



1     A P P E A R A N C E S:   (Cont')

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6     FOR MINERAL COUNTY:                     Simeon Herskovits  
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9     FOR U.S. WATER COMMISSIONER'S  
10    BOARD:                                     Karen Peterson  
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Jim Shaw  
Watermaster

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1 Reno, Nevada, Thursday, February 7, 2013, 10:15 a.m.

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4 THE CLERK: Please rise.

5 The United States District Court for the District  
6 of Nevada is now in session. The Honorable William G. Cobb  
7 presiding.

8 THE COURT: Please be seated everyone.

9 THE CLERK: This is date and time set for a  
10 Status Conference in case numbers 3:73-cv-125-RCJ-WGC;  
11 3:73-cv-127-RCJ-WGC; and 3:73-cv-128-RCJ-WGC; the United  
12 States of America versus Walker River Irrigation District,  
13 and others.

14 If I may have plaintiffs' counsel begin.

15 MR. GUARINO: Thank you. Guss Guarino for the  
16 United States.

17 MR. NEGRI: Your Honor, David Negri also for  
18 the United States.

19 MR. HERSKOVITS: Good morning, Your Honor.  
20 Simeon Herskovits for Mineral County.

21 MR. WILLIAMS: Wes Williams, Junior, for the  
22 Walker River Paiute Tribe.

23 MR. DEPAOLI: Gordon DePaoli for the Walker  
24 River Irrigation District.

25 MR. FERGUSON: Dale Ferguson for the Walker

1 River Irrigation.

2 MS. PETERSON: Karen Peterson, Allison MacKenzie  
3 Law Firm, appearing for the U.S. Board of Water Commissioners.  
4 And Jim Shaw, the Watermaster, is also here, Your Honor.

5 MR. SWAINSTON: Harry Swainston representing  
6 myself, my brother and my sister.

7 MS. URE: Therese Ure representing Circle Bar  
8 and Ranch and Michael Farms.

9 MS. ADAMS: Marta Adams, Nevada Department of  
10 Wildlife.

11 MR. BENESCH: George Benesch, Lyon County.

12 MR. NEVILLE: Good morning, Your Honor. This  
13 is Michael Neville representing California State agencies.

14 MS. SCHNEIDER: Susan Schneider for the United  
15 States, along with Eileen Rutherford.

16 MS. SIMON: Stacey Simon for Mono County.

17 MR. HOY: Good morning, Your Honor. Mike Hoy  
18 for Richard Adams.

19 MR. WATSON: And Chris Watson with the  
20 Solicitor's Office of the Department of Interior.

21 THE COURT: Good morning, everybody. I believe  
22 the Courtroom Administrator has conveyed my requests that you  
23 all remain seated, just speak into the microphones so that  
24 those on the telephone can properly hear you. I may ask that  
25 when we turn to the discussion of the proposed amendment of

1 the Case Management Order, that you do approach the podium and  
2 make your presentation from the podium.

3 We have the -- let me find my overwhelming binder  
4 and books. Just a second, please.

5 We have the proposed agenda that the government  
6 and Tribe have submitted. I would like to utilize that for  
7 our road map here today. However, I am going to defer topic  
8 item 1-A -- or excuse me, 1-B, the case management issue, to  
9 the end of this proceeding here today.

10 Ms. Schneider, I thought you retired.

11 MS. SCHNEIDER: I did, but I'm back on a  
12 part-time basis, about quarter time.

13 THE COURT: And Mr. Swainston, I see you're  
14 making your first appearance.

15 MR. SWAINSTON: Yes, Your Honor.

16 THE COURT: Just so everyone knows,  
17 Mr. Swainston is the brother of my former law partner,  
18 George Swainston. George, unfortunately, passed away three,  
19 four years ago. He had retired from our law firm many years  
20 before that, but I'm just letting everyone know that.

21 Who wants to proceed with the agenda?

22 Ms. Schneider? Mr. Guarino? Who wants to take the  
23 lead on that?

24 MR. GUARINO: That would be me, Your Honor.

25 THE COURT: Go ahead.

1 MR. GUARINO: Thank you.

2 With respect --

3 THE COURT: Let me interrupt. It seems like  
4 maybe our first order of business would be to comment on the  
5 United States' summary of our December 13 status conference.  
6 And I had a couple of questions about that. On the e-service  
7 order, at page 5, it discusses that I am going to hold off  
8 signing it until its resubmission. And then it talks about  
9 the website order that Ms. Griffin was going to draft and  
10 submit to Chief Judge Jones. I viewed those as one in the  
11 same.

12 Am I missing something here?

13 MR. GUARINO: I don't think so, Your Honor.

14 MS. SCHNEIDER: Your Honor, this is  
15 Susan Schneider. Those are two different documents. We  
16 don't -- the one has been submitted, the e-service order was  
17 already -- is submitted.

18 THE COURT: Is that 1779?

19 MS. SCHNEIDER: I don't have that in front me.  
20 I think it's --

21 THE COURT: All right.

22 MS. SCHNEIDER: But Miss Griffin was going to do  
23 something different that she was going to draft herself and  
24 give to the Court.

25 MR. GUARINO: With regards, I believe, to

1 the website.

2 MS. SCHNEIDER: Right.

3 THE COURT: Oh, I thought that was incorporated  
4 into the e-service order, which is Document 1779 and 1779-1,  
5 and it talks about the creation of the website.

6 MS. SCHNEIDER: Your Honor, my understanding  
7 was that it was something separate.

8 THE COURT: Well, does anybody have any position  
9 on 1779 or 1779-1, which was submitted by the United States of  
10 America, Notice of Proposed Order Regarding Service in Filing  
11 in 125B, and Service on Unrepresented Parties. And then  
12 1779-1 is the latest iteration of the proposed order, which  
13 is under submission to Judge Jones for his consideration,  
14 with my recommendation that he execute it with the one minor  
15 change. The last change to be would be on paragraph 14,  
16 about the date the unrepresented parties are supposed to -- or  
17 excuse me, the parties are supposed to complete and return  
18 their notice of selecting method of service.

19 We're going to go ahead with that 1779 in submission  
20 to Judge Jones, unless somebody raises objection to it. And,  
21 to me, I thought those two orders were one in the same. And  
22 I'll proceed under that assumption, unless somebody has some  
23 other order to draft, or we can hear from Ms. Griffin that  
24 there's supposed to be something else.

25 Any comments here for the good of the order?

1 MS. SCHNEIDER: Your Honor, this is Susan  
2 Schneider. I suggest that on the issue of whether there are  
3 two orders, that if there's a way to check with Ms. Griffin,  
4 we can clarify her intent.

5 THE COURT: Okay. Hold on a second.

6 Just for everyone's information, I'm asking the  
7 Courtroom Administrator to try and contact Ms. Griffin to  
8 ascertain whether there are two separate orders, or whether  
9 they've been incorporated into one. So, we'll come back to  
10 that issue.

11 Now, Mr. Guarino, do you want to direct us on  
12 agenda Item 1 --

13 MR. GUARINO: Sure.

14 THE COURT: -- completion of service issues on  
15 125B or 127, as we also know it.

16 MR. GUARINO: Thank you, Your Honor.

17 With respect to the service issues, the Court  
18 recalls at our last status conference, we described that  
19 to be a just recently mailed off, approximately 400 service  
20 notices, to folks who had been identified as potential  
21 dormant riparian water rights holders. We sent out, I think,  
22 specifically, 388 of those notices. Since that time, we've  
23 received about 144 waivers in return from that mailing.

24 In addition, we've also had a number of about 21  
25 notices returned because, for various reasons; the notice



1 didn't get, didn't get to the intended recipient and we  
2 need to follow-up with that as well. In addition, we have  
3 approximately 23 disclaimers of interest being received from  
4 folks who were mailed those notices. There are a number of  
5 folks who did -- who not only filed waivers, but also filed  
6 notices of intent to participate.

7 So, we need to do some follow-up with regards to  
8 materials that we're receiving back from the mailing we  
9 performed back in December. We intend to do that.

10 A problem has -- not a problem, but an issue has  
11 popped up because it appears that a number of folks who  
12 were sent a notice from the United States are not riparian,  
13 dormant riparian water rights holders. They seem to be  
14 people who have property that is along an irrigation ditch  
15 and not a water course that would give rise to a dormant  
16 riparian water right. We're trying to narrow in on that  
17 issue. And it's going to take some research and cooperation  
18 with Mono County, the Tribes, and the United States. And  
19 we've been working on that to try to narrow the focus because,  
20 ultimately, what we're trying to do is not move towards  
21 service on folks who don't -- who shouldn't be served with  
22 the materials in this case. And so if we can eliminate some  
23 of the people who shouldn't have received the notice in the  
24 first place, then we won't have to go through the trouble  
25 and expense to serve these individuals.

1                   With respect to the service phases and moving  
2 towards service on the approximately 200, 250 folks who may  
3 need to be personally served, we are working on getting the  
4 funds necessary to perform that task. We'll need to do --  
5 we'll need to have additional funds provided by the United  
6 States to, first, research these outstanding issues that  
7 seem to be developing with respect to the mailing that we  
8 had in December; as well as to perform the act of service  
9 throughout, throughout California that needs to be done.

10                   THE COURT: What might sequestration do to  
11 those efforts?

12                   MR. GUARINO: I have no idea.

13                   THE COURT: Good answer.

14                   MR. GUARINO: Hopefully, nothing, but no one  
15 can predict what will happen.

16                   THE COURT: What is the impact -- you say  
17 that some certain people have returned a Waiver. What is the  
18 impact on this case to somebody who does execute a Waiver  
19 and return it?

20                   MR. GUARINO: We're trying to identify what  
21 their -- we're trying to identify what their intent was by  
22 filing a Waiver and a disclaimer -- well, a Waiver and a  
23 Notice of Intent to Participate. We'll need to do some -- I'm  
24 not exactly sure what we're going to do to try and, to try  
25 and figure that out, whether they want to file a Waiver, or

1 whether they wanted to return a Waiver, or whether they wanted  
2 to return a Notice of Intent to Participate. My guess is  
3 what we will do is simply treat them as, if we don't get any  
4 more information, we'll treat them as folks who have filed a  
5 Notice of Intent To Participate, and they will be treated as  
6 such.

7 THE COURT: Well, didn't the service package  
8 include a Waiver form?

9 MR. GUARINO: Yes, I believe so.

10 THE COURT: What was meant by that Waiver  
11 form?

12 MR. GUARINO: I believe the intent of that  
13 Waiver form was so that they would not need to -- the Court  
14 would not need to further stay in direct contact with those  
15 individuals, so that the Court would not have to send, send  
16 further notices or further e-mails or further contact  
17 regarding these proceedings to those individuals.

18 THE COURT: And these are just for dormant  
19 riparian surface water right holders?

20 MR. GUARINO: That's my understanding; yes,  
21 Your Honor.

22 THE COURT: Ms. Schneider, did you want to say  
23 something?

24 MS. SCHNEIDER: I hadn't said anything.  
25 Somebody else might.

1 THE COURT: Oh. All right.

2 MS. SIMON: Stacey Simon on behalf of  
3 Mono County.

4 I think you -- are you using the term Waiver as  
5 being the same as disclaimer? Because there were two separate  
6 documents in the service package; one was a Waiver of Service  
7 of Personal Service of Notice in Lieu of Summons. And I think  
8 many folks should have sent back that Waiver, also sent back a  
9 Notice of Appearance and Intent to Participate.

10 Then there was a second form, which was the  
11 disclaimer of Interest. And, to me, it's not -- I think  
12 it makes sense to send back the Waiver and a Notice of  
13 Appearance together.

14 Is that what's causing confusion?

15 MS. SCHNEIDER: This is Susan Schneider. I  
16 agree with Stacey Simon. She's correct.

17 THE COURT: That there are two different forms;  
18 one is the Waiver of Personal Service, and the other is a  
19 Disclaimer of the Interest. So maybe my question should  
20 have been directed to what happens when a disclaimer is  
21 received.

22 MS. SCHNEIDER: If a disclaimer is received,  
23 then we would notify that, but we've been including that in  
24 our service report and asking the Court to dismiss the person  
25 or entity as a defendant because they're disclaiming any

1 interest in the matter.

2 THE COURT: Well, how does that have any bearing  
3 on any Decree that might come out of this case? They could be  
4 impacted by any Amended Decree, couldn't they?

5 MS. SCHNEIDER: If they have disclaimed any  
6 interest, then they have disclaimed any interest. They're  
7 not going to be involved in it anymore. And whether -- in  
8 most instances, what we found disclaimers when people have  
9 sold property and, usually, there's another person or entity  
10 that has the interest. In some instances, there are people  
11 who have indicated that they just simply don't have the  
12 interest -- they don't own the interest that we thought they  
13 had.

14 THE COURT: But that's not what the government's  
15 report says in paragraph A-1. It says: "High number of  
16 disclaimer of interest forms returned due to some properties  
17 on an irrigation ditch classified as riparian."

18 So, that would --

19 MS. SCHNEIDER: That's right.

20 THE COURT: -- that would seem to be people that  
21 have interests, but returning disclaimers.

22 MS. SCHNEIDER: No. My understanding, and I  
23 haven't been working on that, this part of it as much as  
24 Mr. Guarino and Ms. Rutherford has, but my understanding is  
25 that those are persons and entities who should not have been

1 served. They don't fit within the category of riparian,  
2 dormant riparian interests. They simply didn't belong there.  
3 It was a mistake. And I think there was some confusion with  
4 some of the information that we had received, so that we  
5 ended up serving some people who just were the wrong people  
6 to serve.

7 MS. SIMON: This is Stacey Simon. I concur  
8 with that. The list that was provided by Mono County,  
9 it turned out was a bit over-inclusive. Our GIS system  
10 had picked up not only those riparian properties but,  
11 additionally, at least some properties that are not truly  
12 riparian, but just happened to be adjacent to an irrigation  
13 ditch.

14 THE COURT: All right. Thank you.

15 Does anyone have -- or does that complete your  
16 discussion, Mr. Guarino, on A; Topic A?

17 MR. GUARINO: It does, Your Honor.

18 THE COURT: Does anyone have any additional  
19 comment in this part of the report?

20 (No response.)

21 THE COURT: None appearing, let's move to A-2.

22 MR. GUARINO: Yes, Your Honor. With regards to  
23 A-2, the status on the draft caption, the preliminary list  
24 of defendants who have filed a Notice of Appearance, and a  
25 preliminary list of persons and entities that were served and

1 have not filed a Notice of Appearance, the United States  
2 has circulated those lists and the caption to the other  
3 parties. We've received some comments from some parties about  
4 corrections that need to be made to the draft caption and  
5 these lists that have been prepared. We've been making those  
6 corrections as they, as they come in, and we'll proceed  
7 accordingly moving forward.

8 THE COURT: Are you in a position to coordinate  
9 that with Ms. Griffin's office about the list of defendants;  
10 or are you doing it at the same time or what?

11 MR. GUARINO: I've not been in contact -- I've  
12 not heard from or been in contact directly with Miss Griffin  
13 about this issue, but we'll stay in contact with Ms. Griffin  
14 to make sure that we're on the same page on this.

15 THE COURT: Is there anything else you wish to  
16 comment on A-2?

17 MR. GUARINO: I don't think so, Your Honor.

18 MS. SIMON: I had a comment, Your Honor. Again,  
19 Stacey Simon from Mono County. We had a correction to the  
20 list which we forwarded to Ms. Rutherford, and she promptly  
21 made the change, and it was as to Mono County status.  
22 However, we don't have any ability to check as to any of  
23 the other folks who are Mono County residents. We just  
24 don't have that kind of data. And my concern is there may  
25 be other errors of which we're not aware. I'm not sure how

1 to address that.

2 THE COURT: I think, from what I know, this  
3 case is unaddressable. Trying to find everyone who has  
4 some type of interest in this case is near impossible, I  
5 think.

6 Does anyone disagree with that observation? Am I  
7 flat wrong?

8 (No response.)

9 THE COURT: Mr. Shaw, you got any comments?

10 MR. SHAW: Yeah, but I'm not sure everybody  
11 wants to hear them. But, you know, I think California has  
12 created this situation with this riparian that is --

13 THE COURT: Mr. Shaw, could you come up to  
14 the microphone, sir, so everyone could hear you. I would be  
15 interested in those comments.

16 State your name, please, and your title.

17 MR. SHAW: For the record, Jim Shaw, Watermaster  
18 for the Walker River.

19 Your Honor, I feel that with some of the laws and  
20 the stuff that the State of California has in regards to this  
21 Decree and the riparian rights, has created more problems for  
22 this court and for the lawsuits that are in progress right  
23 now. The reason being is because none of those riparian  
24 rights are recognized by the Decree as it sits today. And  
25 so by addressing people and encouraging people -- and I know



1 that Mr. Neville and Ms. Simon won't agree with me -- but by  
2 encouraging people to be participating, become part of this,  
3 I think the statement that you made just a few minutes ago  
4 was very right.

5 THE COURT: All right. Thank you.

6 MS. SIMON: If I may just comment on that, my --

7 THE COURT: Thank you, Mr. Shaw.

8 MR. SHAW: Thank you.

9 Ms. SIMON: If I may comment on that. My  
10 comments as to the difficulty in verifying parties that are  
11 not Mono County, really related not to riparian owners. We  
12 actually have been quite successful in that regard. It would  
13 be the other parties that we, you know, we look at the list,  
14 but we don't have any information. We don't know if it's  
15 right or wrong.

16 MS. SCHNEIDER: Your Honor, this is  
17 Susan Schneider. I think that the way in which the lists  
18 are compiled is looking at the materials that have been  
19 filed with the Court. And that, I think, is simply a matter  
20 of checking and double checking. All the information that  
21 people need to check these list, I think, is within the  
22 court files. But because of the size of the lists, mistakes  
23 have happened and they can just get fixed as they're double  
24 checked.

25 THE COURT: Maybe this is a fundamental question

1 I should have asked from -- at the start. But as I understand  
2 the Tribal claims, and probably what the federal claims are  
3 based on, too, as three different topics, but the third one  
4 was groundwater associated with the entire reservation; and  
5 what are the federal reserve rights to groundwater underlying  
6 and adjacent to all reservation lands?

7 So I guess my confusion is do these riparian  
8 rights translate into a subset of groundwater underlying  
9 and adjacent to all tribal lands?

10 Ms. Schneider?

11 MS. SCHNEIDER: I don't think that that's what  
12 they're referring to.

13 THE COURT: Then what --

14 MS. SCHNEIDER: No.

15 THE COURT: -- what are we doing with the  
16 riparian people in this case?

17 Ms. SIMON: These are surface -- this is  
18 Stacey Simon, Mono County -- surface water rights under the  
19 laws of the State of California.

20 THE COURT: Would be the riparian water rights?

21 MS. SIMON: Uh-huh.

22 THE COURT: Yes?

23 Ms. SCHNEIDER: Your Honor, this is  
24 Susan Schneider. Because the Case Management Order sought  
25 service on surface rights, it is under one of the categories

1 in the Case Management Order for surface rights, that the  
2 dormant riparian rights come into play. It's either 3-A --  
3 I think it's 3-A or 3-B. I'm not sure. I don't have the  
4 Case Management Order in front of me.

5 MR. DEPAOLI: Your Honor --

6 THE COURT: Just a second.

7 3-B are all holders of surface water rights under  
8 the laws of the States of Nevada and California in the  
9 Walker River Basin who are not presently parties to this  
10 adjudication.

11 Mr. DePaoli, did you have something to say?

12 MR. DEPAOLI: What I was going to say, Your  
13 Honor, is that the Tribal claims involve groundwater and  
14 surface water. They also involve claims for additional  
15 surface water. And so 3-B and the dormant riparian holder,  
16 or water right owners in California are being served not  
17 because of the -- well, because of the surface water claims  
18 that are a part of the Tribal claims, not just the groundwater  
19 claims.

20 THE COURT: When I was going over the  
21 government's/Tribe's position regarding potential amendment  
22 of the CMO, my notes were that the three areas that were  
23 sought here, or what this lawsuit involves is Weber Reservoir;  
24 federally reserved water rights for lands restored or added  
25 after '36; and federal reserve rights to groundwater

1 underlying adjacent to all reserve lands.

2 So, I guess it should be groundwater and surface  
3 water.

4 Ms. Schneider, would that be more appropriate?

5 MS. SCHNEIDER: I'm sorry. I'm not following  
6 Your Honor. The three claims were the surface water for -- or  
7 water for Weber Reservoir; water, surface water for the lands  
8 that were added; and then the groundwater addresses the entire  
9 reservation.

10 THE COURT: Maybe Mr. Benesch can clarify, is  
11 it Weeber (phonetic) or Weber?

12 UNIDENTIFIED FEMALE SPEAKER: Weber.

13 MR. BENESCH: I believe it's Weber, Your Honor.

14 THE COURT: Okay. Well, I've been  
15 mispronouncing it all these years. And we'll blame your  
16 friend, Louie Tess (phonetic) on that.

17 All right. Well, I don't see that that's  
18 necessarily determinative of what we're doing right now,  
19 probably more in my continual education of trying to get  
20 up to speed on this case. So, I apologize for that diversion.  
21 No pun intended.

22 Are there any other discussions, Mr. Guarino, as to  
23 Topic 1-A(2)?

24 MR. GUARINO: I don't believe so, Your Honor.

25 THE COURT: Does anyone else have any comment

1 as to 1-A(2)?

2 (No response.)

3 THE COURT: Why don't we turn then to Topic 2,  
4 the service issues relating to the C case.

5 Mr. Herskovits, is that your -- do you want to take  
6 the lead on that?

7 MR. HERSKOVITS: Yes, Your Honor. This is,  
8 again, Simeon Herskovits on behalf of Mineral County.

9 With regard to the service efforts and the status  
10 of them and how close they are to completion, I think 2-A  
11 and -B really are one subject that I'll just address together.

12 We filed a Service Report on January 9th, four  
13 weeks, or 29 days ago. And just this morning, because a  
14 couple of documentation pieces had come in on two of the  
15 three remaining unaddressed or outstanding defendants,  
16 proposed defendants on whom service efforts were still  
17 ongoing, came in. So this short supplement was just to  
18 show that service had been completed on those two proposed  
19 defendants, one of whom has filed a Waiver, and the other  
20 has filed a disclaimer of interest. And that's explained in  
21 the supplement.

22 As reported or recorded in the Service Report  
23 and this short supplement, virtually all of the defendants  
24 who remain to be served have now been served, or have  
25 filed waivers after they received the service package in

1 the mail. They're in the Service Report. There are a list  
2 of a significant number, a small minority, but still a  
3 significant number of parties to be dismissed, either because  
4 they are deceased, or there was an error, somehow, in their  
5 identification, or because they had transferred their water  
6 rights prior to service. So, there are 13 of those proposed  
7 defendants who, as the report describes, who are requesting be  
8 dismissed from the case and deleted from the caption.

9 In addition, there were just three new persons or  
10 entities, or persons or entities whose specific name, legal  
11 name identifying them had to be changed. Those are the three  
12 substitutions in Exhibit D to the report. And there was an  
13 amendment to the caption in one, with regard to one proposed  
14 defendant who has been served. And that was just that one of  
15 the two people listed as the Trustees of the Sandoval Family  
16 Trust had died by the time we served them, so the husband,  
17 Albert Raymond, needs to be deleted, and just his wife's name,  
18 Cecilia Lillian Sandoval, will remain as Trustee.

19 That leaves us with, at the time of the January 9th  
20 report, including those three newly substituted defendants  
21 to be served, that would have left us with a total of six  
22 remaining to be served, but two of those are the two who are  
23 addressed in this supplement that we just filed: Cole Robert  
24 Johnson and Marjorie Ann Jones. They've now been served. And  
25 so in the case of Marjorie Ann Jones, she needs to be deleted

1 from the caption because she's disclaimed her interest, and  
2 Mr. Johnson is served. So we would ask that along with the  
3 other long list of defendants on whom we would like to have  
4 the Court ratify or approve that service is complete, Cole  
5 Johnson's name be added, too.

6 That is the status of service. And just to be  
7 clear where that leaves us, we will have just the three newly  
8 substituted entities, assuming the Court orders or approves  
9 our request that they be substituted in, and the State of  
10 California is the only other defendant that remains to be  
11 served. And we have been speaking with Mr. Neville because  
12 we were unclear precisely which agency or which attorney and  
13 which agency should receive the service package when our  
14 research indicated that property with water rights under the  
15 Decree had been acquired some time ago by the California  
16 Department of Fish and Wildlife, and seemed to be part of a  
17 plot or a reserve -- I'm not sure what the right title is --  
18 managed by the California Wildlife Conservation Board. So I  
19 believe Mr. Neville is helping us sort out exactly, you know,  
20 which attorney and department within the bureaucracy of the  
21 State of California we need to get that to. And I think  
22 within a week, certainly two, we should have completed service  
23 or gotten a package into the hands of someone who will waive  
24 personal service. So, I'm sure that --

25 THE COURT: Let me ask a question, if I may.

1 MR. HERSKOVITS: Yes.

2 THE COURT: Paragraphs 51 and 53 of the  
3 supplement which you filed today or yesterday, Document 662,  
4 would replace those corresponding paragraphs in the original  
5 report filed January 9, Document 654?

6 MR. HERSKOVITS: Replace or supplement; yes.  
7 They correspond precisely to those two numbered paragraphs in  
8 the January 9th report.

9 THE COURT: And is the request of the Court  
10 then, is to just to approve, carte blanche, the entire report;  
11 or do we have to go through and address each one of those 103  
12 by -- or 107 individually?

13 MR. HERSKOVITS: Well, no, I think we do not  
14 have to address each one individually. And the practice  
15 with the various analogous reports that the United States has  
16 filed from time to time, has been for there to be objections,  
17 if there are any objections to particular numbered items or  
18 defendants, and the requested action; or for -- usually,  
19 Ms. Schneider would go through them and only touch upon  
20 the specific individual defendants who there either was  
21 an objection to, or some change of circumstance or new  
22 information raising an issue. Otherwise, an order would be  
23 submitted to the Court and the Court would be requested to  
24 sign the order and, essentially, approve everything requested  
25 in the status report.



1           We've circulated -- we haven't filed a proposed  
2           order because we were not clear about whether we would have  
3           to wait to hear, today, if there were any objections from any  
4           of the defendants or anyone else. We haven't received any.  
5           We've circulated today, just this morning, to the parties and  
6           the Court, a proposed order that does what I've described. It  
7           basically is an order with attachments that approves the  
8           completion of service as to that long list of defendants who  
9           have been served, dismisses the ones who need to be dismissed  
10          from the case, substitutes the three new entities, and makes  
11          the correction to the caption.

12           So, there is an order that would effectively do what  
13          I've described. And I guess, if anyone --

14           THE COURT: I was just handed something about  
15          this case; Proposed Order Setting Supplemental Briefing  
16          Schedule For Later Served Defenses Who Which to File Responses  
17          To Mineral County Briefs --

18           MR. HERSKOVITS: That would be item -- I'm  
19          sorry, Your Honor. That's item 2-D on the --

20           THE COURT: All right. I didn't think it  
21          pertained to it. I was just handed it, and I don't know what  
22          it meant. So, do we have something that pertains to this  
23          particular item A and B?

24           MR. HERSKOVITS: We do, Your Honor. It's a  
25          Proposed Order Concerning Status of Remaining Proposed

1 Defendants to Be Served By Rule 4 Service. I handed copies  
2 to Ms. Ogden this morning and, also, to all of the other  
3 parties.

4 THE COURT: All right. I have not seen this.

5 MR. HERSKOVITS: No, Your Honor. We don't know  
6 yet -- we didn't file it earlier because we do not know yet  
7 if we're going to hear any objections today. We have not  
8 received any objections since the Status Report was filed.  
9 And it doesn't seem as though there would be any, but we did  
10 not want to assume that.

11 THE COURT: I'm informed it's, apparently, a  
12 part of 662. What I printed out on 662, though, didn't  
13 include it.

14 MR. HERSKOVITS: No, it's not --

15 THE COURT: So maybe I missed it as an exhibit.

16 MR. HERSKOVITS: I'm sorry. Ms. Ogden is  
17 probably confused because I handed them to her together.  
18 It's not an attachment or a part of 662. 662 --

19 THE COURT: Now, have the other people in this  
20 case seen this Proposed Order Concerning Status of Remaining  
21 Proposed Defendants to Be Served By a Rule 4 Service?

22 MR. HERSKOVITS: All of the primary defendants  
23 have gotten copies this morning. I think if -- I don't  
24 believe it's been the practice in the past to serve the  
25 proposed order on every single defendant --

1 THE COURT: I think you're right.

2 MR. HERSKOVITS: -- covered in the service  
3 report. It really has just turned on whether there were  
4 objections raised.

5 MR. HERSKOVITS: And we will file -- if there  
6 are, and if there needs to be any change to this report, this  
7 proposed order, we will make those and then file it today or  
8 tomorrow.

9 THE COURT: All right. I have then, in front of  
10 me, the report and the supplement. Those are documents 654  
11 and 662.

12 Does anyone have any comment with respect to these  
13 reports and, particularly, any objection to the Court's  
14 issuance of the order concerning the status that has been  
15 submitted by Mr. Herskovits?

16 (No response.)

17 THE COURT: Well, Mr. Herskovits, silence,  
18 apparently, indicates acquiescence, and I will go ahead and  
19 sign that order.

20 MR. HERSKOVITS: Would Your Honor like us it  
21 to electronically file it after the Status Conference before  
22 signing it, or is the --

23 THE COURT: I guess you should because we  
24 wouldn't have --

25 MR. HERSKOVITS: We should --

1 THE COURT: I was thinking we can change and  
2 modify it here with the proposed order, but not until it does  
3 get filed. So, that's a good point. Yes, please.

4 MR. HERSKOVITS: We will do that today, Your  
5 Honor.

6 And we have been in touch with the three newly  
7 substituted-in defendants. So in addition to what I've  
8 said about the State of California and communicating with  
9 Mr. Neville, we're confident that we'll have service resolved  
10 on those three newly substituted defendants within this month.  
11 So I do believe that we will be complete, completely finished  
12 with personal service by the end of February, which is within  
13 the March 1st deadline that I believe was set by the Court,  
14 but we won't actually, probably, have our next status  
15 conference until whenever that is set. But, that's probably  
16 the point at which we would file one last service report and  
17 one last proposed order to approve completion of service on  
18 those last four remaining defendants to be served. At that  
19 point, it will be only service by publication that needs to  
20 be addressed. But, we will get to that under item number 3 on  
21 the agenda.

22 THE COURT: All right. We can turn to Item 3.

23 MR. HERSKOVITS: I think that --

24 THE COURT: Unless anyone had any comments  
25 or -- excuse me, do we have -- are you talking about Item 3 or

1 item -- well, Item 3 are the issues common to both  
2 sub-proceedings. I'm sorry. I got confused. And this -- we  
3 were just talking about Item 2, subparagraphs A and B.

4 MR. HERSKOVITS: That's correct; which I think  
5 I'm done with. I think that addresses them.

6 THE COURT: All right. Does anyone wish to  
7 make any comment or have any discussion on those two agenda  
8 items?

9 (No response.)

10 THE COURT: None appearing, let us turn to 2-C.

11 MR. HERSKOVITS: Yes, Your Honor. I'm afraid  
12 that I should have asked Mr. Guarino to delete Item 2-C  
13 because at the last status conference, it was agreed, I  
14 believe, the Court affirmed that Mineral County would  
15 finish the list that it's maintaining of pro se defendants  
16 or parties, and circulate it after personal service was  
17 completed, which is -- we're not quite at that point yet.

18 So, that is something that we will be circulating  
19 once we've completed personal service, which, as I've said,  
20 would be this month, I believe. We'll be done within, I  
21 think, maybe two or three weeks.

22 THE COURT: All right.

23 MR. HERSKOVITS: So I'm not sure that Item C  
24 really needed to be on the agenda because there's nothing done  
25 and nothing to be done today with regard to that.

1 THE COURT: Okay. Unless anyone wants to have  
2 any discussion on it, let's move to 2-D.

3 (No response.)

4 MR. HERSKOVITS: Yes. That's --

5 THE COURT: My understanding is you all finished  
6 your briefing on the Motion to Intervene.

7 MR. HERSKOVITS: Yes, Your Honor. We -- when  
8 you say "you all," what I would want to just clarify is that  
9 the briefing schedule that was established by the Court, and  
10 the briefing that has been completed since mid January, is  
11 our opening and reply briefs, and the response or opposition  
12 briefs from any defendants who had any positions or responses  
13 that they wanted to file. That covers defendants who had been  
14 served prior to this last phase of 107 defendants.

15 So this supplemental -- this order that was filed,  
16 or circulated, actually, it hasn't been filed because we were  
17 asked, or directed by the Court to file by the 5th, this  
18 Tuesday, a proposed order addressing how notice and an  
19 opportunity to submit a brief in opposition would be, or  
20 response of any kind would be provided to those newly served  
21 defendants. In practical terms, it will be a very small  
22 number of the people who have been served who actually are  
23 filing Notices of Appearance of one sort or another, but --

24 THE COURT: And this should just be a heads up  
25 to them that they can file a position with respect to Mineral

1 County's Motion For Intervention?

2 MR. HERSKOVITS: Yes. What we've proposed in  
3 this proposed order is that when service is complete, we  
4 would take it, you know, the County would serve this order,  
5 or whatever order the Court ultimately signs, on all of the  
6 newly served defendants who have entered appearances. This  
7 order would then inform them of the briefing. We would give  
8 them a particular time period. I think we proposed 45 days  
9 because that's what the defendants were given to file  
10 oppositions or responses in the original schedule. And  
11 then because we don't know whether anything will be filed  
12 or, if it will be filed, whether new defendants will raise  
13 new issues that we have not had an opportunity to address, we  
14 also proposed a 30-day period for us to file a supplemental  
15 reply, if that's necessary. If people are merely reiterating  
16 or joining the response briefs that were filed by defendants  
17 already, obviously, we would not file or need to file any  
18 additional reply, and it wouldn't be appropriate. But if any  
19 defendant files some paper and makes arguments that are wholly  
20 new, and that we haven't had a chance to reply to, that's the  
21 purpose of including that in the proposed supplemental or  
22 additional briefing schedule.

23 None of us, I think, can predict what the newly  
24 served defendants will do. I believe the proposed order  
25 also indicates that we will serve, with the order, all of the

1    briefs that have been filed, so that these newly served  
2    defendants won't have to go to the trouble of collecting  
3    or looking up the briefs and printing them out themselves.  
4    For pro se defendants, I think that would be more or less  
5    necessary. And I think the number would be small enough  
6    that even for, even for legal counsel, we would probably  
7    send the briefs. I don't recall the precise thing that is  
8    said in the proposed order, that last point, so let me flip  
9    to it, Your Honor.

10            But, that is the proposed order setting supplemental  
11    briefing schedule that was circulated on Tuesday to all of  
12    the other primary parties. And this morning, I handed it to  
13    Ms. Ogden to give to you.

14            My anticipation from the summary, the Status  
15    Conference in December, and the Minutes of the Court, and  
16    the summary, were that this was circulated so that we could  
17    discuss whether or not this order seemed appropriate to all  
18    of the parties and the Court, or whether it should be modified  
19    in some way. But, clearly, I think been -- the Court and the  
20    parties have all agreed that something to this effect needs  
21    to be done, so that these newly served defendants are not  
22    foreclosed from at least an opportunity to weigh in on the  
23    intervention issue.

24            THE COURT:    I --

25            MR. HERSKOVITS:  Oh --



1 THE COURT: -- I feel at a loss. I don't  
2 remember the discussion at the December 13 hearing about  
3 extending briefing out. Maybe I did. I'm just trying to  
4 look at the Minutes here and I don't see -- is that what I've  
5 said?

6 MR. HERSKOVITS: Let me see if I can find it  
7 for you, Your Honor. I will say that the original discussion  
8 occurred back in August when we were talking about setting  
9 a briefing schedule. And, at that time, we addressed the  
10 question of these defendants who were about to be served,  
11 who wouldn't necessarily be served or be in a position to  
12 receive copies of the briefs on the Motion For Intervention,  
13 or be aware of the fact that there was a timeline passing  
14 either while they were being served, before they were served,  
15 or so quickly after they were served that they wouldn't really  
16 be in a position --

17 THE COURT: Well, my concern is timing. And  
18 if there's a reply memo that's been filed here, Judge Jones'  
19 chambers may consider that it is ripe for decision. And now  
20 we're going to enter another order here saying we're going  
21 to give those people who have been recently served another  
22 opportunity to chime in on this issue. How much time are  
23 we talking about that they will have to file something under  
24 this proposed order?

25 MR. HERSKOVITS: Well, I think we're

1 anticipating that service will be complete by March 1st,  
2 or that we may have an order affirming the completion of the  
3 service from the Court at the next status conference, which  
4 hasn't been scheduled yet, but I guess I was anticipating  
5 would be early March. We would then, within one week,  
6 serve the order on the newly served defendants, and then  
7 they would have 45 days -- it could be a shorter period of  
8 time. We didn't want to shorten it more than the other  
9 defendants had had -- 45 days for them to reply or file an  
10 opposition or a response, if they so choose. And then 30 days  
11 for us to file a supplemental reply, if one is warranted or  
12 required, depending on whether anything new is filed and  
13 whether it raises any new issues.

14 THE COURT: Well, how are these new people  
15 any different from those who elected not to receive service  
16 in this case? Were the motions served on all hundreds and  
17 hundreds of named defendants?

18 MR. HERSKOVITS: Well, sure. The same, the  
19 same underlying papers have been served on all defendants.  
20 These people are different, just in that they haven't been  
21 served until after the briefing schedule was already under  
22 way. So, they don't differ in any way other than that they've  
23 been brought into the case later, too late to participate in  
24 that original briefing schedule for intervention. I think,  
25 if I'm remembering --

1 THE COURT: So if we don't have another status  
2 conference until March, even a month away, then you give them  
3 45 days after that, you're taking us into May before it's  
4 deemed to be ripe for Judge Jones to take a look at?

5 MR. HERSKOVITS: Well, I think that's probably  
6 correct. If we were to have to file a supplemental reply,  
7 that is about what the time frame seemed to me to be, Your  
8 Honor.

9 Now, I will say that there was some discussion  
10 about whether to move forward with briefing on intervention,  
11 and whether it was appropriate to do it before this last,  
12 this last batch of defendants had actually been served, and  
13 so they would be present, so to speak, if they wanted to be,  
14 for briefing on that issue. I think at the time there was  
15 a bit of unclarity, maybe, about whether that was absolutely  
16 necessary, or whether it was fine to move forward with  
17 intervention without those defendants having been brought  
18 into the case yet. And the decision -- it may not have been  
19 as formal a decision as I'm making it sound. I don't mean to  
20 invest more finality than it had, but the impression I had was  
21 that the Court had discussed it with the parties, and I think  
22 I had addressed it, and maybe that Mr. DePaoli or someone else  
23 on the defendant's side had addressed it, and suggested that  
24 some supplemental opportunity to brief the same intervention  
25 issue could be provided, before it was decided, to these newly

1 served defendants. That's why we've moved ahead with this  
2 proposed order and this idea of setting a supplemental  
3 schedule, brief briefing schedule, relatively short.

4 THE COURT: Well, my understanding on the  
5 Motion For Intervention is that, really, only the principal  
6 players to this case have filed anything, and none of the  
7 other people who have been served in this case did anything  
8 with it.

9 MR. HERSKOVITS: That's correct.

10 THE COURT: So what's the expectation as to  
11 these others? And I know there are considerations that they  
12 should have an opportunity. But, on the other hand, it's  
13 going to delay this out two, three months again. And I guess  
14 in the overall scheme of things, something has been going on  
15 since -- when did Mineral County first file, '96?

16 MR. HERSKOVITS: '94.

17 THE COURT: '94. What's another three months  
18 in the 20-year history of this case?

19 MR. HERSKOVITS: Well, Your Honor, I mean,  
20 that's a valid point. I think the likelihood or the  
21 expectation is low. I'm not sure what, if anything, will  
22 be filed. But, I also don't feel as the plaintiff's legal  
23 counsel, that it's my place to assume that none of these new  
24 defendants would file anything. So, it's quite possible  
25 nothing will be filed.

1 THE COURT: Does -- I guess Walker River took  
2 the lead on that anyway, does Walker River Irrigation District  
3 have any position about this?

4 MR. DEPAOLI: No, Your Honor.

5 THE COURT: When did you distribute,  
6 Mr. Herskovits; this Proposed Order Setting Supplemental  
7 Briefing Schedule?

8 MR. HERSKOVITS: We circulated it to the other  
9 primary parties on this Tuesday, the 5th.

10 THE COURT: And no response?

11 MR. HERSKOVITS: No, we haven't received any  
12 response.

13 THE COURT: All right. Does anyone have any  
14 comment or suggestion on this supplemental briefing schedule?

15 MS. SCHNEIDER: Your Honor, this is Susan  
16 Schneider. I'm looking at the summary of the proceeding, the  
17 Status Conference on December 13th. And I don't know whether  
18 the Court has that, but there is a paragraph on page 4 --

19 THE COURT: You know, I had it when I walked in  
20 here and now -- oh, I gave it to Ms. Ogden.

21 MS. SCHNEIDER: Okay. That discusses, I think,  
22 this issue a little bit. I can read it --

23 THE COURT: No, I have it now. Just wait a  
24 second. Where are you, which paragraph?

25 MS. SCHNEIDER: I'm looking -- this is, I think,

1 the document I have is still a draft, but I think it's page 4,  
2 and it's paragraph 2, section 2(a), and the last paragraph  
3 there. It starts out: "In response to Magistrate Cobb's  
4 request --"

5 THE COURT: Right.

6 (Judge reviewing document.)

7 THE COURT: "Mr. Herskovits will draft an  
8 order to go out after service is complete, that identifies  
9 a time frame to file comments and replies to comments.  
10 Mr. Herskovits will circulate his draft. Magistrate Judge  
11 Cobb will discuss this process with Chief Judge Jones."

12 I think what I'm going to do is follow on what  
13 was said in the agenda and discuss this with Judge Jones to  
14 see whether he wants to afford these additional parties the  
15 opportunity to wade into this motion, or whether he says  
16 let's go ahead. It may be a while for him to get to it  
17 anyway with the, as I've told you guys -- or, excuse me, I  
18 shouldn't use that type phrase -- as I've told everyone  
19 here that with the retirement of Judge Reed and Judge Hicks,  
20 even though he's still taking a full case load, the district  
21 judges here, with the two or three vacancies, are really  
22 overloaded.

23 I know that he wanted to get going on the motion.  
24 That's why I setup the briefing schedule. Even though, at  
25 that time, the Court was aware that there is still to be

1 service on other parties. And I think the rationale  
2 Judge Jones expressed was that it frequently happens in  
3 cases where decisions are made in a case, and then some  
4 other parties brought in is bound by that decision. So,  
5 it's not that unusual of a procedure. So I don't know how  
6 he will react to this, but I will discuss it with him.

7 Mr. Herskovits, could you go ahead and file that  
8 proposed order so I'll have that document?

9 MR. HERSKOVITS: Yes, Your Honor. And just  
10 for the record, certainly Mineral County is not trying to  
11 pressure the Court to add, add a gratuitous amount of time  
12 or opportunity for the newly served defendants. We're just  
13 trying to be very sensitive to the potential complaints of  
14 defendants who might have come in just barely after the  
15 briefing was started or completed.

16 THE COURT: All right. What militates against  
17 that, as I've said earlier, is no one else, other than the  
18 principal players in this case, have filed anything. And,  
19 two, I believe all these are individual users, similar to  
20 those who have already been served in this case, who are among  
21 those who didn't do anything in the case.

22 MR. HERSKOVITS: That's correct, Your Honor.

23 THE COURT: All right. Does anyone else have  
24 anything to comment on with respect to this agenda item?

25 And, Ms. Schneider, thank you for bringing that to

1 my attention. And, Mr. Herskovits, thank you, too.

2 (No response.)

3 THE COURT: None appearing, let's move on.

4 It looks like -- does 3-A, Ms. Schneider, is that  
5 something that you wanted to take on?

6 MS. SCHNEIDER: I'm deferring to Mr. Guarino.  
7 I'm trying to.

8 MR. GUARINO: That's fine, Your Honor.

9 THE COURT: Mr. Guarino, I'm sorry.

10 MR. GUARINO: That's okay.

11 THE COURT: I guess my question is are we back,  
12 again, with this Lia Griffin input that we need?

13 Have we heard back from Ms. Griffin?

14 THE CLERK: Yes, Your Honor. Let me print it.

15 THE COURT: Mr. Guarino, why don't you go ahead  
16 with the discussion of 3-A while we're waiting on this.

17 MR. GUARINO: Thank you, Your Honor. And I  
18 will back up just a bit back to 1-A. I meant to mention,  
19 when I was giving my brief summary report, that based upon  
20 where we're at on the service, the service and continuing  
21 service efforts that we are undergoing, it appears we're  
22 estimating that we will not be able to complete service on  
23 the 125B case until, with the dormant riparian water rights  
24 holders, until probably May or June. I think we were a little  
25 more optimistic, in December, about when we might be able to



1 finish service on those folks, but I think -- we think a more  
2 realistic time frame is May or June.

3 And so with that said, and moving back over to  
4 3-A concerning publication, we have begun to look at  
5 the issue. I have had some preliminary contact with  
6 Mr. Herskovits with respect to the common issues of  
7 publication concerning 125B and 125C. I don't anticipate  
8 that we would move forward on publication until after we've  
9 completed service. And then --

10 THE COURT: And what would publication be for,  
11 or for whom?

12 MR. GUARINO: Publication would be for anyone  
13 who we have not identified as someone who would need be given  
14 notice of these proceedings; or who we were ultimately unable  
15 to contact for -- through the service process that we would  
16 otherwise have.

17 THE COURT: Would that hold true for 128 as well  
18 as 127?

19 MR. HERSKOVITS: Yes, Your Honor. It's the same  
20 situation.

21 THE COURT: Could there be one notice, or do  
22 you have to have two different publications?

23 MR. HERSKOVITS: Well, they're two separate  
24 cases with separate issues, and so they're -- I think it could  
25 maybe be jointly done, but it would have to be very clearly

1 setout to make sure people were informed of the nature of the  
2 two cases. But, we are thinking that there is enough that's  
3 common to what needs to be done on the two proceedings, that  
4 it would be productive for us to talk about what we think  
5 needs to be included and done and share ideas about how it  
6 could be done efficiently.

7 MR. GUARINO: And that's what we propose to do  
8 moving forward.

9 THE COURT: So this is sort of a catchall kind  
10 of notice: Please be advised that there's a lawsuit pending  
11 which may affect your water rights.

12 MR. GUARINO: Precisely, Your Honor.

13 MR. HERSKOVITS: Yes.

14 THE COURT: But that's still premature to do  
15 that?

16 MR. GUARINO: I believe so.

17 MR. HERSKOVITS: Yes.

18 THE COURT: Well, that could also throw a monkey  
19 wrench in that other order about those you just served about  
20 you have 45 days to file something if you want. Then if you  
21 go out and do a notice, well, shouldn't those people fall in  
22 the same category?

23 MR. HERSKOVITS: Well, one could take the  
24 position that they do, Your Honor. I think that it didn't  
25 come up in earlier discussions. And our view would be that

1 once you get to the publication stage, you probably do have  
2 a clear tipping of the balance of these factors, where  
3 people who have been -- over the many years, have not gotten  
4 identified and have not somehow gotten involved in the case  
5 yet, it's not very likely that people will come out at that  
6 point and add much to the case. And so at that point, I  
7 wouldn't suggest perpetually, or for a prolonged period,  
8 holding open intervention briefing further. It seems to me  
9 that it becomes ever more attenuated as you go into, now,  
10 the speculative outcome of notice by publication.

11 THE COURT: Well, I certainly think there  
12 should be sort of a catchall notice by publication in both  
13 cases, and I think it's premature to discuss the details.  
14 But that being said, I think that takes care of Topic 3-A,  
15 unless anyone else has any comments to make.

16 Mr. DePaoli.

17 MR. DEPAOLI: Your Honor, just one comment.  
18 Without saying that publication can or cannot be common  
19 with respect to B and C, it does seem to me, though, that a  
20 decision will need to be made on the Motion to Intervene and  
21 the filing of the Complaint in Intervention before there is a  
22 publication with respect to C.

23 THE COURT: Why? I disagree. You think there  
24 has to be a decision on the -- whether they can intervene or  
25 not? Shouldn't they be given an opportunity to wade in on the

1 possibility that intervention is or is not appropriate?

2 MR. DEPAOLI: Well, that's sort of the same  
3 discussion we were having about the people who have been  
4 recently served. If that's the -- if that's the purpose of  
5 the publication, to let people know that there might be a  
6 lawsuit in which someone might be allowed to assert through  
7 intervention --

8 THE COURT: Oh, I see your point.

9 MR. DEPAOLI: -- and that they have time to  
10 oppose the intervention, if that's the purpose, then that,  
11 maybe, is correct. But my understanding is that the purpose  
12 of this publication is to let people know that there actually  
13 is such a lawsuit pending, and that's why it seems to me that,  
14 as to C, that decision should come first.

15 THE COURT: Well, I would disagree that the  
16 decision has to come first, but I can see that now that  
17 notices would not necessarily be, to use your term common,  
18 that you would need one notice to advise everyone that Mineral  
19 County wants to intervene in this lawsuit for the purpose  
20 of securing more water for Walker Lake. Something to that  
21 effect. And, a Motion For Intervention is pending. And  
22 you're given notice of this and you have the opportunity to  
23 comment if you so desire.

24 The other one would be, the 127 case, where it's  
25 just -- there's an action pending. And if you have any claim

1 to rights, you better take note of the pending lawsuit.  
2 Something like that.

3 All right. Good distinction. Thank you.

4 MR. HERSKOVITS: Your Honor, if I can just maybe  
5 add a point to that, or refine it a little bit. Two things  
6 occur to me: One is that in C and in B, it's not just anyone  
7 in the universe who has the standing to come in, but the  
8 notice would alert any unidentified Decree water rights or  
9 surface appropriated water rights holder, who somehow hadn't  
10 been served personally, to come forward. So, it wouldn't be  
11 quite just anyone who wants to comment.

12 THE COURT: Right. It's just those people who  
13 claim to have water rights in the Walker River Basin?

14 MR. HERSKOVITS: Yes, Your Honor.

15 The other thing I wanted to note is we are likely  
16 to be finished with personal service by the end of February;  
17 which means, at least in theory, that we could move to  
18 publication in March. However, it doesn't sound as though  
19 the United States and Tribe will be finished until maybe  
20 May or June. So maybe that, by that time, a decision on  
21 intervention will have been made, even if there is the  
22 supplemental briefing schedule, which would then put the two  
23 notices on, roughly, the same time.

24 THE COURT: I don't think they have to go in  
25 lock step, myself. I would think that you could proceed with

1 notice --

2 MR. HERSKOVITS: That's true; yes.

3 THE COURT: -- and that would be my inclination  
4 to go in that fashion. So, maybe have that ready to go as a  
5 topic --

6 MR. HERSKOVITS: In March?

7 THE COURT: -- at the next conference.

8 MR. HERSKOVITS: Uh-huh.

9 THE COURT: And I think we ought to have one in  
10 March rather than waiting two months.

11 MR. HERSKOVITS: I think so, Your Honor,  
12 because we will, I believe, will be finished with personal  
13 service and ready to take this next step. In the meantime,  
14 Mr. Guarino and I can discuss what kind of -- if there are any  
15 efficiencies or commonalties in how Publication Notice, what  
16 publication should be pursued, we can work that out, even if  
17 they are published separately at different times.

18 THE COURT: All right. Then let's turn --  
19 unless there are any other topics on 3-A?

20 (No response.)

21 THE COURT: None appearing, let's go to 3-B  
22 about the draft e-service order. And that was what was  
23 1779-1, which has been submitted to Judge Jones. I think  
24 he was concerned that there were going to be arguments on it  
25 today. And my understanding is there is no argument on the

1 form and content of 1779-1.

2 Am I mistaken in that belief?

3 (No response.)

4 THE COURT: All right. Then the only thing that  
5 Judge Jones needs to ascertain then is a date in paragraph 14  
6 for the deadline for people to return the notice response.  
7 After Judge Jones signs this order, the website, which is  
8 ready to go, will go live.

9 So, to me, that takes care of the discussion of  
10 the e-service order, unless anyone else has anything to  
11 comment on that. But then we have to go back to that -- what  
12 was the other issue on electronic service they were asking  
13 Ms. Griffin?

14 Well, again, I get back to the e-service order  
15 discussed in the summary at page 5, and the website order,  
16 Judge Jones said that you don't need a general order. He  
17 doesn't want a general order. He wanted an order to be  
18 entered in this case. And that's why I thought the general  
19 order and the E-Serve Order about the website were all taken  
20 care of by 1779-1.

21 Does anyone think differently?

22 (No response.)

23 MS. SCHNEIDER: Your Honor, this is Susan  
24 Schneider. I think the only question was whether Ms. Griffin  
25 has a different view of it. And I just don't know the answer.

1 THE COURT: Well, what we got back from  
2 Ms. Griffin, and she said that the order being reviewed by  
3 Chief Judge Jones includes the website and e-service. So I  
4 think she and I are, at least, are on the same web page -- if  
5 you want to use that phrase -- same wave length there.

6 MS. SCHNEIDER: All right then. Then that's --

7 THE COURT: Now, down the line, I guess, she  
8 says we're going to probably have something like this in the  
9 C case.

10 Mr. Herskovits.

11 MR. HERSKOVITS: Yes; that's the expectation,  
12 Your Honor.

13 THE COURT: Okay.

14 MR. HERSKOVITS: I'm not sure they'll be much  
15 different. We could probably, with minimum modification, use  
16 the same order. We were not -- we were not prepared to move  
17 on to that yet until we finished our personal service. So,  
18 that may be something else that should be put on to the agenda  
19 for the March status conference, a similar e-service order for  
20 the 125C or number 128 case, that proceeding.

21 THE COURT: Well, when you do the agenda, I  
22 think one of the topics ought to be, and maybe a report from  
23 Ms. Griffin, on how the website is working out and any  
24 complications. And, certainly, if anyone has any issues  
25 after it does go live, please let her know.



1                   So is there anything else on agenda Item 3-B and  
2 3-C?

3                   MR. GUARINO: I don't believe so, Your Honor.

4                   THE COURT: All right. None appearing, let's  
5 go to the thing of setting the date for our next status  
6 conference on this case in March. I'm looking at the week  
7 of March 11th. The 14th I may have to be in Las Vegas.

8                   What about the 13th, Wednesday?

9                   MR. WILLIAMS: Your Honor, I have a hearing with  
10 the State Engineer on the 13th.

11                  THE COURT: What time is that hearing?

12                  MR. WILLIAMS: 9:00 a.m. I'm not exactly sure  
13 how long it's going to last.

14                  THE COURT: Could we set this, perhaps, at  
15 11:00?

16                  MR. WILLIAMS: Yeah, well, that hearing is in  
17 Carson City.

18                  THE COURT: 1:00?

19                  MR. WILLIAMS: I believe so. I believe that  
20 would work.

21                  THE COURT: The reason why I'm looking at that  
22 week is because we had, all the judges here, magistrate  
23 judges, had reserved it on our calendars for possible  
24 assistance to the magistrate judges in Las Vegas on a week  
25 of settlement conferences. And it appears that that is being

1 vacated now, so I have some time in my calendar. Otherwise,  
2 I'm in a world of hurt about moving things around.

3 So let's set it for March 13 at 1:00 p.m.,  
4 1:30 p.m. And I don't know that we have anything momentous  
5 that I would necessarily ask everyone to be here in person.  
6 You can participate by phone. But, certainly, if you want  
7 to attend personally, that's fine with me.

8 Now, before we return to this case management  
9 issue, and we'll take a little recess before we do that, is  
10 there anything else, additional issues that need to be  
11 addressed here today that we haven't covered?

12 (No response.)

13 THE COURT: All right. Now the next topic will  
14 be the case management issues. My thought is that those will  
15 probably take some time, but I would like to continue through  
16 the lunch hour so we can get this done and let those that got  
17 to catch a plane or something get out of here. So why don't  
18 we take ten minutes. And unless anyone has violent objection,  
19 and we'll start those arguments about the Amendment of the  
20 Case Management Order.

21 So, we'll be in recess for that ten minutes.

22 (Recess taken.)

23 (Back on record at 11:40 a.m.)

24 THE COURT: Please be seated.

25 THE CLERK: This is to reflect that we're back

1 on the record in the United States of America versus Walker  
2 River Irrigation District, and others.

3 THE COURT: At this time, we'll take up the  
4 agenda item on the proposals to amend or supplement, however  
5 you want to call it, the Case Management Order in this matter.  
6 It appears the United States has taken the lead on this in  
7 the 127 case.

8 And Mr. Guarino or Ms. Schneider, I don't know  
9 who's going to continue here.

10 MR. GUARINO: That would be me, Your Honor.

11 THE COURT: And just to let everyone know, I  
12 and my law clerk have gone through these, discussed them, and  
13 then I went back and reread the magistrate judge 101 education  
14 you gave me when I first came into this case to bring me up  
15 to speed, and tried to get a better handle on it. So, I am  
16 familiar with your arguments. And I thought they were both  
17 very well written and very well prepared, as has been most  
18 everything in this case. There's some excellent lawyering  
19 going on in this matter.

20 With that Mr. Guarino, go ahead.

21 MR. GUARINO: Thank you, Your Honor.

22 While I think that our position is fairly squarely  
23 presented in our briefs, we're seeking the Court to issue a  
24 Supplemental Case Management Order, for the reasons that we  
25 articulate, and to proceed as efficiently as possible, and to

1 move this case forward. We think that the proposal that we  
2 have, which is the Court should enter a Supplemental Case  
3 Management Order that would next have the parties, all  
4 parties, file their Rule 12 motions to challenge the legal  
5 sufficiency of the Tribal claims, the Complaint -- I'm sorry,  
6 the federal, the United States' counter-claim, to challenge  
7 any of the claims of the United States' counter-claim would  
8 be the most efficient way to proceed.

9 We've argued to the Court that the best way to  
10 proceed is to follow the Rules of Civil Procedure, which  
11 outlines a path for not only this case, but every case that  
12 comes before the Court. This case is really no different  
13 from any other case. It's not a complicated case. It  
14 doesn't, it doesn't trigger any notions of complex civil  
15 litigation.

16 We start with, of course, the Case Management  
17 Order, which was issued about a decade ago. And in the Case  
18 Management Order, the judge was very clear that when we  
19 got to this point in the proceedings, the magistrate would  
20 have to make a number of decisions. And it gave, I think,  
21 the magistrate very wide latitude, and directed the magistrate  
22 that you're going to have to control --

23 THE COURT: Magistrate judge.

24 MR. GUARINO: Magistrate judge. Sorry.

25 THE COURT: That's the official title since

1 1990.

2 MR. GUARINO: And I misspeak. I'm sorry.

3 The magistrate judge has a lot of discretion here  
4 to proceed as it, as he believes is the most efficient way to  
5 proceed in this case.

6 THE COURT: Well, wasn't part of that discretion  
7 he was saying that that would include this briefing of what he  
8 called the threshold issues?

9 MR. GUARINO: Possibly; yes.

10 THE COURT: I don't know if it's possibly.  
11 It's black and white in that CMO. I mean, it's Judge Reed,  
12 who lived, breathed and died this case, and came up with the  
13 sub-bracketing idea for the various cases, and thought that  
14 the best management approach is this idea of the briefing of  
15 the threshold issues.

16 MR. GUARINO: The Court was very clear that  
17 the magistrate judge should consider what issues it should,  
18 it should proceed on. And it's the United States' position,  
19 very clearly, that it's the -- that legal issues, simply the  
20 legal issues, the challenges, the legal, the legal challenges  
21 to the sufficiency of the Tribal claims should be those  
22 threshold issues, if you want to label them that way, that  
23 this court should proceed with. They are, they are a known  
24 set of potential issues that can be developed by any party,  
25 that can be brought by anybody. There's no limitation upon

1 any party from doing so.

2 THE COURT: Give me an example of some of the  
3 types of federal rule motions you're talking about; all 12(b)  
4 motions?

5 MR. GUARINO: Yes, all 12(b) motions. And for  
6 example, the Walker River Irrigation District raises the issue  
7 of groundwater. And they, apparently, seem to be arguing that  
8 reserved water rights cannot include claims for groundwater.  
9 We anticipate that's going to be a challenge to the very  
10 sufficiency of our, of our Tribal claims. They can bring  
11 that -- I believe they can bring that as a 12(b)(6) challenge  
12 to the Tribal claims that you can't, you can't have reserve  
13 water rights that involve groundwater. If that's their claim,  
14 that's one they should bring it. They don't need a factual  
15 basis.

16 THE COURT: Well, does that involve any  
17 discovery?

18 MR. GUARINO: I should think that it would not.

19 THE COURT: Okay. Let me interrupt one second.

20 Mr. DePaoli, do you have an example of some type  
21 of potential motion that could be filed that would involve  
22 discovery? Just give you the one. Just stay where you are,  
23 Mr. Guarino.

24 MR. GUARINO: Sure.

25 MR. DEPAOLI: I'm sorry, Your Honor. What?

1 THE COURT: Do you have any example of some  
2 type of a motion that the defendants might file that would  
3 necessitate discovery?

4 MR. DEPAOLI: Yes.

5 THE COURT: What?

6 MR. DEPAOLI: A motion based upon claim and  
7 issue preclusion, for one.

8 THE COURT: And what type of discovery would  
9 you envision under claim or issue preclusion?

10 MR. DEPAOLI: What I would envision on that,  
11 Your Honor, would likely center around precisely what the  
12 United States was doing in the litigation that went from 1925  
13 to 1940 with respect to Weber Reservoir and the surface  
14 water claim that the United States was asserting at that  
15 time.

16 It would be our position that the United States --  
17 that the surface water claim that the United States was  
18 asserting at that time would have included putting water  
19 into that Reservoir, which had been studied and was, in fact,  
20 under construction prior to the time that the Decree was  
21 entered. And so our -- we would need to get into exactly  
22 what was going on at that time, both in the pleadings and  
23 perhaps elsewhere, as to why a claim, today, for a surface  
24 water for Weber Reservoir should not have been litigated  
25 and was part of a claim that was in fact litigated in the

1 original litigation.

2 THE COURT: Okay. So, hypothetically,  
3 Mr. Guarino, if we go ahead and amend or supplement the Case  
4 Management Order, and the defendants wanted to do discovery --  
5 and I'm not saying they can or cannot at this time, but let's  
6 say, hypothetically, they allowed them to do it, would that  
7 convert that 12(b) motion to a Rule 56 motion; and do you  
8 contemplate that type of motion being provided for in this  
9 first phase?

10 MR. GUARINO: I don't, I don't believe that the  
11 supplement -- I believe -- the answer, I think, is no. If it  
12 contemplates discovery at this, in this sup -- in this initial  
13 phase, no, I don't think we should proceed to that issue then.  
14 We should wait until the discovery is complete. But, let me  
15 back --

16 THE COURT: You think that's part of the merits  
17 phase?

18 MR. GUARINO: I do. I do. Just as any defense,  
19 or in the very claims themselves, need to be discovered at  
20 the same time. And I would simply disagree with Mr. DePaoli  
21 about what would be needed to establish a res judicata or  
22 claim preclusion.

23 THE COURT: So your argument is he could make  
24 that as a 12(b) anyway, without --

25 MR. GUARINO: It's based upon the pleading, is



1 my belief. And the pleading in this very case. And if  
2 we didn't -- if he's saying that what we did before bars, in  
3 this case, bars us from bringing the claim now, then it's  
4 reflected in the pleadings themselves. And you don't need  
5 discovery for such claims. I don't know what intent he's  
6 going to try and divine from, from the United States. But,  
7 clearly, even if there are instances where lawyers are  
8 thinking about things, that's not going -- that's not what --  
9 that's not how this issue is determined. It's based upon  
10 what the Court was ruling on, and what the pleadings of the  
11 United States were. You don't need discovery for that. And  
12 so I think that's more appropriate 12(b), a 12(b)(6) motion,  
13 which he can certainly provide.

14 But if it's necessary to engage in discovery,  
15 then it should not be an issue that the Court should take up  
16 as a threshold issue because discovery, under any set of  
17 circumstances, for any of the issues, whether it be for  
18 challenges to the claims, or the very claims themselves, is  
19 going to be a very involved process than what Mr. DePaoli  
20 and the opponents to this motion is of the position of; is  
21 we're going to go through discovery not once, but at least  
22 twice on --

23 THE COURT: But you're also saying that if a  
24 party doesn't make a 12(b) motion at this time, they're  
25 precluded. But what happens if, during discovery in Phase II,

1 you find something that's relevant that gives rise to a 12(b)  
2 type of motion? Are they precluded; or should we modify your  
3 proposal to say "except as permitted by legal court."

4 MR. GUARINO: Well, Your Honor, the way,  
5 the way Rule 12 motions work, through the Rules of Civil  
6 Procedure, a party first needs to either raise their Rule 12  
7 motions before they answer, at the time they answer. If the  
8 issue is something that involves something more than the  
9 strict pleadings of the case and involves other things, the  
10 Court can convert consideration of that motion into a Rule 56  
11 motion and consider it, and either resolve it then, or resolve  
12 it later. The Court has a number of options here.

13 But what our position is is that if we, if we  
14 immediately just start developing, I would describe them  
15 as a series of just basically challenges to the claims,  
16 and have them completely litigated from threshold issue  
17 establishment, to discovery, to some sort of motions practice  
18 through some sort of evidentiary hearing -- which is what I  
19 believe a Walker River Irrigation District is proposing --  
20 we're going to simply be in an endless loop of issues that  
21 will eventually lead us right back to where we're at right  
22 now; which is, we'll eventually have to get to the claims.

23 Now, of course, I believe Walker River Irrigation  
24 District's notice opposing the Tribal claims hope to actually  
25 defeat the claims before we get to the claims, but what we're

1 setting up here is, is sort of an endless series of issues for  
2 the Court to take up again and again and again. And then the  
3 Court is going to have to come up with procedures again and  
4 again and again to address these sorts of things.

5 And what we're proposing is, under Rule 12, the  
6 issues that you can bring up are straightforward. They're  
7 legal challenges. They're challenges that don't need  
8 discovery development or development of other materials.  
9 And they can be presented to the Court, and the Court can  
10 rule on them. And if the Court rules on them and finds that  
11 the Tribal claims survive, it can move forward. We can move  
12 forward to further case management and further development  
13 of those -- of the challenges that are filed.

14 And I skipped, I suppose, what we really need, of  
15 course, is to get to that point where an Answer is filed,  
16 so we know who's involved in the case; so we know what the  
17 challenges are to the claims; and we can proceed to discovery  
18 and case management on that.

19 THE COURT: Would you require an Answer to  
20 the -- by the unrepresented parties? And what if they don't  
21 answer?

22 MR. GUARINO: If they don't answer, then they  
23 have no apparent complaint to the Tribal claims.

24 THE COURT: I don't think that's at all what  
25 Judge Reed contemplated when he particularly said no defaults

1 would be entered.

2 How many parties did you say you have now, 5200?

3 MR. GUARINO: We have notified approximately  
4 5200. There have been approximately 1100 individuals who  
5 have filed an intent to participate. We have a number of  
6 people who have -- we have served and we have heard nothing  
7 from. So, there are those folks out there.

8 So the potential number of folks who might standup  
9 to object or file an Answer to the claims is potentially  
10 large. But as the Court was talking earlier with  
11 Mr. Herskovits, about who actually is going to come in  
12 and file a Complaint or file an objection or file an Answer  
13 to the Tribal claims, is going to be a relatively small  
14 number of people. I think that's precisely what the Court,  
15 ultimately, was thinking about previously. It's the only  
16 thing that the Court could have been thinking about.  
17 Eventually, we need to know who and what the objections  
18 are to the Tribal claims that we have asserted.

19 THE COURT: Well, isn't it reasonable to assume  
20 that somebody who has some water rights upstream is not going  
21 to voluntarily relinquish those rights unless they file that  
22 disclaimer?

23 MR. GUARINO: Let me backup --

24 THE COURT: I mean can't you do an assumption  
25 and just say all those who have not appeared, who have been

1 served, or those who have appeared and have been served,  
2 will be deemed to just generally deny the allegations in the  
3 counter-claim, and go from that assumption?

4 MR. GUARINO: I would say no, Your Honor. And  
5 for a couple of reasons. But, let me back up just a second.

6 The Court's used the term "default." We need to  
7 be clear here that what we have is the Tribal claims, three  
8 claims on behalf of the Walker River Tribe, and other claims  
9 associated with the federal government. Those are the claims  
10 before the Court. The claims of other folks, the water rights  
11 of other folks are not before the Court. There is no default  
12 on those rights at all. Now they can come in and object to  
13 the water rights of the United States, but they can also  
14 choose not to. And if they don't speak up and say I have an  
15 objection -- I mean that's why we've been providing service  
16 for the last decade to folks, so that they can come in  
17 and say I have an objection; I have an answer; I have a  
18 response to this Tribal claim, and it is as follows: You  
19 don't have this right. There is no such thing as a reserved  
20 water right for the Walker River Tribe. There is no such  
21 thing as a reserved water right for the marine base, or  
22 whatever, whatever somebody wants to say. But if you don't  
23 say something, you're not defaulted. There is no default.  
24 You just choose not to say something. And so --

25 THE COURT: Any by implication, though, what

1 you're saying is those people have waived any right to their  
2 own water rights if the claims of the Tribe infringe on those.  
3 And so you're going to be -- the net effect of your conclusion  
4 is that, oh, yes, they can take my water rights to fulfill the  
5 groundwater rights that the Tribe is seeking, or the federal  
6 claims that the government is seeking for Pickle Meadows.

7 MR. GUARINO: It is indisputable that in a,  
8 in a basin, one person's exercise of their water right will  
9 impact, theoretically, any other water right holder in the  
10 basin. But the notion that if someone has, or exercises  
11 an established water right, is taking from another person,  
12 another water right holder, is simply, I believe, not correct  
13 because that's -- the system works in an inter-connective  
14 way. But, providing or quantifying for one does not take  
15 from another. They have their own water rights, whatever  
16 they might be, whenever they were established under whatever  
17 law that provides for such water rights.

18 So, that is -- the issue before this Court is for  
19 the identification and quantification of the Tribal water  
20 rights or the federal water rights that are before the Court.  
21 If a person does not answer, they are not being defaulted.  
22 Their water rights are what they are, they always will be;  
23 just as the Tribal water rights are what they are. They  
24 always have been. They always will be. They came into  
25 existence at the time they were reserved for. And so there

1 is not this notion -- there is not a mechanism in which this  
2 water right takes from others.

3 And so a person can say, you know what? We think  
4 the Walker River is entitled to this water. We think that  
5 this water right is their water right. And it is not  
6 unreasonable to think that some of the people who are  
7 interested, who have filed a Notice of Intent To Participate,  
8 think that. They can agree with that. That's not  
9 inconsistent with our position. And if they don't come  
10 in to Answer or file their objection, they are saying to  
11 this court, because they have been provided notice, that  
12 we have these, this claim before the Court. Do you have a --  
13 if you don't have a position, then you are not raising an  
14 objection to these water rights. And the Court, at that  
15 time, can narrow the focus of these proceedings on to those  
16 individuals or entities that object to or challenge the  
17 claims itself, and on the issues that they have with the  
18 claims themselves. It's a narrowing process, Your Honor,  
19 that --

20 THE COURT: All right. You know, I don't  
21 think we need to address the issue of Answers at this point  
22 in time.

23 MR. GUARINO: Okay.

24 THE COURT: Maybe I got us a little ahead of  
25 ourselves here. But it's, certainly, an issue I'm going to

1 have briefed down the road because my assumption -- and let me  
2 ask Mr. Swainston.

3 Those you know in Smith Valley, how many of those  
4 are siding with the government on this case, and how many  
5 are siding with Walker River Irrigation District?

6 MR. SWAINSTON: Well, I would expect, Your  
7 Honor, that close to 100 percent would be siding with the  
8 Irrigation District.

9 THE COURT: That would be my impression, too.

10 MR. SWAINSTON: But, that's just my impression.

11 THE COURT: Well, again, we don't need to get  
12 into that right now, but my thought process is maybe down the  
13 road, we embrace a position that those who have not filed a  
14 response waiving those water rights or whatever, are deemed  
15 to have opposed the relief sought by the Tribe and the  
16 government. But, that's down the road.

17 Let me get back to another issue here. Would you  
18 want these 12(b) motions to apply to both the Tribal claims  
19 as well as the federal claims?

20 MR. GUARINO: Yes, Your Honor, we would. And  
21 the reason we would want that is because we believe that legal  
22 challenges to the Tribal claims will be in common with other  
23 challenges to the federal government.

24 THE COURT: I understand that position. But  
25 then after those 12(b) challenges are decided for the Tribal



1 and federal claims, you only are seeking to have answers filed  
2 in the Tribal case and not the federal case?

3 MR. GUARINO: Yes, Your Honor.

4 THE COURT: Why is that?

5 MR. GUARINO: As Judge Reed outlined, 10 years  
6 ago or so, he found it appropriate to bifurcate the issues so  
7 that we could, so that we could address the claims seriatim.  
8 So that, one by one, we could address the natural grouping, I  
9 think, of the claims. And so the first one -- the first ones  
10 before the Court were the Tribal claims for Walker River  
11 Paiute Reservation, and so that would be Phase I. And then  
12 we would move on to the other Indian tribes that we have made  
13 claims for, and any other federal agencies have made claims  
14 for.

15 THE COURT: Supposing 12(b) motions were made,  
16 and Mr. DePaoli and others were able to convince Judge Jones  
17 that the government and the Tribe don't have a case here, you  
18 wouldn't even get to the issue of Answers then, would you?

19 MR. GUARINO: Under -- if the Tribal claims  
20 are dismissed under Rule 12, then the case, I think, would be  
21 concluded.

22 THE COURT: And would it necessarily follow that  
23 if the Tribal claims are dismissed under Rule 12, the federal  
24 claims would be dismissed?

25 MR. GUARINO: Depending on the challenges

1 raised. If, if the same challenges raised to the federal  
2 claims, that were raised at the Tribal claims, and the  
3 judge -- and the Court ruled on the Tribal claims and the  
4 federal claims at the same time, the party -- I think it's  
5 incumbent upon any motion to dismiss to identify the scope  
6 of their challenge. If it's only to the Tribal claims, there  
7 might be -- because Indian reserved water rights is a little  
8 bit different, but very similar to other federal reserved  
9 water rights. There's a distinction. The purpose for which  
10 a reserved right is made for Indian tribes is much different  
11 than for an agency, a federal agency, under normal  
12 circumstances. So --

13 THE COURT: Let me interrupt again, if you  
14 don't mind. The thought process is that if we did embrace  
15 your proposed amendment about just having Phase I include  
16 motions, 12(b) motions for the Tribal case, and 12(b) motions  
17 for the federal claims --

18 MR. GUARINO: Uh-huh.

19 THE COURT: -- and let's see what washes out of  
20 those; and then, at that point in time, decide where to go in  
21 the Answers.

22 MR. GUARINO: Yes.

23 THE COURT: Okay.

24 Now, with that, is it an appropriate time to hear  
25 from the defendants?

1 MR. GUARINO: I think so. I think the Court --  
2 so long as the Court understands the position of the United  
3 States, and I think it does. You know, we think that the  
4 Federal Rule provides a very clear road map for how this  
5 court should proceed. And by following them, we will all know  
6 what to expect. And I think we will be able to meet what, I  
7 think, we've been hearing from the Court over the last several  
8 months; which is, this case needs to move forward. And what  
9 we don't want to do is we don't want to end up in a series of  
10 loops that brings us right back to where we're going to be.  
11 And we also need to recall that the United States has -- needs  
12 to be given the opportunity to prevent and defend its claims  
13 as well, to the extent that it has the right to do that.

14 By simply crafting legal threshold issues, what  
15 we're doing is we are putting a very large exclusive burden  
16 upon the Tribes and the United States, in that it will be the  
17 United States and the Tribes that will have to go through  
18 discovery, of an unlimited nature, several times, before  
19 we can even get to the point where we can present upon our  
20 claims. The Court would be hearing challenges to the very  
21 claims before the Court even heard the claims themselves.  
22 That's not the way to proceed under these circumstances.  
23 It's not an appropriate way to handle -- we don't believe  
24 it's an appropriate way to handle it.

25 THE COURT: And your argument is the Court ought

1 to follow Federal Rules of Civil Procedure and go with  
2 briefing under 12(b). But what about Rule 56, I forget if  
3 it's (a) or (b) that allows motions for summary judgment to  
4 be filed anytime after the Answer, or at anytime the Court  
5 permits.

6 MR. GUARINO: I completely understand that,  
7 Your Honor. However --

8 THE COURT: You want to take away that ability  
9 to file motions for summary judgment, too?

10 MR. GUARINO: Not at all. Not at all.

11 THE COURT: So your concept then, for this Phase  
12 I; 12(b) as well as 56 motions?

13 MR. GUARINO: No, Your Honor. 12(b) motions,  
14 and then Rule 56 when they are normally heard, which is after  
15 the close of discovery, after all parties have been given an  
16 opportunity to --

17 THE COURT: That's not how the rule reads, is  
18 it? Doesn't it say --

19 MR. GUARINO: Judge, I'm not -- Your Honor --

20 THE COURT: 56: "Unless a different time is set  
21 by local rule, or the Court orders otherwise, a party may file  
22 a motion for summary judgment at anytime until 30 days after  
23 the close of discovery.

24 MR. GUARINO: I'm not disputing with the Court  
25 the language of the Rule.

1 THE COURT: Well, I'm just wondering if I  
2 amend this CMO in the way that you want to do so, because  
3 the rationale being we have to follow the Federal Rules, well,  
4 why don't we follow the Federal Rules, too, on 56?

5 MR. GUARINO: Because under, under many  
6 circumstances, Your Honor, a court will designate a time by  
7 which Rule 56 motions should be filed, and so that becomes  
8 the date that -- that becomes the time at which Rule 56  
9 motions are filed. And so that time is usually after  
10 discovery has closed, so that if you want to file -- if a  
11 party wants to file a Rule 56 motion, they can do so after  
12 all discovery is done, so they have the materials they need  
13 to file such a motion. That's all I'm saying. I'm not  
14 saying the parties should be denied the right to file a  
15 motion, a Rule 56 motion. But in managing this case moving  
16 forward, obviously, we're going to have more than one party  
17 involved in this case. Obviously, you're going to hear from  
18 a number of different voices. In other circumstances, it  
19 appears to be a logical way to proceed by the Court, with  
20 the Court setting a time at a later point in the proceeding,  
21 after discovery closes, for people to file their Rule 56  
22 motions. Otherwise, the Court and all the parties have to  
23 stop every time a motion is filed by one of the parties. And  
24 so to proceed in an orderly and efficient way, the Court, I  
25 believe, at some point in the future, would identify that time

1 in which a Rule 56 motion would be filed.

2 I'm not saying the Court can't pick a time, a  
3 different time, or a party can't otherwise file a motion for  
4 summary judgment, if the Court hasn't addressed the motion  
5 in advance. But if the Court says Rule 56 motions will be  
6 filed 60 days after the close of discovery, 30 days after the  
7 close of discovery, whenever that might be, that's the time  
8 for that to occur. Not in the middle of discovery, or  
9 sometime prior to discovery, because what that will do,  
10 to use very simple language, it will wreck the schedule.

11 THE COURT: Well, I don't think -- well, the  
12 schedule we've had has been wrecked. I mean, how long has  
13 it been since this case has been pending now; 22 years?

14 MR. GUARINO: Exactly, Your Honor.

15 THE COURT: Well, I would like to see some way  
16 to accelerate it, but I have this procedural problem on the  
17 motion for summary judgment in Phase I, if you're going to  
18 say, all right, defendants, go ahead with your motions to  
19 dismiss. But let's say Mr. DePaoli comes up with some motion  
20 to dismiss where he attaches exhibits --

21 MR. GUARINO: Uh-huh.

22 THE COURT: -- being Decrees by the government,  
23 or allocation of government to tribal lands or something like  
24 that --

25 MR. GUARINO: Sure.

1 THE COURT: -- now he's attaching documents  
2 outside the pleadings which, under Rule 12(d) --

3 MR. GUARINO: Uh-huh.

4 THE COURT: -- converts it into a motion for  
5 summary judgment. So, should I preclude the defendants from  
6 being able to do that; or do we just preclude the defendants  
7 from undertaking discovery to file a traditional Rule 56  
8 motion and do that in Phase II?

9 MR. GUARINO: Let me be clear, Your Honor.  
10 No, I don't necessarily think the Court should preclude  
11 Mr. DePaoli, or anybody else, from filing a Rule 56 motion  
12 that doesn't require discovery.

13 If what Mr. DePaoli does is he files a motion and  
14 then attaches pleadings and says this proves my point, we  
15 win. Now what we, what the United States would do at that  
16 point is determine whether or not he has raised an issue,  
17 or raised material that can only be addressed in response  
18 with discovery. Then the Court, under the rule, can defer  
19 resolution of that Rule 56 motion until later.

20 But if the United States, at that point, takes the  
21 position of, sure, that motion needs to be converted to a  
22 Rule 56 motion based on what's been attached to the motion,  
23 but we can still, nonetheless, address that, and it's ready  
24 for the Court's decision, then the Court can move forward on  
25 Rule 56. I think that's a very good point that the Court has

1 raised. And I want the Court to be clear that my position,  
2 and the United States' position, is that the issue is what  
3 we don't want to do is engage in a series of threshold issues  
4 that are going to, each one, require its own development of  
5 discovery, the motions, dispositive motions practice, and  
6 then, ultimately, an evidentiary trial, apparently. So --

7 THE COURT: Okay. Let's hear from Mr. DePaoli  
8 or whoever else wants to address it.

9 Thank you very much, Mr. Guarino. You've raised  
10 some interesting issues for me to consider.

11 Mr. DePaoli, tell us why we should maintain the  
12 status quo and stick with this discussion of the threshold  
13 issue.

14 MR. DEPAOLI: Thank you, Your Honor.

15 I guess I would begin with this whole discussion  
16 which has been implied by the United States, but not  
17 supported, that somehow the Case Management Order itself  
18 violates the Federal Rules of Civil Procedure. We address  
19 that in our opposition, and no one has come forward and  
20 indicated that there is something in the Case Management  
21 Order that violates the Federal Rules of Civil Procedure.  
22 At this point, the Case Management Order has become a RIDS  
23 approach to case management. It is not a RIDS approach  
24 to case management. It's what Judge Reed entered nearly  
25 13 years ago, to a large extent, based upon positions that



1 the United States and the Tribe took then, which they  
2 repudiate now.

3 Contrary to what has been said this morning and what  
4 has been said in the reply, we're not contending, Your Honor,  
5 that the Case Management Order mandates litigation of all  
6 threshold issues that anyone wants to come up with. We're  
7 not contending that it mandates a host of separate trials,  
8 or orders separate litigation on a host of undetermined  
9 threshold issues.

10 What we do contend is that Judge Reed, and the Case  
11 Management Order, required that the magistrate judge consider  
12 whether there were issues in these cases as to the Tribal  
13 claims, threshold issue which should be addressed at the  
14 outset of the litigation. We do not --

15 THE COURT: Well, how does that differ,  
16 practically, from a motion to dismiss?

17 MR. DEPAOLI: Well, I think that's --

18 THE COURT: Otherwise, aren't we just delving  
19 into advisory opinions?

20 MR. DEPAOLI: No, we're not. I think that the  
21 Case Management Order pretty clearly, if all that was intended  
22 with the Case Management Order were Rule 12(b) motions, there  
23 would have been no need for a Case Management Order. There  
24 would have been no need for provisions that say once the  
25 threshold issues are identified, we will proceed to discovery;

1 and, after discovery, we will proceed either to dispositive  
2 motions or evidentiary hearing; or, if necessary, both.

3 Judge Reed -- and I think we tried to bring that  
4 out in our opposition, and I'm going to explain it further  
5 today -- clearly contemplated that there may be some issues  
6 out there that are going to have to be litigated, no matter  
7 what we do, either now or later, or in the middle, or at  
8 the end, that could result in avoiding a lot of unnecessary  
9 litigation. An that's what the Case Management Order was  
10 intended to have the magistrate judge consider; are there  
11 issues in these proceedings that could possibly defer  
12 unnecessary proceedings in the interest of judicial economy  
13 and convenience to the parties? To the extent that the  
14 magistrate judge does designate one or more such threshold  
15 issues, the Case Management Order directs procedures to be  
16 followed in connection with their disposition. It allows  
17 discovery only on whatever the designated issues are and,  
18 certainly, that would be pursuant to an appropriate discovery  
19 plan that recognizes how many parties we have here. The Case  
20 Management Order provides for their disposition through a  
21 dispositive motion, or dispositive motions, or an evidentiary  
22 hearing.

23 THE COURT: Well, let's say we address one of  
24 the threshold issues that Judge Reed identified at page 9 of  
25 the CMO, whether this court has jurisdiction to adjudicate

1 said Tribal claims. So, let's identify that as a threshold  
2 issue. The parties brief it. And the Court says yes.

3 Does that preclude a subsequent motion to dismiss  
4 for lack of subject matter jurisdiction; or if the Court says,  
5 no, there is no jurisdiction, does that mean that the Court  
6 has, essentially, ruled on a motion?

7 I mean, aren't we talking about a rose by any other  
8 name here?

9 MR. DEPAOLI: I think in that case, Your Honor,  
10 and I think that, really, is the first matter that needs to  
11 be considered; and that is, the subject matter jurisdiction  
12 issues. But it's not it, in that case, that would be a  
13 motion based upon the fact that there is no subject matter  
14 jurisdiction. And that is exactly --

15 THE COURT: Well, what --

16 MR. DEPAOLI: -- what Judge Reed had in mind  
17 with the Case Management Order.

18 THE COURT: You present an argument in your  
19 opposition to the Walker River motion that, look, this Decree  
20 has been decided and ruled upon. People had an opportunity,  
21 a long time ago. It should not be revisited at this time  
22 because it's not intervening. It wants to cancel the prior  
23 Decree.

24 Isn't that the type of argument you might make  
25 here with respect to the Tribal claims, and wouldn't that

1 be dispositive of the case if Judge Jones were to agree with  
2 you.

3 MR. DEPAOLI: In terms of subject matter  
4 jurisdiction or the res judicata?

5 THE COURT: Well, probably more claim  
6 preclusion, issue preclusion type of approach, but --

7 MR. DEPAOLI: Well, I --

8 THE COURT: -- but Judge Reed referred to it as  
9 whether this court has jurisdiction to adjudicate said Tribal  
10 claims. I'm not sure in what context he contemplated that.

11 MR. DEPAOLI: I think he contemplated that  
12 from the standpoint of subject matter jurisdiction, Your  
13 Honor, not claim preclusion or issue preclusion. And there's  
14 probably at least two parts to that; one is the extent to  
15 which the Decree court has the ability to deal with claims  
16 related to groundwater at all and, second, whether the  
17 Decree court, which is an administration phase, should be  
18 adjudicating new claims to water rights at all. I think  
19 that's entirely subject matter jurisdiction.

20 THE COURT: Then why isn't it appropriate not  
21 to go ahead and assert that now in a motion, and address this  
22 issue, which is at the heart of the case. I mean, that may  
23 make everything else we've done here moot.

24 MR. DEPAOLI: I think it is appropriate, Your  
25 Honor. I mean, I think -- when get to the end of what I had

1 to say today, that's exactly what I was going to say, is that  
2 the first order of business is to deal with subject matter  
3 jurisdiction. And then, depending upon the outcome of that  
4 subject matter jurisdiction, proceed to determine whether  
5 there are any other, what I would refer to as threshold issues  
6 that ought to be designated as threshold issues consistent  
7 with the existing Case Management Order. And if there are,  
8 proceed to deal with them in the way the existing Case  
9 Management Order provides that they should be dealt with.

10 THE COURT: Are all threshold issues necessarily  
11 Rule 12 motions?

12 MR. DEPAOLI: No. I think that the major  
13 threshold issue, or an important threshold issue is not one  
14 that can be decided simply on the face of the pleadings.  
15 It's going to require material outside the pleadings to deal  
16 with res judicata and issue preclusion.

17 THE COURT: But why can't you go ahead, under  
18 Rule 12(b), and submit those documents that are, at which  
19 the Court could take judicial notice, and that may have a  
20 net effect of converting it to a Rule 56 motion, but it's  
21 one that's done without discovery at this time?

22 MR. DEPAOLI: Because I'm not sure I have all  
23 the documents that I need in order to make that the way I  
24 would like to make it. One could do it just, just based upon  
25 a certain amount of information, but I am fairly certain that

1 there are going to be some other information that the United  
2 States is going to put forward that say, well, that's not the  
3 whole story. And that's, you know, that's why the first step  
4 was for the magistrate judge to determine are there issues  
5 that are appropriately threshold issues, as Judge Reed had in  
6 mind, like claim preclusion; and, if so, to do exactly as the  
7 Case Management Order says, have discovery on that issue.  
8 And it wouldn't be one-sided discovery. It's discovery that  
9 the Tribe and the United States can seek discovery just as  
10 easy as the rest of us. Have that discovery, and have it  
11 disposed of either through a dispositive motion; or if it  
12 can't be handled through a dispositive motion, through an  
13 evidentiary hearing with the district judge.

14 THE COURT: Would you agree then, according  
15 to your approach, the threshold issues would fall into one  
16 of two categories; they would either be considered a motion  
17 to dismiss under Rule 12, or a motion for summary judgment  
18 under Rule 56? And if they don't fall under one of those  
19 two categories, what the heck are we doing discussing the  
20 threshold issue?

21 MR. DEPAOLI: Well, I'm not -- I mean, I'm  
22 not sure that -- just take, just take claim preclusion for an  
23 example. I'm not sure that, ultimately, the best way to deal  
24 with that is a through a Rule 56 motion because there is going  
25 to be, arguably, two sides to that story, and someone is going

1 to say there are material facts in dispute. And that's --  
2 Judge Reed anticipated that and basically said, or, they can  
3 be resolved by evidentiary hearing in front of the district  
4 judge. And that, we put that in our opposition. That was  
5 based, in my estimation, on the judge's experience with the  
6 United States versus Truckee/Carson Irrigation District, and  
7 the separate trial that was had on the res judicata issue on  
8 the claims for additional water for the Pyramid Lake Indian  
9 Reservation.

10 THE COURT: Okay. Continue. Thank you.

11 MR. DEPAOLI: I'm going to -- one of the things  
12 that the United States has done, both in its reply and a  
13 little bit this morning, is to compare its approach to this,  
14 to the provisions of the existing Case Management Order.  
15 And I think that's a useful thing to do, if it's done  
16 fairly. We've been talking about motions to dismiss under  
17 Rule 12. As I said, we all seem to agree that subject matter  
18 jurisdiction is an issue that needs to be addressed, and the  
19 Case Management Order will allow that to be addressed. If  
20 the magistrate judge determines that I also want addressed  
21 the legal issue of whether there is a federal reserve right  
22 for underground water, that could be addressed as well. But  
23 the --

24 THE COURT: Well, wouldn't that be a motion to  
25 dismiss for failing to state a claim and making the argument

1 that there is no such federally reserved right?

2 MR. DEPAOLI: That's kind of what that would  
3 be. I mean other than that, Your Honor, Your Honor is very  
4 familiar with the test for whether someone has failed to  
5 state a claim upon which relief can be granted. And other  
6 than that kind of an argument, that there is simply, as a  
7 matter of law, no right, no federal right to underground  
8 water, federal reserve right to underground water. I have  
9 a hard time seeing that anyone will have much success with a  
10 Rule 12(b)(6) motion as to the Tribal and federal claims for,  
11 for all practical purposes with that exception, which -- and  
12 there's case law out there on this issue, of whether there's  
13 reserve rights to groundwater or not, going each way. Other  
14 than that, 12(b)(6) motions here are just going to be a  
15 waste of the Court's time, and everyone else's time, and not  
16 materially advance the litigation.

17 In terms of -- and the second step that the United  
18 States has suggested is after you deal with 12(b) motions,  
19 we need Answers, affirmative defenses, counter-claims and  
20 cross-claims. As to Answers and affirmative defenses, it's  
21 not our position that Answers are never to be required here,  
22 but the Case Management Order left the timing of Answers to  
23 the discretion of the magistrate judge.

24 The reasons the United States say they need Answers,  
25 it needs Answers now, really don't hold -- pardon the pun --



1 any water, in my judgment.

2 They say they need to know why people, or what basis  
3 the core parties object to their claims. I think they have a  
4 pretty good understanding as to why parties would object to  
5 their claims.

6 Second, they're going to get a very clear  
7 understanding as to the threshold issues as to what the  
8 objections are.

9 And, third, depending on the outcome of threshold  
10 issues, at an appropriate time, there will be Answers, and  
11 whatever mystery there is will be uncovered as to what people  
12 object for.

13 THE COURT: Again, getting a little ahead of  
14 myself, I was asking Mr. Guarino the question about how  
15 should the Court consider the failure of a party not to file  
16 an Answer -- which, probably, we'll get 10, 15, 20 answers in  
17 this case, and the other four- or 5,000 won't do anything.  
18 What's the practical effect as to those people who just don't  
19 want to hire an attorney or don't know what to do in this  
20 case?

21 MR. DEPAOLI: Well, and I think that's --  
22 there's two parts to that, Your Honor. I mean, I think  
23 the argument that, let's, right now, force people to either  
24 hire an attorney and file an Answer or we'll forget about them  
25 is, basically, exactly what Judge Reed wanted to try to avoid,

1 if possible, with threshold issues. He knew that he was  
2 ordering the joinder of a lot of people here, many of whom  
3 would have nothing more than a domestic well. And he did  
4 not want to put them in a position of having to make that  
5 choice unless they really had to. And that's why the Case  
6 Management Order was structured that way.

7 And that gets me to this issue of cross-claims and  
8 counter-claims, or counter-claims and cross-claims. The  
9 argument that counter-claims are not required here, as being  
10 a straw man, I think, is wrong. And I want to -- let me tell  
11 you what the United States and the Tribe said to Judge Reed  
12 when they filed their counter-claims that we're talking about  
13 now in 1992. What they were concerned about when they filed  
14 those is that if they didn't file them at that time, they  
15 would face a serious challenge later by the Irrigation  
16 District and others, that they were required to file their  
17 counter-claims as a result of what the District had filed  
18 related to some orders that the California State Water  
19 Resources Control Board had entered. And they pointed out  
20 that compulsory counter-claims become unenforceable if  
21 they're not asserted as compulsory counter-claims.

22 And consider what they said in 1998, in their joint  
23 motion to Judge Reed to join and serve groundwater users. In  
24 that particular filing, they specifically said -- this was in  
25 their joint motion -- they specifically said: "Thus, as the

1 purpose of these proceedings is to determine the relative  
2 rights of those claimants who are claiming water from the same  
3 source, meaning surface or groundwater, it is necessary to  
4 join both."

5 Now, anyone -- any attorney who is consulted by  
6 someone who is ordered to file an Answer in these proceedings,  
7 is going to have the very same concern that the United States  
8 and the Tribe had in 1992. For anybody who's got a ground  
9 water right, for anybody who's got a right that wasn't part  
10 of the adjudication of the Walker River Decree, they're going  
11 to be concerned that, not today with Mr. Guarino, but some  
12 10 years from now, some attorney from the United States or  
13 some attorney from the Tribe is going to say they don't  
14 have that groundwater right. They should have asserted  
15 that as a compulsory counter-claim in connection with  
16 these proceedings.

17 THE COURT: Or, alternatively, they could argue  
18 that by not filing an Answer, they waived any claim to it.

19 MR. DEPAOLI: Potentially. Definitely, because  
20 they wouldn't have even done -- filed an Answer, much less  
21 a counter-claim. And the Ninth Circuit law on compulsory  
22 counter-claims is are the claims logically connected that  
23 considerations of judicial economy and fairness dictate that  
24 all of the issues be resolved in one lawsuit. And the purpose  
25 of that is to avoid a multiplicity of lawsuits.

1           Now, can anyone really contend that in a proceeding  
2 where -- that's claimed to involve a water from the same  
3 source, that claims of all parties to water from that source  
4 should not be litigated in one proceeding, rather than in a  
5 multiplicity of proceedings?

6           And there's also the practical issue. The  
7 United States and the Tribe want the Court to permanently,  
8 preliminarily and permanently enjoin the defendants and  
9 counter-defendants from asserting any adverse rights or  
10 interests to the rights that are declared, any rights that  
11 are found to exist for the Tribal claims. How can the Court  
12 grant effective injunctive relief without adjudicating the  
13 relative priority and relationship of all of the rights one  
14 to the other? How can --

15           THE COURT: Well, according to Mr. Guarino, if  
16 they don't answer, they have waived those rights. But, he  
17 also says that they're not necessarily waiving them. They're  
18 just not asserting any claim to the groundwater rights the  
19 Tribe is asserting.

20           And maybe I need to be educated here. What is  
21 meant by this "federally reserved rights to groundwater  
22 underlying and adjacent to all reservation lands"? What  
23 does that involve?

24           MR. DEPAOLI: What that involves is think of,  
25 think of a groundwater basin as the Walker River. And part of

1 the Walker River is inside the reser -- goes, passes through  
2 the reservation. Part of it is above the reservation; part of  
3 it is below the reservation, or downstream of the reservation.  
4 So when the Tribe asserts a claim to water from the Walker  
5 River, in order to be able to know whether someone is  
6 interfering with that Tribal claim to water from the Walker  
7 River, you need to know, well, what is their right upstream  
8 on the Walker River, or what is their right downstream on the  
9 Walker River? How does it relate to that Tribal right?

10 The same thing is true to the groundwater basin  
11 that's under and adjacent to the reservation. Some of that  
12 groundwater basin, if it's -- if the boundaries went down,  
13 is within the reservation, but some of it is outside the  
14 reservation. And so how can you, someone who's outside  
15 the reservation, in that groundwater basin, know if they're  
16 interfering with the Tribe's rights to that groundwater basin  
17 that's also within the reservation, without knowing what is  
18 the relationship between those two rights inter se?

19 Is the Tribes' rights senior? How big is the  
20 Tribe's right? What's the other right? What's its priority?  
21 What's its quantity and so on?

22 And so that language about "under and adjacent,"  
23 refers to the fact that part of this water source is not  
24 within the reservation.

25 THE COURT: And are there any boundaries

1 that have been set in this case yet by what is meant by  
2 "adjacent"? Is somebody with a well up in Bridgeport  
3 adjacent to the Walker River Paiute Tribe?

4 MR. DEPAOLI: No, I don't think so, Your Honor.  
5 I think that from the standpoint of a groundwater basin,  
6 and looking strictly and solely at groundwater, we would be  
7 talking about that the groundwater basin 110 as designated  
8 by the Nevada State Engineer, which is in the Schurz area,  
9 in the Walker Lake area, and the Hawthorne area. There is  
10 probably -- there is zero connectivity between a groundwater  
11 basin in Bridgeport and the one down in Schurz, with the  
12 exception of the argument that the -- of this connection  
13 between surface and groundwater, so that there is  
14 potentially -- and this relates more to the surface claim  
15 the Tribe is making than it may make to the groundwater claim,  
16 but with the argument that the surface and groundwater are a  
17 single source of supply in the basin, it could be argued that  
18 someone pumping groundwater in Mason Valley, potentially, is  
19 decreasing the amount of surface water available to satisfy  
20 the Tribe's right that may or may not be recognized as a  
21 result of these proceedings.

22 THE COURT: Is that why Judge Reed thought all  
23 groundwater users, including those with domestic wells should  
24 be served?

25 MR. DEPAOLI: I think Judge Reed did that -- had

1 two concerns. I think that he was concerned about whether or  
2 not the Tribe's pumping would affect some other groundwater  
3 users. And I think that had to do with a lot of inclusion of  
4 domestic users. The language in the Case Management Order  
5 suggests that. And then I think his expansion of that to  
6 require persons with actual permits for either industrial  
7 or irrigation use of groundwater be joined, was more related  
8 to the issue of surface and groundwater, a single source of  
9 supply; and, if so, are we going to regulate that, in some  
10 fashion or another, as a single source.

11 THE COURT: Well, that first one that you  
12 identified, doesn't that speak to the suggestion that somebody  
13 should file a counter-claim if it's conceivable that the  
14 Tribe's pumping of water may adversely affect their  
15 groundwater use?

16 MR. DEPAOLI: I think that's the, that is the  
17 potential problem that I think anybody is going to face if  
18 they're ordered to file an Answer at this point in time. Or,  
19 I think some of that may get -- may become clearer as a result  
20 of the subject matter jurisdiction issues. But if not, I  
21 think anybody who is in a position, or required to file an  
22 answer, is going to have a real dilemma. And if they have a  
23 groundwater right, or if they have a surface water right  
24 that's not -- was not adjudicated as part of the Decree, to  
25 file an answer and not assert that counter-claim, I think that

1 I would be hard-pressed to advise someone not to assert such a  
2 counter-claim.

3 THE COURT: Your opposition, at page 11,  
4 says that: "Similarly, if the groundwater claims for the  
5 reservation as it existed when the Walker River Decree  
6 was entered are barred on claim preclusion grounds, the  
7 need for adjudication of groundwater rights and hydrographic  
8 basin 110 may also be obviated."

9 Isn't that an argument in favor of turning to motion  
10 practice?

11 MR. DEPAOLI: It's an argument. And, again,  
12 it's an argument in favor of turning to having claim  
13 preclusion be a threshold issue, allowing the appropriate  
14 discovery on that issue, and then dealing with the resolution  
15 of that, either through a dispositive motion or through a  
16 separate evidentiary hearing.

17 I think that -- I don't think that we should get  
18 caught up in motion practice versus something else. I think  
19 the important focus is are there some issues that could  
20 potentially narrow, shorten, make this case less difficult,  
21 or less expensive for all involved. And if there are those  
22 issues that we can identify, let's identify them. If there  
23 needs to be discovery on them, let's have that discovery. And  
24 then let's dispose of them. And that, I think, it takes me to  
25 what I want to --



1 THE COURT: Just a second.

2 I mean as expediting, this is the binder of all  
3 the identification of the threshold issues in this case. And  
4 it's -- there's a voluminous amount of materials in there.  
5 And some of them I would just deem to be almost -- they're all  
6 interesting issues we'll probably have to address at some  
7 point in time in this case, but it's not something that's  
8 going to narrow the focus of the case or the involvement of so  
9 many attorneys and expenses and everything.

10 You know, I hear this thing about -- particularly  
11 from RID, about how this is supposedly going to narrow the  
12 issues and be less expensive, but I'm concerned that it's  
13 turned out to be the opposite.

14 MR. DEPAOLI: Well, Your Honor, we, in our  
15 last, in the last filing, we, I would say, minimized what we  
16 proposed to be threshold issues considerably.

17 THE COURT: You did. I agree.

18 MR. DEPAOLI: And it's not our -- it's not  
19 our call. It's Your Honor's call. And so as I said at the  
20 beginning, Your Honor can say yes, one, two and three ought  
21 to be threshold issues; or Your Honor can say none of these  
22 ought to be threshold issues. And if that's what Your Honor  
23 decides, then we are at that next point. But, I don't think  
24 that ought to be the decision. And what I, what I want to  
25 compare that potential, which I think needs to be looked at

1 after the subject matter jurisdiction issues are dealt with,  
2 to this approach that after Rule 12 motions, we would move  
3 to simultaneous trial preparation on all issues, merits and  
4 defenses alike. That is going to be a very long, arduous,  
5 and expensive process for all concerned; and, perhaps, to a  
6 certain extent unnecessary, if there is a threshold issue that  
7 can narrow those down.

8 THE COURT: Well, I guess what I'm having a  
9 problem with, even Judge Reed's original concept of threshold  
10 issues, let's say, I identify claim preclusion as a threshold  
11 issue, and then you brief this claim preclusion issue as a  
12 threshold issue, what becomes of that? Does the judge then  
13 say, well, I'm going to deem this to be a Rule 12 motion and  
14 enter an order dismissing the case because claim preclusion  
15 applies here?

16 I mean, that's the problem I have with Judge Reed's  
17 concept --

18 MR. DEPAOLI: I think --

19 THE COURT: -- with all due respect to  
20 Judge Reed, you know, who is a brilliant man and lived  
21 this case. And I would certainly be very hesitant to change  
22 anything he entered in this matter as case management.

23 MR. DEPAOLI: The concept is that to the extent  
24 that that issue is identified, there would be a period of  
25 discovery on that issue. And after that point, the parties

1 would either -- the defendants would move for a summary  
2 judgment in their favor based on that issue; or, if they felt  
3 that there was material issues that ought to be tried, it  
4 would be a separate trial, as took place in United States  
5 versus TCID, that led to Nevada v. United States. That's  
6 exactly what happened there. And it ended a case that had  
7 17,000 defendants, all the way to the Supreme Court of the  
8 United States, in ten years.

9 THE COURT: And we've been going along here  
10 20 years.

11 MR. DEPAOLI: Right.

12 The big issue, as I see it, for trial preparation  
13 here, if we do all this simultaneously, is going to be on the  
14 quantification issues. And there are issues there that I'm  
15 certain are going to come up in terms of whether any of these  
16 lands are arable, whether -- what would need to be done to  
17 irrigate any of these lands is likely to happen. The United  
18 States and the Tribe are going to have a different approach  
19 to quantification that's going to involve a number of things.  
20 We're going to do all that discovery. We're going to do  
21 all the discovery on all the defenses; the res judicata,  
22 claim preclusion defense. We're going to do all of that.  
23 We're going to probably deal with the counter-claims and,  
24 potentially, cross-claims.

25 And then there is the potential that, at the end

1 of all of that, a determination could be made that claim  
2 preclusion does in fact bar some or all of these, and so a  
3 lot of that may very well have been unnecessary. And that's  
4 what Judge Reed was trying to deal with with the Case  
5 Management Order. And what I think here is we all agree on  
6 step one, which is subject matter jurisdiction. Step two is  
7 are there threshold issues that should be identified that  
8 I think -- I mean I think the test has to be do they have  
9 some real potential to narrow or end this litigation?  
10 And if they do, proceed as the Case Management Order provides.

11 THE COURT: If they have the potential to  
12 narrow or end, doesn't that necessarily mean it's a Rule 12  
13 motion?

14 MR. DEPAOLI: No. I think what it probably  
15 means is, as was said in the Case Management Order, it's a  
16 dispositive motion that is likely to be a Rule 56 motion; or  
17 if it can't be handled as a dispositive motion because there  
18 are material facts in dispute, then it's a trial, a separate  
19 trial.

20 But what I want to emphasize is that process is not  
21 going to change this litigation in the sense that it's going  
22 to cause it to be longer than it would. Those issues and  
23 defenses are going to get litigated. They're either going to  
24 get litigated at the outset, or they're going to get litigated  
25 as the case goes forward. If they get litigated at the

1     outset, they're going to be over at the outset, and so nobody  
2     will have to deal with them again. We're not going to be  
3     back to square one if we litigate it and get it decided on  
4     an appropriate threshold issue. It's something that's going  
5     to have to be dealt with one way or the other, sooner or  
6     later.

7                     THE COURT: Well, two questions: You said,  
8     first, Phase I ought to be subject matter jurisdiction?

9                     MR. DEPAOLI: Yes.

10                    THE COURT: You're saying subject matter  
11     jurisdiction in the form of a motion?

12                    MR. DEPAOLI: Yes. I think that would be  
13     in the form of a motion. And I don't think that requires  
14     discovery. I mean, the Case Management Order allows that to  
15     happen.

16                    THE COURT: Phase II, moving to threshold  
17     issues, one of which you say is possibly claim preclusion.  
18     Let's say you brief the issue of claim preclusion and  
19     Judge Jones decides, no, claim preclusion, under the  
20     briefing of this threshold issue is not appropriate. Does  
21     that preclude you from bringing a 12(b) motion on that issue  
22     then?

23                    MR. DEPAOLI: Yes. And I don't think -- if we  
24     have claim preclusion as a threshold issue, we need to deal  
25     with it completely; not as a matter of law, but with getting

1 out all the facts that bear on that defense, and getting it  
2 decided and a decision on, yes, that's a claim that was or  
3 should have been asserted originally or not. And once  
4 that's -- once a decision is made on that, that's the  
5 decision, obviously, subject to appellate review. But  
6 as far as this court goes, that would not be something, if  
7 that's unsuccessful, that would not be something that would  
8 come up again. It would be over with.

9 THE COURT: Well, getting back to Judge Reed's  
10 Case Management Order, it seems to me that with, perhaps,  
11 the exception of subparagraph E on page 10, all of these  
12 threshold issues are things that should be litigated  
13 in a 12(b) type of motion; (a) is whether this court has  
14 jurisdiction to adjudicate Tribal claims, (b) is what law  
15 applies, whether federal law governs pumping of groundwater.  
16 And I guess it should have been further stated, or as the law  
17 of the States of California or Nevada apply.

18 Maybe that's not ripe for a motion of any kind. And  
19 why, at this stage, address it, or why not. Maybe it should  
20 be addressed.

21 MR. DEPAOLI: I don't think that one should be  
22 addressed. I don't think that issue gets you anywhere.

23 THE COURT: Well, I tend to agree.

24 MR. DEPAOLI: It's not -- the question is not  
25 does federal law govern pumping of groundwater on the

1 reservation. The question is is there a federal reserved  
2 right for groundwater for the Walker River Reservation; and,  
3 if so, what's its quantification?

4 THE COURT: And your argument is, I take it,  
5 there is no such federal reserved right. And it seemed like  
6 that could be asserted in a motion to dismiss.

7 MR. DEPAOLI: That could, that narrow issue.  
8 But if there is a federal reserved right, then the case law  
9 tells us that that's a federal right. It's subject to federal  
10 law. And that federal law would govern that pumping. So I  
11 don't -- not all of the issues that are in the Case Management  
12 Order, we think, are appropriate threshold issues, and we have  
13 narrowed what we suggested down.

14 THE COURT: But you do embrace the concept,  
15 Mr. DePaoli, that maybe it is appropriate at least subject  
16 matter jurisdiction ought to be handled in a motion. And  
17 you're saying that some of the issues relating to claim  
18 preclusion might need discovery.

19 MR. DEPAOLI: Yes.

20 THE COURT: But, that should not be a motion?

21 MR. DEPAOLI: Yes. I think that's what the  
22 Case Management Order said; to the extent that issues that  
23 are designated require discovery, that's the next step,  
24 discovery.

25 THE COURT: All right. Mr. DePaoli, I have

1 interrupted you a lot of times. Is there any other burning  
2 comment you want to make? It's getting a little late here.

3 MR. DEPAOLI: No. I think I would just conclude  
4 by quoting from what the United States and the Tribe said in  
5 February of 2000. And I'll -- and we put it in our brief,  
6 but I think it's as good then -- or now, as it was then; and  
7 that is: "That it is efficient to deal with threshold issues  
8 regarding the Tribal claims because it's going to allow the  
9 parties to focus their time and resources on a manageable  
10 set of issues and eliminate the temptation for the parties to  
11 litigate every issue in the case at once, without a coherent  
12 structure for doing so."

13 And, obviously, the threshold issues need to be  
14 issues that do have the potential to narrow the case down,  
15 and not issues that we just litigate for the sake of  
16 litigating, because that's not going to get us anywhere.

17 And in closing, I think that's what I would suggest  
18 is that we, at the appropriate time -- and I realize there's  
19 still, apparently, some service that needs to be done -- that  
20 the Court establish some sort of a schedule for motions on  
21 subject matter jurisdiction issues; deal with subject matter  
22 jurisdiction issues; and after subject matter jurisdiction  
23 issues are dealt with, return to what happens next under the  
24 existing Case Management Order, to see if, okay, in light of  
25 what we've done with subject matter jurisdiction, is there an



1 issue, or two issues, that ought to be threshold issues to  
2 be treated as provided in the Case Management Order; which  
3 is, identify, discovery, and disposed of. And go at it that  
4 way. I don't think there's any need, whatsoever, to enter a  
5 supplemental Case Management Order. The Case Management Order  
6 as it exists takes care of exactly what needs to happen next,  
7 and will take care of what needs to happen after that. And if  
8 what happens after that there is are no such threshold issues,  
9 then we're off to where we're off to.

10 Thank you.

11 THE COURT: Thank you, Mr. DePaoli.

12 Anyone else on the defendant's side want to add  
13 anything to the arguments?

14 (No response.)

15 THE COURT: I do have just some questions I  
16 would like it go over with counsel. And just please remain  
17 seated where you are.

18 Mr. Guarino, can you explain the difference to me  
19 for how underground water and surface water constitutes a  
20 single source, as is referred to in the Case Management Order  
21 at page 3?

22 MR. GUARINO: I'm sorry. Page 3 of what, Your  
23 Honor?

24 THE COURT: Well, I saw in the defendant's brief  
25 referencing that the Tribe's position has been as stated in

1 the Case Management Order, at page 3, lines 24 through 25.

2 This has been done because of the claim that underground and  
3 surface waters, constitute a single source.

4 Can you explain to me, as someone who has probably  
5 demonstrated to everyone already in this case, multiple times,  
6 I have very little knowledge about water rights laws.

7 Could you explain how surface waters and underground  
8 waters constitute a single source.

9 MR. GUARINO: In a general sense, Your Honor --  
10 can you hear me?

11 As a general sense, Your Honor, I think that that  
12 phrase reflects the connectivity between surface water and  
13 groundwater as a -- that they're connected. They're not  
14 isolated from each other and so they interact; ground  
15 water goes into surface water and vice versa, depending on  
16 hydrologic conditions of the area.

17 Does that respond to the Court's inquiry?

18 THE COURT: Well, I guess it's a factual  
19 explanation and somebody much more knowledgeable than I  
20 would have to decide that. I was just curious, factually,  
21 about how that --

22 MR. GUARINO: And I don't know. I don't have --  
23 I'm not as familiar with the Walker River Basin as I am in  
24 other basins. But I know that generally be true, that that's  
25 the notion that there, generally, connectivity between

1 groundwater and surface water to some extent, depending upon  
2 its location and its conditions.

3 With respect to the Walker River Tribe, the claims  
4 for groundwater are, are simply for the right of the Walker  
5 River to drill for -- to drill for and to use groundwater  
6 that's found underneath the reservation itself.

7 THE COURT: All right. In your reply memorandum  
8 then you say: "The immediate focus on this court is on three  
9 claims. The first one is quantification of a water rights  
10 claim associated with Weber Reservoir."

11 Explain what that is to me.

12 MR. GUARINO: Weber Reservoir was completed in  
13 1936, 1937 or so, after the Decree was entered in this case.  
14 It's filled and used by the Walker River Tribe for, I believe,  
15 predominantly irrigation purposes. And we're claiming a water  
16 right to the storage and use of that water.

17 THE COURT: Is that any different from what you  
18 already have?

19 MR. GUARINO: We have, under the Decree, I  
20 believe we have a stream flow quantity to the Walker River  
21 itself, which is not the same as a storage right.

22 THE COURT: The second one is: "Quantification  
23 of groundwater rights for groundwater underlying the Walker  
24 River Paiute Reservation."

25 MR. GUARINO: And that's what I was talking

1 about briefly before; the right to use, to find and use the  
2 groundwater that is below --

3 THE COURT: Underneath.

4 MR. GUARINO: -- underneath the reservation  
5 itself.

6 And if I may, Your Honor, with respect to other  
7 groundwater users that might be in the area, or that might be  
8 affected by Walker River groundwater use, to the extent -- I  
9 think the discussion that was going on between the Court and  
10 Mr. DePaoli earlier, I think confused apples and oranges a  
11 bit in that, in this proceeding, what we're talking about is  
12 quantifying the right of the Tribe to use groundwater found  
13 underneath the reservation itself.

14 With respect to enforcing that right against a  
15 groundwater user or any other water user that might have some  
16 connection to that groundwater, it's a completely separate  
17 administration issue. It's a completely -- it's not, I  
18 believe, what we're here for in court before the Court itself.  
19 To the extent a party files a counter-claim in the interest of  
20 protecting its water rights, groundwater rights, because of  
21 fear of interference of the Tribe itself, that is something I  
22 think that is not before the Court.

23 THE COURT: Well, I don't want to get into that  
24 issue again.

25 MR. GUARINO: Sure.

1 THE COURT: But could you explain number  
2 three: "Quantification of water rights associated with lands  
3 added to the reservation in '36 and thereafter."

4 MR. GUARINO: Yes.

5 THE COURT: And that would have been after  
6 the decree --

7 MR. GUARINO: Yes.

8 THE COURT: -- just by a couple of months, if I  
9 recall.

10 MR. GUARINO: Yes.

11 THE COURT: But those are groundwater rights?

12 MR. GUARINO: I actually don't have a copy of  
13 the Complaint right in front of me, Your Honor.

14 THE COURT: I'm just looking at your  
15 memorandum --

16 MR. GUARINO: I believe it's not just  
17 groundwater.

18 THE COURT: -- Quantification of water rights.

19 MR. GUARINO: It's not just water rights.

20 It's not just groundwater rights, Your Honor. It's  
21 groundwater rights and surface water rights to the Walker  
22 River itself.

23 THE COURT: And that would be because of the  
24 addition of those lands after the Decree?

25 MR. GUARINO: Precisely.

1 THE COURT: You say, in footnote 1, at page 3 of  
2 your reply about 12(b)(5) motions: "Such motions must be  
3 filed at this point or not at all."

4 In view of the unusual nature of this case, isn't it  
5 rather Draconian to say, all right, defendants, you have  
6 30 days to file your motions and, if you don't file one,  
7 you've waived them.

8 MR. GUARINO: Let me explain a little bit  
9 more, Your Honor. That's, generally, how 12(b) motions are  
10 viewed. This is the time to make them. For instance -- but  
11 we all know that under 12(b)(1), subject matter jurisdiction  
12 challenges can be raised at anytime by a party. However,  
13 on challenges to, say, personal jurisdiction, which probably  
14 doesn't apply in this case so much, in proper venue it  
15 probably doesn't apply in this case so much. But potentially  
16 number four, insufficient process, now there's something we  
17 haven't talked about before. And as the Court -- as we all  
18 know in this case, there are many, many people who have been  
19 either provided notice concerning, or served with notice  
20 concerning these proceedings. One of them might, might  
21 assert that they have not been properly served. And if -- and  
22 this is the time, then, for that to be raised or not at all.

23 THE COURT: Well, is claim preclusion a 12(b)(6)  
24 motion?

25 MR. GUARINO: I believe it is. I believe it

1 is. I think --

2 THE COURT: Well, what about Mr. DePaoli's  
3 approach that he needs discovery on that, and not as a motion  
4 to dismiss.

5 MR. GUARINO: If he needs discovery for it, then  
6 it can come in due time when we are engaged in discovery.

7 THE COURT: And make it as a Rule 56 motion, or  
8 is the government going to claim, the Tribe going to claim  
9 that he waived by not asserting it?

10 MR. GUARINO: No, we would not claim that, Your  
11 Honor. He would be able to raise that. We're not trying to  
12 stop anybody from raising their claims. And to the extent  
13 that it's a claim that would require discovery, and that you  
14 would need discovery to provide that claim, to provide for  
15 that claim, it would be a Rule 56 motion.

16 THE COURT: What about this approach in Phase I;  
17 what about requiring motions to dismiss as to (a), subpart  
18 (a), the Tribal's claims, motion to dismiss; or 12(b) motions  
19 for the federal claims, and then just see what washes out  
20 of that and address the matter of Answers down the road, as  
21 opposed to trying to amend the CMO to address Answers at  
22 this time?

23 MR. GUARINO: Can the Court repeat that again  
24 about (a) and --

25 THE COURT: (A) is Tribal claims; (b) is federal

1 claims.

2 MR. GUARINO: Happening simultaneously?

3 THE COURT: Have those motions proceed at the  
4 same time because, I think, which was the Tribe's approach.  
5 But you said then after the Tribe motions are done, you have  
6 to answer there, but it's stayed as to the federal claims.

7 MR. GUARINO: Yes, sir.

8 THE COURT: I was thinking about maybe staying  
9 both of them after and see what washes out on the motion  
10 phase.

11 MR. GUARINO: And just see or take this sort of  
12 one step at a time?

13 THE COURT: Yes.

14 MR. GUARINO: I'm not opposed to that, Your  
15 Honor. I think that's -- I think the Court needs to think  
16 about the step immediately in front of it, but also how it's  
17 going to fit in the larger picture of things. And I think  
18 providing for all parties to pursue legal challenges to the  
19 claims under Rule 12 is the appropriate way to do it, and  
20 that the Court declared that that is Phase I. That is what  
21 we are doing. Without commenting further on what we will be  
22 doing next, the Court can consider further that when we get,  
23 when we cross that bridge and we resolve the Rule 12 motions.

24 And I think -- you know, I was looking at, as  
25 Mr. DePaoli was reading the quote of the United States of



1 some years ago, I note that in the brief, it seems to be the  
2 position of the United States, even back then, that what we  
3 should do is focus on, in line 2 of the quote on page 11 of  
4 the response, "the legal issues." The legal issues. And  
5 that's precisely what we're asking the Court to do. And  
6 those legal issues are associated with a motion to dismiss.

7 THE COURT: Fifty-two hundred parties have been  
8 served so far, huh?

9 MR. GUARINO: Yes, Your Honor.

10 THE COURT: Okay. Of that, 1100 have waived  
11 service and chosen not to have any further involvement. So,  
12 they're just ignoring the case?

13 MR. GUARINO: Yes, Your Honor.

14 THE COURT: But 300 have filed a Notice of  
15 Intent To Participate. I then want to say 1150 persons have  
16 indicated they intend to participate. Whatever the number is,  
17 that's, that's 3,000 of the 5200.

18 What happened to the other 2200?

19 MR. GUARINO: As it's been explained to me,  
20 Your Honor, there are -- and, frankly, Ms. Schneider might  
21 have greater insight into this. But as the case progresses,  
22 there are people who are removed, even though they have been  
23 served, they are removed from further involvement for various  
24 reasons, as in they weren't proper -- they weren't the person  
25 to have been served in the first place, or there's been a

1 transfer, or they no longer own the property. There's a host  
2 of reasons why people would drop in and drop out. And that  
3 number was to give the Court a starting place of what's been  
4 done over the last decade.

5 But, Your Honor, if I may, and I described this  
6 last month when we were here before the Court, in other  
7 contexts I have seen, very clearly, where water users,  
8 non-Indian water users express an interest in participating  
9 in a proceeding such as this, to quantify an Indian water  
10 rights claim or to address an Indian water rights matter,  
11 and the number of participants who indicate I would like to  
12 participate, or fill out the form that's presented to them  
13 and return it back to the court is, in fact, quite high.

14 Another experience I have is when there was at least  
15 2500 participants who came forward and filed their piece of  
16 paper and said I want to participate. That case that I've  
17 been involved in is an excellent example of, in that instance,  
18 there's only a handful of active participants who actually  
19 do participate. Folks may have great interest in what's  
20 going on, for whatever reason. They may be opposed to the  
21 Tribal claims. But, this an initial expression of interest  
22 in participating. It's not an expression of we will be in  
23 court to present to the Court argument on any  
24 particular issue.

25 Now, I say that. I don't know how many people

1 will or won't. But, I'm expecting a great winnowing of  
2 participants in this process as we move forward.

3 MS. SCHNEIDER: Your Honor, this is Susan  
4 Schneider. If I could just add to what Mr. Guarino said.  
5 I got an awful lot of calls from people in connection with  
6 service. And a lot of times the question -- you know, they  
7 try to get some legal advice from me, which, of course, I  
8 don't want to give to them. But the sense that I've been  
9 getting from people, many people who filed a Notice of  
10 Appearance and Intent to Participate, is they're only doing  
11 so for purposes of keeping track of the case. And in more  
12 recent calls, as I've noted to people that there's this  
13 E-Serve Order pending and that will come out at some point,  
14 several of them have been very positive about that and  
15 indicated that that will also help their goal of just keeping  
16 track of things.

17 THE COURT: Thank you.

18 You know, I guess it gets back to my lack of  
19 familiarity with water and how it flows and how it  
20 interrelates, but I'm looking at page 9 and 10 of the  
21 memorandum you've filed: "Litigation of the Tribal claims  
22 does not require the Court to initiate a general string  
23 adjudication of the surface and groundwater of the Walker  
24 River basin. The Tribal claims ask this court only to  
25 recognize and quantify water rights as described in the U.S.

1 counter-claims and Tribal counter-claims."

2 My note is: "What does this mean?" Because  
3 Mr. DePaoli talked about that one water basin area but,  
4 nonetheless, Judge Reed had everyone in Walker River Basin  
5 served, basically.

6 MR. GUARINO: I have the urge to stand, but I'll  
7 try to sit.

8 Well, Your Honor, when the United States is making  
9 its claim for water rights in the basin, it is appropriate  
10 to give other potential water right holders, potential water  
11 rights holders notice that's what we're doing. That's what  
12 the last ten years has largely been about. The notices that  
13 went out to folks throughout the basin was not a notice to  
14 say you need to come into court and make a claim for your  
15 water rights; and, if you don't do that, there will be a  
16 default.

17 That's not the notice that went out. The notice  
18 that went out was a notification that we are making water  
19 rights claims on behalf of the Walker River Tribe and the  
20 federal government. That's why groundwater water users were  
21 notified as well. So that if they want to come in and Answer  
22 and object to the claims of the United States, they could do  
23 so.

24 THE COURT: So it's not -- I maybe understood  
25 this erroneously. The Tribe asserting a claim to the

1 adjacent land, groundwater rights, would not necessarily  
2 deplete or diminish Harry Swainson's water rights, but they  
3 would co-exist?

4 MR. GUARINO: They would co-exist. There  
5 might be very -- there might be very small, or none at all,  
6 hydrologic connection between the Tribe, the groundwater  
7 rights underneath the Walker River Reservation and another  
8 water rights holder somewhere else in the basin. That's --

9 THE COURT: All right. It's not necessary to  
10 resolve this issue for this proposed amendment, but it's  
11 something that has bothered me and concerns me.

12 Is it your position, Mr. Guarino, that res judicata,  
13 collateral estoppel, claim preclusion, whatever, can be  
14 asserted in a motion, 12(b) motion?

15 MR. GUARINO: I believe so.

16 THE COURT: Without discovery?

17 MR. GUARINO: I believe so. I'm not sure. I  
18 mean, I would have to see the motion that's filed.

19 THE COURT: Sure. I understand that.

20 MS. SCHNEIDER: Your Honor, this is Susan  
21 Schneider. There's Ninth Circuit case law on the scope  
22 of what, if any evidence, additional evidence can be presented  
23 in a Rule 12(b) motion; for example, pocket filings and so  
24 forth, and prior pleadings. So, there are some documents that  
25 can come before the Court in a Rule 12 motion without

1 converting it to a Rule 56.

2 I mean, I agree with Mr. Guarino. I don't think --  
3 I think res judicata can be dealt with under Rule 12.

4 MR. NEGRI: And, Your Honor, David Negri,  
5 if I could real quickly just add to that. To add to  
6 Ms. Schneider's point, there is Ninth Circuit case law  
7 saying res judicata can be brought as a 12(b)(6) motion. I  
8 have litigated cases where we've raised it as a 12(b)(6)  
9 motion, cited that case law, and proceeded to a determination.

10 THE COURT: Okay. Thank you.

11 Mr. DePaoli, one of the objections contained in  
12 your memorandum at page 12, is that the Tribe/government's  
13 proposal would require 12(b) motions -- and I think we all  
14 agree it would -- followed by Answers, counter-claims,  
15 cross-claims, and Answers to counter-claims and cross-claims.  
16 What if we were to do what I've floated as an idea; and  
17 that's just to have the next phase be 12 -- or any type of  
18 motions that are appropriate to this case; and then defer  
19 the Answers to counter-claims and further counter-claims and  
20 so forth?

21 MR. DEPAOLI: And not have the opportunity to  
22 have threshold issues at all?

23 THE COURT: Yes.

24 MR. DEPAOLI: You know, I still am convinced,  
25 Your Honor, that the first issue to be dealt with is subject

1 matter jurisdiction; and that then we should follow the Case  
2 Management Order and have the Court determine whether or not  
3 there are any issues that ought to be handled in the manner  
4 as the Case Management Order specifically provides for the  
5 handling of threshold issues: Designation, discovery, and  
6 disposition. And so I don't think we should abandon that  
7 concept.

8 THE COURT: My thought is that threshold issues  
9 are kind of along the lines of advisory opinions. And I've  
10 always had a difficult time embracing the concept of briefing  
11 what's called threshold issues. And it's really one of those  
12 times where I would like to be able to go to Judge Reed, but  
13 can't, and ask him the rationale here, and a light bulb would  
14 probably go off in my head.

15 My thought on this case is consistent with  
16 Judge Jones; that we've got to get off center here and get  
17 going. And it may very well be that Rule 12 motions of some  
18 kind will be dispositive or narrow the issues. And my thought  
19 process is to have this new Phase I as being a requirement  
20 that 12(b) motions be filed within X days. I'm kind of  
21 reluctant to say that 12(b) motions would be waived because  
22 let's say Mr. DePaoli's part, he thinks that claim preclusion  
23 needs some discovery, and if he doesn't file his motion, he  
24 might be precluded from it; or, if he later tried to assert it  
25 as a Rule 56 motion, that there would be an argument that it

1 should have been asserted as a 12(b) motion. So my thought  
2 is that maybe the very first Phase I would be absolutely,  
3 positively, dispositive motions that could be litigated  
4 without any discovery. Simultaneously, would be potentially  
5 dispositive motions that may need discovery. And any party  
6 seeking to file such motion, or they want discovery, would  
7 have to come back to court and get leave of court for that  
8 discovery before I turn anyone loose on what it is. And I  
9 think I would still embrace what Judge Reed said; it's just  
10 about written discovery.

11 I would like to defer any, the requirement for any  
12 Answers or counter-claims, or Answers to counter-claims or  
13 cross-claims, until after we see what shakes out on the first  
14 phase of motion practice in this case.

15 I've made some other notes here. I don't know if  
16 that's a, would be entitled a Supplemental Case Management  
17 Order or Amended, or Amendment to Case Management Order. I  
18 would think that Mr. Guarino, footnote -- let's see here -- 4  
19 at page 1 of the case, Proposed Supplemental Case Management  
20 Order says: "The Court" -- or, excuse me, I guess it's  
21 footnote 5: "The Court notes that additional supplemental  
22 CMOs will be needed in the future." We may be optimistic in  
23 saying "may."

24 I don't want to preclude the right of somebody to  
25 do discovery of a certain limited nature, to pursue a 12(b) or



1 12 motion. And it may be that we allow Rule 56 motions that  
2 would involve matters outside the pleadings to be asserted  
3 at this time. And then, thereafter, I would like to address  
4 the issue of, well, what do we do now about Answers? And at  
5 that point in time, maybe reconsider whether some briefing  
6 on threshold issues that remain would be beneficial. You  
7 know, I'm not precluding or eliminating the threshold issue  
8 altogether, but they may be something relevant that we want  
9 to do down the road. They still may be of benefit to this  
10 case.

11 With those enunciations of where I would like to  
12 see this case go, Mr. Guarino, or whomever, do you have any  
13 comment or questions?

14 MR. GUARINO: I don't believe so, Your Honor.

15 THE COURT: Ms. Schneider, is there anything  
16 you want to offer, since you've lived with this case for so  
17 many years?

18 MS. SCHNEIDER: I do agree with the Court that,  
19 in fact, under any approach here, you're going to be needing  
20 more than one supplemental Case Management Order in the  
21 future.

22 THE COURT: Mr. DePaoli, I know this decision  
23 doesn't comport, necessarily, or entirely with your approach.  
24 It sort of embraces some of what you said and rejects some of  
25 the others.

1                   Is there any question or discussion?

2                   MR. DEPAOLI: I guess the only question, Your  
3 Honor, is I assume this will be put in the form of another  
4 Order that sort of spells it out?

5                   THE COURT: Well, yes. And what I'm thinking --  
6 my original thought was to just tell plaintiffs to put  
7 something together, but I don't think that would be  
8 appropriate.

9                   And perhaps, Mr. Guarino, you can draft a proposed  
10 either supplemental Case Management Order, or amendment to it,  
11 whatever you want to call it, and discuss it with the other  
12 sides, that embraces these concepts that I am going to direct  
13 be applied to this case.

14                   MR. GUARINO: We'll do that.

15                   THE COURT: So does that answer your concern,  
16 Mr. DePaoli? You will have another written document to follow  
17 the CMO. And I want the parties to have a chance to discuss  
18 the best way to do it. And that will be one of our agenda  
19 items at the next meeting.

20                   MR. DEPAOLI: The proposed order, Your Honor?

21                   THE COURT: Yes.

22                   With that, does anyone else have any comment or  
23 questions?

24                   (No response.)

25                   THE COURT: Well, it's been an interesting day.

1 I, again, would like to compliment the lawyers involved on  
2 their excellent presentations.

3 Mr. Shaw, thank you for coming and making your  
4 comments.

5 And unless there's anything else to be brought to  
6 our attention, we'll be in recess.

7 I've got more housekeeping to do here, so just go  
8 ahead and do what you want.

9 Thank you all.

10 (Court Adjourned.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathryn M. French

February 13, 2013

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KATHRYN M. FRENCH, RPR, CCR  
Official Reporter

\_\_\_\_\_  
DATE