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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE ROBERT C. JONES, DISTRICT JUDGE,  
AND THE HONORABLE WILLIAM G. COBB, MAGISTRATE JUDGE  
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UNITED STATES OF AMERICA, :  
 :  
Plaintiff, : No. In Equity No. C-125-RCJ  
 : Subproceedings: C-125-B and  
WALKER RIVER PAIUTE TRIBE, : C-125-C  
 :  
Plaintiff-Intervenor, : 3:73-CV-125-RCJ-WCG  
 : 3:73-CV-127-RCJ-WGC  
-vs- : 3:73-CV-128-RCJ-WGC  
 :  
WALKER RIVER IRRIGATION : November 4, 2013  
DISTRICT, a corporation, et :  
al., :  
 :  
Defendants. :  
 :  
 :

TRANSCRIPT OF STATUS CONFERENCE

APPEARANCES:

FOR THE PLAINTIFF: ANDREW "GUSS" GUARINO  
Assistant United States Attorneys  
Denver, Colorado

DAVID L. NEGRI  
Assistant United States Attorney  
Boise, Idaho

FOR THE WALKER RIVER PAIUTE TRIBE: WES WILLIAMS, JR.  
Attorney at Law  
Schurz, Nevada

Reported by: Margaret E. Griener, CCR #3, RDR  
Official Reporter  
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(Appearances continue on next page.)

1 APPEARANCES (Continued):

2

3 FOR WALKER RIVER GORDON H. DePAOLI and  
4 IRRIGATION DISTRICT: DALE E. FERGUSON  
Attorneys at Law  
5 Reno, Nevada

6 FOR U.S. BOARD OF KAREN A. PETERSON  
7 WATER COMMISSIONERS: Attorney at Law  
Carson City, Nevada

8 JIM SHAW, Water Master

9 FOR MINERAL COUNTY: SIMEON HERSKOVITS and IRIS THORNTON  
10 Attorneys at Law  
El Prado, New Mexico

11 SEAN ROWE  
12 Mineral County District Attorney  
Hawthorne, Nevada

13 FOR MONO COUNTY: STACEY SIMON  
14 Attorney at Law  
Mammoth Lakes, California

15 FOR LYON COUNTY: GEORGE N. BENESCH  
16 Attorney at Law  
Reno, Nevada

17 FOR NEVADA DEPARTMENT MARTA A. ADAMS and  
18 OF WILDLIFE: BRYAN L. STOCKTON  
Deputies Attorney General  
19 Carson City, Nevada

20 FOR NATIONAL FISH AND DON SPRINGMEYER and  
21 WILDLIFE FOUNDATION: CHRISTOPHER MIXSON  
Attorneys at Law  
22 Reno, Nevada

23 FOR CIRCLE BAR N. RANCH THERESE URE  
24 AND MICA FARMS: Attorney at Law  
Reno, Nevada

25 (Appearances continued on next page.)

1 APPEARANCES (Continued):

2

3 FOR CALIFORNIA STATE  
4 AGENCIES:

ANNADEL ALMENDRAS  
Deputy Attorney General  
San Francisco, California

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ERIN K. L. MAHANEY  
Deputy Attorney General  
Sacramento, California

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1 RENO, NEVADA, MONDAY, NOVEMBER 4, 2013, 10:08 A.M.

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4 THE COURT: Good morning. Thank you. Please be  
5 seated. Welcome.

6 This is a joint session of the District Court as  
7 well as the magistrate judge regarding pretrial and other  
8 procedures in this proceeding.

9 Let's start, of course, with appearances here in the  
10 courtroom and then afterwards on the telephone for those  
11 parties appearing, please. Government.

12 MR. GUARINO: Good morning, your Honor. Gus  
13 Guarino for the United States.

14 MR. WILLIAMS: Good morning, your Honor. Wes  
15 Williams, Jr., on behalf of the Walker River Paiute Tribe.

16 MR. HERSKOVITS: Good morning, your Honor.  
17 Simeon Herskovits for Mineral County. I would like to also  
18 introduce, with me is Sean Rowe, the District Attorney for  
19 Mineral County, and seated behind him is Jerry Tipton, the  
20 chairman of the current Mineral County Commission.

21 MR. DePAOLI: Good morning, your Honor. Gordon  
22 DePaoli and Dale Ferguson on behalf of the Walker River  
23 Irrigation District.

24 MR. BENESCH: Good morning. George Benesch on  
25 behalf of Lyon County.

1 MS. ADAMS: Good morning, your Honor. Marta  
2 Adams, Nevada Department of Wildlife, and with me to my right  
3 is Bryan Stockton.

4 THE COURT: Thank you.

5 MS. URE: Good morning, your Honor. Therese Ure  
6 representing Circle Bar N Ranch and Mica Farms.

7 THE COURT: Thank you. Others as well, please,  
8 in the courtroom.

9 MS. SIMON: Good morning. Stacy Simon on behalf  
10 of Mono County.

11 MR. SPRINGMEYER: Good morning, your Honors.  
12 Don Springmeyer and Chris Mixon on behalf of the National Fish  
13 and Wildlife Foundation.

14 THE COURT: Thank you.

15 MR. NEGRI: Your Honor, David Negri also for the  
16 United States.

17 THE COURT: Thank you.

18 MS. PETERSON: Your Honor, Karen Peterson for  
19 the U.S. Board of Water Commissioners, and the Water Master is  
20 here also.

21 THE COURT: Any other parties?

22 Okay. On the telephone, please.

23 MR. NEVILLE: Good morning, your Honor. This is  
24 Michael Neville for the California state agencies.

25 MS. ALMENDRAS: This is Annadel Almendras also

1 appearing on behalf of the California state agencies.

2 MS. THORNTON: Good morning, your Honor. This  
3 is Iris Thornton on behalf of Mineral County.

4 THE COURT: Very good. When you do speak up on  
5 the telephone, please, so that our court reporter knows who's  
6 speaking, would you state your name first as you make an  
7 argument or comment on the telephone. Here in the courtroom I  
8 think she can see you, she knows who's speaking.

9 I intend to follow generally the United States's  
10 suggested supplemented agenda, but I may divert, of course,  
11 for some items that I think need to be covered.

12 Again, this is a status hearing, and the most  
13 appropriate thing to discuss is the service issues which is  
14 listed as 1 and 2 on the government's proposed agenda.

15 Just by way of reminder, as I explored with you last  
16 time, under Judge Reed's prior order, he had bifurcated 125-B  
17 and 125-C but for file purposes only. The order clearly  
18 states that it's still one case but there would be two files  
19 created, and pleadings would be filed respectively in the  
20 different cases.

21 And, of course, at the last hearing I did grant the  
22 motion to intervene by Mineral County from the 125-C  
23 proceeding, but they had the right to intervene in the 125-B  
24 proceeding which was the federal government's action on behalf  
25 of the Tribe and federal reserved rights on the other

1 properties.

2 So with that reminder, please, let's get a status  
3 update from the United States and then secondarily from  
4 Mineral County on service and service-related issues.

5 MR. GUARINO: Thank you, your Honor. Gus  
6 Guarino for the United States.

7 I'll just be brief about our efforts. As the Court  
8 recalls, last year, late last year, we began our efforts to  
9 serve a group of water rights holders referred to as the  
10 dormant riparian water rights holders in California. There  
11 were approximately 400 folks that we'd identified with the  
12 help of California.

13 Since that --

14 THE COURT: May I ask, by the way, how are you  
15 identifying those 400? Are there state records that identify  
16 those folks, or you just -- on the ground surveying them?

17 MR. GUARINO: We have relied upon the records of  
18 the state in large part to identify these properties rights --  
19 these property holders.

20 THE COURT: Do they have a certification process  
21 for old riparian rights owners?

22 MR. GUARINO: These are dormant --

23 THE COURT: Some way to declare a list?

24 MR. GUARINO: These are dormant riparian water  
25 rights. I don't have an answer directly for that.

1 THE COURT: Okay.

2 MR. GUARINO: Maybe California does.

3 These folks were identified, and we've been trying  
4 to serve these folks since last December. We've made great  
5 strides. As I reported, I think back in middle summer, we  
6 were down to about 40 water rights holders, property holders,  
7 who we needed to serve.

8 When we ran out of the money that we had budgeted  
9 for serving these folks, we spent a bit of the summer looking  
10 for money. We found some more money.

11 THE COURT: Awesome.

12 MR. GUARINO: Well, we spent all that money.  
13 And these last 40 individuals appear to be tough nuts to  
14 crack, and we have spent the money that we had accumulated to  
15 find these folks, and we're having very serious problems  
16 finding these last 40 folks.

17 So our efforts are continuing. We expect -- we  
18 expect to resume our efforts. Because we've run out of money,  
19 we had put it on hold until we could find more money to have  
20 our process server continue --

21 THE COURT: Now, when you say dormant -- this  
22 question really has to do with what we need to do to get them  
23 served, whether by publication or directly.

24 When you say dormant, you mean this is a person or  
25 entity that's still entitled to a property that would have a



1 riparian right, but it's dormant because it is not using the  
2 right, isn't taking water from the stream, for example? Is  
3 that what you mean by dormant?

4 MR. GUARINO: I think that's -- that is my  
5 understanding, Judge, but I think somebody from California  
6 might be more versed in the nature of this right. They're  
7 very unusual.

8 THE COURT: We'll hear from them in a moment.

9 But clearly title would reflect present owners. I'm  
10 not asking you to serve somebody who previously owned the  
11 cabin adjacent to the river, I'm asking you to serve current  
12 title owners who potentially have a dormant riparian right.

13 MR. GUARINO: Yes.

14 THE COURT: So is that not -- I understand it  
15 costs money, but is that address information not immediately  
16 available even online from a county assessor?

17 MR. GUARINO: I don't believe it's online, but I  
18 believe California has this information. They've provided  
19 that to us, and we've pursued that. These are folks who have  
20 property along a stream, a natural stream course.

21 THE COURT: Right. Could I not order -- of  
22 course, I can order -- publication would suffice, but can I  
23 not order that simply posting a notice on the property would  
24 also suffice with a mailing to the address present with the  
25 county treasurer or county assessor?

1 MR. GUARINO: I don't know whether or not  
2 posting of a notice on property would suffice. It might be,  
3 but we have only 40 of the identified individuals left.

4 THE COURT: Remaining.

5 MR. GUARINO: And we're going to find them,  
6 we're going to get them. It's just a matter of time now.  
7 It's just a little --

8 THE COURT: Even if it's not directly *in*  
9 *personam*, I would be glad to sign an order that said you could  
10 serve them by a mailing to the address, last known address on  
11 the tax rolls of the county, and maybe even without a posting  
12 but potentially with a posting as well on the property, you  
13 just stick it on a tree or stick on it the cabin if it exists.

14 MR. GUARINO: If these individuals prove to be  
15 impossible to locate, that might be something that we could  
16 explore.

17 THE COURT: And you'll ask me at the appropriate  
18 time.

19 MR. GUARINO: Yes. We would like to exhaust our  
20 efforts to personally serve them and just be done with that.

21 THE COURT: Okay. Terrific.

22 MR. GUARINO: So that is where we're at.

23 THE COURT: Okay. Now, how about overall  
24 rights? You're requesting adjudication of surface rights, of  
25 course, and you've served all of those folks, they've either

1 responded or they haven't, and you've also served, at Judge  
2 Reed's request, all of the people that would assert a  
3 groundwater right that would be affected by a modification of  
4 this decree or a declaration of a right by the Tribe.

5 How is that process? Is that complete? What do we  
6 have left to do in that process?

7 MR. GUARINO: My understanding is that service  
8 is complete, and this last group of dormant riparian water  
9 rights holders are the last group of individuals --

10 THE COURT: Last group. And just one more  
11 clarification so I can get it straight in my mind. When you  
12 say it's complete, is this complete per -- well, it's complete  
13 by personal service, you did personal service. Did you do  
14 publication at all?

15 MR. GUARINO: We have not published yet. We  
16 have --

17 THE COURT: And you didn't see the need.

18 MR. GUARINO: We're not there yet.

19 We started by sending a mailing out, and many people  
20 returned those mailings, and they waived personal service. So  
21 they've been served because we have gotten responses back from  
22 them.

23 THE COURT: Right. And I understand from Judge  
24 Cobb that the numbers are -- out of a total original of about  
25 3,000, we have 1,000 that have been served.

1 MAGISTRATE JUDGE COBB: They've all been served.

2 THE COURT: Oh, they've all been served, only a  
3 thousand responded in some form or fashion.

4 MR. GUARINO: I am looking for a document I had  
5 earlier this morning, and I am trying to find it. But the  
6 rough numbers -- the rough numbers, your Honor, are that we  
7 have approximately 3,800 identified defendants.

8 THE COURT: And they're served.

9 MR. GUARINO: And they're served, yes, sir.

10 THE COURT: And what's the proof of the service?  
11 You have returns of service on each one of those?

12 MR. GUARINO: Yes, sir. We actually either have  
13 their waiver or we have personal service on them.

14 THE COURT: Okay. And a number of those, of  
15 course, have not responded.

16 MR. GUARINO: Yes, sir.

17 THE COURT: They were required by the service to  
18 respond.

19 MR. GUARINO: Yes, sir.

20 THE COURT: About 2,000 have not.

21 MR. GUARINO: About --

22 MAGISTRATE JUDGE COBB: Twenty-eight hundred.

23 THE COURT: Twenty-eight hundred.

24 MR. GUARINO: About 1,100 have responded by  
25 entering appearances.

1 THE COURT: Okay.

2 MR. GUARINO: So I know that number better. But  
3 they have been served either by personal service or by mail  
4 with return waivers.

5 THE COURT: Right. And the proof of service is  
6 on file or just simply in your files?

7 MR. GUARINO: I don't believe we've -- each  
8 year, your Honor, my understanding is we have filed annual  
9 service reports, and we're about to provide the Court our 18th  
10 service report.

11 THE COURT: And attached to it was?

12 MR. GUARINO: Exhibits reflecting what we have  
13 received back from folks. So I know that I have -- I have all  
14 my --

15 THE COURT: No, that wasn't my question. My  
16 question was, is the proof of service, especially for those  
17 who haven't responded, is that attached and in our file  
18 somewhere?

19 MR. GUARINO: I don't know.

20 THE COURT: You don't know. Okay.

21 MR. GUARINO: I don't know that.

22 THE COURT: So we may not have proof of service  
23 for that remaining figure, 2800, or whatever it is, that  
24 haven't responded, we may not have proof of service on file,  
25 you just don't know.

1 MR. GUARINO: I don't know. I would like to  
2 think we have provided that information.

3 THE COURT: Certainly, hopefully, you have it in  
4 your files.

5 MR. GUARINO: Yes, we do.

6 THE COURT: I do think you ought to file those  
7 in if you haven't already. I think we need that.

8 MR. GUARINO: I will double-check and clarify  
9 that.

10 THE COURT: Now, one last clarification. Judge  
11 Cobb told me that the original CMO said default would not be  
12 taken whether they responded or not.

13 MR. GUARINO: Yes.

14 THE COURT: Okay. Okay. That's clear in my  
15 mind.

16 All right. And is that the report then? You've  
17 served everybody except those 40?

18 MR. GUARINO: Yes.

19 THE COURT: And subject to, of course, my  
20 requirement, and would you check to see if the proof of  
21 service is on file. If not, would you include it in some huge  
22 filing. You know, you can do it electronically so that you  
23 just scan them in, and you keep the originals, of course.

24 MR. GUARINO: I will, your Honor. And, as I  
25 said, I'd like to think that it has been filed. I just

1 haven't seen that document itself.

2 THE COURT: Right. Okay.

3 MR. GUARINO: I've seen what we've created and  
4 what we're preparing to file with the Court which is the 18th  
5 report to update the Court and everybody about service, and in  
6 that is about 250, 260 folks that we've been working on very  
7 diligently over the last year or so, and I'd like to think  
8 that our personal service information has been filed with the  
9 Court as well.

10 THE COURT: Okay. And before the next report,  
11 hopefully you'll conclude with respect to the 40, or you'll be  
12 filing a motion to do it some other way so that you can file  
13 one last report.

14 MR. GUARINO: Yes, your Honor.

15 THE COURT: Okay. Good.

16 And, again, those are dormant riparian rights which  
17 are surface right claims.

18 MR. GUARINO: Yes, your Honor.

19 THE COURT: Okay. How about Mineral County in  
20 125-C?

21 MR. HERSKOVITS: Yes, your Honor. This is  
22 Simeon Herskovits from Mineral County, again.

23 As of late winter, early spring, Mineral County had  
24 completed service on all of the identified defendants up to  
25 that point, and that was within the class of defendants that

1 in previous proceedings Judge Reed and Magistrate Judge  
2 McQuaid had been utilizing as the appropriate class or scope.

3 And, as I understand it, your Honor, you have  
4 decided that that needs to be broadened to match the  
5 categories in B. So we had completed service on all --

6 THE COURT: And to what extent would that  
7 require broadening? What was your previous concept or list in  
8 B?

9 MR. HERSKOVITS: Our list was for all holders  
10 of decree --

11 THE COURT: I'm sorry, in C.

12 MR. HERSKOVITS: I'm sorry. Yes, your Honor, I  
13 understood that you meant that.

14 In C, pursuant to some orders from Judge Reed in the  
15 1990s, our understanding, and I believe it's fair to say at  
16 that time the Court's understanding was that we were to serve  
17 all holders of decree water rights and other appropriate  
18 surface water rights, so not groundwater and not purely  
19 riparian water rights. There is, of course, sometimes an  
20 overlap between people who hold one sort and another.

21 THE COURT: Now, when I asked you to broaden,  
22 did you think that that included then as well groundwater  
23 claimants?

24 MR. HERSKOVITS: Well, at the hearing on the  
25 23rd, your Honor, when you clarified that you did mean that,



1 and I -- from the status conference in July, I didn't  
2 understand that clearly, but now I do understand it.

3 As I understand it, I believe the Court has directed  
4 us to broaden service to include the 11 categories that  
5 pertain to the United States and the Tribe in the 125-B  
6 subproceeding which includes groundwater rights holders,  
7 all groundwater rights --

8 THE COURT: Let me ask for a clarification in  
9 that regard just second-guessing what I've previously said.

10 Does your claim affect groundwater right users? In  
11 other words, it primarily affects surface right users as you  
12 conceded to me last time. You told me, of course, that you  
13 were not filing even a surface water right, you were claiming  
14 an old, continued-in-existence trust right for public  
15 supervision of waters.

16 And, nevertheless, in response to my question, you  
17 admitted that it would certainly have an effect on surface  
18 water right users both as to existence of the right of the  
19 county as well as the priority date, and it would have an  
20 effect potentially requiring diminishment or junior priority  
21 by already declared surface water right users upstream.

22 So basically you conceded to me, with all due  
23 respect, you may disagree, that it was the same as a  
24 modification of the decree regarding the declared priority  
25 rights and existence of rights of upstream users, and that's

1 why, of course, I wanted extensive service.

2 Can you now clarify, does it affect any upstream  
3 basin groundwater users? Does your claim or the remedy that  
4 you seek, does it portend at all in any respect to affect  
5 upstream basin groundwater users? If it doesn't, of course, I  
6 don't need you to serve all those other people.

7 MR. HERSKOVITS: Well, your Honor, let me answer  
8 that question by explaining that --

9 THE COURT: Who's speaking? I can't see who's  
10 speaking.

11 MR. HERSKOVITS: Oh, I'm sorry, your Honor.  
12 This is Simeon --

13 THE COURT: Raise your hand.

14 MR. HERSKOVITS: Simeon Herskovits for Mineral  
15 County again.

16 THE COURT: Okay. I was looking over here.  
17 Mineral County. Right. Okay. I apologize.

18 MR. HERSKOVITS: And I apologize.

19 Your Honor, our claim sought only a modification of  
20 the surface appropriative water rights in the basin. So when  
21 it was filed and since it's been pending --

22 THE COURT: And please be a little more  
23 explicit. What do you mean a modification? Do you mean a  
24 junior declaration to your superior right?

25 You know, under Nevada law, under most states' laws,

1 an appropriative right did not exist for instream uses, it had  
2 to be a take-out. But, as we now know, I believe, under  
3 Nevada law, an appropriative right can include an instream use  
4 under Nevada law.

5 So be a little bit more explicit, please. What  
6 exactly, with respect to surface rights, are you claiming?  
7 What remedy are you seeking? Is it not a declaration of a  
8 superior instream use to anyone on surface rights upstream  
9 from you?

10 MR. HERSKOVITS: Yes. In essence, your Honor.  
11 It is a remedy that would require increased flows on an  
12 average annual basis responding to the fluctuations that the  
13 entire basin has to deal with hydrologically, but an increase  
14 of the annual average amount of water that is allowed to flow  
15 to the lake to such an extent as to restore the lake to a  
16 reasonable state of environmental, recreational and  
17 aesthetic health.

18 THE COURT: It would include all upstream  
19 surface users, including the Tribe.

20 MR. HERSKOVITS: It would certainly affect all  
21 upstream surface right users.

22 There hasn't been any exploration of whether --  
23 let's call it a curtailment of surface diversions upstream  
24 would affect groundwater usage or rights upstream. Arguably,  
25 at least, it would not, but I think arguments also have been

1 advanced, particularly in B, that the system is all  
2 interconnected.

3 We have never asserted that, and we have never taken  
4 that position. We have merely sought a reduction or  
5 reallocation, or however it gets characterized, a reduction of  
6 diversions upstream to allow for adequate flows to the lake.  
7 But that's only been targeted at surface diversions.

8 THE COURT: And with respect to a priority date,  
9 what priority date will you be asking the Court for, 1864  
10 creation of territory or state, or 1913, or 1905, the  
11 Reclamation Act? What priority date will you be seeking with  
12 respect to surface rights that exist upstream?

13 For example, the Tribe, of course, for reserved  
14 lands, they claim an 1854 date for those surface rights. The  
15 1936 is the date, as I understand it, for Weber Reservoir and  
16 storage rights, and 1936 for additional lands added. But 1854  
17 is their priority date with respect to original reservation,  
18 and that's the date they seek for the groundwater rights, of  
19 course.

20 What date would you be seeking, or are you seeking a  
21 priority date at all?

22 MR. HERSKOVITS: Well, your Honor, let me answer  
23 both of those suppositions.

24 Our understanding of the public trust is that it  
25 operates as a bedrock *a priori* constraint on the system, and

1 so we have not viewed it or articulated it as an appropriative  
2 water right with a priority date.

3 If we were required to do that, we would assert a  
4 priority date precedent to or superior to all others on the  
5 system because we view it as a trust obligation of the  
6 sovereign or sovereigns.

7 THE COURT: But you weren't a sovereign until  
8 the date you became a state --

9 MR. HERSKOVITS: But before that the --

10 THE COURT: And/or before the date that Mineral  
11 County was declared a subdivision.

12 MR. HERSKOVITS: Well, that is correct, your  
13 Honor, but the United States was a sovereign before that time,  
14 and the United States would have had the trust obligation as  
15 well, and with regard to the portion of the basin in  
16 California, we would maintain that that also pertained to that  
17 sovereign.

18 So the overlapping sovereigns that have had  
19 historically control or authority over the basin would all  
20 have been subject to the same obligation.

21 THE COURT: Well, of course, you'll make the  
22 argument, but I don't see how possibly you can make that  
23 argument that the United States passed to you a trust right  
24 when you were set up as a state. I don't understand that  
25 concept. So, at any rate, I'll leave that for you.

1           So that's with respect to surface rights. How about  
2 the groundwater rights?

3           MR. HERSKOVITS: Well, we haven't asserted any  
4 groundwater right, and we have also not requested a remedy  
5 that addresses groundwater usage or rights. We have focused  
6 solely on surface diversions and surface water rights.

7           THE COURT: So even if the groundwater usage  
8 upstream -- let's say it's overappropriated, and even if that  
9 affects -- if that affects, however, the surface waters in the  
10 stream, you will not seek a remedy from this Court in a  
11 modification of the decree that imposes or impairs groundwater  
12 right users at all.

13           See, that's that ultimate question whether you have  
14 to serve them or not, isn't it?

15           MR. HERSKOVITS: Yes, your Honor.

16           THE COURT: In other words, if you will limit  
17 your request for a remedy to surface waters, in other words,  
18 the only -- even if groundwater is overappropriated and  
19 diminishes the surface water rights, you will only be asking  
20 for a remedy against the surface water users, you will never  
21 ask this Court, you're not asking the Court to modify the  
22 groundwater users or to limit them in ways that do not limit  
23 the stream, rather, you will -- any impairment, even caused by  
24 overappropriation of groundwater rights, you will only ask for  
25 a remedy vis-à-vis the surface water right users.

1 MR. HERSKOVITS: Well, your Honor, if I can  
2 explain.

3 I think the understanding we have had is that the  
4 Court's jurisdiction pertain to the surface appropriative  
5 water rights, so all we came --

6 THE COURT: And that's all.

7 MR. HERSKOVITS: -- to this court seeking was a  
8 remedy addressing that.

9 If there were a problem with overappropriation of  
10 state groundwater rights, I think Mineral County's belief was  
11 that it would pursue something with the state engineer or in  
12 the state administrative and court context.

13 THE COURT: Very good. I'm inclined to agree  
14 with you. I also don't think I really have jurisdiction over  
15 groundwater users, but we'll get to that in a moment.

16 What then -- why should I require you, or should I  
17 not require you to serve groundwater users?

18 MR. HERSKOVITS: Well, our position has been  
19 that the Court should not require us to serve groundwater  
20 rights users or holders.

21 I just want to acknowledge that because the United  
22 States and Walker River Paiute Tribe have asserted claims that  
23 the two are inseparable and that the Court has jurisdiction  
24 over groundwater -- I don't know if reserve the right is the  
25 proper phrase, but I would want to acknowledge that if the

1 ruling were made that groundwater had to be addressed in the  
2 same proceeding, in B, then I think we might be compelled to  
3 revisit that issue, and then at that point, if we were, then I  
4 think we would have to serve groundwater rights holders, but  
5 that's --

6 THE COURT: Right. One of the first rounds of  
7 briefing will be on jurisdiction over groundwater usage.  
8 That's shortly to come in this hearing, of course.

9 So assuming -- and I'm inclined, as I sit here,  
10 subject to your briefing, to think that the Court does not  
11 have jurisdiction over groundwater usage. I think expressly  
12 by federal statute that was reserved to the states, and it's  
13 the state engineer with whom you file a claim.

14 That's, for example, the current practice, even for  
15 federal reserved rights for domestic use, for the forest  
16 ranger at their cabin, or for watering rights for wildlife, or  
17 for cattle that they, themselves, put on the range, or  
18 antelope or whatever else it is. The practice currently  
19 across all the western United States is the federal government  
20 files a claim with the state engineer pursuant to their state  
21 statute.

22 And the federal statute expressly said there's no  
23 impact or effect upon the states -- in fact, it encouraged the  
24 states to implement that system and said the first people that  
25 implement that statutory system will be honored with the first



1 reclamation projects, and that's why, of course, Nevada got  
2 the first project, and that state statute requires claims, and  
3 that's the practice.

4 I've seen in a number of other cases where the  
5 federal government -- they may be asking me for a declaration  
6 that they do have such a right, but, in all events, they go  
7 first to the state engineer and ask for a declaration of an  
8 appropriative right off stream.

9 Unless this Court is the decree court for the  
10 instream use, they're always going to the state engineer for a  
11 claim of appropriative right off of a -- for groundwater. So  
12 that would be my inclination.

13 Is there any opposition if the Court deletes the  
14 requirement of service for Mineral County on groundwater  
15 users?

16 (No audible response.)

17 THE COURT: I see no reason why I shouldn't  
18 delete that pending -- if, as a result of the subsequent round  
19 of filing I say that I do have jurisdiction over groundwater,  
20 then, of course, I will give you an opportunity to expand your  
21 complaint. But as of now, I take it that the only remedy  
22 you're seeking is against surface water users.

23 MR. HERSKOVITS: Yes.

24 Now, your Honor -- and you've already said something  
25 that, I think, answers a concern I had, which was if you reach

1 a different ruling, notwithstanding what the Court has said  
2 today, and you do extend it to groundwater --

3 THE COURT: I'll give you a further opportunity.  
4 You'll need to remind me, of course --

5 MR. HERSKOVITS: Oh, we will.

6 THE COURT: -- by an attempt to file an amended  
7 complaint.

8 MR. HERSKOVITS: Yes, your Honor.

9 The other -- the one other issue that I think needs  
10 to be considered is previously we were not required, and we're  
11 not seeking relief that directly addressed or sought any  
12 change in purely riparian water rights in California, again,  
13 because those did not seem to be within the confines of the  
14 Court's original decree jurisdiction.

15 I know that there may be a view that the riparian  
16 water rights upstream in California may need to be covered or  
17 may -- it's what some analogous to the arguments about  
18 groundwater, but previously we haven't served those. So I  
19 think --

20 THE COURT: It really isn't. It's more  
21 analogous to surface water users because that's what they are.  
22 They're a surface water user. Even if dormant, they have a  
23 riparian right, they sit adjacent to the stream, to use from  
24 the stream, and your decree that we leave sufficient flows in  
25 the river would definitely affect their riparian right.

1 MR. HERSKOVITS: Well, then, your Honor --

2 THE COURT: I would be declaring, especially  
3 based upon *in personam* jurisdiction, their having been served,  
4 that they cannot use their right to impair your right.

5 MR. HERSKOVITS: Your Honor, let me just  
6 request, is my understanding correct, then, that the Court  
7 believes that we should be adding the category of riparian  
8 water rights holders to those we have to serve in the C case,  
9 the 125-C case, but not groundwater rights holders?

10 THE COURT: That would be my position, unless  
11 you clearly limit your complaint to not seeking any remedy  
12 against riparian, dormant or otherwise, rights.

13 MR. HERSKOVITS: I don't know if we're prepared  
14 to do that today, your Honor. I would request maybe an  
15 opportunity to examine the issue and --

16 THE COURT: So unless and until you do it, I  
17 take your complaint as affecting all surface water right  
18 users, riparian or appropriative.

19 MR. HERSKOVITS: And I propose that we make a  
20 filing with the Court --

21 THE COURT: If you wanted to further limit it.

22 MR. HERSKOVITS: -- wants me to assess whether  
23 we think there's a basis for restricting it to nonriparian  
24 rights.

25 THE COURT: Okay. So pending such an amendment,

1 you have to serve the riparian and dormant riparian rights  
2 users.

3 MR. HERSKOVITS: I understand, your Honor.

4 Then let me just revisit. Just to reiterate or  
5 clarify, we have previously completed service on all of the  
6 appropriative water rights in the basin, surface water rights.

7 We would now have remaining an amount, which we're  
8 not certain of yet, of riparian water rights holders to serve,  
9 and we have begun to do the research to assess the number and  
10 the extent to which overlap reduces that number, and to use,  
11 hopefully, the existing records that the federal government  
12 and the Tribe have already generated.

13 THE COURT: Right.

14 MR. HERSKOVITS: I can't now yet tell you how  
15 many additional defendants that will be or how long it will  
16 take.

17 Mineral County has extremely limited resources, but  
18 I think certainly we will figure out the scope of the  
19 additional service required, and we will tackle it and do it  
20 as expeditiously as possible. I think we will have to, at a  
21 future status conference or perhaps in a filing --

22 THE COURT: Well, you know that those who have  
23 been served in the federal court's action are parties by  
24 virtue of their service. So you should be able to figure out  
25 a method --

1 MR. HERSKOVITS: Oh, yes.

2 THE COURT: -- the least expensive process.

3 MR. HERSKOVITS: Well, there is the question of  
4 what form of service is required on -- because they've all  
5 been served by the federal government with the exception of --

6 THE COURT: That's right. You're in essence  
7 filing a counterclaim or cross-claim or additional claim by  
8 additional party.

9 MR. HERSKOVITS: Yes. And --

10 THE COURT: And that typically would require  
11 your own service.

12 MR. HERSKOVITS: Yes, and we have today engaged  
13 in Rule 4 service, and, in a process very closely analogous to  
14 that of the federal government and the Tribe, we've mailed out  
15 packages, received a certain proportion of waivers back, and  
16 for those who did not sign waivers, followed it up with  
17 personal service.

18 THE COURT: Right. Let's visit that issue then.  
19 How soon will you complete service first before we visit that  
20 second issue?

21 MR. HERSKOVITS: Well, we just need to figure  
22 out how many additional riparian -- how many additional water  
23 rights holders we now have to serve, the riparian ones.

24 And then I guess there's a question of whether --  
25 and I don't want to presume anything, your Honor, but from

1 some remarks you made at the September 23rd hearing, there is  
2 a question in our mind as to whether the same Rule 4 personal  
3 service requirements will be applicable to these defendants  
4 who have already been served in B, or whether you had in mind  
5 something lesser such as a mailing.

6 THE COURT: Intervention, and I allowed  
7 intervention, doesn't require original summons service. A  
8 counterclaim or a cross-claim, especially third-party  
9 practice, if you will, that may require an additional service.

10 So with respect to B, I didn't require that you  
11 serve as a result of granting the motion to intervene, right?

12 MR. HERSKOVITS: You did not make such a  
13 requirement on that basis.

14 THE COURT: It's only with respect to your C  
15 claim, your new claim that you have, Mineral County, either in  
16 its own right or on behalf of the state, has a surface right.

17 MR. HERSKOVITS: And that is Rule 4 original  
18 service, am I correct?

19 THE COURT: You tell me. Can you avoid Rule 4  
20 by latching onto the B complaint? There's still one case,  
21 they're only one case.

22 MR. HERSKOVITS: Yes, your Honor.

23 THE COURT: They're bifurcated by file, but  
24 since people have been served and are parties to that, you're  
25 the inventive lawyer, since you're asserting a claim on your

1 own behalf and in addition to the federal government's, maybe  
2 even contra to the federal government's rights, do you have to  
3 serve under Rule 4?

4 MR. HERSKOVITS: Well, your Honor, in  
5 anticipation of that issue or question which we need to  
6 resolve, I was going to request of the Court an opportunity to  
7 actually research and brief it, although what I would propose  
8 to do is research that issue and address it perhaps with  
9 counsel for the other principal parties and see whether or  
10 not --

11 THE COURT: That's fine. You should have done  
12 it heretofore, with all due respect, you should have done it  
13 heretofore, but anticipating further status hearings,  
14 especially on the service issues, please.

15 Okay. All right. That's a report on the status of  
16 service.

17 Judge Cobb, please.

18 MAGISTRATE JUDGE COBB: Before we go on, I  
19 just -- I know that Mr. Herskovits' and Mineral County's  
20 argument is that appropriation of surface water rights to  
21 provide the maintenance of flow to Walker Lake that you're  
22 seeking would not impact groundwater rights and thus a  
23 groundwater user doesn't have to be served.

24 I was just wondering if anyone else in the courtroom  
25 might have a contrary view as to whether appropriation of

1 those surface water rights by Mineral County might have an  
2 impact on someone's vested groundwater rights, and I didn't  
3 know if anyone would like to address that.

4 (No audible response.)

5 MAGISTRATE JUDGE COBB: Apparently it's not an  
6 issue.

7 THE COURT: At least the county so far has  
8 agreed that they're not requesting a remedy against any  
9 groundwater user.

10 So even if there is an overappropriation which  
11 affects the surface water rights, they will not seek, under a  
12 modification that they might receive from this Court, any  
13 remedy against a groundwater right user. They will limit  
14 their request to the surface right users.

15 So even if the groundwater because of  
16 overappropriation is affecting the surface water rights, they  
17 will be limited in their remedies against surface water users.

18 MR. HERSKOVITS: Yes.

19 Your Honor, if I may, Simeon Herskovits again,  
20 that's correct, and just to be a little bit redundant, that is  
21 with the understanding that if the Court reaches a conclusion  
22 that it does in fact have the jurisdiction to rule on the  
23 groundwater rights and that it must take those into account in  
24 crafting a remedy, we would request -- we would then have to  
25 serve them all, but we would request then to broaden our



1 claims as required under that scenario only.

2 THE COURT: All right. The next one listed by  
3 the government was the issue of the website development and  
4 discussion concerning the need to develop and the steps needed  
5 to accomplish a court website that includes both 125-B and C  
6 documents in some workable fashion.

7 Please, your concerns and issues and whether you've  
8 been able to work this out.

9 MR. GUARINO: Your Honor, Guss Guarino for the  
10 United States.

11 This is an issue that came up in discussions amongst  
12 the parties and with the Court, Magistrate Judge Cobb. Over  
13 the last two months, we have met a couple of times both in  
14 person and on the phone to discuss service issues and related  
15 service issues. One of them is associated with this -- with  
16 the website.

17 We have created a website, as the Court is aware,  
18 with regards to the 125-B case, but as we proceed with the  
19 125-C case, it appears to us that we would need to create  
20 additional -- some element of that website to incorporate  
21 material from 125-C to keep --

22 THE COURT: Right, or it could be a separate  
23 website.

24 MR. GUARINO: Could be a separate --

25 THE COURT: And, with all due respect, it ought

1 to be at the cost of the county.

2 MR. HERSKOVITS: Your Honor, if I could address  
3 that. To date --

4 THE COURT: Is the cost of the B website at the  
5 court's cost or the government's cost?

6 MR. GUARINO: My understanding is the court's  
7 cost.

8 THE COURT: Oh, too bad. I know in bankruptcy  
9 court, you know, we used to develop those websites for huge  
10 cases, and we imposed the cost upon the parties, and they were  
11 glad to accept that cost.

12 But if I've done it for the B website, we certainly  
13 would be doing it for the C, but it would be a separate  
14 website with notices and links, of course, to each other.

15 MR. GUARINO: And from the United States's point  
16 of view and concerning the 125-B case, the only concern that  
17 we would have is that we would want to keep the materials  
18 separate as long as the website were designed in a way that  
19 one could portal through to B and one could portal through to  
20 C, and all the documents were kept separate.

21 THE COURT: I agree. They should be separate  
22 and they ought to be separate websites. The bifurcation was  
23 effective to the extent of creating separate files.

24 MR. GUARINO: I suppose why we raise this  
25 question is whether or not -- is to engage in this discussion

1 further with the Court about whether or not we need to have a  
2 specific order in place directing the clerk of the court --

3 THE COURT: We do.

4 MR. GUARINO: -- to proceed to do that.

5 THE COURT: Yes, we do. And would you propose  
6 the form of an order jointly with Mineral County and, of  
7 course, the federal government.

8 MR. GUARINO: And I'll also be in touch -- yes,  
9 your Honor.

10 THE COURT: And, of course, other counsel.

11 MR. GUARINO: And I will also be in touch with  
12 the clerk as well.

13 THE COURT: Right. How about service, the  
14 e-service orders as it relates to that?

15 You know, the Court opined about how you could do  
16 that, especially with postcard service and such, and -- but  
17 you need to educate me.

18 You know, there's a wonderful song *From a Distance*,  
19 the world looks beautiful from a distance, and that's the way  
20 the Court views the proceedings in the case, but you're at  
21 ground level. You need to tell me what problems there would  
22 be.

23 What I vaguely outlined was a service process  
24 through the website for those who had agreed, even *pro se*  
25 entrants, was a procedure for them to receive service by

1 e-mail through the normal CM-ECF filing system of the Court,  
2 and for those who had not agreed to sign on and enter their  
3 appearance by entry of a mail service, that we would make  
4 service of pleadings for all others who were parties by virtue  
5 of a website, and we would allow -- and this is where we need  
6 to clarify a little bit, a required postcard mailing or  
7 something different, if we could diminish the cost to all  
8 those who were parties.

9 And that raises one subsidiary question, too. How  
10 about the 2800 that haven't entered, didn't respond at all?  
11 They're parties because they've been served with summons, you  
12 have the proof of service.

13 The original CMO denied the right to you to take  
14 default, at least until we change that CMO and give them new  
15 notice that we intend now to take default in lieu of any  
16 further service upon you of any pleadings.

17 But so initially it includes all 38, 3900 people  
18 that have been served, they're parties, without yet default or  
19 formal taking of default.

20 So how are we going to serve those folks, the people  
21 that haven't responded to the e-mail invitation? How are we  
22 going to serve them?

23 MR. GUARINO: Your Honor, Guss Guarino, for the  
24 United States.

25 This has been a topic of great conversation amongst

1 the parties for over two, three months now, and we're trying  
2 to come to grips with a number of things.

3 I might start by saying I think the parties are  
4 resolved or are of a common understanding of what we think we  
5 need to do. With respect to folks who have been served but  
6 have done nothing in the case, not filed an entry of  
7 appearance, not done anything, they simply were served and  
8 have done nothing else --

9 THE COURT: Technically they've defaulted,  
10 although there's no default entry request that can be made  
11 under the present CMO. They're parties though.

12 MR. GUARINO: Yes, your Honor, they are parties.

13 I believe -- I have a greater understanding of what  
14 the word default means. There are several -- it's a common  
15 word but has different meanings depending on what we're  
16 talking about.

17 When -- it is mentioned in the CMO, and maybe that  
18 needs to be clarified about no party will be --

19 THE COURT: On the face of it, without  
20 clarification, Judge Reed said you will not take default.

21 MR. GUARINO: And to the extent that we're  
22 talking about the entry of a default by the Clerk of the Court  
23 under Rule 55, or entry of default judgment against a party, I  
24 believe that's what the CMO was talking about.

25 When we talk about a person can be in default by

1 simply not responding as they're required to do and were  
2 required to do, and I believe that's what they are, and they  
3 are in that default.

4 I believe I have a common understanding with my  
5 compatriots about that, and so we might need to clarify the  
6 CMO to clarify that if a person makes no response, then they  
7 are in default for not responding, and the Court can treat  
8 them as having not been served and need not continue to try  
9 and contact them.

10 THE COURT: Having anticipated that question, my  
11 initial gut reaction to that is, before we exclude them  
12 totally from the service list, I think I would require one  
13 more service, by postcard even, to the address of record for  
14 the personal service.

15 You know, the personal service -- well, that may be  
16 a tough rule because the personal service of most cases will  
17 be at their address, but sometimes it may have been when they  
18 were standing in front of the local Wal-Mart, I don't know.

19 So that could be a problem, but my anticipation is  
20 that before you write them totally off the service list, there  
21 ought to be a final postcard that says -- to the address where  
22 they were personally served, or where you sent them at least  
23 initially to personally serve them if you have an address,  
24 stating that they are in technical default and the Court will  
25 proceed with the case without their right to respond and

1 therefore without further service of pleadings upon them and  
2 per the original relief sought in the complaint.

3 In other words, we can't go beyond the original  
4 complaint with which they were served. We can't say that they  
5 lose their surface water rights totally, but we can say that  
6 consistent with whatever remedy was sought in the original  
7 complaint, they are now in technical default and we will no  
8 longer serve them.

9 How do you respond to that? Would that be a  
10 horrifically onerous problem, especially if it were just  
11 decreed by postcard?

12 MR. GUARINO: It will be a burdensome act  
13 because we have 3800 I believe is the number of total  
14 defendants, 1,100 have entered their appearances, we're  
15 talking about the difference between the two, so several -- a  
16 couple of thousand, it sounds like, 2,000 notices would need  
17 to go out to.

18 We would need to craft a statement to these folks  
19 saying if you don't do anything else --

20 THE COURT: No more service.

21 MR. GUARINO: No more service, the Court, no  
22 party will continue to contact you.

23 THE COURT: The Court will deem your lack of  
24 response to be a consent to any remedies entered consistent  
25 with the original complaint.

1 MR. GUARINO: Yes, your Honor.

2 THE COURT: That would be about 2,000?

3 MR. GUARINO: Two thousand.

4 THE COURT: And it would be a simple mailing.

5 Initially the showing would be to the address that you had  
6 originally listed.

7 MR. GUARINO: Last known address.

8 THE COURT: Last known address, and, of course,  
9 you'll get a number of those back without any -- without --  
10 you know, just returned mailing, the postmaster returns them  
11 to you, but you'll just simply make that a matter of record,  
12 especially if you had proof of service at that last known  
13 address, that's their tough luck. Our local rules, as well as  
14 national rules, require their updating of addresses once they  
15 have been served.

16 So I think that would be sufficient. The cost would  
17 in essence be your cost in preparing and mailing a postcard.

18 MR. GUARINO: Yes, your Honor.

19 THE COURT: And then you would no longer have to  
20 serve them.

21 MR. GUARINO: It certainly would be a conclusive  
22 act I think that we could point to to say that we have given  
23 everybody an opportunity to know about this case --

24 THE COURT: Right.

25 MR. GUARINO: -- to be involved in this case if



1 they chose to.

2 THE COURT: The court will no longer hear from  
3 them.

4 MAGISTRATE JUDGE COBB: Judge Jones, may I?

5 THE COURT: Please, Judge Cobb.

6 MAGISTRATE JUDGE COBB: We had a similar  
7 discussion last week at the status conference that Mr. Guarino  
8 will remember, I'm sure, that arose from a case that was  
9 contained in one of the amended e-service orders, the *Cutting*  
10 *versus Allentown* case which is found at 936 F.2d 18, a First  
11 Circuit decision, and also a case out of the Eleventh Circuit,  
12 *Varnes versus Local 91, Glassblowers Association*, 674 F.2d  
13 1365.

14 Those cases seem to hold that if you have been  
15 served and don't do anything, there's no further requirement  
16 that those individuals be served unless there's a substantive  
17 change in the relief sought by the parties.

18 What I would respectfully recommend, Chief Judge  
19 Jones, is that maybe Mr. Guarino and the parties submit a  
20 brief to you, to the Court, for consideration as to whether  
21 any additional notice of any kind is required to the group  
22 that has been served with the service package and has failed  
23 to respond.

24 The Court decision held that defendant's argument  
25 that notice of plaintiff's motion for default judgment was

1 required under Federal Rule of Civil Procedure 5(a) because at  
2 the time it was made the clerk had yet to enter a default is  
3 without merit the Court stated.

4 Where defendants, as here, were served with a  
5 summons and do not appear and answer within a required time  
6 period, they are, quote, "parties in default," close quote,  
7 for 5(a) purposes.

8 Now, countervailing to that, you have Judge Reed's  
9 CMO who has said there is going to be no default taken against  
10 them.

11 I just offer this as a subject that might be briefed  
12 to you to consider whether any additional service is required  
13 on that group of 2800 who have ignored the service package.

14 THE COURT: With respect, I have to decline that  
15 position for two reasons. Number one, those decisions are  
16 from different circuits, but, more importantly, because what  
17 we were -- would be proposing here is a substantive change to  
18 the relief sought by, in essence, the complaint and the  
19 service.

20 The original service, which included the CMO, said  
21 there will -- no default be taken. So, in other words, those  
22 folks knew by not responding they were submitting to the  
23 jurisdiction of the Court, and they knew they were submitting  
24 to the fact that they were -- knew or not -- I'm using that in  
25 a colloquial term of art sense, they knew or had knowledge of

1 the fact that they would be submitting to any remedy  
2 allowable, but they would still have the right to participate  
3 in framing that remedy.

4 In other words, they're a party. The CMO said no  
5 default will be taken, and therefore they could respond or not  
6 respond at their risk to any individual motion or any  
7 individual trial setting, but they were a party, and they  
8 could, of course, continue to appear. Default -- the entry of  
9 default cuts that off.

10 So this is a substantive change. We would be  
11 deleting that statement out of the CMO, and effectively that  
12 requires some notice to them.

13 I do think, even if we don't require notice of  
14 anything else, motions to dismiss, summary judgment, trial  
15 setting, anything else, we mandatorily would have to give them  
16 notice that we are, in essence, changing the posture of the  
17 case now, we're deleting that sentence from the CMO, if you do  
18 not respond, you will consent to judgment, period. You will  
19 have no further right to appear, and you will not receive  
20 further notice.

21 I think we've got to give them notice of that.

22 MR. GUARINO: Your Honor, Guss Guarino for the  
23 United States.

24 So what I'm envisioning, then, based on the Court's  
25 instruction, is that we would need to develop a motion, a

1 joint motion from the parties with a proposed notice that  
2 would be sent out to these category of individuals and have  
3 the Court make -- amend the CMO essentially by removing this  
4 language or further defining this language to mean what it's  
5 going to mean, and then have the Court approve the notice, and  
6 then we would send the notices.

7 Is that consistent with what the Court --

8 THE COURT: Yes, and it can be an *ex parte*  
9 motion with service only to the folks here, not everybody who  
10 has entered an appearance, just the folks who are appearing by  
11 counsel.

12 MR. GUARINO: Principal parties, yes.

13 THE COURT: It can be an *ex parte* motion.

14 MR. GUARINO: I will work with the other  
15 parties.

16 THE COURT: With an agreed form of notice, very  
17 short, postcard available, and you will only serve it on those  
18 who have not responded.

19 How about the website and other issues of service of  
20 further motions and such on those who have responded, either  
21 by e-mail consent or non-e-mail consent?

22 MR. GUARINO: Yes, your Honor. With regard to  
23 this category of folks, the parties are of the belief that  
24 providing postcard notice to this group of about a thousand  
25 people who have entered their appearance but have not

1 responded saying that we'll accept e-mail service or rely upon  
2 the website, they, in this instance, I think, have done  
3 nothing in response to the Court's earlier attempt to have  
4 folks say that I want mail service only or I'll accept e-mail  
5 service. There's this group of folks who have done nothing.

6 I think the parties are unanimous in the belief that  
7 we don't have to send folks like that a postcard, and many  
8 parties have expressed that it would be extremely -- it's  
9 extremely expensive to do so for them and extremely burdensome  
10 and frankly would reduce -- eliminate or reduce greatly their  
11 participation in this case.

12 THE COURT: Now, this is not in the 2,000  
13 category.

14 MR. GUARINO: Correct.

15 THE COURT: How have these folks responded if  
16 they've done nothing -- they did nothing with respect to the  
17 e-mail invitation.

18 MR. GUARINO: Yes, but they have entered their  
19 appearance.

20 THE COURT: And how generally did they enter  
21 their appearance if not by an attorney?

22 MR. GUARINO: They entered their appearance when  
23 they returned typically the waiver of service form, and they  
24 completed the entry of appearance form as well.

25 THE COURT: Okay. Even if it was *pro se*.

1 MR. GUARINO: Yes, and they --

2 THE COURT: Okay. But they did not respond to  
3 the e-mail invitation.

4 MR. GUARINO: No, your Honor, they did not.

5 MAGISTRATE JUDGE COBB: Well, some did.

6 MR. GUARINO: Yes, some did.

7 MAGISTRATE JUDGE COBB: Out of the 900 or a  
8 thousand, which were the e-service order, the original one  
9 which was mailed out, approximately, I think, 130 opted for  
10 e-mail service and maybe a hundred asked just to be served by  
11 mail because they don't have access to Internet, and the other  
12 8 or 900 ignored it, and that's the group that I think that  
13 Mr. Guarino is talking about now.

14 THE COURT: I'm inclined to accept your  
15 resolution but with one caveat. I do think we need a one-time  
16 mailing saying to all those folks who didn't respond to the  
17 e-mail request or even enter their request for a mailing  
18 service, that we need to have a one-time mailing of a postcard  
19 that says you have not responded, the cost of serving  
20 individual motions upon you is prohibitive, and therefore the  
21 Court has approved a procedure for simply posting those  
22 motions, and those motions will be posted at the following  
23 website without separate notice to you.

24 And you tell me if at a separate public location as  
25 well as in various communities, either library or courthouse

1 or whatever, you have the right to post at a courthouse,  
2 certainly, in Bridgeport, whether or not they have a library,  
3 whether or not they have a newspaper, I suspect that you have  
4 the right just like anybody who posts a notice of foreclosure  
5 on a deed of trust to go post on the courthouse steps.

6 MR. GUARINO: We haven't explored this element  
7 as in-depth as -- we've been focused more on the e-service  
8 postcard.

9 THE COURT: Right.

10 MR. GUARINO: The federal government can't,  
11 obviously, go into a state courthouse and say we're going to  
12 amass a large group of documents here, and we've got to work  
13 with folks there, and we're going to rely mostly on local  
14 parties to try to set up something to the extent that  
15 something can be set up.

16 THE COURT: Right. So a person has access to it  
17 in addition to a website, assuming that they're out on the  
18 range and don't have a computer.

19 MR. GUARINO: So we have not quite gotten there  
20 yet, but we're going to still look into, I think, that issue.

21 THE COURT: If you would, and then present to me  
22 an agreed order with the form and format for this final notice  
23 to those who have not responded.

24 You have not requested specific mailing, and you  
25 have not requested service by e-mail, therefore the Court has

1 approved a process whereby we will simply post these further  
2 pleadings on X website, and you are hereby notified that  
3 that's the place where you can view them, and, if you agree,  
4 add at an additional location, and it ought to be listed on  
5 the website the library at, the library at, the courthouse at.

6 MR. GUARINO: So we will need to get that  
7 actually worked out before a notice can be sent out.

8 THE COURT: Right.

9 MR. GUARINO: That makes sense.

10 THE COURT: And you're right, some of the  
11 motions will be very, very lengthy, and the local courthouse  
12 is not going to enjoy having a big table of fly-a-way papers  
13 posted down below their bulletin board.

14 And so if that's the case, then, of course, in those  
15 locales, you may certainly justify to me that it's just the  
16 website.

17 MR. GUARINO: Is it possible in the Court's mind  
18 that -- there might be a library in the county that -- that  
19 would allow -- that would allow folks to come in and use the  
20 Internet and allow them to access the website through that.

21 THE COURT: Yeah.

22 MR. GUARINO: That might be an alternative  
23 instead of having a physical accumulation of documents.

24 THE COURT: Terrific.

25 MR. GUARINO: As long as they could agree to



1 help people who come in seeking this information to --

2 THE COURT: There's someplace within 50 miles  
3 where the posting is available.

4 MR. GUARINO: I'm sure that for folks out there,  
5 in an institution or office out there, no one is going to want  
6 to accumulate a mass of paper.

7 THE COURT: Yeah.

8 MR. GUARINO: But there might be --

9 THE COURT: So you can work that out and present  
10 to me, again, an *ex parte* order.

11 MAGISTRATE JUDGE COBB: If I may?

12 THE COURT: Please, Judge Cobb.

13 MAGISTRATE JUDGE COBB: Chief Judge, at the last  
14 status conference we spent a lot of time on the 17th edition  
15 of the proposed superseding e-service order, and I think,  
16 Mr. Guarino, is that we should continue to revise it and along  
17 the lines of the direction and authorization given to you by  
18 the Chief so that we have a superseding e-service order that  
19 addresses the subjects that he has raised, and that that  
20 document will have to be served on the entire constellation of  
21 people who have made an appearance in this case.

22 And with your leave, Chief, we would like to work on  
23 that and submit it to you as a superseding order which will  
24 replace the original service order.

25 THE COURT: That's fine.

1 MR. GUARINO: Yes.

2 THE COURT: That's fine.

3 All right. Have we addressed all of those issues?  
4 And that included the case management order development Judge  
5 Cobb just raised as well.

6 MR. GUARINO: Your Honor, could I have just one  
7 moment? I would like to confer --

8 THE COURT: Yeah.

9 (Discussion held off the record.)

10 MR. GUARINO: Your Honor, I just wanted to  
11 clarify with my compatriots.

12 With respect to the folks who have responded to the  
13 previous e-service order indicating that they wanted mail  
14 service, we're of the understanding that what will we need to  
15 do for the folks who said I would like to have a mail service,  
16 and there's about a -- I think Judge Cobb indicated there were  
17 a hundred plus or so of those folks, we would, nonetheless,  
18 still have to send a postcard notice to those folks saying, A,  
19 a pleading has been filed.

20 THE COURT: I think that's okay with me. In  
21 other words, the initial thought is you've got to mail the  
22 whole five inches worth of pleading to them because they  
23 requested it.

24 But, on the other hand, as long as you send a  
25 postcard to them saying the pleading, all five inches of it,

1 is available on the following website or at a local proximity  
2 to you, this is just simply a mailing in response to your  
3 request for mailing service, that that would be acceptable to  
4 me.

5 MR. GUARINO: Okay. We'll make sure --

6 THE COURT: So that would hopefully reduce the  
7 burden as well.

8 MR. GUARINO: It would, your Honor, thank you.

9 MAGISTRATE JUDGE COBB: And, Mr. Guarino, you  
10 will have to revise that proposed superseding order because  
11 that is a major change in how we're proceeding, and, Chief  
12 Judge, I think it will greatly simplify matters, too, and  
13 minimize expense.

14 MR. GUARINO: Yeah, it just makes a lot of  
15 sense.

16 THE COURT: Okay. Let's pass now to the things  
17 that the Court wants to address, and that's eventually getting  
18 to the merits of this dispute, and --

19 MR. HERSKOVITS: Your Honor --

20 THE COURT: -- as I expressed last time, I want  
21 to resolve first jurisdiction.

22 You know, I already told you as I sit here I don't  
23 think I have jurisdiction over groundwater users. I think  
24 that's a matter for the state engineer and for appeals to  
25 proceed per state law which can either be to a state court or

1 to a federal court, if one has jurisdiction anyway. In other  
2 words, it's per state law.

3 If that were to be the ruling of the Court, that  
4 would drastically simplify this case. As we heard last time,  
5 the federal government asserts a claim only from 1936 for  
6 surface water rights priority. It's only with respect to the  
7 groundwater right that they seek an 1854 priority date. I  
8 don't think there's any need for me to declare that they have  
9 a right to assert that claim that they have a reserved right.  
10 I think we all acknowledge that they do have that -- they've  
11 got the trust obligation to assert that right whenever it  
12 arises, but they have to assert it with the state engineer for  
13 groundwater rights.

14 And I think that's the way the federal government  
15 does it on everything, including everything that I've seen.  
16 Of course, I've only seen a limited number of cases.

17 But unless the groundwater right is irrevocably  
18 intermixed with the surface right, like the Circuit declared  
19 with respect to the Truckee River in Judge George's case, you  
20 know, there the issue was that the groundwater right was  
21 directly tied into the bed of the water stream, and therefore  
22 he did have jurisdiction.

23 But if we don't have that, you know, if we don't  
24 have that kind of proof, then the federal statute says it's  
25 the state engineer, or it's the state system, and this federal

1 statute has no effect upon state systems. It expressly  
2 reserves that function to the state.

3 And even in all of these water dispute rights over  
4 BLM land and Forest Service land, in every one of those cases  
5 the federal government asserts their right to use of water  
6 through the state.

7 So is it -- I'm not asking you to address the merits  
8 of that right now, but I do need to have that addressed right  
9 off the bat in the way of pleading because that drastically  
10 narrows this lawsuit, not necessarily with respect to Mineral  
11 County's claim, but I don't think they have the right to  
12 assert a priority going back before the date of the creation  
13 of the state, even before the date of the federal statute, the  
14 Reclamation Act, that preserves to the state the right to  
15 adjudicate the water, groundwater rights. I'm not sure they  
16 have jurisdiction to request that prior to those respective  
17 dates.

18 So we need to address that issue forthwith because,  
19 depending on the ruling, and we can certify it so that the  
20 Circuit gives us their second-guess immediately, that  
21 drastically simplifies this case.

22 It may well be that many of our respondents will  
23 just want to drop out. They had priority dates that precede  
24 1936, and they don't care if the state engineer grants  
25 additional -- I think you've got the right to address that

1 claim to the state engineer.

2 We have an unrecognized right, we're asserting a  
3 claim to it, we're asserting a claim preceding the 1932 act,  
4 we're asserting a claim that predates the incorporation of the  
5 State of Nevada, it's a trust obligation, it's a reserved  
6 right on -- coming from the date that we created the  
7 reservation, and/or the date, 1948, 1848, when we took the  
8 lands from Mexico. It at least dates back to that date, we  
9 were trustee.

10 As I sit here, I think you've got the right, you've  
11 got the obligation to pursue that right. Even if you sat on  
12 that right, even if you waived that right under *res judicata*,  
13 you've got an obligation to pursue it.

14 The respondents may be able to say waiver, they may  
15 be able to say *United States versus Nevada, res judicata*, but  
16 you've got an obligation -- I already think -- you don't need  
17 my declaration, but I do think you have to make that claim  
18 with the state engineer.

19 So that we need to address because that greatly  
20 reduces what I have to do or what the respondents may want to  
21 respond to.

22 Your comments, and if so, more importantly, when can  
23 we brief those issues? I think we've got basically all of the  
24 service except for Mineral County that we need to get, the  
25 riparian rights owners. They've done all of the surface right

1 owners as previously required.

2 So I think we're pretty close to a position where I  
3 can ask you to brief that critical jurisdiction issue, as well  
4 as the other jurisdiction issues that I raised at the last  
5 hearing and that are in the transcript.

6 What are your comments on that, and how soon can we  
7 get to at least that merits question?

8 MR. GUARINO: Yes, your Honor. Guss Guarino for  
9 the United States. Thank you.

10 Obviously, the United States takes the position that  
11 the Court does have jurisdiction over groundwater and can  
12 address those in these proceedings.

13 But even thinking about that -- I mean, this issue  
14 will be raised in the form, I believe, in the nature of a  
15 motion to dismiss directed by the respondents to us.

16 THE COURT: Or a partial motion to dismiss.

17 MR. GUARINO: Or a partial motion to dismiss.

18 But one of the things that the Court indicated was  
19 that the Court recognizes that the Ninth Circuit has  
20 recognized that there is jurisdiction certainly over --

21 THE COURT: Can be.

22 MR. GUARINO: Can be jurisdiction over --

23 THE COURT: If they're --

24 MR. GUARINO: If there's a connection --

25 THE COURT: The proof is direct connection.

1 MR. GUARINO: And isn't that a factual  
2 prerequisite that would need to be developed?

3 THE COURT: That would be one of your responses  
4 to the motion to dismiss.

5 MR. GUARINO: And so that was one of the things  
6 that popped into my mind.

7 THE COURT: But certainly you haven't alleged it  
8 in the complaint.

9 MR. GUARINO: No. We don't believe that having  
10 that factual predicate is necessary for the Courts to have  
11 jurisdiction.

12 THE COURT: Right, although I do.

13 In other words, you haven't alleged a connection  
14 between groundwater and surface water as a reason for  
15 asserting the jurisdiction. You've just said this federal  
16 court has jurisdiction over groundwater rights reserved by  
17 virtue of the creation of the reservation.

18 MR. GUARINO: As it is a reserved right.

19 THE COURT: So you've alleged no  
20 interconnection. You've just said on its face, if we were out  
21 500 miles from any other surface water right that we have, we  
22 have the right under the reservation, Winters Doctrine, for a  
23 federal court to take jurisdiction over the state engineer's  
24 process.

25 MR. GUARINO: Yes, your Honor.



1 THE COURT: So we need to address that.

2 So can I not now set a deadline for respondents to  
3 file that motion, partial motion to dismiss, as well as the  
4 other jurisdiction questions that I have raised, including any  
5 motion to recuse counsel? Should I not set a deadline for  
6 that?

7 I raised the last issue the last time and told the  
8 Tribe, you know, unless they tell me otherwise, I will take  
9 their silence as a waiver of any conflict of interest. It's  
10 fine with them if the federal government appears on their  
11 behalf at the same time they appear on behalf of the Forest  
12 Service and others who are asserting rights, or responding to  
13 Mineral County's requested claims.

14 Has the Tribe made a decision yet whether they're  
15 willing to waive any and all conflict? That's one of the  
16 questions I asked you to address last time.

17 MR. WILLIAMS: Your Honor, forgive me, but I do  
18 not recall that issue. It is -- it's not a simple issue  
19 though.

20 THE COURT: It's not a simple issue. I  
21 addressed it -- it's right in the transcript. You said I need  
22 time to confer, I said you have time to confer.

23 And the specific question was -- I told you of the  
24 potential conflict, I didn't say whether it's waivable or not,  
25 although counsel thought that it was waivable, for the

1 government, and I asked you do you waive, and the identified  
2 conflict was they may have counterpositions both on the  
3 Winters Doctrine on the dismissal, on the response to Mineral  
4 County, including waiver of sovereign immunity claim by virtue  
5 of the filing of the complaint on your behalf.

6 That is, you have -- by appearance through them, you  
7 have waived any sovereign immunity defense because, if I were  
8 to grant a remedy to the federal government on behalf of the  
9 Tribe, there's a very good prospect that I will broaden the  
10 appointment of my Water Master. Especially if I decree a  
11 right on behalf of Mineral County, I will broaden the rights  
12 of my Water Master.

13 That Water Master will have jurisdiction over the  
14 entire water stream and certainly over the California owners  
15 who have appeared. So that Water Master will be interstate,  
16 and their jurisdiction to enforce the decree will be with  
17 respect to the entire water stream.

18 So that was the potential conflict, and I asked you  
19 to address that, do you waive any conflict. You, of course,  
20 have the right to appear here, too, but the conflict, of  
21 course, is allowing the U.S. Attorney to appear on your behalf  
22 with respect to these other issues.

23 MR. WILLIAMS: Yes, your Honor.

24 The way this issue has been addressed in the past is  
25 that the United States has a trust duty to the Tribe to bring

1 these types of claims. The Congress has recognized that there  
2 is this conflict issue so Congress has afforded funds to  
3 Tribes to fund separate attorneys to basically work with the  
4 U.S. Attorneys on these type of claims.

5 THE COURT: And that's the way we would propose  
6 it here. If you do not waive the conflict -- clearly you've  
7 waived sovereign immunity with respect to the remedies sought  
8 on your behalf by the U.S. Attorney, but you haven't yet  
9 waived some of the other claims or positions they may take,  
10 especially in response to protecting their Forest Service  
11 lands.

12 And if you don't waive that, the way that I would  
13 propose that we handle it is I don't disbar the U.S. Attorney  
14 from representing you, what I do is I require that they have a  
15 different office and a Chinese wall, if you will, for a  
16 separate representation, for example, of the Forest Service so  
17 that present counsel can continue to represent you, but a  
18 different U.S. Attorney counsel would be obligated to  
19 represent the Forest Service in their claims if those were  
20 deemed to conflict.

21 If, in your judgment, there never will be a  
22 conflict, you can waive it and should waive it. But if you  
23 think that there might be a conflict in those positions, you  
24 should not waive it, and I would require a separate U.S.  
25 Attorney office, probably, to represent those other parties.

1 MR. WILLIAMS: Your Honor, I have to defer to  
2 Mr. Guarino, but I believe that's the process that has been  
3 set up with Mr. Guarino and Mr. Negri. They are from separate  
4 offices, and Mr. Negri is representing the other federal  
5 claims.

6 THE COURT: Is that correct?

7 MR. WILLIAMS: But I'm not exactly sure what  
8 Mr. Guarino would be --

9 THE COURT: Mr. Guarino, when you file a  
10 pleading, you're not filing it on behalf of the other federal  
11 claimants?

12 MR. GUARINO: Your Honor, when I file a pleading  
13 on behalf of the United States, my pleading is filed on behalf  
14 of the United States.

15 THE COURT: Okay.

16 MR. GUARINO: I can tell the Court, we described  
17 to the Court before, I work with Department of Justice in the  
18 Environment and Natural Resources Division. Mr. Negri as well  
19 works for the Department of Justice in the Environment and  
20 Natural Resources Division.

21 I work in the Indian resources section. It's a unit  
22 of -- we're just Indian water lawyers, that's all we do, and  
23 the things that Mr. Negri does I just don't deal with, and  
24 vice-versa.

25 The Attorney General has designated attorneys to

1 work on different subject matters based upon their complexity  
2 and the issues, and the Attorney General and his delegations  
3 have set this system up, and that's the way we deal with it.  
4 We wear many hats, but --

5 THE COURT: Okay. And I respect that, and I  
6 think that's an appropriate method.

7 MR. GUARINO: Okay.

8 THE COURT: So let me just say, if you do not  
9 file a request overruling any waiver, I will take your  
10 continued appearance here, counsel, on behalf of the Tribe, as  
11 your waiver.

12 You have an understanding, and I have an  
13 understanding, that when there is a conflict between those  
14 positions, separate U.S. Attorney counsel will appear and file  
15 a pleading. But otherwise you're waiving any conflict.  
16 You're allowing present principal counsel to file a pleading  
17 on behalf of all federal parties, including on behalf of the  
18 Tribe, without any asserted conflict.

19 You do anticipate, and reiterating one more time,  
20 it's my understanding that separate counsel will appear if  
21 they want to file a different pleading or a different  
22 position. But otherwise every time that only this present  
23 counsel files a pleading, you're waiving any conflict.

24 And I think that's going to be my ruling unless,  
25 within the next 14 days, you file a pleading that asks for

1 clarification, in other words, limitation on that.

2 MR. WILLIAMS: Your Honor, I had two comments on  
3 that.

4 As far as Mr. Guarino asserting claims on behalf of  
5 the Tribe, that involves the Tribe -- the United States trust  
6 duty to the Tribe.

7 THE COURT: Right. You definitely have waived  
8 that.

9 MR. WILLIAMS: And, by its waiver, if him or  
10 his -- or whoever follows him commits some type of act that  
11 violates the trust to the Tribe, we wouldn't be waiving that.

12 THE COURT: No.

13 MR. WILLIAMS: We would never want to waive  
14 that.

15 THE COURT: No.

16 MR. WILLIAMS: But as far as him representing  
17 the Tribe in this case specifically the way you outlined --

18 THE COURT: No.

19 MR. WILLIAMS: -- I believe that's fine.

20 THE COURT: In other words, you are waiving any  
21 conflict of interest that the government has with itself.  
22 That's what you're waiving.

23 MR. WILLIAMS: Correct, yes.

24 THE COURT: So, in other words, this counsel can  
25 go ahead and represent you, and you have the same

1 understanding that I do, that if the federal government, on  
2 behalf of other federal claimants, has to take a contrary  
3 position, it will be to a different attorney. But, in the  
4 meantime, you are waiving any conflict by virtue of the fact  
5 that these two attorneys are from the same entity, U.S.  
6 Department of Justice.

7 MR. WILLIAMS: Correct, your Honor, and that's  
8 the understanding that the Tribe has had throughout this  
9 proceeding.

10 THE COURT: Okay. That's great.

11 MR. WILLIAMS: The one other issue I wanted to  
12 bring up is that in the past the government has funded tribal  
13 attorneys to work with the U.S. Attorney. That funding  
14 through the Bureau of Indian Affairs is minimal and may not  
15 even exist at this point. I don't believe we've received  
16 anything, or the Tribe hasn't received anything for the last  
17 year or more. So -- I mean, it does raise problems for the  
18 Tribe's continuing participation in monitoring --

19 THE COURT: I sympathize with that. You can do  
20 like the Forest Service did, you can close down the  
21 reservation. But I sympathize with that, and, of course, I  
22 know counsel is responsive, and your appearances here is  
23 acknowledged and authorized, of course, and certainly the  
24 federal government should be providing for your reimbursement.

25 All right. How about a date for identification of

1 these issues. I think I identified them in the last  
2 transcript, they're there, but, most importantly, basic  
3 jurisdictional motion or partial motion to dismiss.

4 MR. GUARINO: Your Honor, Guss Guarino for the  
5 United States.

6 As we come back to this issue, I was going to  
7 comment, the Court has outlined a number of things regarding  
8 the e-service order and final service upon folks and that sort  
9 of thing. It seems to me that we need -- it's going to be --  
10 it's going to take a little time to develop what we need to do  
11 there, and, frankly, getting everything sort of in place --

12 THE COURT: Thirty days? Sixty days?  
13 Sixty days at least.

14 MR. GUARINO: At least.

15 THE COURT: Until after December 31st.

16 MR. GUARINO: Yes, until the new year, I'm  
17 thinking we can't do this.

18 THE COURT: And I get that. I'll give you  
19 another status hearing first part of the new year, please.

20 MAGISTRATE JUDGE COBB: Judge Jones, if I may  
21 work with them on this issue on the e-service order, and I was  
22 just looking at my calendar, and I was wondering, if you could  
23 have a revised draft of the e-service order done by the 30th  
24 of this month, and if we could have a status conference, if  
25 you don't mind my conducting one.



1 Ms. Ogden, I was looking at December 3?

2 THE COURT: I've given you the overall  
3 guideline, and I think Judge Cobb should make the rulings on  
4 the order.

5 THE CLERK: Yes, that's fine.

6 MR. HERSKOVITS: Excuse me, your Honor. This is  
7 Simeon Herskovits for Mineral County.

8 I just wanted to say that on December 3rd I will be  
9 back on the east coast seeing a medical specialist for the  
10 illness that I have been dealing with this year.

11 THE COURT: How long will you be gone, a couple  
12 days or a week?

13 MR. HERSKOVITS: I should be back within a day  
14 or two after that.

15 THE COURT: Okay. And this is for Judge Cobb.

16 MAGISTRATE JUDGE COBB: December 6th?

17 THE CLERK: At 1:30.

18 (Discussion held off the record.)

19 MAGISTRATE JUDGE COBB: December 6th. Let's  
20 shoot for ten o'clock, December 6, because we do have people  
21 in different time zones, Ms. Ogden, rather than try to do it  
22 in that afternoon.

23 THE COURT: Then, Judge Cobb, do I need to set a  
24 further status hearing in front of me?

25 MAGISTRATE JUDGE COBB: I would. I would do

1 something in January.

2 THE COURT: I'll give you a potential date, but  
3 I won't set it as a firm status hearing. It will just be in  
4 case you have appeals, or you want to second-guess Judge  
5 Cobb's ruling with respect to these *ex parte* orders or -- but  
6 otherwise I'll anticipate that by the end of the year you will  
7 have resolved these issues including further service.

8 And taking that date as a given then, subject to a  
9 further hearing in case you want to appeal or change those,  
10 can we come up with a proposed deadline for filing this first  
11 round of motions to dismiss, jurisdictional motions?

12 MR. DePAOLI: Your Honor, Gordon DePaoli.

13 Are you proposing to establish the deadline today?

14 THE COURT: Yes, it should either be January  
15 31st -- that's probably too soon, or February 28th, that might  
16 be more within the realm of reason. March 31st is getting out  
17 there.

18 So I would like to propose a deadline. It's not in  
19 concrete. If you tell me there's an objection or -- you know,  
20 that there's still some additional parties, but we've got a  
21 website worked out, and, of course, there's still work to do  
22 to revise the websites, to establish them and to publish  
23 pleadings, especially a new motion to dismiss.

24 But that will work to your advantage. The website  
25 will be established, and you can do a posting on the website

1 without a huge mailing. So really we're talking about your  
2 drafting time.

3 You've got all the issues identified, subject to any  
4 you might add, in the transcript of last time and this  
5 transcript, you've got issues identified. You've already  
6 heard my leanings so you already know where the weakness is on  
7 the other side's case on certain claims. So why shouldn't I  
8 now set a deadline at least February 28th, if not March 31st  
9 for filing that initial round.

10 This isn't all motions to dismiss. There will be a  
11 further deadline for that following this jurisdictional  
12 ground. As soon as we get a -- on jurisdiction, a fence  
13 around this animal -- I don't want to address the other  
14 jurisdiction issues especially, for example, like *res*  
15 *judicata, U.S. versus Nevada*, unless it directly relates to  
16 jurisdiction.

17 What I really want is a first round that tells us  
18 what jurisdiction we have, and you may all agree with the  
19 ultimate ruling and not want to appeal it, but if you want to  
20 appeal it, we'll get an answer from the Circuit.

21 But I'm guessing that we'll all end up on the same  
22 wavelength, quite frankly, and then we can go forward to the  
23 other motions to dismiss, general motions to dismiss and later  
24 summary judgment, and I can even set an eventual trial time.

25 So this is just for this initial round to tell us

1 what the animal is.

2 MR. DePAOLI: Your Honor, February 28th I think  
3 would give us time that we need to do that and to work  
4 together to try to coordinate efforts so that there's  
5 hopefully one.

6 THE COURT: Okay.

7 MR. DePAOLI: I do have one question, your  
8 Honor.

9 THE COURT: Response times would follow from the  
10 local rule.

11 MR. GUARINO: Your Honor, the United States  
12 would request 60 days to respond in that it's a very involved  
13 process to --

14 THE COURT: Under the local rule you have, what,  
15 15 days or 20 days?

16 MR. GUARINO: Something around that.

17 THE COURT: And you want 60 days to respond.

18 MR. GUARINO: We request 60 days because of the  
19 review time that is necessary with the United States.

20 THE COURT: Okay. And with a corresponding  
21 reply extension as well.

22 MR. HERSKOVITS: We would request the same, your  
23 Honor. This is Simeon Herskovits from Mineral County.

24 THE COURT: Yeah. As I told you, this initial  
25 round will be filed in both cases B and C. I'm going to

1 address it all at one time so it goes up one time to the  
2 Circuit, not in multiple stages or in different cases. So  
3 this applies to both.

4 I think we better set March 31st with 60-day  
5 response time and a 30-day reply time, and then the Court will  
6 set you on notice. I'll certainly give you oral argument on  
7 this, and we'll come back and argue it, and get a final  
8 resolution in the decision on the jurisdiction.

9 Okay. March 31st deadline, 60 days thereafter for  
10 response.

11 MAGISTRATE JUDGE COBB: Judge Jones, you had  
12 previously indicated an interest in whether you believe this  
13 Court is proceeding *in rem*, *in personam* or a combination.

14 THE COURT: Yes. That will be a part of the  
15 discussion, I'm sure.

16 MAGISTRATE JUDGE COBB: That was my question.

17 THE COURT: In other words, jurisdiction, do I  
18 have jurisdiction over people who were not served in the 1934  
19 decree hearing.

20 Do I have -- the only way I would have it is if I  
21 have *in rem* jurisdiction. In other words, if that decree in  
22 essence decreed water rights all up and down certain water  
23 courses, exclusive of some tributaries, do I not have *in rem*  
24 jurisdiction over everybody that was a party.

25 Judge Reed and I and Judge Cobb have required

1 additional parties to be served *in personam*, of course, or  
2 served pursuant to continuing party status as part of an *in*  
3 *rem* proceeding. But if I don't have *in rem* jurisdiction over  
4 the parties to that original case, then there's no *res*  
5 *judicata* effect on Mineral County, for example.

6 If I had *in rem* jurisdiction over everything, at  
7 least from the California border down, then potentially  
8 Mineral County is bound by *res judicata* under *United States*  
9 *versus Nevada*.

10 If all we have is *in personam* jurisdiction over them  
11 by virtue of the filing of their complaint, then there was no  
12 binding effect of the prior decree upon them.

13 And even if they have a trustee right, the fact that  
14 they didn't enter an appearance in that prior decree hearing,  
15 or the State of Nevada on behalf of Mineral County, the future  
16 county, means that it's a nonact, there was no binding effect  
17 of the decree upon them or anybody else, anybody else that  
18 wanted to come in and use the surface water rights.

19 If I had *in rem* jurisdiction over them, then I think  
20 they're bound whether they appeared or not in preserving that  
21 trust right.

22 In other words, when an *in rem* proceeding on surface  
23 waters of a river to a certain extent are declared, in my  
24 opinion it's an *in rem* proceeding, and the fact that you are a  
25 present user of surface rights, you may have a huge right that

1 you're presently using, you water the cows there and have for  
2 many years prior, means that you didn't hold up your hand, and  
3 you're barred, you're bound, just like everybody else if that  
4 was an *in rem* proceeding. If not, then you're not bound. And  
5 the decree doesn't, in fact, decree all rights at that  
6 particular point in time.

7 So that's a significant difference, in my opinion,  
8 as to the application of the *United States versus Nevada*, or  
9 *res judicata*, and it also pertains to the rights of the  
10 California user because my understanding of their rights would  
11 be that it would be *in personam* only.

12 So that needs to be addressed in your original  
13 motion. So you need to thoroughly think about your position  
14 with respect to *in rem* versus *in personam* because that will  
15 determine the ultimate outcome of any *res judicata* argument.

16 MR. DePAOLI: Your Honor, and I understand the  
17 need to address the *in rem* versus *in personam*, but --

18 THE COURT: In other words, are we modifying a  
19 decree, or are we asking for a new complaint unrelated to the  
20 prior decree.

21 MR. DePAOLI: I would request, your Honor, that  
22 we have at some point in time an opportunity to address the  
23 question of whether *res judicata* does or does not necessarily  
24 turn on *in rem* versus *in personam* jurisdiction because I think  
25 there is a different point of view on that.

1 THE COURT: Sure. Right. That's fine.

2 Okay. All right. Those are the dates. A minute  
3 order will so reflect those dates.

4 MR. GUARINO: Your Honor, Guss Guarino for the  
5 United States.

6 With respect to a summary -- we've been discussing  
7 many things over the last hour and a half. Obviously we have  
8 a transcript.

9 The United States has tried to create summaries in  
10 the past, and I often find myself drafting, sort of wondering  
11 what the utility is in that, and then I've noticed that the  
12 Court has also provided a summary from time to time about  
13 these proceedings.

14 I guess I'm asking the Court, does the Court want  
15 the United States to try to summarize what we've done here  
16 today?

17 THE COURT: Any orders. Review the transcript  
18 of the last hearing, the big hearing, the status hearing. I  
19 already asked -- who did I ask to submit the order granting  
20 the motion to intervene?

21 MR. HERSKOVITS: Your Honor, Simeon Herskovits  
22 for Mineral County. You requested that I do so, and I did  
23 file that order after circulating it to counsel for the other  
24 principal parties and modifying it. I submitted that and  
25 filed that with the Court on Friday early afternoon.



1 THE COURT: Okay. Then would you please attempt  
2 to summarize any orders. You don't need to summarize the  
3 discussion because a lot of it was just discussion.

4 MR. GUARINO: Okay.

5 THE COURT: In the transcript, if you read an  
6 order of the Court, please, let's embody that.

7 MR. GUARINO: And I can do that. I understand  
8 the instructions of the Court. I think the specific  
9 instructions, particularly as addressed to myself, and maybe  
10 to the extent they were just --

11 THE COURT: On service, on website and on motion  
12 rounds now, first round.

13 MR. GUARINO: Yes. Thank you for that  
14 clarification.

15 THE COURT: Okay. All right. Anything else?  
16 Judge Cobb, is there anything else we need to cover?

17 MAGISTRATE JUDGE COBB: No, sir.

18 THE COURT: You'll do all of the preliminaries  
19 on that website.

20 MAGISTRATE JUDGE COBB: I think we should have  
21 sufficient time now, since you have the deadline, to get  
22 something finalized to you, and after the parties and I work  
23 it out, we can bring it to you for your further modification.

24 THE COURT: Right. And Judge Cobb will enter  
25 the order, the *ex parte* order.

1                   MAGISTRATE JUDGE COBB: I'm thinking that this  
2 December conference can be telephonic similar to the one we  
3 had last month, and I don't know if that assists you,  
4 Mr. Herskovits, at all, but -- we'll keep it on the same date.  
5 But unless we have some firm agreement and anyone wants to  
6 attend in person, I am right now viewing it as just a  
7 telephonic appearance.

8                   MR. HERSKOVITS: It does facilitate the  
9 proceeding for me, your Honor, thank you for mentioning it.

10                   This is Simeon Herskovits for Mineral County again.

11                   I also just want to clarify or confirm that we will  
12 be preparing an e-service order for the B [sic] subproceeding  
13 that essentially mirrors the one that's being prepared for B.

14                   MAGISTRATE JUDGE COBB: I think that is  
15 consistent with Judge Jones' direction, yes.

16                   MR. HERSKOVITS: Yes. And I have a question,  
17 which is, shall we also prepare a proposed case management  
18 order in C? There never has been one, and it would be much  
19 simpler than B, but it could essentially follow suit in what  
20 has been decided for case management in B and now for C.

21                   MAGISTRATE JUDGE COBB: I would think that there  
22 should be a separate case management order. I don't see how  
23 you can merge the existing CMO in the C case.

24                   Do you wish -- I don't know that you can have that  
25 done by the end of the month as well?

1 MR. HERSKOVITS: I don't think so, your Honor,  
2 because of my schedule as it now is. I just don't think that  
3 would be possible. I think by the -- by Christmas we could.

4 THE COURT: Well, why don't we discuss that at  
5 that December 6th -- Ms. Ogden, was that the date?

6 THE CLERK: Yes, your Honor.

7 MAGISTRATE JUDGE COBB: December 6th, and we can  
8 perhaps set a time where you can circulate the draft CMO for  
9 128, and then we can address it with maybe a hearing early in  
10 January.

11 THE COURT: That would be my request, too, just  
12 by way of overall guideline, and Judge Cobb will determine it,  
13 but that you have a CMO, because I've already told you what my  
14 over long-distance view of the case is, it's one single case.  
15 We have bifurcated for purposes of separate files, but we need  
16 a shadow CMO for the C case that mirrors but with addressing  
17 the difference of the claims, of course.

18 MR. HERSKOVITS: Yes, your Honor. I appreciate  
19 that and agree completely.

20 THE COURT: Okay. Thank you.

21 Let me compliment all the parties. Thank you for  
22 being here, and even on the telephone. You've made  
23 substantial -- and Judge Cobb has made substantial progress in  
24 now -- in service and in other ways in getting this case to  
25 issue, and that's my desire.



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