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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

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

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I. THE COUNTERCLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE

A. Introduction.

Most of the facts relevant to the disposition of the Motion to Dismiss are set forth in the Irrigation District's initial points and authorities. However, some additional facts are pertinent to the contentions raised by the Tribe and the United States.

First, the First Amended Petition is an ancillary proceeding in which the only named parties are the Irrigation District and the California respondents. It was brought to obtain a determination as to whether the orders issued by the California respondents were contrary to, inconsistent with and interfere with the Final Decree of this Court in the main action. Process was issued and served on the named California Respondents.

The alternative second claim for relief seeks to change the point of diversion to storage of Irrigation District water released from its Reservoirs to satisfy required instream flow requirements. The sole reason for that alternative claim is that the Court adopted Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of the Waters of the Walker River and its Tributaries (the "Rules and Regulations") do not prescribe a procedure to be followed for changing the point of diversion from one state to another. This alternative claim has been stayed. If it proceeds, it will

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proceed as a part of the main action pursuant to paragraph X of the Final Decree.[1]

Second, in separate reports to this Court dated May 12, 1992, both the Tribe and the United States stated that "the Tribe's Counterclaim . . . should proceed separately from the First Amended Petition." They represented that they would not even have sufficient data with respect to the Counterclaim until after the "1995 field season." See, Report of United States at pgs. 3-4; Report of Walker River Paiute Tribe at pgs. 3-4. In its scheduling and planning order of May 18, 1992, this Court ordered that the Tribe's Counterclaim "proceed on a separate track" from the First Amended Petition. See, May 18, 1992, Minutes of Court at pg. 1.

B. The Fact That The Irrigation District And The United States And The Tribe May Have Been Adverse Parties In The Main Action Does Not Make Them Opposing Parties With Respect To The First Amended Petition Within The Meaning Of Rule 13.

Admittedly, in the main action the United States and the Tribe are aligned as plaintiffs and the Irrigation District is one of many named defendants. Throughout those proceedings those parties have been adverse. However, that adversity does not make them "opposing parties" under Rule 13 with respect to an ancillary proceeding to enforce the provisions of the Final Decree. The Tribe and the United States are not named as respondents in this ancillary proceeding.

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[1] Paragraph X of the Final Decree allows parties to "change the manner, means, place or purpose of use or the point of diversion" of their water rights "so far as they may do so without injury to the rights of other parties."

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The Tribe and the United States have not supported their position that they are opposing parties to the Irrigation District in this context and they wholly ignore the authorities relied upon by Nevada and the Irrigation District. Their failure to cite supporting authority and their disregard of Nevada's and the Irrigation District's authority arise out of necessity. Their position is without support.

The concept of a counterclaim presupposes a claim asserted against the person asserting a counterclaim. See, e.g., Augustin v. Mughal, 521 F.2d 1215, 1216 (8th Cir. 1975); United States v. Timber Access Industries Co., 54 F.R.D. 36, 39-40 (D. Or. 1971); see also, Irrigation District's Points and Authorities filed herein August 3, 1992 at pgs. 8-10 and cases cited therein. The language of Rule 13 requires that there be a claim against the party asserting the counterclaim.

Moreover, in the main action the United States and Tribe are plaintiffs. In order for a plaintiff to properly assert a counterclaim, the defendant must have first asserted a counterclaim against the plaintiff. Otherwise the proper procedure is to amend the complaint. See, Bethlehem Fabricators, Inc. v. John Bowen Co., 1 F.R.D. 274 (D. Mass. 1940); Warren v. Indian Refining Co., 30 F.Supp. 281 (D. Ind. 1939).

The Tribe and the United States and the Irrigation District are not "opposing parties" as contemplated by Rule 13 because the Irrigation District has not asserted a claim against them. As plaintiffs in the main action, the United States and the

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Tribe could only assert a counterclaim if the Irrigation District had first asserted a counterclaim against them.

The Irrigation District's alternative claim for relief, which has been severed and stayed, does not state a "claim" against the United States and the Tribe in a way which affords a basis for a "counterclaim." That portion of the Irrigation District's First Amended Petition is only before the Court because of an omission in the Rules and Regulations. How, it will ultimately proceed remains to be seen.

The procedure for change applications in this Court's Rules and Regulations and before the relevant state agencies do not contemplate "counterclaims" by protestants. The fact that a change application cannot injure the water rights of others does not mean that one seeking to change an existing and recognized water right has asserted a "claim" against every other water right holder on the system, thus requiring those water right holders to assert "compulsory" counterclaims and allowing them to assert "permissive" counterclaims against that party.

The notion that Rule 13 should become a part of the change procedures before this Court and under its Rules and Regulations should be rejected. Engrafting the counterclaim provisions of Rule 13 onto those change procedures will lead to unnecessary litigation in connection with change applications and could wholly emasculate the procedures which this Court has taken great care to develop in order to facilitate the orderly, speedy and economic processing of change applications.

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C. The Claims Which The United States And The Tribe Propose To Assert In Their Counterclaims Are Not Compulsory Or Permissive Counterclaims Under Rule 13.

The assertion that the Tribe's and United States' claims are either "compulsory" or "permissive" within the meaning of Rule 13 misses the point. It is simply not necessary to consider whether their claims arise out of the "same transaction or occurrence"[2] and are compulsory or are merely permissive because both subsection (a) and (b) of Rule 13 require that counterclaims be stated against an "opposing party." Because the Irrigation District is not an opposing party to the United States and Tribe, they cannot assert a counterclaim whether that claim would under other circumstances be considered compulsory or permissive.

D. Policies Favoring The Liberal Construction Of The Federal Rules Do No Support Ignoring The Opposing Party Requirement Of Rule 13 In This Context.

The cases and authorities relied upon by the Tribe for a liberal interpretation of the "opposing party" requirement of Rule 13 are not applicable here. Those authorities involve a party suing in one capacity and then having a counterclaim asserted against that party in another capacity. In some situations, courts have allowed a counterclaim even though the counterclaim is asserted against the plaintiff in a capacity different from that in which the plaintiff brought the action. See, e.g., Klinzing v. Shakey's Inc., 49 F.R.D. 32, 34-35 (E.D. Wis. 1970); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975),

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[2] The fact that the Tribe and the United States stated that the Tribe's "Counterclaim" should proceed independent from the First Amended Petition is a clear statement on their part that it does not arise out of the same transaction or occurrence as does the First Amended Petition.

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cert. denied sub nom Aldens, Inc. v. Kane, 425 U.S. 943 (1976). Even in that situation, the cases are not uniform as to whether the counterclaim is actually one against an opposing party. See, United States v. Timber Access Industries Company, 54 F.R.D. 36, 39 (D. Or. 1971).

Like the Tribe, the United States relies upon 3 Moore's Federal Practice ¶13.06, at 28-29, and also upon Crosley Corporation v. Hazelton Corp., 122 F.2d 925, 930 (3rd Cir. 1941) to support its liberal construction position. The statement in Moore's Federal Practice is made in the context of cases considering whether counterclaims may be maintained against parties in a capacity different from that in which they brought suit. Those cases do not apply to the present situation because the question is not one of the capacity of the parties to the original claim but rather one of whether there is a claim pending against the Tribe and the United States such that a counterclaim, by definition, can be asserted.

Crosley did not involve counterclaims at all. There two parties had commenced numerous actions. The court held that between courts of concurrent jurisdiction, the first court which had the case should decide the entire matter. The court stated that the courts should not be called upon to duplicate each other's work. Crosley Corporation v. Hazelton Corp., 122 F.2d 925, 929-930 (3rd Cir. 1941).

Judicial economy does not support disregard of the requirements of Rule 13 here. To the contrary, the Tribe's and the United States' admission that the Tribe's counterclaim should

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proceed independent of the First Amended Petition and not until after the 1995 irrigation season, is clear evidence that judicial economy and the "just, speedy and inexpensive determination of every action" do not require that the provisions of Rule 13 be ignored here to allow these claims to be asserted as "counterclaims" to that First Amended Petition.

E. The Provisions of Rule 15 Do Apply If The Tribe And The United States Intend To Assert Their Claims For Additional Water Rights In The Main Action.

The Tribe contends that subsections (a) and (d) of Rule 15 do not apply because "courts have denied motions to amend or supplement complaints" after a final judgment has been rendered.[3] Tribe's Points and Authorities at 22. It is for that precise reason that the Tribe and the United States should not be allowed to circumvent the requirements of Rule 15 by the expedient of labelling as "counterclaims," claims which are clearly supplemental to the original complaint in the main action. If a motion under Rule 15 to allow the assertion of these claims for new and additional water rights is denied, then the claims, if they are to be asserted at all, must be asserted in a new action.

With respect to this question, and the questions of service of process and joinder, the Tribe and the United States argue that they are simply seeking to modify the Final Decree pursuant to paragraph XIV which in applicable part provides:

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[3] In arguing that "the District and Nevada seem to be directing the Tribe down a dead-end street" when they contend that Rule 15 applies, the Tribe ignores case law allowing supplemental pleadings to be filed after entry of a final judgment. E.g., Poindexter v. Louisiana Financial Assistance Comm'n., 296 F.Supp. 686 (E.D. La.) aff'd, 393 U.S. 48 (1968).

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> The Court retains jurisdiction of this cause for the purpose of changing the duty of water for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user . . . .

Assuming arguendo, that provision was intended to apply to claims for new and additional water rights, it should be invoked by a motion or petition in the main action not as a "counterclaim" to this ancillary proceeding.

Moreover, Nevada and the Irrigation District contest the applicability of paragraph XIV to a claim for new and additional water rights made by a party to the original action. That provision in the Final Decree must be read in context with the provisions of paragraphs XI and XII which in applicable part provide:

> XI. Each and every party to this suit and their and each of their servants, agents and attorneys and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein described, be and each of them hereby is forever enjoined and restrained from claiming any rights in or to the waters of Walker River and/or its branches and/or its tributaries, except the rights set up and specified in this decree . . . .
>
> XII. This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries, except the undetermined rights of Walker River Irrigation District under its applications to the State Water Commission of the State of California and the undetermined rights of the applicants for permits from the State Engineer of the State of Nevada hereinabove specified, and it is hereby ordered, adjudged and decreed that none of the parties to this suit has any right, title, interest or estate in or to the waters of said Walker River, its branches or its tributaries other than as above set forth,

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> excepting the undetermined rights of Walker River Irrigation District and the several applicants for permits from the State Engineer of the State of Nevada. Nothing herein shall prejudice the rights of any of the parties defendant hereto under any transfer or legal succession in interest since the commencement of this suit to any of the rights hereby adjudicated to the several parties defendant.

Provisions like paragraphs XI and XII in a final water right judgment are evidence that the judgment was not intended to permit the assertion of claims to additional water rights. See, Nevada v. United States, 463 U.S. 110, 132 (1983) (nearly identical provision in the Orr Ditch Decree found by a unanimous Supreme Court to evidence an intent settle all claims to waters of the Truckee River in Nevada).

In any event the Tribe and the United States should not be allowed to circumvent the provisions of Rule 15 and paragraphs XI and XII of the Final Decree by asserting new claims for additional water rights as "counterclaims."

II. IRRESPECTIVE OF HOW THE TRIBE'S AND THE UNITED STATES' CLAIMS FOR ADDITIONAL WATER PROCEED, JOINDER OF ALL CLAIMANTS TO THE WATERS OF THE WALKER RIVER AND ITS TRIBUTARIES IS REQUIRED

A. Introduction.

The facts relevant to disposition of the joinder motion are set forth in The Irrigation District's initial points and authorities. Some additional facts are pertinent to the contentions of the Tribe and the United States.

To a large extent the Tribe and the United States have treated the separate, but related, issues of joinder and service

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of process or notice as if they were a single issue.[4] The principal contention on joinder is 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." Tribe's Response at 23.

That assertion, whatever it means, is curious in light of the fact that in its earlier argument on the propriety of its "counterclaim" the Tribe states that it filed "a counterclaim against WRID and all other water users with decreed rights to the use of waters of the Walker River and its tributaries." Tribe's Response at 11. Moreover, both the Tribe's "counterclaim" and the proposed United States "counterclaim" expressly allege that "counterdefendants are all water users on the Walker River and its tributaries as set forth in the Final Decree." Tribe's Counterclaim at para. 4, p. 7; Proposed United States Counterclaim at para. 4, p. 3.

It is clear that the United States and the Tribe seek recognition of two new and additional water rights for the Walker River Indian Reservation and that they intend that this Court's determination with respect to those rights be binding upon "all water users on the Walker River and its tributaries as set forth in the Final Decree." That cannot be accomplished without joinder of those persons and entities.

B. Absent Joinder "Complete Relief" Cannot Be Accorded Among The Tribe And The United States And The Irrigation District And Nevada.

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[4] Apparently the United States does not challenge Nevada's and the Irrigation District's position with respect to joinder.

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The Irrigation District and Nevada do not contend that the phrase "existing parties" in Rule 19(a)(1) means all persons who may have an interest in the litigation. They do contend that "complete relief cannot be accorded among those already parties" unless all claimants to the waters of the Walker River are joined. Relief is never "complete" if there is a possibility of repeated litigation involving the same subject matter. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983).

A judgment here without joinder of all claimants to the waters of the Walker River means that in the future any additional water rights for the Reservation may be challenged by other water right holders who have not been joined. In terms of operation of the stream system, including the Irrigation District reservoirs, there may be a direct conflict between the claimed additional Reservation right or rights and rights held by a non-party. Clearly, non-joinder involves the possibility of repeated litigation involving these claimed rights. Thus any relief granted without joinder will not be "complete" as to existing parties.

C. Persons Or Entities Holding Water Rights To Waters Of The Walker River And Its Tributaries Claim An Interest Related To The Subject Matter Of The Tribe's Claims For Additional Water Rights And They Are So Situated That Disposition In Their Absence May Impair Or Impede Their Ability To Protect That Interest.

Although the Tribe and the United States do not directly challenge the water rights of person or entities who have not been joined, that does not mean that such persons have no interest in the subject matter of their claims. Hamilton v. MacDonald, 503 F.2d 1138, 1147 (9th Cir. 1974) does not support the Tribe's

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position. There the subject matter of the litigation was title to land. Appellants argued that creditors holding a security interest in livestock grazing on the land were indispensable parties. Rejecting that argument the Court said:

> The subject matter of this action is the title to and possession of the land, not the livestock - the secured creditors 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. F.R.Civ.P. 19(a)(1).

503 F.2d at 1147. Similarly, Walton v. United States, 415 F.2d 121, 124 (10th Cir. 1969), does not aid the Tribe. There, title to specifically described land was at issue. The only parties claiming an interest in that land were the United States and Walton. The court rejected the contention that similarly situated landowners were necessary parties. The court found that they were not necessary parties because their land was not the subject of litigation.

Here the waters of the Walker River and its tributaries form a single res and are analogous to one parcel of land in which several parties are claiming an interest. The subject matter of the Tribe's and United States' claims involve how this single res is to be divided among all water right claimants and thus all water right claimants clearly have an interest in its subject matter.

The Tribe argues that the ability of persons who hold permitted rights to protect their interest in the waters of the Walker River will not be impaired or impeded by disposition of the Tribe's claims because "there has never been a comprehensive

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integration of the state permitted rights with the Decree."[5] Tribe's Response at 30. Here the Tribe seeks to have its claimed additional water rights "integrated" into the Decree. That is fundamentally different from the issuance of a permit to appropriate.

The mere issuance of a permit under state law without an adjudication of relative rights does not create a right as against prior existing rights on the source. See, Salmon River Canal Co. v. Bell Brand Ranches, Inc., 564 F.2d 1244, 1248-1249 (9th Cir.), cert. denied, 436 U.S. 918 (1978). By asking the Court to "protect its interests under the umbrella of the Court's Decree," the Tribe effectively seeks an adjudication of the relationship of its rights to all others. In such a situation the ability of claimants to water rights who have not been joined to protect their interests may be impaired or impeded by disposition of the action. See Irrigation District's Points and Authorities at 16-17.

D. Disposition Of The Tribe's Claims Will Subject Nevada And The Irrigation District To A Substantial Risk of Inconsistent Obligations By Reason Of The Interest Of Other Claimants Who Have Not Been Joined.

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. den., 465 U.S. 1049 (1984) did not hold that a possibility of future litigation does not satisfy the requirements of Rule 19(a). Rather it held that the possible future litigation must subject the parties to the pending

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[5] Apparently the Tribe does not dispute that transferees of rights under the Decree will have their ability to protect their interests impaired or impeded.

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litigation to the risk of inconsistent obligations. The focus of Rule 19(a)(2)(ii) is on the possibility of inconsistent obligations, not the probability of future litigation. See, Hodgson v. New Kensington-Arnold School District, et al., 56 F.R.D. 393, 395 (W.D. Penn. 1972).

Water rights on a single stream system are interrelated. The obligations of Nevada and the Irrigation District with respect to any decision by the Court on the Tribe's claimed rights may well be inconsistent with their obligations to other water right holders who are not bound by the Court's decision because they were not joined. That is precisely the kind of problem which the provisions of Rule 19(a)(2)(ii) seek to avoid.

III. BECAUSE ALL CLAIMANTS TO THE WATERS OF THE WALKER RIVER AND ITS TRIBUTARIES MUST BE JOINED OR SUBSTITUTED WITH RESPECT TO THE CLAIMS OF THE TRIBE AND THE UNITED STATES THEY MUST BE SERVED IN ACCORDANCE WITH THE REQUIREMENTS OF RULE 4

A. Introduction.

The Tribe and the United States argue that they should be allowed to give notice of their claims to new and additional water rights on the Walker River by posting and publication. The principal grounds for their contention is that they are simply seeking to modify the Decree and they should not be required to give notice different from that given with respect to the Irrigation District's First Amended Petition.

It is ironic that the Tribe and the United States complain about the "aura of fundamental unfairness," if they are not permitted to give the same notice of their claims to new and additional water rights in the same way as the Irrigation District was allowed to give of its First Amended Petition which seeks only

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to enforce the Final Decree as written. It was the Tribe and the United States who insisted on a rule requiring that they receive actual notice of all change applications when the rule provides that every other water right holder on the Walker River system, including the Irrigation District, receive notice by publication. See, Rules and Regulations at Section 4.1.

B. Persons Joined Or Substituted Under Rule 19 Or Rule 25 Must Be Served In The Manner Provided By Rule 4

In their initial points and authorities Nevada and the Irrigation District established that persons joined or substituted under Rules 19 and 25 respectively must be served as provided in Rule 4. See, e.g., Irrigation District Points and Authorities at 18-19. The Tribe and the United States have not challenged that authority. Because all claimants to waters of the Walker River must be named, joined or substituted, they must be served in accordance with Rule 4.

C. The Claims For New And Additional Water Rights Are Fundamentally Different From The Irrigation District's First Amended Petition.

As noted at pgs. 7 - 9 above, Nevada and the Irrigation District contest the assertion that claims for new and additional water rights simply involve a request to modify the Final Decree within the meaning of paragraph XIV. However, even if they do, they involve matters which directly affect the interest of all claimants to the waters of the Walker River in their water rights.

Under such circumstances notice of the claim must be "reasonably calculated, under all circumstances, to apprise interested persons of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central

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Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950). When a person's name and address is reasonably ascertainable, notice by mail or other means as certain to ensure actual notice is required. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983).

The First Amended Petition, particularly its first claim for relief, does not directly involve the water rights of anyone other than the Irrigation District. The parties directly involved, the California respondents, were personally served with summons and complaint. The notice which was posted and published was simply intended to allow interested persons an opportunity to participate.

Moreover, no one contended that there were persons or entities who must be joined or substituted under Rules 19 and 25 with respect to the Irrigation District's First Amended Petition. There was no order from the Court to that effect. Thus, there was no requirement to provide notice in any form to anyone other than the California respondents.

Finally, state law notice requirements for applications for new water rights are not analogous to the claims asserted by the Tribe and United States here. As noted above, the mere issuance of a permit under state law does not create a right as against prior existing rights on the source. See, Salmon River Canal Co., 564 F.2d at 1248-49. Here, the Tribe and the United States clearly seek to establish new and additional water rights against all existing rights. Under these circumstances the requirements of due process as set forth in Mullane and Mennonite

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Bd. of Missions, must be satisfied. They can only be satisfied by compliance with Rule 4.[6]

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant Nevada's and the Irrigation District's motions.

DATED: October 5, 1992.

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[6] The principles set forth in In Re Rights to Use Waters of Yakima River, 674 P.2d 160 (Wash. 1983) support Nevada's and the Irrigation District's position here. There the court stated that if only a moderate number of users are involved notice by mail or personal service would be required. Here less than 600 users are involved. Contrary to the situation in Yakima, the Irrigation District here cannot represent all interests on the Walker River system. First, there are substantial water right holders not within the Irrigation District boundaries in Antelope Valley and Bridgeport. Second, within the Irrigation District boundaries some users have only natural flow rights, some have only storage rights and some have both. It is not clear that there is an identity of interests among such persons with respect to the Tribe's and United States' claims.

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CERTIFICATE OF SERVICE BY MAIL

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