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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

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.<sup>1</sup> 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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<sup>1</sup>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.

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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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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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  
 to allow the broadest possible joinder of  
 permissive counterclaims.

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

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

25 See also, Crozley Corporation v. Hazeltine Corp., 122 F.2d 925,  
 26

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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.<sup>2</sup>

12        / / / / / /

13        / / / / / /

14        / / / / / /

15        / / / / / /

16        / / / / / /

17        / / / / / /

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18  
 19        <sup>2</sup>We 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.

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CONCLUSION

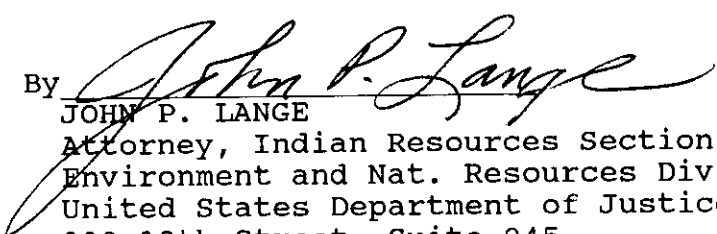
The court should permit the filing of the Counterclaims because justice so requires.

DATED this 10th day of September, 1992.

Respectfully submitted,

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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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