

In its First Amended Petition, the District raises questions about the ability of the Control Board to affect the District's reservoir operations in California, claiming that the Control

Board cannot affect rights under the decree in this case. If WRID loses on that argument, it wants to transfer its storage rights to Nevada. As a practical matter, by raising the issues of reservoir releases, minimum pools, instream flows, and change of diversion points, the First Amended Petition put into question the entire operation of the River.

The Court directed that WRID provide the following notice of its First Amended Petition: "Persons, entities or governmental agencies who are not parties to this action or successors to parties to this action may seek Court permission to participate in the proceedings on the First Claim for Relief by filing an appropriate motion prior to 4:00 P.M. on March 18, 1992 . . . ." See Notice of Filing and Schedule of Proceedings at 4.

The Court also established the means by which such notice should be provided. Publication was required, as well as first class mail to parties who are assessed for the administration of the Decree. See Order Requiring Notice of Filing and Schedule of Proceedings Concerning First Amended Petition for Declaratory and Injunctive Relief and Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion to Storage of Water from California to Nevada dated January 15, 1992, at 2. No additional parties were required to be joined.

In response to the First Amended Petition, the Tribe filed its Answer to First Amended Petition, and Counterclaim and Cross-claim of the Walker River Paiute Tribe. The Tribe contends the reservoirs in question may not be operated in a way that interferes with either the Tribe's decreed rights or the Tribe's

claimed -- but presently unrecognized -- rights to store water in Weber Reservoir and to use water on lands restored to the Reservation after the time period covered by the Decree in this case. To the extent the District seeks to transfer its storage rights to Nevada, the Tribe similarly claims that WRID may not do so in a fashion that interferes with either the Tribe's decreed rights or its claimed, but unrecognized entitlements.

The Tribe first asserted its position in its cross-claim against the Control Board, claiming that the Control Board lacked authority to order the District to operate its reservoirs in a way that interfered with any rights of the Tribe to use the waters of the Walker River, whether those rights were recognized in the Decree or not. The Tribe was compelled to seek protection for its unrecognized rights in order to avoid the argument that the Tribe had somehow waived or otherwise surrendered its rights by only seeking protection for its decreed rights. Having raised the question of unrecognized rights against the Control Board, the Tribe also raised the question against the other holders of decreed rights on the River, including WRID.

III. ARGUMENT

A. THE TRIBE'S COUNTERCLAIM IS APPROPRIATE.

The Tribe responded to WRID's First Amended Petition by, among other things, filing a counterclaim against WRID and all other water users with decreed rights to the use of the waters of the Walker River and its tributaries. The styling of the tribal claim as a counterclaim reflects the historical adversity between

the Tribe and WRID as competing water users on the Walker River. Ignoring that long standing adversity and the traditional judicial treatment of water right holders from the same water supply as adverse parties, WRID and Nevada argue that the Tribe's counterclaim does not meet the requirements of Fed. R. Civ. P. 13 because the District is not an "opposing party" to the Tribe. In WRID's and Nevada's view, the question of who is an opposing party must be judged solely on the basis of the First Amended Petition. Because that pleading does not assert a claim directly against the Tribe and the United States, WRID and Nevada contend that the District may not be subjected to the tribal counterclaim.

As shown below, the District's analysis is far too simple. The District is an opposing party within the meaning of the Rule and the Tribe's counterclaim arises out of the same "transaction or occurrence", i.e., the operation of the River under the terms of the Decree, that is the basis for WRID's First Amended Petition. As a result, the tribal counterclaim is entirely appropriate under Rule 13.

1. The WRID is an "opposing party" to the Tribe and the United States.

There can be no question that the District is an opposing party to the Tribe in this case. Indeed, the caption of WRID's First Amended Petition reads, United States of America, Plaintiff, Walker River Paiute Tribe, Plaintiff-Intervenor vs. Walker River Irrigation District, a corporation, et al., Defendants. Moreover, as indicated by that caption, the First

Amended Petition is a part of a far larger case in which the rights of the District and the Tribe are antagonistic.

WRID's claims in the First Amended Petition arise from the prior proceedings in which the Tribe and WRID were opponents. According to the District, "[t]his Court has jurisdiction over this Petition pursuant to: (i) its continuing jurisdiction over the waters of the Walker River and its tributaries in California and Nevada; (ii) its inherent authority to enforce the terms and conditions of the Final Decree and to protect its jurisdiction to enforce the Final Decree . . . ." Id. at ¶ 6. In its second claim for relief, WRID requests that it be allowed to change its point of diversion of water from California to Nevada under the jurisdiction retained under the Final Decree. Id. at ¶ 29.

The District and the Tribe are plainly opposing parties in the context of the overall litigation. In Nevada v. United States, 463 U.S. 110 (1983), the Supreme Court explained the unique nature of water adjudications:

> A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. See Frost v. Alturas, 11 Idaho 294, 81 P. 996, 998 (1905); Kinney, Irrigation and Water Rights at 277. Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose. 649 F.2d at 1309.

Id. at 139 (citing with approval the Court of Appeals discussion of the unique nature of water adjudications). The Supreme Court concluded that "[t]his rule seems to be generally applied in stream adjudications in the Western States, where these actions

play a critical role in determining the allocation of scarce water rights, and where each water rights claim by its 'very nature raise[s] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims.'" Id. at 140 (citations omitted).

Despite the fact that WRID's present claims arise from the Decree in this case under which the District and the Tribe are opposing parties, WRID now argues that the Tribe's counterclaim is invalid for two reasons: (1) the District's First Amended Petition is only against the California defendants; and (2) WRID has not filed a claim against the Tribe or the United States in this part of the case. See WRID's Points and Authorities at 9. To be sure, Fed. R. Civ. P. 13 requires an "opposing party" in order to assert a counterclaim. But there is no support for the District's strained reading of the "opposing party" requirement to be determined on the basis of a particular pleading, and not the case as a whole.

As stated in Moore's Federal Practice and Procedure:

> The traditional principle appears to be that unless a person has submitted himself to the jurisdiction of the court in a capacity by making a claim in that capacity, then he is not an "opposing party" such that a compulsory counterclaim must and a permissive counterclaim may be entered against him in that capacity.

3 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE AND PROCEDURE ¶ 1306 [1] (2d ed. 1992). "[R]ecent cases indicate the court should not interpret 'opposing party' mechanically but should interpret it liberally and realistically, so as to allow the joinder of all

related claims and prevent the multiplicity of suits." Id., see Klinzing v. Shakey's Inc., 49 F.R.D. 32 (E.D. Wis. 1970) (In anti-trust class action on behalf of franchise, defendant could counterclaim for conspiracy to breach contracts and add additional parties to counterclaim); and Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), cert. denied sub nom Aldens, Inc. v. Kane, 425 U.S. 943 (1976).

In this instance, WRID has submitted itself to the jurisdiction of this Court as "a defendant in this action and as the owner in trust of the water rights set forth in paragraph VIII of the Final Decree." First Amended Petition at ¶ 7. Its first claim for relief raises a multitude of questions about the operation of the District's reservoir and the impact of those operations on river flows. WRID's second claim for relief requests a change of point of diversion to within the State of Nevada -- a request that potentially implicates all decreed water rights holders on the River. As a result, WRID is an opposing party to the Tribe within the meaning of the Rule.

2. The Tribe's Counterclaim otherwise satisfies Rule 13.

The Tribe filed its counterclaim, in part, to avoid any subsequent argument that it had waived its claim because the claim was a compulsory counterclaim. Rule 13, Counterclaim and Cross-Claim, subsection (a) Compulsory Counterclaims of the Federal Rules of Civil Procedure provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require

> for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a).

A counterclaim is compulsory if it "aris[es] out of the same transaction or occurrence . . . [that is the subject matter of] the opposing party's claim . . . ." Southern Constr. Co. v. Pickard Eng'g Co., 371 U.S. 57, 60 (1962).[2] This then, "gives rise to the critical question: what constitutes a "transaction or occurrence?" 6 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1410 (1990).

First, "[i]n deciding what is a transaction, we take note that the term gets an increasingly liberal construction." Albright v. Gates, 362 F.2d 928, 929 (9th Cir. 1966); Pochiro v. Prudential Ins. Co., 827 F.2d 1246, 1249 (9th Cir. 1987). In addition to the liberal reading, the Pochiro Court explained that an additional standard by which the compulsory nature of a counterclaim can be determined is "the liberal 'logical relationship' test to determine whether two claims arise out of the same 'transaction or occurrence.'" Id. at 1249 (citations omitted.).[3]

[2/]The Supreme Court in Pickard, 371 U.S. 57, explained that "[t]he Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." Id. at 60. See, e.g., United States v. Eastport S.S. Corp., 255 F.2d 795, 801-802 (2d Cir. 1958).

[3/]Although the Pochiro court was technically applying Arizona law, the court relied primarily on federal law in its discussion regarding Rule 13, "Arizona Rule of Civil Procedure 13(a) which defines a compulsory counterclaim, is identical to Federal Rule of Civil Procedure 13(a)." Pochiro, 827 F.2d at 1249.

The court explained the logical relationship test as, " '[t]his flexible approach to Rule 13 problems attempts to analyze whether the essential facts of the various claims are so logically connected that consideration of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.'" Id. (citations omitted.); see Grumman Sys. Support Corp. v. Data Gen. Corp., 125 F.R.D. 160, 162 (N.D. Cal. 1988) (Acknowledging that this is the test to be applied in this Circuit.).

The tribal claims fit within this rule. The Court will examine precisely the same issues in resolving the First Amended Petition (and the tribal cross-claim) as will have to be addressed in the Tribe's counterclaim. Plainly, the tribal claim that the Control Board cannot affect the operations of the District's reservoirs in a fashion that interferes with the Tribe's decreed rights is part of the same occurrence that gave rise to the District's First Amended Petition. Also, the claim that the Board cannot require the operation of the reservoirs in a way that adversely affects the Tribe's claimed rights arises out of the same issue that lead to the Petition -- the scope of the Board's authority to affect River operations. The tribal counterclaim seeking to establish those same rights against other decreed water rights holders arises from the same matters as lead to the First Amended Petition.

The Ninth Circuit has explained the consequences of failing to assert a compulsory counterclaim in a timely fashion, "[i]f a party fails to plead these causes of action as counterclaims, he is held to have waived them and is precluded by res judicata from

ever suing upon them again. The apparent purpose of such compulsion is to prevent a multiplicity of lawsuits." Union Paving Co. v. Downer Corp., 276 F.2d 468, 470 (9th Cir. 1960) (citations omitted); see also, WRIGHT, MILLER & KANE, supra, at § 1409. By filing its counterclaim, the Tribe sought to avoid the harsh dictates of that rule. It also sought to make clear that its claims ran against the District as well as the Board. There is no reason to dismiss those claims now.

In any event, no matter what the relationship between the tribal claims and the events that gave rise to the First Amended Petition, the Tribe's claim may be filed as permissive counterclaim. Fed. R. Civ. P. 13(b) states: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Id. The Tribe's claims fit within the confines of that Rule.

Finally, by addressing the Tribe's and the United State's claims at this time, this Court will prevent wasteful multiplicity of litigation and foster judicial convenience. The Court has already issued extensive scheduling orders for both the WRID First Amended Petition and the Tribe's Counterclaim and Cross-claim in order that the claims could be conveniently addressed. The claims of the Tribe are inextricably connected to the WRID's First Amended Petition.

B. THE TRIBE'S COUNTERCLAIM IS ASSERTED UNDER THE CONTINUING JURISDICTION OF THIS COURT OVER THE WATERS OF THE WALKER RIVER AND ITS TRIBUTARIES.

WRID and Nevada are mistaken when they argue that the Tribe's counterclaim is actually an amendment and/or supplement to the original complaint, and therefore requires approval by the Court pursuant to Fed. R. Civ. P. 15. See WRID Points and Authorities at 10-12; and State of Nevada's Preliminary Threshold Motions at 3. Under the terms of the Decree, the Court retains jurisdiction over the waters of the Walker River; it is that retained authority which the Tribe seeks to invoke in its counterclaim. Article XIV of the Decree provides: "The Court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user . . . ." Id. at 72-73 (emphasis added).

The question of whether the Tribe's claims are meritorious and justify a modification of the Decree awaits resolution. But the Tribe is not required to follow Rule 15 in order to invoke the retained authority of the Court to modify the Decree.

1. The Tribe and the United States filed their counterclaims as modifications to the Final Decree.

The Tribe filed its counterclaim to the WRID's First Amended Petition pursuant to the Final Decree. The procedure invoked by the Tribe to advance its claim for additional water rights is consistent with the Decree's provision retaining jurisdiction to modify its terms. That provision is well founded.

Section 73 of RESTATEMENT (SECOND) OF JUDGEMENTS OF LAW provides:

> Subject to the limitations stated in § 74, a judgment may be set aside or modified if:
>
> (1) The judgment was subject to modification by its own terms or by applicable law, and events have occurred subsequent to the judgment that warrant modification of the contemplated kind; or
>
> (2) There has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust.

RESTATEMENT (SECOND) OF JUDGEMENTS OF LAW § 73 (1982).

The language of the Restatement reflects well-established principles.[4] As stated by Justice Harlan in System Fed'n No. 91 v. Wright, 364 U.S. 642, 646-47 (1961), quoting in part from United States v. Swift & Co., 286 U.S. 106, 114 (1932):

> At the outset it should be noted that the power of the District Court to modify this decree is not drawn in question. That proposition indeed could not well be disputed. See Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421; United States v. Swift & Co., 286 U.S. 106; Chrysler Corp. v. United States, 316 U.S. 556. In the Swift case, Mr. Justice Cardozo put the matter thus, at 114:
>
> > "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed

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[4] Circumstances on the Reservation have changed since the entry of the Decree. For example, more than 750 tribal members live on the Reservation, as compared to about 500 at the time of trial, and the current tribal roll recognizes over 1,300 people as tribal members. The Tribe is prepared to develop additional acreage beyond that now under irrigation, provided a reliable water supply is available. Circumstances have changed upstream as well. In United States v. Walker River Irrig. Dist., 11 F. Supp. at 164, the district court concluded that "the river had been fully appropriated." In the intervening years, the upstream users have gained access to additional water supplies which have permitted the development of new land. In short, the situation on the River appears to have changed considerably since 1939.

> conditions though it was entered by consent. . . . Power to modify the decree was reserved by its very terms . . . .

System Fed'n No. 91 v. Wright, 364 U.S. at 646-47.

Recently, the Supreme Court has noted that modifications to final decrees involving Indian water rights may be appropriate when there is an "unforeseeable change in circumstances." Arizona v. California, 373 U.S. 546 (1963), Decree, 376 U.S. 340 (1964), Supplemental Decree, 439 U.S. 419 (1979), 460 U.S. 605, 625 (1983), Second Supplemental Decree, 466 U.S. 144 (1984).[5] And, in appropriation states, it is common for courts to retain jurisdiction over water adjudications in order to correct errors which subsequently become apparent. See, e.g., 6 ROBERT E. CLARK WATERS & WATER RIGHTS § 531.7 (1972). As stated by the Utah Supreme Court:

> The inherent power always exists in a Court of equity for devising new and more adequate remedies if the facts of the case justify such action, and does not conflict with the law. The equitable jurisdiction of the court is and should be flexible, elastic enough to meet changing conditions and problems. Particularly is this true when applied to water rights and water use. We subscribe to the rule that the use of water must not only be beneficial to the lands of the appropriators, but it must also be reasonable in relation to the reasonable requirements of subsequent appropriators, and the Court has the power to improve methods of conveying, measuring

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[5] The Court further stated "We note that our cases with similar reservations of jurisdiction involved equitable apportionment where our latitude to correct inequitable allocations injustices is at its broadest. . . . [O]ur retention of jurisdiction was limited to the consideration of new issues and change and changed circumstances." Arizona v. California, 460 U.S. at 625.

> and diverting water so as to assure the greatest possible use of the natural resource.

In Re Water Rights of Escalante Valley Drainage Area, 348 P.2d 679, 682 (Utah 1960) (footnote omitted).

The Tribe here seeks to use the procedures set forth in the Decree in this case which recognize the inherent authority of the Court to modify its Decree. There is no requirement that Rule 15 be utilized in such circumstances.

2. **Rule 15(a) and 15(d) of the Federal Rules of Civil Procedure are not applicable in this instance.**

Fed. R. Civ. P. 15(a) and (d) allow parties to amend or supplement their pleadings. However, when a final judgment has been rendered as is the case here, courts have denied motions to amend or supplement complaints. In short, the District and Nevada seem to be directing the Tribe down a dead-end street in contending that the only way in which the tribal claims may be pursued is to amend the United States' initial complaint.

In Cooper v. Shumway, 780 F.2d 27 (10th Cir. 1985), the court explained "[a]s the district court correctly determined, once judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)." Id. at 29.

Other courts have held that, post decision, a party cannot amend a complaint. See Kaplan v. Ruggieri, 574 F. Supp. 631 (E.D.N.Y. 1983), aff'd 742 F.2d 1436 (2d Cir. 1984), cert. denied, 469 U.S. 835 (1984).

The underlying rational is that "[t]o hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." 6 WRIGHT, MILLER & KANE, supra, at § 1489 (1990).

3. **Conclusion.**

In accordance with well established principles, the Decree provides for its own modification pursuant to Article XIV. The invocation of the Court's retained authority does not require the use of the procedures set forth in Rule 15.

C. JOINDER OF PARTIES

1. **Introduction.**

WRID and Nevada also argue that the Tribe and the United States must join and hence serve (1) all those individuals who are successors in interest to the water rights recognized under the Decree and (2) all state water right holders on the Walker River. In addition, WRID argues that the transferees, if not joined, should be substituted for the original parties to this action. According to the District and Nevada, joinder of these parties is required under Fed. R. Civ. P. 19 and 25, with the result that the "new" parties must be served under Fed. R. Civ. P. 4.

In so contending, the District and Nevada ignore the fact that the Tribe seeks only to protect its interests under the umbrella of the Court's Decree -- not a declaration of its rights against all users on the River. In accomplishing that objective,

the Tribe has volunteered to comply with the procedures followed by the District with regard to the First Amended Petition. No more is required. This Court has extensive continuing jurisdiction over the waters of the Walker River, including the authority to determine how notice will be provided to the water right holders under the Decree in the event the Decree is modified.[6] Decree, art. XIV at 73. Because the Tribe seeks only to modify the Decree to reflect its additional entitlements, notice as directed by this Court is all that is required.[7] Certainly, there is no justification to impose a more stringent burden on the Tribe than was imposed on the District with regard to the First Amended Petition. Likewise, the Tribe is not

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[6] Changes to water rights under this decree have taken place on numerous occasions in the past. We are not aware of any instance in which those individuals seeking a change have been required to join additional parties. A clear example, is WRID's own request to change its point of diversion. WRID's proposed change has the potential to impact all water users of the Walker River.

[7] The Decree provides:

> The Court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user, . . .
>
> The Court shall hereafter make such regulations as to notice and form or substance of any applications for change or modification of this decree, or for change of place or manner of use of water as it may deem necessary.

Decree, art. XIII at 72-73.

required to join other water users on the River or to substitute holders of transferred water rights.

2. **The Tribe is not Required to "Join" Successors in Interest.**

The successors in interest to the original parties to the Walker River Decree have an affirmative duty to protect their decreed water rights. Indeed, the long standing practice in this Court has been to notify water right holders by published and posted notice.[8] Perhaps the best example of the manner in which notice has been provided in the past is the notice order for the First Amended Petition. At the request of WRID, the Court's continuing authority with regard to the administration of the Decree was invoked in response to the First Amended Petition. The Court directed:

> IT IS FURTHER ORDERED that within the same ten (10) day period, Mr. DePaoli shall also provide to the Court, . . . a proposed form of order for the giving of the notice. This order will provide for publication by one publication of the notice in each of the newspapers in Nevada and California where notices of annual budget have been published in the past. The order will also provide for posting at the same locations where publications of the annual budget have been posted in the last several years. The order shall provide for mailing of a copy of the notice to water users whose rights may be impacted by these proceedings in Lyon County, Nevada and in the Bridgeport, California areas. For the Antelope Valley water users, the notice will be mailed to the Antelope

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[8/]The Court recently invoked its authority pursuant to the Decree to provide for notice to be given for an application to change of point of diversion, manner of use or place of use. See Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Waters of the Walker River and Its Tributaries and Order of Appointment of California State Water Control Board as Special Master adopted April 9, 1990.

> Valley Mutual Water Company. The notice will also provide a copy of the notice mailed to those water users whose names appear on the records of the U. S. Board of Water Commissioners and the Walker River Irrigation District as holding water rights under the final Decree. . . ."

United States v. Walker River Irrig. Dist., Civil-N-C-125-ECR, Minutes of the Court dated January 3, 1992 at 2-3.[9]

The Tribe has offered to provide notice of its counterclaim to all current owners of water rights under the Walker River Decree in the same fashion as was directed with regard to the First Amended Petition.[10] Tribe's Proposed Order Requiring Notice of Filing of Answer to First Amended Petition, and Counterclaim and Cross-claim of the Walker River Paiute Tribe, filed March 17, 1992. There is no reason to distinguish the Tribe's claims from those of the District in the First Amended

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[9]The actual notice provided:

> Persons, entities or governmental agencies who are parties to this action or successors in interest to parties to this action may participate in the proceedings. . . . No default will be taken against any person, entity or governmental agency who is a party to this action or a successor in interest to a party to this action who does not so respond. However, the final outcome with respect to the First Claim for Relief may impact the manner in which the Walker River and its tributaries are operated under the Final Decree.

Notice of Filing and Schedule of Proceedings at ¶ 9. A similar notice by publication was provided to all other individuals not parties to or successors in interest to this adjudication. Id. at ¶ 10.

[10]Nev. Rev. Stat. § 533.360 only requires the state Engineer to publish notice prior to considering an application for water rights.

Petition so far as notice is concerned. As the District concedes, the outcome of its Petition -- whether as to Reservoir operations or change in diversion point -- has the potential to affect all water right holders on the River. See Notice of Filing and Schedule of Proceedings. Accordingly, the Tribe should not be held to any different standard.

3. Joinder of Transferees and State Water Rights Holders is not Required.

a. Introduction.

Nevada and the District are also wrong when they argue that Rule 19 requires joinder of all water users on the Walker River before proceeding with the tribal claims. For over 50 years this Court has had authority over changes and modification to the final decree. Throughout this period, it has never been required that all water users on the River be joined in the case. Rule 19 does not require a different result with regard to the Tribe's counterclaim.[11]

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[11] Rule 19(a) of the Federal Rules of Civil Procedure provides as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the

(continued...)

b. Complete Relief can be Granted to the Existing Parties.

Rule 19(a)(1) applies when non-joinder would prevent complete relief from being given to existing parties. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir.), cert. denied, 464 U.S. 849 (1983). WRID and Nevada misread Northrop and Rule 19(a), when they assert that "existing parties" means all persons who may have an interest in the litigation. See WRID's Points and Authorities at 15; and Nevada's Preliminary Threshold Motions dated August 3, 1992, at 5. Here complete relief can be achieved among the present parties to the case.

c. Transferees and State Water Rights Holders do not Claim an Interest "Related to the Subject of the Action."

Joinder under Rule 19(a)(2) may also be required where an absent person "claims an interest in the subject of the action." Whether a person claims such an "interest" necessarily turns on the particular facts of each case. Bosteve Ltd. v. Marauszwki, 110 F.R.D. 257, 260 (E.D.N.Y. 1986). WRID and Nevada have moved to join parties and therefore have the burden of establishing that joinder is necessary. Sierra Club v. Watt, 608 F. Supp. 305, 319-21 (E.D. Cal. 1985) (burden of persuasion rests upon party asserting necessity of joining absent parties).

[11/] (...continued)
substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed. R. Civ. P. 19(a).

The subject matter of this action is the decreed water rights of the Walker River. Specifically, the First Amended Petition raises the question of the extent to which the Control Board may affect the operation of the River; the Tribe's counterclaim addresses whether the Decree should be modified to provide for additional federal water rights of the Tribe at Weber Reservoir and for use on the lands restored to the Reservation. Since the rights of the state water right holders who are not parties to the Decree are not at issue, the absent persons have no interest in the subject matter of this action. See Hamilton v. MacDonald, 503 F.2d 1138, 1147 (9th Cir. 1974) (Creditors holding security interests in livestock grazing on land whose title was subject of action "have no interest in the land, and the rights of the parties to the land can be determined, and complete relief accorded them, in the absence of the secured parties."); Walton v. United States, 415 F.2d 121, 124 (10th Cir. 1969) (Owners of land "similarly situated" as lands which were the subject of a quiet title action by the United States but who had no interest in the "specific property" in litigation are not necessary parties).

WRID and Nevada argue that joinder of all users of the waters of the Walker River and its tributaries is required in order to avoid possible harm that may result to such individuals. See Nevada's Preliminary Threshold Motions at 5; and WRID's Points and Authorities at 16 and 17.[12] Although actual harm

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[12/] WRID contends that non-party water right holders are sufficiently close to the present parties to this adjudica- (continued...)

need not be shown to require joinder, "hypothetical interest" based on "[s]peculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties . . . ." Northrop Corp., 705 F.2d at 1046.

WRID's and Nevada's arguments about harm to non-parties ignore the history of the River and its administration. When the Walker River Decree was entered in 1936 the parties to the Decree assumed that the waters of the Walker River had been fully appropriated. Yet in the intervening period, both California and Nevada have apparently issued state permitted water rights. The existence of the Decree did not hinder these activities and, there has never been a comprehensive integration of the state-permitted rights with the Decree. As a result, joinder is not required.

d. The Possibility of Future Litigation does not Require Joinder.

WRID and Nevada also argue that Rule 19(a)(ii) requires the joinder of all water users because WRID and Nevada, who are already parties to this suit, may be subject to inconsistent obligations. It is unclear how a determination of additional water rights for the Tribe would result in the District and Nevada being subject to inconsistent obligations. The mere possibility of such future litigation by absent parties does not make them necessary parties. See Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1255 (9th Cir. 1983), cert. denied, 465

[12/] (...continued)
tion that the non-parties may be precluded from relitigating issues decided in this proceeding.

U.S. 1049 (1984) (The State of Washington is not a necessary party to a quiet title action brought by an Indian Tribe to the abandoned bed of a navigable river "even though the State might in the future challenge the title of the Tribe or the Port to the riverbed.").

e. Conclusion.

To conclude, WRID and Nevada have failed to carry their burden as to the joinder of absent transferees and of state water right holders. Therefore, WRID and Nevada's motions to join should be denied.

IV. CONCLUSION

For all the reasons stated above, the preliminary threshold motions of Nevada and WRID should be denied and the Tribe should be allowed to proceed with its counterclaim after providing notice in the fashion set forth in the Tribe's proposed order.

Dated: Sept. 10, 1992

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of the foregoing Response of the Walker River Paiute Tribe to the Walker River Irrigation District's and the State of Nevada's Preliminary Threshold Motions, via U.S. Mail or overnight carrier if so designated, all charges prepaid thereon, this 11 day of September 1992, addressed to:

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