CAROL C. FITZGERALD
CLERK
BY
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Douglas N. Frazier
United States Attorney
300 Booth Street, Room 2032
Reno, Nevada 89509
Telephone: 702 784-5439

John P. Lange
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
999 18th Street, Suite 945
Denver, Colorado 80202
Telephone: 303 294-1900

Attorneys for the United States of America

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

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PROCEDURAL BACKGROUND

On January 9, 1991, the Walker River Irrigation District ("Irrigation District") filed a 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 (C-125, #186). Two days later, by Minute Order dated January 11, 1991, the court noted that the Petition did not reflect a Certificate of Service on all counsel in the matter and, therefore, ordered that no action be taken "until an appropriate Certificate of Service has been filed."

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

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

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

By Order dated January 15, 1992, the court ordered that the Irrigation District "shall give notice of the filing and schedule of proceedings concerning the Walker River Irrigation District's 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" in the manner set forth in the court's Order of January 15, 1992. The court's Order required that notice: (a) be posted in several locations; (b) be published for one week in three different newspapers; (c) be mailed to each owner of water rights adjudicated by the final decree in this action as shown by the current assessment records of the United States Board of Water Commissioners; (d) be mailed to the Antelope Valley Mutual Water Company; (e) be mailed to counsel for the United States, and (f) be mailed to counsel for California Trout, Inc. (C-125A #11).

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

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

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

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

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

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

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

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

ARGUMENT

I.

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

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

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

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

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

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

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

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

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

Rule 13(a), in pertinent part, provides that 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. Had the Tribe and the United States not filed Counterclaims, any efforts by the Tribe or the United States subsequently to obtain the relief now requested in the Counterclaims would be met with the arguments that the Counterclaims were compulsory and had to be filed at the time the Irrigation District served the First Amended Petition on the United States and the Tribe.

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

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

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

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

Rule 13(b) provides that "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." (Emphasis added.) Both the Irrigation District and Nevada avoid any consideration of Rule

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

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

II.

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

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

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

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

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

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

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

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

> [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 multiplicity of suits.

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

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

III.

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

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

> The Court retains jurisdiction of this cause for . . . modifying this Decree . . . .
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> ****
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> The Court shall hereafter make such regulations as to notice and form or substance of any applications for change or modification of this Decree . . . .

It is under the authority of this paragraph of the Decree that the Irrigation District filed its First Amended Petition seeking declaratory and injunctive relief as well as the alternative relief requesting a change in the point of diversion for storage of water out of Bridgeport and Topaz reservoirs in California to 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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request in the Counterclaims opposed by the Irrigation District and Nevada.

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

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

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

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

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

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[2]We note that in the State of Nevada, if a person desires to obtain a new water right, the notice provisions of the application process do not require actual service of process on other water users along a river system. In Nevada if a person wants to apply for a new water right, the notice provisions in the application process only require the applicant to file an application in proper form which is then sent to publication in a 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.

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CONCLUSION

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

DATED this 10th day of September, 1992.

Respectfully submitted,

DOUGLAS N. FRAZIER
United States Attorney

By JOHN P. LANGE
Attorney, Indian Resources Section
Environment and Nat. Resources Div.
United States Department of Justice
999 18th Street, Suite 945
Denver, Colorado 80202

Telephone: (303) 294-1900

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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:

Shirley A. Smith, Esq.
Asst. U. S. Attorney
300 Booth Street, Room 2031
Reno, NV 89509

Larry C. Reynolds, Esq.
Deputy Attorney General
State Engineer's Office
123 West Nye Lane
Carson City, NV 89710

Jim Weishaupt
Walker River Irrigation District
P. O. Box 820
Yerington, NV 89447

James T. Markle
State Water Res. Control Bd.
P. O. Box 100
Sacramento, CA 94814

John Kramer
Department of Water Resources
1416 Ninth Street
Sacramento, CA 94814

Richard E. Olson, Jr.
Classen and Olson
P. O. Box 2101
Carson City, NV 89702

Ross E. De Lipkau
P. O. Box 2790
Reno, NV 89505

Gary Stone
290 South Arlington
Reno, NV 89510

Gordon H. DePaoli, Esq.
Woodburn, Wedge & Jeppson
P. O. Box 2311
Reno, NV 89505

Richard R. Greenfield, Esq.
Field Solicitor's Office
Department of the Interior
Two N. Central Ave., Suite 500
Phoenix, AZ 85004

Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, CA 89706

R. Michael Turnipseed, P.E.
Division of Water Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

Scott McElroy, Esq.
Jeff J. Davis, Esq.
Greene, Meyer & McElroy
1007 Pearl Street, No. 240
Boulder, CO 80302

John Davis, Esq.
P. O. Box 1646
Tonopah, NV 89049

Rodger Johnson
Water Resources Control Bd.
State of California
P. O. Box 2000
Sacramento, CA 95810

James W. Johnson, Jr.
1600 W. Holcomb Lane
Reno, NV 89511-9440

Roger Bezayiff
Chief Dep. Water Commissioner
U.S. Bd. Water Commissioners
P. O. Box 853
Yerington, NV 89447

Linda A. Bowman, Esq.
Vargas & Bartlett
201 W. Liberty St., Suite 300
P. O. Box 281
Reno, NV 89504

Mary Hackenbracht, Esq.
Department of Justice
State of California
2101 Webster St., 12th Floor
Oakland, CA 94612-3049

Margaret Ann Twedt, Esq.
Deputy Attorney General
State of Nevada
Division of Water Resources
Capitol Complex
123 Nye Lane
Carson City, Nevada 89710

George N. Benesch, Esq.
Benesch & Fermole
427 Ridge Street
Post Office Box 3197
Reno, Nevada 89505

Matthew R. Campbell, Esq.
David E. Moser, Esq.
McCutchen, Doyle, Brown & Enerson
3 Embarcadero Center
San Francisco, CA 94111

Deirdre Hills