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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.

WALKER RIVER IRRIGATION DISTRICT,
Petitioner,
STATE OF NEVADA,
Petitioner-Intervenor,
vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, W. DON MAUGHAN,
ELISEO M. SAMANIEGO, JOHN CAFFREY,
MARC DEL PIERO AND JAMES M. STUBCHAER,
Members of the California State Water
Resources Control Board,
Respondents,
CALIFORNIA TROUT, INC.,
Respondent-Intervenor.

In Equity C-125
Subfile C-125B

POINTS AND
AUTHORITIES OF THE
UNITED STATES IN
RESPONSE TO
OPPOSITION BY THE
WALKER RIVER
IRRIGATION DISTRICT
AND STATE OF NEVADA
TO COUNTERCLAIMS
FILED BY THE UNITED
STATES

12

PROCEDURAL BACKGROUND

1
2 On January 9, 1991, the Walker River Irrigation District
3 ("Irrigation District") filed a Petition for Declaratory and
4 Injunctive Relief and Request for Order to Show Cause; Or, in
5 the Alternative, to Change the Point of Diversion to Storage of
6 Water From California to Nevada (C-125, #186). Two days later,
7 by Minute Order dated January 11, 1991, the court noted that the
8 Petition did not reflect a Certificate of Service on all counsel
9 in the matter and, therefore, ordered that no action be taken
10 "until an appropriate Certificate of Service has been filed."

11 On May 14, 1991, the Irrigation District moved the court for
12 an Order setting a scheduling and planning conference in the
13 matter. The planning conference was held on January 3, 1992. At
14 the scheduling and planning conference counsel for the Irrigation
15 District moved for leave to file its First Amended Petition.¹
16 The court ordered "that within ten (10) days from this date
17 Petitioners will make service of the First Amended Petition and
18 file proof thereof with the Clerk." The order also bifurcated
19 the proceedings so that the First Claim for Relief (declaratory
20 and injunctive relief) would initially be considered by the court
21 with no further proceedings in relation to the Second Claim for
22 Relief (alternative petition to change point of diversion) except
23 upon the further order of the court.

24
25 ¹In the course of the scheduling and planning conference,
26 the court created a new sub-file (#C-125A) in connection with the
27 First Amended Petition of the Irrigation District.

1 The First Amended Petition was served upon the United
2 States, as reflected by the certificate of service by mail, on
3 January 3, 1992.

4 By Order dated January 15, 1992, the court ordered that the
5 Irrigation District "shall give notice of the filing and schedule
6 of proceedings concerning the Walker River Irrigation District's
7 First Amended Petition for Declaratory and Injunctive Relief and
8 Request for Order to Show Cause; Or, in the Alternative, to
9 Change the Point of Diversion to Storage of Water from California
10 to Nevada" in the manner set forth in the court's Order of
11 January 15, 1992. The court's Order required that notice: (a) be
12 posted in several locations; (b) be published for one week in
13 three different newspapers; (c) be mailed to each owner of water
14 rights adjudicated by the final decree in this action as shown by
15 the current assessment records of the United States Board of
16 Water Commissioners; (d) be mailed to the Antelope Valley Mutual
17 Water Company; (e) be mailed to counsel for the United States,
18 and (f) be mailed to counsel for California Trout, Inc. (C-125A
19 #11).

20 No service of process under Rule 4 of the Federal Rules of
21 Civil Procedure was required in connection with the Irrigation
22 District's First Amended Petition.

23 On March 17, 1992, the Tribe filed its Answer to the First
24 Amended Petition and also filed a Counterclaim and Cross-Claim.
25 The Tribe also filed on the same date a Motion for an Order for
26 Notice of Proceedings relating to the Tribe's Answer and its

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1 Counterclaim and Cross-Claim. The Tribe, in the Motion, stated
2 that the Counterclaim and Cross-Claim affect all water users on
3 the Walker River and its tributaries.

4 The proposed Order for Notice by the Tribe essentially
5 provided for notice in the same manner employed by the Irrigation
6 District and approved by the court in connection with the
7 Irrigation District's First Amended Petition.

8 The Tribe also filed, on March 17, 1992, a Motion for a
9 schedule and planning conference in connection with the Tribe's
10 Counterclaim and Cross-Claim. The United States, on March 17,
11 1992, filed its Answer to the First Claim for Relief of the First
12 Amended Petition, but, at that time, did not file a Counterclaim
13 or a Cross-Claim because the matter was still under consideration
14 within the federal government.

15 The scheduling and planning conference requested by the
16 Tribe was held on May 18, 1992. In the course of the conference,
17 the court ordered the United States to indicate its position with
18 respect to the Cross-Claim and Counterclaim of the Tribe by way
19 of an appropriate Motion (C-125A #34). The decision by the
20 United States to align itself with the Tribe was thereafter made
21 and the United States moved for leave to file a Counterclaim and
22 Cross-Claim, essentially requesting the same relief set forth by
23 the Tribe in its Counterclaim and Cross-Claim.

24 The United States now responds to Nevada and the Irrigation
25 District, who are the only parties served to date who have
26 opposed the Counterclaims filed by the Tribe and proposed by the

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1 United States, which are hereafter collectively referred to as
2 "Counterclaims."

3 ARGUMENT

4 I.

5 THE COUNTERCLAIMS FILED BY THE TRIBE AND THE
6 UNITED STATES ARE EITHER COMPULSORY
7 COUNTERCLAIMS, UNDER RULE 13(a), OR
8 PERMISSIVE COUNTERCLAIMS, UNDER RULE 13(b),
9 AND SHOULD NOT BE DISMISSED

10 The Irrigation District and Nevada have moved this court for
11 an Order dismissing, without prejudice, the Counterclaims filed
12 by the Tribe and the United States.

13 Nevada has adopted and incorporated the arguments contained
14 in the Irrigation District's Points and Authorities supporting
15 its Motion to Dismiss. Both argue that the Counterclaims should
16 be dismissed because the Counterclaims are not against an
17 opposing party.

18 The Irrigation District and Nevada rely on an extremely
19 narrow and rather mechanical interpretation of "opposing party"
20 as that term is used in Rule 13 of the Federal Rules of Civil
21 Procedure. Both maintain that the Counterclaims, in the context
22 of the Irrigation District's First Amended Petition, are not
23 against an opposing party.

24 This case has been going on since 1924. The United States
25 is plaintiff and the Irrigation District is a defendant. The
26 Tribe is a plaintiff-intervenor. Nevada intervened and has
27 aligned itself with the Irrigation District. The United States
28 and the Irrigation District have been opposing parties since the

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1 inception of the case. See United States v. Walker River
2 Irrigation District, 11 F.Supp 158 (D. Nev. 1935); United States
3 v. Walker River Irrigation District, 14 F. Supp. 11 (D. Nev.
4 1936); United States v. Walker River Irrigation District, 104
5 F.2d 334 (9th Cir. 1939); United States v. Walker River
6 Irrigation District, 15 ILR 3083 (D. Nev. 1988); United States v.
7 Walker River Irrigation District, C-125, Order of February 13,
8 1990) (C-125,#162). To maintain that the Irrigation District is
9 not an opposing party in this case, vis-a-vis the United States
10 and the Tribe, simply ignores reality.

11 The subject matter of this case is water, a scarce commodity
12 in the arid West that is commonly fought over in cases like this
13 one. In its First Amended Petition, the Irrigation District
14 seeks a modification of the Decree, entered in this case in 1936,
15 by changing the place of diversion of water, presently stored in
16 reservoirs in California, to an undisclosed place in Nevada. In
17 their Counterclaims, the United States and the Tribe seek a
18 modification of the same Decree by confirming a storage right in
19 a reservoir located on the Reservation, and also confirming a
20 water right for lands restored to the Reservation after the
21 effective date of the Decree. Given the long history and
22 particular circumstances of this case, it is difficult, if not
23 impossible, to imagine that the parties in this case are not
24 "opposing parties."

25 Rule 13 provides for the filing of counterclaims and cross-
26 claims. Rule 13(a) addresses compulsory counterclaims and Rule

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1 13(b) addresses permissive counterclaims. When the Irrigation
2 District filed its First Amended Petition, the Tribe and the
3 United States were faced with the prospect of either filing
4 Counterclaims at that time, or face serious challenges later by
5 the Irrigation District, and others, that they were required to
6 file their Counterclaims as a result of the First Amended
7 Petition filed by the Irrigation District. Compulsory
8 counterclaims become unenforceable in federal court if a pleader
9 fails to assert them. See 6A Wright & Miller, Federal Practice
10 and Procedure, §1507, p. 199.

11 Rule 13(a), in pertinent part, provides that a pleading
12 shall state as a Counterclaim any claim which at the time of
13 serving the pleading, the pleader has against any opposing party,
14 if it arises out of the transaction or occurrence that is the
15 subject matter of the opposing party's claim. Had the Tribe and
16 the United States not filed Counterclaims, any efforts by the
17 Tribe or the United States subsequently to obtain the relief now
18 requested in the Counterclaims would be met with the arguments
19 that the Counterclaims were compulsory and had to be filed at the
20 time the Irrigation District served the First Amended Petition on
21 the United States and the Tribe.

22 For purposes of this case, in the context of Rule 13(a), the
23 "transaction or occurrence that is the subject matter of the
24 opposing party's claim" is the relief requested in the Irrigation
25 District's First Amended Petition. That Petition includes a
26 claim for relief requesting this court to modify the Decree,

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1 which modification would allow the Irrigation District to change
2 the place of storage of vast quantities of water from Topaz and
3 Bridgeport Reservoirs, located in California, to an undisclosed
4 place in the State of Nevada. Any such modification of the
5 Decree clearly has the potential to injure the water rights
6 presently decreed to the United States for the benefit of the
7 Tribe, as well as the water rights which the United States and
8 the Tribe seek to confirm in the Counterclaims under
9 consideration.

10 The Irrigation District and Nevada conveniently avoid this
11 potential injury, brought on by the filing of the First Amended
12 Petition, by emphasizing the First Claim for Relief requesting
13 injunctive relief against the California Board, and ignoring the
14 Second Claim for Relief which has the potential to significantly
15 impact many water users on the Walker River, including the Tribe.

16 Rule 13(b) allows permissive counterclaims. Assuming
17 arguendo that the Counterclaims do not arise out of the
18 transaction or occurrence that is the subject matter of the
19 Irrigation District's claims, there is no question that the
20 United States and the Tribe, under Rule 13(b), are entitled to
21 file permissive counterclaims.

22 Rule 13(b) provides that "a pleading may state, as a
23 counterclaim, any claim against an opposing party not arising out
24 of the transaction or occurrence that is the subject matter of
25 the opposing party's claim." (Emphasis added.) Both the
26 Irrigation District and Nevada avoid any consideration of Rule

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1 13(b) in their Points and Authorities in support of their motion
2 to dismiss. The reason is obvious: there is no legitimate basis
3 upon which the United States and the Tribe should be denied the
4 right to proceed with the Counterclaims under 13(b). Permissive
5 counterclaims, by definition, are ones which do not arise out of
6 the transaction or occurrence that is the subject matter of the
7 opposing party's claim.

8 Although the Irrigation District and Nevada maintain that
9 the Tribe and the United States are not opposing parties, the
10 court essentially recognized that they are opposing parties when
11 the court ordered service of the First Amended Petition of the
12 Irrigation District to be served upon the United States and the
13 Tribe, as well as other parties. When the Irrigation District
14 first submitted the original Petition on January 9, 1991 (C-125
15 #186), the court ordered that no action be taken until "an
16 appropriate Certificate of Service has been filed." (Order of
17 the court dated January 11, 1991.) Ultimately, service of the
18 First Amended Petition was required by the court to be made upon
19 the United States and the Tribe for the simple reason that they
20 are opposing parties.

21 II.

22 THE STRAINED CONSTRUCTION OF THE TERM
23 "OPPOSING PARTY" THAT THE IRRIGATION DISTRICT
24 AND NEVADA URGE THIS COURT TO ADOPT IS
CONTRARY TO THE SPIRIT AND PURPOSE OF THE
FEDERAL RULES OF CIVIL PROCEDURE

25 Rule 1 of the Federal Rules of Civil Procedure provides that
26 the rules "shall be construed to secure the just, speedy, and

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1 inexpensive determination of every action." This mandate, "is
2 only one of a number of similar admonitions to the bench and bar
3 scattered throughout the rules directing that the rules be
4 interpreted liberally in order that the procedural framework in
5 which litigation is conducted promotes the ends of justice and
6 facilitates decisions on the merits, rather than determinations
7 on technicalities." 4 Wright & Miller, Federal Practice and
8 Procedure, §1029, p. 119. The interpretation of "opposing party"
9 urged upon the court by the Irrigation District and Nevada is
10 clearly not a construction designed to secure this just, speedy
11 and inexpensive determination of the matters presently before the
12 court. The Irrigation District and Nevada would have the Tribe
13 and the United States file an amended or supplemental pleading
14 under Rule 15. This approach, however, is impractical and
15 contrary to the spirit and purpose of the Federal Rules of Civil
16 Procedure.

17 To begin with, the Tribe was not a party when the original
18 Complaint was filed in 1924. The Tribe cannot amend or
19 supplement pleadings that the Tribe never filed in the first
20 instance. Moreover, the original complaint in this case (which,
21 incidentally, was amended back at the time the original
22 proceedings took place) was heard long ago and resulted in the
23 entry of a Decree in 1936. As noted in 6 Wright & Miller,
24 Federal Practice and Procedure, §1473, p. 521, "an amended
25 pleading, whether prepared with or without leave of court, only
26 should relate to matters that have taken place prior to the date

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1 of the earlier pleading." (Emphasis added.) Here, the United
2 States and the Tribe seek confirmation of water rights based on
3 events that occurred subsequent -- not prior to -- the date of
4 the original pleadings. Moreover, Paragraph XII of the Decree
5 was amended, following an appeal to the Ninth Circuit, to
6 specifically provide that the Decree only determined water rights
7 "as of the 14th day of April, 1936." See Order for Entry of
8 Amended Final Decree to Conform to Writ Of Mandate, Etc., dated
9 April 24, 1940, In Equity, C-125. It is unrealistic to
10 require the United States to amend the Complaint originally filed
11 in 1924 when the modern version of the Federal Rules of Civil
12 Procedure freely allow a pleader to file, as a counterclaim, any
13 claim which the pleader has against any opposing party at the
14 time a pleading is served on him or her. 6 Moore's Federal
15 Practice, §13.05, at p. 25.

16 As noted in 6 Wright & Miller, Federal Practice and
17 Procedure, §1420, p. 159:

18 The well-supported current view is that Rule
19 13(b) operates to remove the past
20 restrictions on unrelated counterclaims and
21 to allow the broadest possible joinder of
22 permissive counterclaims.

23 Moreover, as noted in 3 Moore's Federal Practice, §13.06[1], at
24 pp. 28-29:

25 [R]ecent cases indicate the court should not
26 interpret 'opposing party' mechanically but
27 should interpret it liberally and
28 realistically, so as to allow the joinder of
all related claims and prevent multiplicity
of suits.

See also, Crozley Corporation v. Hazeltine Corp., 122 F.2d 925,

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1 930 (3rd Cir. 1941). The court should reject the interpretation
2 of "opposing party" advanced by Nevada and the Irrigation
3 District. Under Paragraph XIV of the Decree, the court has
4 retained jurisdiction to modify the Decree. Rather than dwell on
5 technical arguments about amending or supplementing original
6 pleadings, the court should simply permit the Counterclaims to go
7 forward in the interest of judicial economy.

8 III.

9 THE COURT SHOULD NOT REQUIRE THE TRIBE AND
10 THE UNITED STATES TO OBTAIN SERVICE ON THEIR
11 COUNTERCLAIMS BY A METHOD ANY DIFFERENT THAN
12 THE METHOD OF SERVICE ALREADY APPROVED BY THE
13 COURT FOR THE SERVICE OF THE IRRIGATION
14 DISTRICT'S FIRST AMENDED PETITION

15 Paragraph XIV of the Decree entered in these proceedings
16 provides, in pertinent part, that

17 The Court retains jurisdiction of this cause for . . .
18 modifying this Decree

19 ****

20 The Court shall hereafter make such regulations as to
21 notice and form or substance of any applications for
22 change or modification of this Decree

23 It is under the authority of this paragraph of the Decree that
24 the Irrigation District filed its First Amended Petition seeking
25 declaratory and injunctive relief as well as the alternative
26 relief requesting a change in the point of diversion for storage
27 of water out of Bridgeport and Topaz reservoirs in California to
28 an undisclosed place of storage in Nevada.

Paragraph XIV of the Decree is also the authority under
which the United States and the Tribe seek the relief they

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1 request in the Counterclaims opposed by the Irrigation District
2 and Nevada.

3 When the Irrigation District filed its First Amended
4 Petition it was necessary for the court to determine the scope of
5 the notice, and, therefore, service that would be required. The
6 notice employed was essentially one of publication, mailing and
7 posting, without any requirement that notice be accomplished by
8 service of process under Rule 4 of the Federal Rules of Civil
9 Procedure. The United States and the Tribe, in their respective
10 Counterclaims, recognized that the relief requested may impact
11 other water users on the Walker River system. Likewise, the
12 relief requested by the Irrigation District to modify the Decree
13 by changing the point of diversion of water now stored in
14 Bridgeport Reservoir and Topaz Reservoir in California to an
15 undisclosed location in Nevada, will undoubtedly impact the water
16 users of the Walker River system. In spite of this, the
17 Irrigation District and Nevada do not insist on service of
18 process under Rule 4 for the modification of the Decree sought by
19 the Irrigation District, but adamantly insist that the United
20 States and the Tribe must serve all water users on the Walker
21 River system with process under Rule 4 in connection with their
22 Counterclaims.

23 There is an aura of fundamental unfairness which hangs over
24 the proceedings in this case where the Irrigation District is
25 permitted to provide notice of its efforts to modify the Decree
26

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1 through publication, posting and mailing, while the Tribe and the
2 United States would be required to comply with the more onerous
3 burdens of Rule 4 in their request to modify the Decree.

4 The fundamental unfairness is no less simply because the
5 Irrigation District only wishes to proceed with its First Claim
6 for Relief against the California Board at the present time. The
7 fact is, the notice of the Second Claim for Relief of the
8 Irrigation District's First Amended Petition, to change the
9 location of storage from California to an undisclosed place in
10 Nevada, is on file with the court. Moreover, the notice to water
11 users for that relief -- even though presently stayed -- has been
12 approved and accomplished through publication, posting and
13 mailing, rather than service of process under Rule 4. The method
14 of service approved by the court for the Irrigation District's
15 First Amended Petition was apparently deemed to be reasonably
16 calculated to apprise parties of both claims for relief set forth
17 in the First Amended Petition, even though that service did not
18 include service of process under Rule 4. Presumably, the method
19 of service employed by the Irrigation District meets the
20 requirements of due process, and, if so, there seems to be no
21 legitimate reason to require the United States and the Tribe to
22 obtain service any differently. Cf. Mullane v. Central Hanover
23 Bank and Trust Co., 339 U.S. 306 (1950); Tulsa Prof. Collection
24 Services v. Pope, 485 U.S. 478 (1988); In Re Rights to Use Waters
25 of Yakima River, 674 P.2d 1960 (Wash. 1983); 2 Water and Water
26 Rights §15.02(c) 1991 Ed., The Michie Co.

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1 This case involves a controversy over water that has been
 2 ongoing since 1924. A decree has been entered. Paragraph XIV of
 3 the Decree specifically provides that the court retains
 4 jurisdiction over these proceedings for purposes of modifying the
 5 Decree and, also, to regulate the "notice and form or substance
 6 of any applications for change or modification" of the Decree.
 7 The court has permitted the Irrigation District to provide notice
 8 for its requested modification of the Decree through publication,
 9 posting and mailing. The United States and the Tribe are simply
 10 requesting equal treatment in their requests for modification of
 11 the Decree insofar as any notice is required.²

12 // // // // //
 13 // // // // //
 14 // // // // //
 15 // // // // //
 16 // // // // //
 17 // // // // //

19 ²We note that in the State of Nevada, if a person desires to
 20 obtain a new water right, the notice provisions of the
 21 application process do not require actual service of process on
 22 other water users along a river system. In Nevada if a person
 23 wants to apply for a new water right, the notice provisions in
 24 the application process only require the applicant to file an
 25 application in proper form which is then sent to publication in a
 26 newspaper of general circulation in the county where the point of
 diversion is located. NRS §533.360 requires the application to
 be published once a week for four consecutive weeks. There is no
 actual service of process required on any other existing water
 users. California has similar notice provisions which require
 publication, posting and mailing, but do not require actual
 service of process on other existing water users. Cf. California
Water Code, §§1310-1324.

CONCLUSION

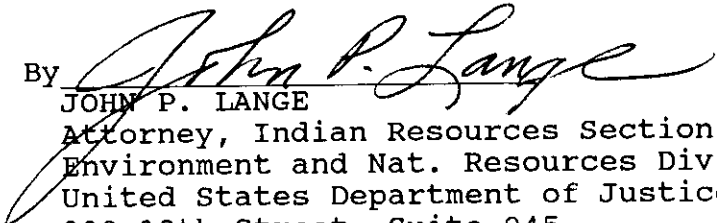
The court should permit the filing of the Counterclaims because justice so requires.

DATED this 10th day of September, 1992.

Respectfully submitted,

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BY


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CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 1992, served a true copy of the foregoing POINTS AND AUTHORITIES OF THE UNITED STATES IN RESPONSE TO OPPOSITION BY THE WALKER RIVER IRRIGATION DISTRICT AND STATE OF NEVADA TO COUNTERCLAIMS FILED BY THE UNITED STATES by placing same in the U. S. mails, postage prepaid, addressed as follows:

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