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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF NEVADA

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 WALKER RIVER PAIUTE TRIBE,)
16 Plaintiff-Intervenor,)
17 vs.)
18 WALKER RIVER IRRIGATION DISTRICT,)
19 a corporation, et al.,)
20 Defendants.)

21 WALKER RIVER PAIUTE TRIBE,)
22 Counterclaimant,)
23 vs.)
24 WALKER RIVER IRRIGATION DISTRICT,)
25 et al.,)
26 Counterdefendants.)

IN EQUITY NO. C-125
SUBFILE NO. C-125-B

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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Aldens, Inc. v. Packel,
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Bethlehem Fabricators, Inc. v. John Bowen Co.,
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Klinzing v. Shakey's Inc.,
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1 I. THE COUNTERCLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE

2 A. Introduction.

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

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

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

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

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

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

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

27 ¹ Paragraph X of the Final Decree allows parties to
28 "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."

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

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

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

23 The Tribe and the United States and the Irrigation
24 District are not "opposing parties" as contemplated by Rule 13
25 because the Irrigation District has not asserted a claim against
26 them. As plaintiffs in the main action, the United States and the
27

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

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

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

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

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

4 The assertion that the Tribe's and United States' claims
5 are either "compulsory" or "permissive" within the meaning of Rule
6 13 misses the point. It is simply not necessary to consider
7 whether their claims arise out of the "same transaction or
8 occurrence"² and are compulsory or are merely permissive because
9 both subsection (a) and (b) of Rule 13 require that counterclaims
10 be stated against an "opposing party." Because the Irrigation
11 District is not an opposing party to the United States and Tribe,
12 they cannot assert a counterclaim whether that claim would under
13 other circumstances be considered compulsory or permissive.

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

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

26 ² The fact that the Tribe and the United States stated
27 that the Tribe's "Counterclaim" should proceed independent from
28 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.

1 cert. denied sub nom Aldens, Inc. v. Kane, 425 U.S. 943 (1976).
2 Even in that situation, the cases are not uniform as to whether
3 the counterclaim is actually one against an opposing party. See,
4 United States v. Timber Access Industries Company, 54 F.R.D. 36,
5 39 (D. Or. 1971).

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

18 Crosley did not involve counterclaims at all. There two
19 parties had commenced numerous actions. The court held that
20 between courts of concurrent jurisdiction, the first court which
21 had the case should decide the entire matter. The court stated
22 that the courts should not be called upon to duplicate each
23 other's work. Crosley Corporation v. Hazelton Corp., 122 F.2d
24 925, 929-930 (3rd Cir. 1941).

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

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

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

10 The Tribe contends that subsections (a) and (d) of Rule
11 15 do not apply because "courts have denied motions to amend or
12 supplement complaints" after a final judgment has been rendered.³
13 Tribe's Points and Authorities at 22. It is for that precise
14 reason that the Tribe and the United States should not be allowed
15 to circumvent the requirements of Rule 15 by the expedient of
16 labelling as "counterclaims," claims which are clearly
17 supplemental to the original complaint in the main action. If a
18 motion under Rule 15 to allow the assertion of these claims for
19 new and additional water rights is denied, then the claims, if
20 they are to be asserted at all, must be asserted in a new action.

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

25 ³ In arguing that "the District and Nevada seem to be
26 directing the Tribe down a dead-end street" when they contend that
27 Rule 15 applies, the Tribe ignores case law allowing supplemental
28 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,

1 excepting the undetermined rights of Walker
2 River Irrigation District and the several
3 applicants for permits from the State
4 Engineer of the State of Nevada. Nothing
5 herein shall prejudice the rights of any of
6 the parties defendant hereto under any
7 transfer or legal succession in interest
8 since the commencement of this suit to any of
9 the rights hereby adjudicated to the several
10 parties defendant.

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

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

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

25 **A. Introduction.**

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

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

1 of process or notice as if they were a single issue.⁴ The
2 principal contention on joinder is that the "Tribe seeks only to
3 protect its interests under the umbrella of the Court's Decree - -
4 not a declaration of its rights against all users on the River."
5 Tribe's Response at 23.

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

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

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

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

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

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

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

26 Although the Tribe and the United States do not directly
27 challenge the water rights of person or entities who have not been
28 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

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

5 The subject matter of this action is the
6 title to and possession of the land, not the
7 livestock - the secured creditors have no
8 interest in the land, and the rights of the
9 parties to the land can be determined, and
10 complete relief accorded them, in the absence
11 of the secured parties. F.R.Civ.P. 19(a)(1).

12 503 F.2d at 1147. Similarly, Walton v. United States, 415 F.2d
13 121, 124 (10th Cir. 1969), does not aid the Tribe. There, title
14 to specifically described land was at issue. The only parties
15 claiming an interest in that land were the United States and
16 Walton. The court rejected the contention that similarly situated
17 landowners were necessary parties. The court found that they were
18 not necessary parties because their land was not the subject of
19 litigation.

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

27 The Tribe argues that the ability of persons who hold
28 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

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

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

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

22 Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251
23 (9th Cir. 1983), cert. den., 465 U.S. 1049 (1984) did not hold
24 that a possibility of future litigation does not satisfy the
25 requirements of Rule 19(a). Rather it held that the possible
26 future litigation must subject the parties to the pending

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

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

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

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

17 **A. Introduction.**

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

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

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

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

9 In their initial points and authorities Nevada and the
10 Irrigation District established that persons joined or substituted
11 under Rules 19 and 25 respectively must be served as provided in
12 Rule 4. See, e.g., Irrigation District Points and Authorities at
13 18-19. The Tribe and the United States have not challenged that
14 authority. Because all claimants to waters of the Walker River
15 must be named, joined or substituted, they must be served in
16 accordance with Rule 4.

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

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

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

1 Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950). When a
2 person's name and address is reasonably ascertainable, notice by
3 mail or other means as certain to ensure actual notice is
4 required. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800
5 (1983).

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

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

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

1 Bd. of Missions, must be satisfied. They can only be satisfied by
2 compliance with Rule 4.⁶

3 **IV. CONCLUSION**

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

6 DATED: October 5, 1992.

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24 ⁶ The principles set forth in In Re Rights to Use Waters
25 of Yakima River, 674 P.2d 160 (Wash. 1983) support Nevada's and
26 the Irrigation District's position here. There the court stated
27 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.

CERTIFICATE OF SERVICE BY MAIL

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I certify that I am an employee of Woodburn and Wedge, and that on this date, pursuant to FRCP 5(b), I deposited in the United States mail at Reno, Nevada, a true copy of the foregoing document, addressed to:

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DATED this 5th day of October, 1992.

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