

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE  
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UNITED STATES OF AMERICA, :  
 :  
Plaintiff, :  
 :  
WALKER RIVER PAIUTE TRIBE, : No. 3:73-CV-127-ECR-WGC  
 :  
Plaintiff-Intervenor, : No. 3:73-CV-128-ECR-WGC  
 :  
versus : February 21, 2012  
 :  
WALKER RIVER IRRIGATION : Reno, Nevada  
DISTRICT, a corporation, et :  
al., :  
 :  
Defendants. :  
 :  
UNITED STATES OF AMERICA, :  
WALKER RIVER PAIUTE TRIBE, :  
 :  
Counterclaimants, :  
 :  
versus :  
 :  
WALKER RIVER IRRIGATION :  
DISTRICT, et al., :  
 :  
Counterdefendants. :  
 :  
\_\_\_\_\_

TRANSCRIPT OF MISCELLANEOUS HEARING

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**APPEARANCES :**

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**FOR WALKER RIVER**      **WES WILLIAMS, JR.**  
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**FOR CIRCLE BAR N**      **THERESE URE**  
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**FOR THE US BOARD OF**      **KAREN A. PETERSON**  
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Carson City, Nevada

1           RENO, NEVADA, TUESDAY, FEBRUARY 21, 2012, 10:25 A.M.

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4                       THE COURT:   United States versus Walker River  
5   Irrigation District and Mono County versus Walker River  
6   Irrigation, the 127 and 128 cases.

7                       Before I call for your appearances, let me give  
8   a preface and what we're actually doing here today. I'm Judge  
9   Robert Jones, of course, I'm not Judge Reed, and Judge Reed is  
10   not reassigning this case to me. He's temporarily  
11   incapacitated to the extent he can't take oral arguments.

12                      By the way, Madam Clerk, would you put in a  
13   call, Carrie should be contacting Judge Reed's law clerk --  
14   oh, she's here.

15                      I'm Judge Jones. Counsel, would you introduce  
16   yourselves, please.

17                      MS. JUN:   Do you want me to --

18                      THE COURT:   Yes.

19                      MS. JUN:   I'm Patricia Jun, I'm Judge Reed's law  
20   clerk, and I'm here to listen in and report back.

21                      THE COURT:   I've asked Ms. Jun to come and  
22   attend the hearing, make sure I ask all the questions that  
23   Judge Reed would want to consider.

24                      Because he can't take oral argument immediately,  
25   and because he wanted you to be able to orally argue, and

1 because the issue needs to be decided forthwith, all of which  
2 were Judge Reed's concerns, he asked me to simply take the  
3 argument.

4 We are making a tape, Judge Reed will review it.  
5 I have a memo here of some of the items -- at least I did  
6 have -- it's still in on my desk -- there we go -- some of the  
7 questions -- no, it's on my conference table, there's a memo  
8 sitting on this case, please, one page -- that he wanted to  
9 ask. But that's what we're doing here today.

10 And so I'll ask you, in other words, to keep  
11 that in your mind, you're basically arguing for Judge Reed.

12 I'll try to ask all of the questions that I  
13 think he has. If you can think of areas that I have not  
14 covered that might be of interest to him, you don't need to be  
15 redundant, you know, he reads very well, and you don't need to  
16 restate the arguments, but emphasize the important points, of  
17 course.

18 Let's -- with that introduction and what  
19 basically we're doing here today, let me call for appearances,  
20 please. Let's start with plaintiffs.

21 MS. SCHNEIDER: Susan Schneider for the United  
22 States.

23 MR. WILLIAMS: Wes Williams, Jr., on behalf of  
24 the Walker River Paiute Tribe.

25 MR. HERSKOVITS: Good morning, your Honor.

1 Simeon Herskovits on behalf of Mineral County.

2 THE COURT: Thank you.

3 MR. DePAOLI: Gordon DePaoli, your Honor, on  
4 behalf of the Walker River Irrigation District, and with me is  
5 Dale Ferguson and Domenico DePaoli.

6 MS. PETERSON: Karen Peterson, Allison McKenzie  
7 law firm, appearing on behalf of the U.S. Board of Water  
8 Commissioners, and the Water Master is also here today, Jim  
9 Shaw.

10 MS. URE: I'm Therese Ure from the Schroeder law  
11 office appearing on behalf of the Circle Bar N Ranch and Mica  
12 Farms.

13 THE COURT: Okay. Thank you.

14 Let's -- I think without many interruptions of  
15 questions, I need to go ahead and let you make your initial  
16 arguments, and then I'll pipe in with the questions that I  
17 think Judge Reed has. Both Ms. Jun and I will have input into  
18 that series of questions. But I think it's best if I let you  
19 go ahead and make your initial arguments without interruption  
20 first.

21 Again, you're addressing Judge Reed, but just  
22 keep in mind, please don't be redundant and repeat everything  
23 in the brief, he's got all of that. But do emphasize the  
24 important points in the brief, of course, and add anything  
25 that you think you need to address by way of oral argument.

1 I'll let you proceed. This is the objections to  
2 the magistrate judge's series of orders.

3 MR. DePAOLI: Good morning, your Honor. Gordon  
4 DePaoli on behalf of the District, and if I get too detailed,  
5 your Honor, just let me know.

6 THE COURT: Okay.

7 MR. DePAOLI: I want to begin, your Honor, by  
8 emphasizing a few points that -- based on some assertions that  
9 are made in the responses to our objections.

10 The District's purpose here is not to delay.  
11 The District's purpose is not to prevent the Court from  
12 reaching the merits of these claims. The District is here to  
13 assist with the orderly moving forward of these matters.

14 We have here two proceedings, and I'll refer to  
15 them as B and C, your Honor, if that's okay.

16 THE COURT: Yes.

17 MR. DePAOLI: B is the claims by the United  
18 States and the Walker River Tribe for various federal  
19 interests in the basin.

20 Subproceeding C is Mineral County's motion to  
21 intervene to assert a public trust claim for Walker Lake.

22 These are, as we know, multiyear proceedings.  
23 Subproceeding B is a multiphase proceeding.

24 The purpose here is to move these matters  
25 forward in an orderly fashion. That requires that we do what

1 can be done now to ensure that as they move forward, and that  
2 when we get to the end, we will truly be at the end.

3 The Walker River litigation itself provides an  
4 example of what I am concerned with.

5 The first litigation concerning the water in  
6 Walker River was brought in this court in 1902. That matter  
7 ended with what was labeled a final decree in 1919.

8 However, in 1924, the United States brought a  
9 C-125 action, and the reason that was brought is that the  
10 United States, the Tribe, and numerous other claimants to the  
11 waters of the Walker River, had not been parties to the  
12 litigation that went from 1902 to 1919.

13 That second litigation went through 1936 at the  
14 trial court and ended in 1940 with an amended decree based  
15 upon a Ninth Circuit decision.

16 THE COURT: And there the Tribe was given  
17 additional water rights in recognition of their early rights.

18 MR. DePAOLI: In that one, the Tribe was given  
19 their recognition of their initial water right as a result of  
20 their --

21 THE COURT: Right. How is this case -- I'm  
22 sorry for the question, but just for my own education, how is  
23 this case different in timing and in precedent with respects  
24 to *United States versus Nevada* over the Truckee River and the  
25 Pyramid Lake?

1                   There, you know, the Supreme Court, to  
2 everyone's consternation, said your asserted right is gone  
3 because the United States represented you as trustee and did  
4 not assert that right in the final settlement of the decreed  
5 rights, and therefore that right to -- a surface right to the  
6 lake, Pyramid Lake, somewhat like is being asserted here with  
7 respect to the county claim, of course, but also to the Tribal  
8 right.

9                   How is this case different from Pyramid in  
10 timing and in distinction from the application of *United*  
11 *States versus Nevada*?

12                  MR. DePAOLI: Your Honor, there may come a time  
13 when I will argue that they are not different. However,  
14 the -- and that is an issue that Judge Reed has indicated may  
15 very well be a threshold issue to be looked at early on in the  
16 case.

17                  But part of the differences, the potential  
18 differences here, relate to, one, the fact that Weber  
19 Reservoir, for which a water right is sought, was -- and there  
20 likely will be a dispute about this, but there may be an  
21 argument that it was -- because it was not fully complete and  
22 fully operational during the time when that decree was  
23 entered, there should not be a *res judicata* bar.

24                  The other twist involved in this litigation is  
25 that there were some lands added to the Reservation, or,



1 depending on your perspective, restored to the Reservation, in  
2 1936, and that the claims here are for those added lands.

3 The final potential additional distinction may  
4 be that this litigation seeks to not only establish a right to  
5 water from surface water but also a right to underground  
6 waters.

7 So those are some of the arguments that we will  
8 likely have --

9 THE COURT: Okay.

10 MR. DePAOLI: -- at the threshold issue stage.

11 But the District's objections here are to three  
12 orders, one which applies in both subproceedings which I will  
13 refer to as the successor-in-interest order, and there is a  
14 service cut-off order which applies to subproceeding B only,  
15 the Tribal and the federal claims, and then there is a  
16 September 27th order concerning service which applies to C.

17 Our objections do need to be considered in the  
18 context of each of these matters and where each of these  
19 matters are at the present time.

20 Subproceeding B has been divided by the case  
21 management order into -- bifurcated into two parts, the Tribal  
22 claims, which are the claims for the Reservation of the Tribe  
23 and the United States will proceed first.

24 The federal claims are the claims that the  
25 United States is making on behalf of other federal interests

1 in the basin, including the ammunition depot, the warfare  
2 training camp for the Marines, the Toiyabe National Forest,  
3 the Yerington Reservation and some other ones.

4 The Tribal claims are to proceed in two phases.  
5 Phase 1 is the threshold issue phase as determined by the  
6 magistrate judge.

7 Phase 2 of the Tribal claims will involve  
8 completion and determination on the merits related to the  
9 Tribal claims.

10 And then the remaining additional phases in the  
11 case will be any other claims, counterclaims, defenses and  
12 issues raised by the pleadings not addressed at the threshold  
13 issue stage and then the federal claims themselves.

14 The threshold issue phase has as its purpose the  
15 possibility of avoiding what may be costly and possibly  
16 unnecessary proceedings if there are some issues that can be  
17 narrowed down through that threshold issue phase.

18 THE COURT: In other words, just filling that  
19 out a little bit more, we may or may not have an issue for  
20 lower priority use claimants depending on the extent of the  
21 rights granted to the Tribe.

22 MR. DePAOLI: Yes, or depending on the outcome  
23 of some of the matters that will be considered in the  
24 threshold issue phase.

25 I mean, the threshold issues have not --

1 THE COURT: Will the threshold issue phase also  
2 include the interplay between the Tribal rights, Weber rights,  
3 and the Walker Lake surface right? Forget about the  
4 groundwaters for a moment.

5 MR. DePAOLI: Actually, your Honor --

6 THE COURT: Was there an interplay relative to  
7 priority assuming both of those rights are fully granted?

8 MR. DePAOLI: At this point, your Honor, the two  
9 proceedings are separate and on separate tracks.

10 But, again, there will be -- one of the issues  
11 in subproceeding C of the trust plan, one of the issues there  
12 will be, if there is a public trust claim for the benefit of  
13 Walker Lake, what water rights are subject to that public  
14 trust plan, and that could -- can involve issues of will it  
15 involve only Nevada appropriated water rights, could it  
16 involve federal reserve rights in Nevada on which the Tribe's  
17 claims are based, could it involve appropriate rights in the  
18 state of California on the Walker River.

19 So those are issues, but those issues will not  
20 be addressed in the threshold issue phase, your Honor, I do  
21 not believe.

22 THE COURT: Thank you.

23 MR. DePAOLI: Some of the things that will be  
24 looked at in the threshold issue phase, however, which I think  
25 bear on the successor-in-interest order in particular, are

1 where the Court has jurisdiction to adjudicate the Tribal  
2 claims and to what extent it should exercise that jurisdiction  
3 particularly as to groundwater.

4 Another -- and these are threshold issues that  
5 are listed by the case management order itself in addition to  
6 what others may propose should be included on the list.

7 Another is the jurisdiction of the Court over  
8 groundwater in the state of California and the state of Nevada  
9 outside the boundaries of the Reservation, and, if it does  
10 have jurisdiction, should it exercise it.

11 Another is if the Court's only jurisdiction is  
12 to protect federal surface rights from junior groundwater  
13 users, does that jurisdiction have to be exercised at the same  
14 time the Court is trying to decide what those federal reserved  
15 rights are.

16 And then there are the equitable defenses which  
17 the Court has indicated which bar some or all of the Tribal  
18 claims, and that -- one of the ones that is involved there is  
19 this issue of the claim preclusion similar to the *Nevada*  
20 *versus the United States*.

21 So that the resolution of the threshold issues  
22 will, to a large extent, determine the scope of the  
23 proceedings in B on a going-forward basis.

24 For example, if some of the defenses, equitable  
25 defenses, are valid, some of the merits of the Tribal claims

1 may not go forward. On the other hand, none of them may go  
2 forward, some of them may go forward, or all of them may go  
3 forward.

4 Similarly and importantly, on the issue of the  
5 Court's jurisdiction of groundwater and the issues raised by  
6 groundwater, the Court could come to the conclusion that it's  
7 not going to deal with groundwater at all at this time.

8 It could determine that it's going to do a  
9 separate adjudication of underground water, which has never  
10 been done, or it could actually take the broader look and say  
11 it's going to do an adjudication of surface and groundwater as  
12 a single source of supply in the basin.

13 And so then the scope of the proceedings will be  
14 partially determined as a result of those threshold issues.

15 In terms of subproceeding C, we have the issues  
16 that I spoke to your Honor about, first, the issue of will  
17 Mineral County be allowed to intervene, and then the issue of  
18 what water rights may be subject to a public trust claim, what  
19 level of inflow is required for the lake, how will that level  
20 of inflow be provided, and so there is also the potential for  
21 phasing.

22 There is no case management order that has  
23 controlled that proceeding like the one in the B proceeding.

24 But both proceedings have the potential to be,  
25 and obviously have been so far, multiyear proceedings and

1 multiphase proceedings, and we don't know when we're going to  
2 have answers to those issues. We don't know when we're going  
3 to have answers to the threshold issues.

4           There is the potential that some determination  
5 on a threshold issue may be certified for appeal, and so we  
6 don't know when there will be a final resolution of those.

7           What we do know is that the world is not going  
8 to stand still while all this is going on, just as it hasn't  
9 in the last 20 years. There will be conveyances of land and  
10 water rights, reconveyances and reconveyances, while all this  
11 is going on.

12           The orders to which the District has objected  
13 need to be examined in that context and with the objective of  
14 doing what we can at appropriate times along the way to ensure  
15 that when we get to the end, we will truly be at the end.

16           That brings me to the successor-in-interest  
17 order, your Honor. The successor-in-interest order states  
18 that its purpose is to ensure that service will have an end  
19 point at some point in time.

20           My argument today is going to focus primarily on  
21 paragraphs 2 and 11 of the successor-in-interest order. The  
22 operative part of paragraph 2 reads as follows, your Honor:

23           "Thus, where a defendant has been served in a  
24 subproceeding and subsequently sells or otherwise  
25 conveys a water right or a portion of a water right

1 subject to that subproceeding, a  
2 successor-in-interest need not be re-served, but will  
3 be bound by the results in this litigation."

4 Paragraph 11 says that, "Absent service of a  
5 statement noting the death in a subproceeding, the  
6 case may proceed against the original named parties  
7 in that subproceeding and will bind any and all  
8 successors-in-interest."

9 Those two paragraphs in my judgment are not only  
10 contrary to law, they are dispositive and therefore not within  
11 the jurisdiction of the magistrate judge to make.

12 THE COURT: Now, to be clear, there's no *lis*  
13 *pendens* protecting the plaintiffs here.

14 MR. DePAOLI: There is not, your Honor.

15 THE COURT: So it's strictly a question of  
16 jurisdiction to bind successors.

17 MR. DePAOLI: And that is the conclusion the  
18 magistrate reached, is that they will be bound --

19 THE COURT: Then let me ask you to stop. In  
20 fact, I will interpose here one of the questions Judge Reed  
21 has and asked us to ask, and it's directed at both of you, and  
22 that's *in rem* versus *in personam* jurisdiction.

23 And I'll make a little devil's advocate argument  
24 here to raise the issue that I think -- I'm not sure what he's  
25 really contemplating here -- the difference between the two,

1 how water rights adjudications are usually classified, that  
2 is, of course, some of the arguments in the briefs that  
3 they're *in rem* or quasi *in rem*, or at least based upon some of  
4 the case law, why groundwater adjudications may or may not be  
5 treated differently. That may help clarify the issue.

6 And I'll make now the devil's advocate argument.  
7 You know, we're talking about water rights are never owned by  
8 anybody but the state, and, of course, prior to the state,  
9 rights of other parties. In acquiring a water right, you  
10 don't acquire a property right in the water, you simply  
11 acquire the right to a use.

12 That's why we recognize forfeiture and  
13 abandonment of a water right, you know, unlike, if you  
14 actually own the water, we wouldn't be recognizing abandonment  
15 and forfeiture. We recognize abandonment and forfeiture both  
16 under the common law and state statute now because it is a  
17 right to the use of the water, that's all.

18 The water continues, and the sources continue to  
19 be owned by the state or the federal government respectively,  
20 or the Tribe, for example, if under treaty they are acquiring  
21 some rather ancient rights, or under the person who walks into  
22 a water right under the Treaty of Guadalupe.

23 You know, when we took possession of the western  
24 territories, we made agreement that we would recognize ancient  
25 titles, and I assume, I'm not sure, that that includes some



1 titles to water usage.

2 So the argument, the devil's argument in your  
3 behalf is we're talking about something more like a chose in  
4 action.

5 You know, if we were sitting in New Jersey, we  
6 wouldn't hear you to say that I've transferred my riparian  
7 right to use of the water to a city in South Carolina because  
8 that just doesn't -- it doesn't sound, it doesn't make sense,  
9 it's illogical. It's a right to use of the stream in the bed  
10 to contiguous properties.

11 But out here in the west, the wild west, we  
12 recognize a use to the water, and consequently that use can be  
13 changed to a different diversion point. It can be sold to a  
14 different user miles away as long as the use is preserved, the  
15 beneficial use is preserved, and as long as it hasn't been  
16 forfeited or abandoned.

17 So we are talking about something that's closer  
18 to a chose in action which, of course, can be transferred.

19 So is there anything there -- I'm trying to  
20 frame the question for you as I think that maybe it's pending  
21 in Judge Reed's mind. Can you help Judge Reed and myself out,  
22 explain to us, please, the application, why this isn't quasi  
23 *in rem* or *in rem* totally.

24 If it is quasi *in rem* or *in rem*, why doesn't it  
25 have implications as well, especially with respect to

1 successors-in-interest, to *in personam* rights like a chose in  
2 action which can be freely transferred, and if isn't *lis*  
3 *pendens* protection, why do we need an additional service  
4 requirement on successors-in-interest who are not apprised of  
5 the lawsuit?

6 MR. DePAOLI: And I will answer your question.

7 Let me -- let me start by saying that part of  
8 the position that we are taking is that, A, that  
9 the decision -- and I'll get to this, but the decision about  
10 how to deal with successors-in-interest and what notice they  
11 ought to be provided is not necessarily one that needs to be  
12 made at this time.

13 The second point that I would make is that your  
14 Honor may very well make good arguments as to why a  
15 successor-in-interest ought to be bound, but that  
16 successor-in-interest should have an opportunity to have  
17 notice and opportunity to explain why they think they are not  
18 bound. That is not a decision that ought to be made today.

19 In other cases and matters cited by the  
20 plaintiff parties all involve situations where there is an  
21 argument over whether a successor is bound by a prior  
22 judgment, and that successor has an opportunity to come  
23 forward and explain why they believe they are not bound.

24 THE COURT: You're suggesting that this issue  
25 should be saved for a subsequent lawsuit.

1 MR. DePAOLI: Yes.

2 THE COURT: Well, clearly, the argument is in  
3 favor of the magistrate judge's ruling when you consider  
4 judicial economy and wasting or having the threat of future --  
5 many future proceedings.

6 Because, let's take the example of someone who  
7 is a successor-in-interest, let's say a nearby town that  
8 purchased a rancher's water use right, let's take before 2009.  
9 No, no, after 2009.

10 They have not been served. They may or may not  
11 be aware -- I'm sure they're aware of the lawsuit, but they  
12 may or may not be aware or apprised of the lawsuit, but their  
13 right was owned, the use right was owned by the rancher at the  
14 relevant date in 2009, and clearly their right is going to be  
15 affected.

16 Nobody is going to terminate their use right,  
17 but if we are going to declare a priority right much larger,  
18 practically what we're saying is your right is gone.

19 The threat here is that many of these already  
20 adjudicated rights will become worthless because, if they're  
21 all granted, these priority rights, allegedly prior, subsume  
22 many of those junior use rights. So you are definitely going  
23 to be affected, city or town. You are not named in the  
24 lawsuit, you have not been served.

25 Why should we not -- why can we not have a rule

1 here -- even if it's based upon a required publication, let  
2 alone individual service, why can we not have a rule that says  
3 successors are bound out of necessity?

4 We are adjudicating all of the use rights.  
5 That's what a decree proceeding is all about.

6 We're not talking about just one small  
7 proceeding whether somebody has abandoned their use, we're  
8 talking about the entire river and the original decree which  
9 divides up -- we all agree that the river is overappropriated,  
10 and, if these claims are granted, maybe two or three times  
11 overappropriated.

12 So clearly these junior rights are going to be  
13 affected. Why can we not have a rule of necessity that says,  
14 successors, you're bound?

15 MR. DePAOLI: Two parts to that, your Honor.

16 First of all, I don't think you can make that  
17 determination without giving a successor some opportunity to  
18 be heard on their position. That to me is fundamental, that  
19 the constitution and case law under it say you can't make  
20 those kinds of decisions about someone else without giving  
21 them a notice and opportunity to be heard.

22 But I'm not saying --

23 THE COURT: Well, let me argue against you for a  
24 minute.

25 You know, as long as the person -- the person

1 who's served owned the water right, the water use right, I  
2 correct myself, at the time they were served, clearly what the  
3 city downstream in time, forgive the pun, is buying is they're  
4 buying whatever the seller had to sell.

5 The seller can't transfer anything more than  
6 they had, and clearly, at the time the seller was served, they  
7 had a right to use water, they didn't own the water, they had  
8 a right to use water that clearly was subject to prior rights  
9 both in time and in law.

10 So what they sold was a water use right to the  
11 city or town subject to all of the -- I'll call them usurping  
12 or intervening rights that already exist. They may not be  
13 adjudicated, they may not be concrete.

14 So why is it inappropriate for the District  
15 Court to say the person who was served on the date that they  
16 were served owned the water use right and therefore I'm  
17 adjudicating that right?

18 I'm saying that it is junior to -- because that  
19 prospect existed on the date that party was served. They are  
20 junior to -- granted and unrecognized at the time, but also an  
21 inchoate right to enlarge a prior water use right. What's the  
22 matter with that logic?

23 MR. DePAOLI: I think the logic gets back to the  
24 same situation, your Honor, in dealing with -- I don't think  
25 the distinction makes a difference between whether it's a

1 right to use water or an ownership interest in land.

2 It comes down to what the successor knew or  
3 should have known and what the parties seeking to establish  
4 the other right know, and it does not seem that given where we  
5 are in this litigation, that there should be a determination  
6 today that everybody's going -- that right now in 2012 where  
7 we are in these proceedings --

8 THE COURT: That's an equitable argument, and I  
9 understand that argument, but I'll give you an example.

10 Let's say I transfer to you an inchoate right to  
11 a judgment. I've been injured -- and let's assume under state  
12 law that I can do that. I have sued, I have damage, and I  
13 need early payment of that damage, and I transfer to you my  
14 inchoate right against a defendant.

15 We're already parties. You don't -- by virtue  
16 of that transfer, I don't think you become a party. You  
17 certainly understand that you're taking the potential inchoate  
18 right subject to whatever happens to that right in court.

19 I'm already a party to the lawsuit as the prior  
20 parties to the successor-in-interest are already --  
21 potentially already part of the lawsuit. They've been served.  
22 They were served when they owned the right, just as I served  
23 or was served at the time I owned fully the right.

24 So you certainly, as the buyer, fully understand  
25 that you're taking that right subject to whatever happens in

1 court. The jury may decide against me. The jury may make the  
2 claim much larger in which case you get it. It may make the  
3 claim much smaller. There may be intervening parties who  
4 subsequently come in and claim, for example, like a medical  
5 lienholder who claim they have a prior right.

6 So why isn't this like the transfer of an  
7 inchoate right, a water use -- even to the extent it's *in*  
8 *personam*, why isn't it like that analogy?

9 MR. DePAOLI: Well, in that analogy, I, as the  
10 buyer, obviously know that the -- what I'm buying is the  
11 subject of litigation and that what I ultimately get will be  
12 from the outcome of that litigation, which is really not the  
13 case here. There is -- and that gets back to whether there's  
14 *in rem* jurisdiction here.

15 There is not -- the court, in C-125, since 1940,  
16 has done nothing more than administer the water rights under  
17 the decree.

18 In terms of new water rights on the Walker  
19 River, those new rights under state law have been determined  
20 based upon rulings by the Nevada State Engineer in Nevada and  
21 by the California State Water Resources Control Board in  
22 California.

23 The reason we're here as to the effort to  
24 establish these additional federal rights is that the United  
25 States is a party and that therefore the federal court would

1 have jurisdiction to determine if such rights do exist and  
2 their extent, but we are not readjudicating all of the rights  
3 that have been determined by the decree.

4 As far as but for service and other notice and  
5 knowledge, the administration of the river goes on today as it  
6 has since 1940. There's nothing about these proceedings that  
7 would let someone know that their right is being looked at for  
8 some kind of curtailment or restriction.

9 The groundwater side of this, your Honor, is  
10 particularly acute. The Court has never assumed any kind of  
11 jurisdiction over groundwater in Nevada or in California. It  
12 doesn't regulate the use of groundwater in any fashion.

13 The threshold issues involved, your Honor, get  
14 right to the Court's own question is should I --

15 THE COURT: And yet we have that strange Ninth  
16 Circuit case last year reversing Judge George on the Truckee  
17 River.

18 Judge George ruled basically the same thing, the  
19 groundwater underlying as a source of the Truckee River is not  
20 part of his adjudication, and he excluded that, but the Ninth  
21 Circuit reversed him and said no, it is a proper source and  
22 within your jurisdiction.

23 MR. DePAOLI: But limited, your Honor.

24 What the Ninth Circuit said -- well, and what  
25 was going on there in that case was that the Nevada State



1 Engineer had granted additional groundwater rights in the --  
2 in a groundwater basin in the Truckee River. The Pyramid  
3 Tribe alleged that the granting of those rights would  
4 interfere with its Orr Ditch decreed water rights.

5 And so the question was where do I seek review  
6 of that state engineer's decision, is it in state court, is it  
7 in federal court, because the federal courts have consistently  
8 reviewed waters -- change applications, at least, involving  
9 Truckee River water rights. So they filed in both places.

10 The Ninth Circuit said, yeah, you have  
11 jurisdiction to determine whether or not that new groundwater  
12 right is going to interfere with the right you decreed in Orr  
13 Ditch.

14 But, again, in that kind of a situation, the  
15 Court will take a look at that and make a -- make a decision,  
16 and that may be the outcome of the threshold issues.

17 The Court may decide on the threshold issues  
18 that it doesn't need to, at this point in time, trouble itself  
19 with groundwater users in Nevada or in California.

20 It can adjudicate these water rights, and if, at  
21 some point in the future, the service, the user of the  
22 groundwater rights, is interfering with a senior federal  
23 right, surface or underground, it can haul into court with  
24 notice and process the persons who are allegedly interfering  
25 and make a determination as to where that occurs.

1           THE COURT: Quite frankly, that's the most  
2     attractive argument you make, in my mind, and you're going to  
3     need to respond to that on the other side, and that is, why  
4     make this lawsuit cover the world. It didn't start that way.

5           The decree concerned the surface rights to the  
6     Walker River, and that's what the decree -- you're saying why  
7     expand it to cover the world. Groundwater rights,  
8     participants in groundwater rights in California as well as  
9     Nevada, why expand the lawsuit? Let's leave that for another  
10    day and another lawsuit.

11          That's probably the most attractive argument  
12    that you make, and that's a reason not to cover, I suppose,  
13    I'm not sure you can logically extend it, but to  
14    successors-in-interest, especially successors-in-interest to  
15    groundwater rights, as well as current users.

16          MR. DePAOLI: Yes. I mean -- but those are  
17    issues that haven't been decided yet, and until they're  
18    decided, there shouldn't be a determination one way or the  
19    other on that point, your Honor.

20          But the --

21          THE COURT: So what you're saying is, for  
22    heaven's sake, under a successor rule, don't cover groundwater  
23    rights users, especially successors in groundwater right  
24    users, because so far this case should involve a decision at  
25    least with respect to these allegedly prior rights, the

1 surface of Walker Lake and the Tribal rights.

2 MR. DePAOLI: My essential point is that there's  
3 no reason to decide right now, and, again, I respectfully  
4 don't think the Court can decide right now, that successors to  
5 successors to successors are going to be bound by the judgment  
6 here when we don't even know the exact scope of these  
7 proceedings. That is the point that we want to make.

8 I think the real issue here, your Honor, and I'm  
9 going to jump -- jump ahead to what I think is the real issue  
10 here. I was going to talk about some other things.

11 But my main point is you can't make a  
12 determination now, you should not make a determination now,  
13 and I don't think you can make a determination now, that some  
14 successor to a successor to a successor will, in 2025, or  
15 whenever we finish this litigation, be bound by the result. I  
16 just don't think you can make that determination.

17 But the real issue that needs to be looked at  
18 here is what is it that we should be doing now to ensure that  
19 when we get to the end of these proceedings that we will have  
20 done everything that we reasonably could have done to bind  
21 successors-in-interest.

22 And I think the plaintiff parties really agree  
23 with that. In their response they have said that due process  
24 requires that notice that is reasonable under the  
25 circumstances, now that service is almost completed, the most

1 reasonable process is to provide notice of these proceedings  
2 to known successors at subsequent critical junctures. I agree  
3 with that.

4 Paragraph 19 of the order which is supposed to  
5 take care of that doesn't exactly say that. It's under a  
6 heading Notice to Parties, and then what it says in paragraph  
7 19 is that,

8 "The plaintiff parties shall provide periodic  
9 notice of developments in these proceedings to other  
10 parties in these proceedings by mail and by  
11 publication as directed by further order of the  
12 Court."

13 What that needs to say is that they should provide  
14 notice to known successors. The known successors at this  
15 point are not parties. The only parties are those who have  
16 actually been served, and so that part of the order needs to  
17 be fixed.

18 And then it seems to me that at this point we should  
19 leave it to Magistrate Cobb or Judge Reed to make  
20 determinations as these matters proceed as to what kind of  
21 notice that ought to be to the known successors-in-interest,  
22 and we can have an argument about what that ought to be when  
23 we know more about the scope of the proceedings going forward.

24 There simply is no reason that I can see to decide  
25 those issues right at this time, your Honor. That is, I

1 think, what needs to be considered here.

2 We, I think, are in agreement that there needs to be  
3 notice to successors of some form or another. The kind ought  
4 to be determined when we know what the scope of the  
5 proceedings are on a going-forward basis.

6 The magistrate's order requires the District and  
7 others to provide information on ownership. The plaintiff  
8 parties in their response have indicated there may be more  
9 meat to that provision provided later.

10 The District has been providing information on an  
11 annual basis since 2003. I suppose if there's going to be  
12 something new on that, we can argue about what that new ought  
13 to be when we get to it.

14 THE COURT: Here's the way Judge Reed phrased  
15 the question. The main other concern Judge Reed has is  
16 whether it is proper to make defendants provide regular  
17 updates on water rights ownership. He would like to question  
18 the parties on what sort of burden that would place upon the  
19 defendants.

20 As you answer that question, are the parties  
21 acquainted with Judge George's two orders regarding notice on  
22 the Truckee Orr Ditch?

23 MR. DePAOLI: Yes, your Honor.

24 THE COURT: Those two orders -- in fact, you  
25 folks provided them to me I assume.

1 MR. DePAOLI: Yes, your Honor.

2 THE COURT: That provides -- it doesn't address  
3 exactly the same issues that you're raising here, but it does  
4 provide a mechanism for a website and website access to  
5 parties both served and unserved, anybody who has an interest  
6 in the river, it does provide a method for giving notice and  
7 constant notice, you know, especially if they agree to -- not  
8 just a time-to-time notice but a constant notice.

9 In other words, if you agree, whether served or  
10 not, especially if you've been served, if you agree to be  
11 served by e-mail from the website, our CM-ECF wonderful  
12 computer system that we have now, then notice will be given,  
13 and that will go out by automatic e-mail and without postage  
14 cost to all those who have consented. If you haven't  
15 consented, of course, there's a different procedure.

16 So you're all aware of those -- that potential  
17 procedure and order.

18 Would you answer, please, Judge Reed's question,  
19 what kind of a burden would that place upon the defendants if  
20 you're required to constantly provide the update and/or maybe  
21 even the notices.

22 MR. DePAOLI: Well, in terms of what it says,  
23 regularly provide updated water right ownership information,  
24 again, if all it means is that we need to continue doing what  
25 we are doing, that is fine, what we do, your Honor, as an

1     irrigation district. But, again, what we know about is only  
2     within the boundaries of the irrigation district.

3                 But on an annual basis, the District has to  
4     update its own records for assessment purposes, and so  
5     annually, since 2003, when we have been doing that, we have  
6     been providing the hard copy and computer disk of this current  
7     assessment roll to the United States.

8                 We have been providing a copy of our new water  
9     right index cards to the United States for those that have  
10    changed during the year.

11                We provide a list of what we refer to as reserve  
12    water rights. That's the situation where someone has sold  
13    their land but kept their water.

14                And we provide all of the deeds that have been  
15    provided to the District over the year by the Lyon County  
16    Recorder's office. The Lyon County Recorder takes note of the  
17    conveyance of lands that are within the District's assessment  
18    base and provides the District with copies of all of those  
19    deeds. They're not --

20                THE COURT: So now you keep all those records,  
21    and you provide annual lists anyway, and you can provide that  
22    to the plaintiff. What additional burden, if any, does the  
23    magistrate judge's order pose for you?

24                MR. DePAOLI: I don't know. That's part of my  
25    problem.

1           It doesn't -- it says regularly provide updated  
2 information. If it means we've got to do more than that, if  
3 it means, for example, that we need to be going to the Lyon  
4 County Recorder's office and actually researching their  
5 records to make sure they're giving us all the deeds they  
6 ought to be giving us, then that's a new burden that we don't  
7 have to do right -- we don't do at this time.

8           THE COURT: If it's just providing whatever you  
9 provide now, that's not an additional burden.

10          MR. DePAOLI: Not an additional burden. We've  
11 been doing that.

12          The way I read the magistrate's order is we need  
13 to provide that to Mineral County. We will begin that. We  
14 will do that.

15          The other thing is the magistrate's order wants  
16 us to provide it to the Court, and we're happy to do that. At  
17 some point we're going to need to understand that -- the  
18 logistics of how we're going to do that --

19          THE COURT: Right.

20          MR. DePAOLI: -- because it's not a small  
21 piece -- batch of paper.

22          THE COURT: And how the District Court will  
23 absorb that information.

24          MR. DePAOLI: Yes, yes.

25          THE COURT: Okay. Let's see if I covered -- he



1 did have an interim question here I think maybe you've already  
2 covered.

3 The parties should be asked whether binding  
4 successors in this case, as the magistrate judge seems to have  
5 ordered, is wholly improper if the case is in fact properly  
6 considered *in personam*, especially as to those subsequent  
7 successors-in-interest.

8 That was his question, the way he framed it.  
9 Have you covered that?

10 MR. DePAOLI: I think so. If it's *in personam*,  
11 then I --

12 THE COURT: Okay.

13 MR. DePAOLI: -- that's one less argument that  
14 somebody is going to have later that they're bound by the  
15 judgment.

16 THE COURT: I'll ask Ms. Jun, are there any  
17 additional questions that you think we should ask?

18 MS. JUN: No, your Honor.

19 THE COURT: Okay.

20 MR. DePAOLI: I was going to move now to the  
21 service cut-off order, your Honor, which applies only in  
22 subproceeding B.

23 And that service cut-off order is very short,  
24 and it says that,

25 "One issue the parties have raised with the

1 Court is the designation of a cut-off date respecting  
2 the defendants to be included in this action pursuant  
3 to the CMO. It is hereby ordered that the service  
4 cut-off date for phase 1 of the Tribal claims is  
5 December 31, 2009, and includes water rights as of  
6 that date."

7 Although I'm not sure that the Tribe and the United  
8 States will agree after reading their response to our  
9 objections, I believe that their position is that the -- that  
10 that order says nothing more than this, and I've sort of  
11 rewritten it, your Honor, as follows:

12 "One issue the parties have raised with the  
13 Court is the designation of a date by which service  
14 of process is sufficiently complete to allow for  
15 final resolution of the list of threshold issues. It  
16 is hereby ordered that service of process through  
17 December 31, 2009, is sufficiently complete to allow  
18 for the final resolution of threshold issues for  
19 purposes of phase 1 of the Tribal claims."

20 If that is all that that order does and is intended  
21 to do, the District does not have any objection to that. The  
22 District agrees that service is sufficiently complete to  
23 finalize the threshold issues and to move forward with them.

24 And, with that, I will hear what the Tribe and the  
25 US may say about that, and, if necessary, I will perhaps want

1 to say a few more things. But if that's all it does, then  
2 we're okay with that.

3 THE COURT: Okay. Thank you.

4 Anything else on the objections? Did you want  
5 to pass to another issue or --

6 MR. DePAOLI: I was going to move now to the  
7 last order, your Honor.

8 THE COURT: Please.

9 MR. DePAOLI: Which is the September 27, 2011,  
10 order. That applies only in subproceeding C.

11 And, again, as a result of the objections that  
12 we have filed and Mineral County's response, it appears that  
13 we are really in agreement as to a number of matters with  
14 respect to that order.

15 We had a concern about the determination that  
16 the caption is accurate and valid. Mineral County has  
17 responded that it is prepared to file an updated caption that  
18 reflects the successor-in-interest -- successors-in-interest  
19 to named persons who have not yet been served by substituting  
20 them for their predecessors based on the magistrate's rulings,  
21 and that any issues as to successors of people who have been  
22 served are going to be handled with the successor-in-interest  
23 order.

24 So that takes care of that objection, your  
25 Honor.

1           We had also objected to substitution without  
2 Rule 4 service. Mineral County's response has been that they  
3 intend to serve substituted parties under Rule 4, and so that  
4 response takes care of that objection.

5           We had objected to the direction that Mineral  
6 County proceed with service without unnecessary delay.  
7 Mineral County has said that it is in agreement with the  
8 District that further guidance from the Court is necessary  
9 before service may commence, and we agree with that, and that  
10 takes care of that response.

11           There was one party that we thought should not  
12 be dismissed, and Mineral County has indicated it will  
13 withdraw that objection or that dismissal, and so that takes  
14 care of that one.

15           THE COURT: I appreciate those resolutions. It  
16 substantially narrows what we have to do.

17           MR. DePAOLI: And then one other one that I  
18 think we are probably okay with is the provision that, for  
19 purposes of this litigation, the estate and  
20 successors-in-interest of a deceased party bear the burden of  
21 filing and serving a notice of death.

22           Mineral County has said that it's going to serve  
23 successors-in-interest by both *inter vivos* transfer and death  
24 of persons who have not been served, and so that covers part  
25 of it.

1           The other part is going to be decided by the  
2 resolution of the objection to the successors-in-interest  
3 order, and so we'll see what happens there.

4           The main area of disagreement, your Honor,  
5 relates to the paragraph of the order which provides that it  
6 is further ordered that Mineral County shall not be required  
7 to make further service on parties who have already been  
8 validly served and for whom the Court has already ratified  
9 service.

10           THE COURT: Does that mean further initial  
11 service, or does that mean service of anything?

12           MR. DePAOLI: Well --

13           THE COURT: No further service or notice on  
14 anybody who has been served and not responded.

15           MR. DePAOLI: I don't think it's intended to  
16 mean that, but if it means that, it doesn't say who has not  
17 responded, it just says anybody who has been served and for  
18 whom the Court has ratified service.

19           I don't think it means that. I think --

20           THE COURT: It's simply referring to the term of  
21 art service, in other words, no more Rule 4 service will be  
22 required on somebody who has been served.

23           MR. DePAOLI: No, I think what -- and this is  
24 how Mineral County interprets it, and this is how I interpret  
25 it based on the way things were at issue.

1 First of all, we're not saying Mineral County  
2 has to got to re-serve everybody they've already served.

3 What I think -- what this portion of the order  
4 was intended to deal with was the situation that existed from  
5 1995 till April 8th, 2000.

6 During that period of time what people who were  
7 served had to do and when they had to do it in order to get  
8 further notice of proceedings in this matter was controlled by  
9 an order that Judge Reed issued in February of 1995.

10 After that date what people had to do and when  
11 they had to do it in this proceeding in order to get further  
12 notice of proceedings in this matter became controlled by an  
13 order issued by Magistrate McQuaid.

14 And so what Mineral County interprets this  
15 provision as doing is relieving Mineral County, and I guess  
16 anyone else, from having to notify people who were served  
17 before April 2000, April 8, 2000, about any further orders in  
18 these proceedings.

19 And, now, I'll explain why I think that's --  
20 what the problem is with that. I think it's contrary to the  
21 prior orders issued by Judge Reed concerning what people had  
22 to do and when they had to do it in that February 9th, 1995  
23 order.

24 Mineral County, in their papers, quotes a very  
25 small portion of that order, but it needs -- all of it needs

1 to be placed in context.

2 Paragraph 4 of that order, your Honor, started  
3 by saying,

4 "If Mineral County intends to seek a waiver  
5 of service, Mineral County shall include with the  
6 mailing the attached Notice of Motion and the  
7 attached Waiver of Personal Service of Motions."

8 Paragraph 5,

9 "In any situations where" -- "in any  
10 situation where service of Mineral County's  
11 Intervention Documents is not waived, in addition to  
12 Mineral County's Intervention Documents, Mineral  
13 County shall also serve the attached Notice in Lieu  
14 of Summons properly issued by clerk of the court."

15 Paragraph 6,

16 "The following schedule shall apply to  
17 Mineral County's Intervention Documents: A,  
18 Responses to Mineral County's Motion to Intervene and  
19 Mineral County's Points and Authorities in Support of  
20 its Motion to Intervene shall be served" --

21 Let me emphasize the end, Responses to Mineral  
22 County's Motion to Intervene and Points and Authorities "shall  
23 be served not later than July 11th, 1995."

24 Paragraph 7,

25 "Persons, corporations, institutions,

1        associations, or other entities properly served with  
2        Mineral County's Intervention Documents who do not  
3        appear and respond to Mineral County's Motion to  
4        Intervene shall nevertheless to be deemed to have  
5        notice of subsequent orders of the Court with respect  
6        to answers or other responses to the proposed  
7        Complaint in Intervention, or responses to any motion  
8        for preliminary injunctive relief filed and served by  
9        Mineral County."

10                Paragraph 8,

11                "A copy of this order shall be served with  
12        Mineral County's Intervention Documents in the same  
13        manner as required by paragraph 3."

14                The notice of motion that is attached to that order  
15        provides,

16                "Copies of these documents, along with an  
17        order of the Court setting important deadlines with  
18        respect to Mineral County's Motion to Intervene are  
19        enclosed.

20                "If you comply with this request and return  
21        the signed waiver, it will be filed with the Court  
22        and no additional copies of the referenced documents  
23        will be served on you. The matter will then proceed  
24        as provided in paragraph 6 of the Order Requiring  
25        Service of and Establishing Briefing Schedule



1           Regarding the Motion to Intervene of Mineral County,  
2           which order is included with this notice."

3           THE COURT:   This is all per the '95 order.

4           MR. DePAOLI:   Yes.

5           THE COURT:   Go ahead.

6           MR. DePAOLI:   The waiver of service form that  
7           was attached to that order that was to be served said this.

8           "I understand that if I do not appear and  
9           respond to the Motion to Intervene by July 11, 1995,"  
10          that's what the first batch said, "and if the Court  
11          enters further orders with respect to answers or  
12          other responses to the proposed  
13          complaint-in-intervention or responses to the  
14          Preliminary Injunction Motion, that I shall  
15          nevertheless be deemed to have notice of subsequent  
16          orders of the Court."

17          The Notice in Lieu of Summons that was attached to  
18          that order said,

19          "You are required to respond within the times  
20          and as provided in the attached Order Requiring  
21          Service of Establishing Briefing Schedules Regarding  
22          the Motion to Intervene of Mineral County."

23          From those documents, your Honor, Judge Reed  
24          established the date when folks were to respond, and the --  
25          appear and respond, and the manner in which they were to

1 appear and respond, and that is appear by responding to the  
2 Motion to Intervene by the deadline.

3 Well, as we indicated in our points and authorities  
4 on page 7, that date for responding changed -- started to  
5 change before it even arrived at that date, was vacated, was  
6 suspended, didn't exist while there was an appeal to the Ninth  
7 Circuit, and ultimately, on January 8th, 1999, was vacated  
8 completely.

9 On April 3rd of 2000, Judge McQuaid entered his  
10 order first finding that some 617 persons had been served over  
11 that period of time, from '95 to 2000, with the information  
12 that I just talked about, and that there were 170 other folks  
13 who needed to still be served.

14 At that point in time he ordered that any party  
15 served from that point forward would have to file and serve a  
16 Notice of Appearance which included their name and address or  
17 their attorney's name and address.

18 He provided that responses to the Motion to  
19 Intervene would be established and scheduled by further order  
20 of the Court, and he gave parties 20 days after being served  
21 to file that Notice of Appearance.

22 So from that point forward people were told if you  
23 want to appear and get notice of further proceedings, you've  
24 got to file this Notice of Appearance within 20 days of your  
25 service, and if you don't, you're going to be deemed to have

1 notice of the subsequent proceedings.

2 So the issue with that part of the magistrate's  
3 order relates to do we -- given the fact that the date for  
4 responding to the Motion to Intervene has been changed,  
5 suspended and ultimately vacated, given the fact that during  
6 the period of time when a lot of service was made from 1999 to  
7 April -- early 1999 to April of 2000, there was no date in  
8 place at all.

9 So if people were being served with something that  
10 said you needed to respond by a date certain, it couldn't have  
11 been accurate and likely was a date that had long since  
12 passed.

13 The question is does Mineral County have some  
14 obligation to -- when there is a schedule, to notify those  
15 persons that here is the schedule so that they can appear and  
16 respond, or not appear and respond as they choose, so that  
17 they can get further notice of proceedings in this matter as  
18 Judge Reed contemplated when he made those orders.

19 Mineral County's response is that parties have known  
20 from the very beginning that they would to have appear to get  
21 further notice. But that misses the point. The point is when  
22 and how, and the when and the how, until April of 2000, was  
23 the when was the date for response to the Motion to Intervene  
24 and the how was by responding to the Motion to Intervene.

25 So there's got to be -- again, keeping in mind that

1 when we finish, as best we can, we want to be done with these  
2 proceedings, there's got to be something done to provide  
3 notice to those 617 persons of a response date by which they  
4 either appear or they don't appear, and then Judge Reed's  
5 orders will kick in as he intended to begin with.

6 And that is the objection to that one, your Honor.

7 THE COURT: Okay.

8 MR. DePAOLI: Thank you.

9 THE COURT: Thank you. Response, please,  
10 answering the same questions.

11 MR. HERSKOVITS: Your Honor, again, I'm Simeon  
12 Herskovits representing Mineral County.

13 With the Court's permission, the counsel  
14 representing the plaintiff parties have divided up their  
15 argument. I will address what we -- both sides have been  
16 referring as to the successor-in-interest order and most of  
17 the issues in that, and Mr. Williams, who represents the  
18 Tribe, will also take some of that, and Ms. Schneider will be  
19 taking up the service cut-off order, and then I would again  
20 take up just to address the service report order, is what we  
21 have called it, that Mr. DePaoli just finished addressing.

22 So -- well, I would start by saying that I think  
23 that far from representing an approach that would move the  
24 case forward to the merits in an orderly fashion and allow  
25 final resolution in any kind of efficient manner, that the

1 approach that WRID and Mr. DePaoli have laid out is actually  
2 one that would trap the case in perpetual substitution of  
3 parties upfront before the merits actually would be reached in  
4 other than a C-125-B or C-125-C case.

5 And I think that the nature of the case which --

6 THE COURT: Well, that sounds like a very  
7 attractive argument too, and that's what I started with.

8 You know, there's a real argument to be made for  
9 judicial economy here to bind the successors-in-interest, but  
10 as I mentioned before, he makes a very attractive argument,  
11 why keep broadening this lawsuit.

12 I mean, the decree was the decree was the  
13 decree. I understand it has a jurisdiction provision that  
14 allows for future amendment of the decree, but why keep  
15 broadening this lawsuit.

16 You know, when the motions were filed, we  
17 understood it to cover certain expanded right requests and to  
18 cover certain potential defendants, that is, all current, then  
19 current but junior conflicting use permit holders or users as  
20 previously decreed.

21 Now the lawsuit keeps expanding, and  
22 potentially, just like you say, could expand interminably into  
23 the future with additional -- I mean, you haven't thought of  
24 all the potential usurping prior rights that you could claim.  
25 You may think of some in the future yet.

1                   And you're certainly not asking for an  
2 adjudication of those undreamed of rights, reserved rights,  
3 that you haven't put forward. You're not asking certainly for  
4 any binding effect on those.

5                   You don't want a *United States versus Nevada*  
6 decision that, hey, whatever we handle in this lawsuit binds  
7 forever the rest of the century and next century's use of the  
8 Walker River and its related groundwater rights. You don't  
9 even want that kind of a ruling.

10                  So why isn't his argument very attractive, let's  
11 limit it to what it was when the motion was filed, for  
12 heaven's sake, and not say that all successors-in-interest and  
13 all future users and all future dreamers of other potential  
14 reserved rights, prior rights, things that haven't even been  
15 thought of yet, are going to be bound.

16                  He makes a very attractive argument there. Why  
17 address jurisdictional issues for a future court. We don't  
18 need to do that, nor do we have jurisdiction to do it.

19                  MR. HERSKOVITS: Well, respectfully, your Honor,  
20 I think there are two types of broadening of the scope of the  
21 case that have been conflated.

22                  One is the question of perhaps substantively  
23 broadening the type of water rights or water resources that  
24 are in question, and arguably bringing groundwater rights and  
25 groundwater resources in the Walker Basin represents a

1 broadening of the scope in a meaningful, concrete sense.

2 I would argue, and I think that the law supports  
3 it, that merely holding that successors-in-interest to the  
4 claimants or owners of existing water rights under the decree  
5 or existing water rights under state law is not expanding the  
6 scope of the case, it's actually just exercising the equitable  
7 jurisdiction that the Court already possesses over this race,  
8 this --

9 THE COURT: So if you later come up with a  
10 brand-new reserved right that you're just not presently  
11 recognizing, or if the Tribe comes up with a future reserved  
12 right, additional land added to the Reservation, you're  
13 certainly not taking the position that the decree the Court  
14 issues here in this case at the conclusion would bind the  
15 Tribe, say you've forever forfeited anything else that you  
16 haven't thought of yet but that you could think of, you're  
17 bound, you can't bring those hereafter. You're certainly not  
18 taking that position, are you?

19 MR. HERSKOVITS: Well, no, your Honor, and I  
20 think that the Court's exercise of continuing jurisdiction --

21 THE COURT: Or if you were to find anciently --  
22 we never discovered it before, but anciently there's a little  
23 side pond to the Walker Lake, and there's a reserved right to  
24 restore the surface right for that little side pond, and that  
25 idea comes up ten years hence. You're not certainly not

1 arguing for the position that no one could make that claim in  
2 the future because the decree is the decree, right?

3 MR. HERSKOVITS: Well, actually, your Honor,  
4 there are different claims that the successor-in-interest  
5 order applies to, and I think that with regard to the public  
6 trust claim on behalf of the lake, that is a fairly simple and  
7 straightforward claim that, once resolved, will establish, at  
8 least in Mineral County's view, an absolute, sort of  
9 bedrock right or --

10 THE COURT: So you're okay with the total  
11 binding effect, regardless if the archeologists find  
12 underneath the town foundations there is evidence of a prior  
13 lake, an extension of the lake, you're satisfied with the  
14 binding nature of the decree here in this case against any  
15 future claim.

16 MR. HERSKOVITS: Well, at least with regard to  
17 the trust claim --

18 THE COURT: Your motion is it, that's it, that's  
19 all we'll ask for into the future.

20 MR. HERSKOVITS: With regard to the public trust  
21 claim, your Honor, yes.

22 THE COURT: Okay. That's fair.

23 MR. HERSKOVITS: I believe that the way that  
24 legal doctrine has been interpreted and applied in all courts,  
25 including now the state courts of Nevada, that that would be



1 clearly determined by historically known conditions in the  
2 lake, and by that I mean written historically-known  
3 conditions.

4 THE COURT: Known at the time of the lawsuit.

5 MR. HERSKOVITS: Known at the time of the  
6 lawsuit, and --

7 THE COURT: Not found subsequently, known at the  
8 time of the lawsuit.

9 MR. HERSKOVITS: Well, yes, but -- yes --

10 THE COURT: So I'm delighted with your answer.  
11 It's a very consistent answer.

12 But that will raise, of course, you recognize,  
13 the Irrigation District's subsequent argument, well, why  
14 aren't you bound, then, by the original decree.

15 You could have raised this right at the time.  
16 Certainly the right, if it existed, was in existence at that  
17 time.

18 Why aren't you bound just like *United States*  
19 *versus Nevada* declares that the Tribe was bound in that case,  
20 even though it didn't enter an objection, it was bound because  
21 its trustee entered all of the positions that it was capable  
22 of entering.

23 You're certainly welcoming that argument in the  
24 future that, hey, your motion to intervene here is  
25 inappropriate in light of the *res judicata* effect of the prior

1 decree.

2 MR. HERSKOVITS: Well, your Honor, I see where  
3 you're going or coming from with that argument, but I do not  
4 agree that that is where our position on the public trust  
5 necessarily leads.

6 In fact, I think the nature of the jurisdiction  
7 retained in the decree expressly addresses a potential future  
8 need to correct or alter the decree depending on circumstances  
9 in the future or errors that have been made in the underlying  
10 decree.

11 I think it's fair to say that in the 1930s and  
12 1940s --

13 THE COURT: But not to argue for rights that  
14 were in existence, just simply overlooked in the petitioners  
15 and movants, at the time the prior decree was entered.

16 MR. HERSKOVITS: Well, no, your Honor.

17 THE COURT: This right on behalf of the Walker  
18 Lake was in existence at that time, was it not?

19 MR. HERSKOVITS: Yes, the public trust  
20 obligation was in existence from --

21 THE COURT: And the representatives of the state  
22 and/or the county could have brought the claim at that time,  
23 could they have not?

24 Why are they not bound then? Why doesn't *res*  
25 *judicata* -- the Reservation of right to modify the decree

1 takes into -- seems to me takes into effect the contemplation  
2 that the beneficial uses, the needs will change.

3 It doesn't take into effect, it doesn't  
4 contemplate that somebody who had a known existing right at  
5 the time of the prior decree would move to modify it. We're  
6 talking about two different animals.

7 So why isn't your motion to intervene now to  
8 assert an existing right at the time of the prior decree, why  
9 isn't it regarded under *res judicata* principles? It was in  
10 existence at the time.

11 MR. HERSKOVITS: Well, your Honor, I believe  
12 that courts have held and the Public Trust Doctrine has  
13 consistently been interpreted that's something that the state  
14 government or a state representative in a proceeding cannot  
15 forfeit, that it is a permanent obligation, a trust obligation  
16 in behalf of the state, to maintain certain conditions in  
17 certain bodies of water and the lands underlying those waters.

18 So I think that even though the decree was  
19 entered at a time when, of course, that obligation existed,  
20 the fact that the state failed to recognize it and exercise it  
21 or didn't recognize the peril to Walker Lake does not  
22 eliminate the obligation, it does not make it any less legally  
23 enforceable and binding on the state --

24 THE COURT: Well, it's really a question for  
25 Judge Reed, but I just don't follow the logic of your

1 argument. I mean, what you're arguing for was that the *United*  
2 *States versus Nevada* was wrongly decided.

3 The United States had a trustee obligation to  
4 protect the Indian water rights in Pyramid Lake. We all  
5 understand they didn't properly represent the Tribe, and they  
6 gave up in the settlement, but the Supreme Court nevertheless  
7 said, well, you're bound.

8 You're making a contrary argument here. You're  
9 saying the state can't forfeit or give up rights. I  
10 understand that argument. But if you're joined in a lawsuit  
11 where those rights are in existence, we know they exist, you  
12 just don't put them forward, seems to me you're bound.

13 I understand you can't forfeit, you can't give  
14 up, you can't waive those by your conduct, but when you're in  
15 a lawsuit which will result in a decree, you have forfeited.

16 If you do not put forth an argument under claim  
17 preclusion and under *res judicata* principles, even if you  
18 cannot waive voluntarily yourself, if you are the  
19 representative of that right, the one under mandatory  
20 counterclaims who must bring it forward, and you don't do it,  
21 you're bound and the parties that you represent are bound.

22 So I -- again, that's an issue for Judge Reed.  
23 But I don't understand the logic of your argument. But that's  
24 fine.

25 MR. HERSKOVITS: Okay, your Honor.

1 Well, that is, at any rate, one of the ultimate  
2 substantive issues in the case.

3 And one thing that I would want to point out,  
4 since we're actually here to address WRID's objections to the  
5 magistrate judge -- Magistrate Judge Leavitt's orders  
6 concerning a number of procedural orders that are not ultimate  
7 substantive or dispositive issues, I would like to return to  
8 those.

9 And I guess I will return to those by taking  
10 issue with an assertion Mr. DePaoli made which is that the  
11 mere decision to apply Rule 25, both 25-A and 25-C, as they're  
12 written and as they've been interpreted and applied by courts,  
13 in this case is not a dispositive issue which he characterized  
14 it as.

15 I don't think under any reasonable construction  
16 of the rule, or the effect that it has on this proceeding or  
17 any case, that it can be looked at as a substantive  
18 dispositive determination.

19 THE COURT: Are we talking about the cut-off  
20 date?

21 MR. HERSKOVITS: No.

22 THE COURT: Successor service.

23 MR. HERSKOVITS: The successors-in-interest, the  
24 service, the binding of successors-in-interest, whether Rule  
25 25 --

1 THE COURT: Well, his primary objection, it  
2 seems to me, was to the date. In other words, you have to  
3 file a response by June of -- July, June of '95, and that date  
4 is gone, and clearly people have been served since that date,  
5 do we not need -- even if we both recognize who has and who  
6 has not been served, do we not need at least a subsequent  
7 notice of some new definite date deadline for your responses  
8 here.

9 MR. HERSKOVITS: Well, your Honor, that's  
10 actually not the issue I was addressing just yet.

11 THE COURT: I'm sorry.

12 MR. HERSKOVITS: I would prefer to get to  
13 that --

14 THE COURT: Okay.

15 MR. HERSKOVITS: -- in a few minutes  
16 when it's --

17 THE COURT: Okay.

18 MR. HERSKOVITS: -- the issue that I have in  
19 mind.

20 THE COURT: What is the issue you're talking  
21 about?

22 MR. HERSKOVITS: The question of whether or not  
23 successors -- the plaintiff parties have to track and serve  
24 successors-in-interest to defendants who have already been  
25 served. As Mr. DePaoli has acknowledged --

1           THE COURT: You've heard the reference to Judge  
2 George's potential orders, the two orders. Have you reviewed  
3 those orders?

4           MR. HERSKOVITS: Yes, your Honor.

5           THE COURT: And you've seen the process that he  
6 suggests under our CM-ECF --

7           MR. HERSKOVITS: Yes.

8           THE COURT: -- for providing constant notice,  
9 continuing notice of anything that's filed if somebody  
10 consents to being served electronically.

11           We're not talking about service, term of art,  
12 Rule 4 service, we're talking about simply service of  
13 subsequent pleadings, you've seen that potential process.

14           MR. HERSKOVITS: Yes, your Honor. And the  
15 plaintiff parties actually, I think, are in agreement with  
16 both the magistrate judge and the defendant parties, WRID in  
17 particular, that such an approach would be appropriate in  
18 these proceedings as well, and that this would be an  
19 economical way to address at least a portion of the service  
20 obligations going forward.

21           It really -- in my opinion, and I think this is  
22 probably understood among the parties, there is not really a  
23 disagreement about a continuing obligation to provide service  
24 under Rule 5. There may be, in a narrow sense on that last  
25 issue concerning just C-125-C that Mr. DePaoli suggests, but

1 more generally we're talking about only Rule 4 service.

2 And the order, in our opinion, correctly applies  
3 Rule 25 by basically saying or ordering that under Rule 25-C  
4 for *inter vivos* transfers, and A, for transfers as a result of  
5 the death of a party, that nothing actually needs to be done  
6 for the judgment in this case to be --

7 THE COURT: Your order simply declares that all  
8 successors will be bound.

9 MR. HERSKOVITS: That's correct.

10 THE COURT: Then what's the matter with his  
11 argument that the magistrate judge has no right to decide  
12 that? The magistrate judge can and should be deciding issues  
13 of service.

14 The judge can't determine whether subsequent  
15 parties, somebody who is not even born yet, will be bound by  
16 the judgment here. That's for another court another day.

17 MR. HERSKOVITS: Well, your Honor, this is a  
18 basic principle that informs Rule 25 and that Rule 25  
19 reflects. I think this is a service issue.

20 And it's important to understand that the reason  
21 that this was brought up to the Court and that it was taken up  
22 as an important procedural step in the case is that, in the  
23 absence of an order like the one that Magistrate Judge Leavitt  
24 entered, the plaintiff parties are being put in the position  
25 of having to continually research, track, and then track down



1 and serve, under Rule 4, every subsequent  
2 successor-in-interest to any owner of any water right who  
3 already was served, and we believe that that is completely  
4 inappropriate and inefficient in this case, and that this is  
5 an *in rem* or quasi *in rem* proceeding as WRID has itself argued  
6 and maintained in the past.

7 And certainly the Court and other courts, such  
8 as the supreme court of this state, in the Mineral County  
9 state petition case that was referred --

10 THE COURT: Well, apparently Judge Reed is  
11 worrying about that conclusion.

12 MR. HERSKOVITS: About whether or not it's an *in*  
13 *rem* proceeding.

14 THE COURT: Right.

15 MR. HERSKOVITS: Well, I don't know -- I, of  
16 course, cannot see if your Honor is ----

17 THE COURT: Is it not a water use right -- you  
18 don't own the water. Is not a water use right more similar to  
19 an inchoate right that can be transferred like any personal  
20 property interest?

21 And therefore this isn't -- to the extent you  
22 intend to affect those users, to the extent you intend to  
23 adjudicate something about the river, its boundaries, or  
24 whether a dam can exist, or the -- I was going to say the  
25 Species Act, the Endangered Species Act or preclusion right,

1 that's different, that really is *in personam*, in other words,  
2 something that's clearly *in rem* jurisdiction, a water use  
3 right -- we're not even adjudicating those water users'  
4 rights, we're simply adjudicating a priority water user right,  
5 but we all acknowledge that it will drastically affect those  
6 junior users. Isn't the junior user's right really an  
7 inchoate right?

8 The user -- the priority junior user doesn't own  
9 the right to water in the year 2020. That user simply has a  
10 right to use the water if there is water available and  
11 consistent with their reasonable and unabandoned use. They  
12 have really an inchoate right.

13 Jurisdiction over them really is *in personam* and  
14 must be *in personam*, is it not?

15 You can't say that we are adjudicating their  
16 right to use a property right now. In 2020, it's an inchoate  
17 right, it's a -- it's a -- what do you call it, a usufruct --

18 MR. HERSKOVITS: Usufructuary right.

19 THE COURT: Right. It's something in the  
20 future.

21 We can't adjudicate nor bind. All we can do is  
22 adjudicate the present claimed increased use right by the  
23 Tribe and the county as to people who would be affected and we  
24 recognize we have to get jurisdiction over because their  
25 rights are being affected. It's *in personam*. It can't be

1 anything but *in personam*. How do you contend with that?

2 MR. HERSKOVITS: Your Honor, I respectfully  
3 disagree.

4 For one thing, under both states' law, water  
5 law, a water right, a usufructuary right to the water, exists  
6 in perpetuity. So I don't believe it's accurate to  
7 characterize it as an inchoate type of property right.

8 I do agree that there is a sort of continuing  
9 nature to a water right under western water law, and that's  
10 true in Nevada and California.

11 THE COURT: You bet. It assumes that the river  
12 still exists --

13 MR. HERSKOVITS: That's true.

14 THE COURT: And all the sources still exist, and  
15 it assumes that all of the prior adjudicated rights don't  
16 expand their right. So it really is in every sense inchoate.

17 MR. HERSKOVITS: Well, your Honor, I'm going to  
18 respectfully disagree and just point out that I think this  
19 Court and every other Court previously that has looked at and  
20 characterized the nature of the interests and the resource  
21 that are at issue, and when a Court takes jurisdiction over  
22 the water in an interstate stream adjudication, or an in-state  
23 stream adjudication of waters rights, is dealing with a kind  
24 of real property and is more akin to an *in rem* kind of action  
25 than an *in personam* kind of action.

1                   Now, of course, those labels, those  
2 characterizations are simply ways of describing the nature of  
3 the interests or rights the Court is concerned with in a  
4 particular case.

5                   In this case, I think that regardless of the  
6 label that's put on water rights, they are the property right,  
7 the only kind of property right that the Court can rule on in  
8 its jurisdiction --

9                   THE COURT: Well, your argument in those cases  
10 that you cite seem to me to be clearly in conflict with the  
11 long line of cases that say that you never acquire the right  
12 to the water, you only acquire the right to use it.

13                   It seems to me it's very clearly in conflict  
14 with that line of cases and that it's -- we really are talking  
15 about what should be *in personam* jurisdiction.

16                   The only reason we're naming all of those  
17 parties, because we're not -- is because it will affect them.

18                   We're not naming those parties because we intend  
19 to adjudicate their right or change their priority. We don't  
20 intend to affect their right through your new motion as to  
21 whether they can take the water from the ditch or whether or  
22 not they can sell it or assign it to the city. We're not  
23 going to adjudicate their right in any means whatsoever.

24                   The only thing we're doing is adjudicating a  
25 priority right, the Tribal right and the county's right.

1           The only reason we acknowledge that we want them  
2 involved in the lawsuit is because we recognize we are going  
3 to affect the potential future use of their right. Doesn't  
4 that equal *in personam* jurisdiction?

5           MR. HERSKOVITS: I don't believe it does, your  
6 Honor. It really pertains to the water right that the  
7 individual human being or entity is the possessor of and not a  
8 person -- there's no kind of personal liability --

9           THE COURT: You're not even petitioning or  
10 asking to adjudicate their right.

11          MR. HERSKOVITS: Well, actually --

12          THE COURT: You're not asking to say anew that  
13 your right is junior. You're not asking to do that.

14          You're not asking to say you can't sell it.

15          You're not asking to say it's no longer in  
16 existence because we know that the river is appropriated two  
17 times over, you're simply asking to adjudicate a priority  
18 right. You're not affecting their right whatsoever.

19          We all understand that there is a major effect  
20 because you want to expand a prior right. It just seems to me  
21 that that equals *in personam* jurisdiction.

22          You want their input. You want to preserve  
23 their due process right to object to the increase of this  
24 prior right, but you don't portend, you don't ask or petition  
25 to adjudicate their right in any means, way or fashion.

1 Therefore that means to me that's *in personam* jurisdiction.

2 MR. HERSKOVITS: Well, your Honor, I don't think  
3 that's quite an accurate characterization of how the merits of  
4 the plaintiff parties' claims would have to be resolved.  
5 Certainly there's a difference --

6 THE COURT: You want to cut off their right --  
7 I'm sorry to keep making the argument, I'm just -- I'm talking  
8 out loud is what I'm doing.

9 You want to cut off their right hereafter  
10 forever to object to your motion to increase a priority right.  
11 That's what you want to do.

12 You're not asking to adjudicate any right that  
13 they have, you just want to cut off their right hereafter to  
14 say, hey, I wasn't part of that increase of a priority right  
15 to me so I have the right now to come in under the retained  
16 jurisdiction for modification and say, hey, Judge, you  
17 previously increased the water level right to the Walker Lake,  
18 but I never had an opportunity to be heard, and that was  
19 adjudicated by you to be a prior right to me, and so I want  
20 now to say my right should be prior, or that right should be  
21 diminished, or it's impairing my use right in an unreasonable  
22 fashion.

23 So what you're saying is I don't want to  
24 adjudicate that junior priority, I simply want to cut them off  
25 from ever again entering objection; now or never, please.

1 That's what you're trying to do.

2 It seems to me that that smacks totally of *in*  
3 *personam* jurisdiction. It's not *in rem* or quasi *in rem*.

4 As to the Tribe, as to your right, I'm sure we  
5 could say that's *in rem*, quasi *in rem*, but as to their right  
6 to forever be barred from interposing objection, that's *in*  
7 *personam*.

8 I'm asking it in the form of a question. It may  
9 not sound like it.

10 MR. HERSKOVITS: Well, your Honor, actually I  
11 think it is because I think if the Court reaches the merits of  
12 the Tribe's claims -- and the United States agency's claims  
13 too, but let's focus on the Tribe now as the example.

14 If it adjudicates the river and the water rights  
15 available to the Tribe, and it finds in favor of the Tribe, it  
16 will actually be substantively affecting directly all of the  
17 other water rights in the basin. It's not just a personal  
18 cutting off --

19 THE COURT: You're claiming it even affects  
20 groundwater user rights, right?

21 How about future cloud seeders? How about those  
22 who say, hey, we want more water on the other side of the  
23 Sierra so we would like a new right to seed the clouds which  
24 we recognize will diminish the flow into the Walker River,  
25 will diminish everything on the eastern side of the Sierras.

1 Are we binding them too?

2 Are we binding all the world which in rem  
3 proceedings portend to do?

4 How about the Japanese who want -- or the  
5 Chinese who want to seed their clouds and thereby diminish our  
6 water along the California coast, are we binding them too?

7 MR. HERSKOVITS: Well, your Honor, none of those  
8 types of claims or issues are actually before the Court right  
9 now.

10 THE COURT: Exactly. And that's the point he's  
11 making. That's the point he's making.

12 MR. HERSKOVITS: But that's a different point,  
13 your Honor, than the fact that the existing set of water  
14 rights created on the river has to be changed and adjusted in  
15 order to account for, one, the bedrock constraint that's  
16 represented by Walker Lake and the obligation to maintain it  
17 at certain levels, at least as we are maintaining, and, on  
18 behalf of the Tribe and the federal government, again,  
19 existing water rights, existing water right claimants, that  
20 the rights that they possess --

21 THE COURT: This whole thing can be solved  
22 simply by striking or abating the two sentences of the  
23 magistrate judge, this is binding on all  
24 successors-in-interest.

25 Why not just simply say it's adjudicating



1 whatever rights, *in rem* or *in personam*, of those people that  
2 have been served on date certain, December 31st, 2009,  
3 adjudicating their rights?

4 They are bound, of course, they were ordered to  
5 be served, and they've served. Just strike those two  
6 sentences.

7 All successors-in-interest are bound.

8 MR. HERSKOVITS: Well, your Honor --

9 THE COURT: What does that mean? Does that mean  
10 that the Japanese and/or the cloud seeders on the other side  
11 of the Sierras will be bound too? Do you see why it raises  
12 those problems?

13 MR. HERSKOVITS: Well, your Honor, let me say  
14 two things about that.

15 One is it only addresses successors-in-interest  
16 to water rights that presently exist under the decree so it is  
17 not in fact talking about water rights that do not exist yet.  
18 So I just want to be --

19 THE COURT: I think that's a very good point,  
20 and that's an additional argument for striking those two  
21 sentences. The only thing you want to do is bind the present  
22 users.

23 MR. HERSKOVITS: Well, no, your Honor.

24 Again, I have to come back to the water rights  
25 at issue being the real proper focus of attention and the

1 Court's jurisdiction, and the reason is that, for the  
2 plaintiff parties, we want to know when we've served the  
3 current owner of a water right under the decree that that  
4 effects Rule 4 service as to that water right.

5 And that if -- and let's say it's you. If you  
6 then turn around and sell that water right to the law clerk  
7 who is here in the courtroom, that we don't suddenly have a  
8 brand-new and perpetually endlessly repeating obligation to  
9 effect new Rule 4 service on that very same water right that  
10 is now been getting shuffled around between people.

11 That's the nature of the problem that gave rise  
12 to the magistrate judge taking up this issue, and there was a  
13 dispute between the plaintiff parties who thought it was clear  
14 under the law that Rule 25 was what governed substitutions of  
15 successors-in-interest or the treatment of  
16 successors-in-interest when there is a property interest, this  
17 type of an interest in a case, pending case, that then gets  
18 transferred during the pendency of the case to a new owner.

19 And the defendants have taken the position that  
20 no, no, no, no, under Rule 19, and it must be Rule 19 that  
21 applies, you now have to totally serve the new owner of that  
22 same water right as if it were a brand-new defendant who was  
23 never properly brought into the case.

24 THE COURT: Yeah. I don't think you should have  
25 to do that. I think that's really nonsense.

1                   But, in the same breath, I don't think that the  
2 magistrate judge's order saying that all successors are bound  
3 should be allowed to continue either.

4                   You don't want to -- you don't need to bind  
5 them. All you need to do is bind all of the present users who  
6 would have the right to have input on this prior right.

7                   And if you get the adjudication that the Walker  
8 Lake surface is a prior right, and it's a right to the tune of  
9 so many cubic feet per second, that's all you need. You don't  
10 care about the future cloud seeder or the future downstream  
11 user or the future transferee. You don't care, you've got  
12 your adjudication of that right.

13                   Why say somebody who lives the next generation  
14 is bound? I don't understand that. Why do you need that?

15                   MR. HERSKOVITS: Well, your Honor, from our  
16 standpoint, and I guess that -- I'll make sure that I don't  
17 misspeak for the other plaintiff parties, the real issue was  
18 the applicability of Rule 25. We need to know how this  
19 process is going to be managed.

20                   THE COURT: Okay.

21                   MR. HERSKOVITS: We need to know that there will  
22 be a completion of service.

23                   THE COURT: Okay.

24                   MR. HERSKOVITS: And we need to know, I think,  
25 at least during the life of the case, that if we have served,

1 again, hypothetically, you on a water right today, and we have  
2 completed Rule 4 service --

3 THE COURT: Well, we've beat this to death, but,  
4 again, I submit to you that maybe the solution is just to  
5 strike those two sentences, and then we have solved the entire  
6 problem.

7 MR. HERSKOVITS: It may be, your Honor.

8 I certainly think that current procedural  
9 requirements and the service issue, continuing open-ended Rule  
10 4 service threat during the life of the case was the real  
11 focus and concern of the plaintiff parties.

12 And it is my belief that that is actually what  
13 Magistrate Judge Leavitt was actually intending to resolve and  
14 not some sort of abstract, absolute ruling or disposition that  
15 the potential for anyone to ever come up with any type of  
16 claim in the future, I don't think that's what this order was  
17 intended to accomplish.

18 THE COURT: Okay. How about the other issues?

19 MR. HERSKOVITS: Okay. If I can have a moment  
20 just to see -- we're not presenting this as we initially  
21 envisioned it.

22 (Discussion held off the record.)

23 MR. HERSKOVITS: Your Honor, just for the sake  
24 of efficiency today, I think that I -- I think if you believe  
25 that we have discussed the successor-in-interest issues pretty

1 exhaustively --

2 THE COURT: I think we have. We've probably  
3 gone much more in-depth as to things Judge Reed wanted to hear  
4 than we intended, but --

5 MR. HERSKOVITS: Well, I do want to give  
6 Mr. Williams a chance to address a couple of points.

7 THE COURT: Please.

8 MR. HERSKOVITS: Perhaps -- why don't I then  
9 allow him to just talk about some of the practicalities.

10 THE COURT: Okay. Thank you.

11 Mr. Williams.

12 MR. WILLIAMS: Thank you, your Honor. Wes  
13 Williams, Jr., on behalf of the Walker River Paiute Tribe.

14 Your Honor, I just wanted to address a couple of  
15 specific issues in the successor-in-interest order, and that  
16 is the implementation of that order, that there are two  
17 sections, paragraphs 19 and 20, towards the end of the order  
18 that talk about procedures that will need to occur after this,  
19 and Mr. DePaoli touched on them briefly.

20 All I wanted to mention is that some of these  
21 issues such as notice to the parties in the future about the  
22 proceedings and things that are going on in the cases, we did  
23 have a conversation with the magistrate -- with the new  
24 magistrate that's been assigned to this case regarding those  
25 issues and also addressed briefly the issues in the Truckee

1 River case that you brought up.

2 THE COURT: Yeah, and I've read Judge Cobb's  
3 summary, and I appreciate his solicitation of the summary.

4 MR. WILLIAMS: So those are things that we'll  
5 continue to work on. We still need to work on the publication  
6 trying to create a website and the process we need to go  
7 through with that.

8 THE COURT: Good.

9 MR. WILLIAMS: And the e-file system.

10 THE COURT: Terrific.

11 MR. WILLIAMS: Mr. DePaoli did mention what's  
12 mentioned in paragraph 20, a duty to provide updated  
13 information, and it mentions that California, Nevada and the  
14 District, will be providing -- will have an obligation to  
15 provide information to the plaintiff parties.

16 We've talked to California and tried to work  
17 some of those issues out. We'll be having similar  
18 conversation with Nevada. As Mr. DePaoli stated, the District  
19 has been providing information.

20 At this point, if we -- the way we planned to  
21 approach it is if we think that there is other information  
22 that they have that they might be able to provide to the  
23 plaintiff parties, we'll discuss that with them, and if  
24 there's a controversy or any problems with that, we'll bring  
25 that up with the magistrate and deal with that in a future

1 time.

2 THE COURT: Okay.

3 MR. WILLIAMS: I believe that's all I really  
4 need to address at this point.

5 THE COURT: Many of these issues have been  
6 resolved, and we appreciate that.

7 MR. WILLIAMS: Yes. Thank you, your Honor.

8 THE COURT: Okay.

9 MS. SCHNEIDER: Good morning, your Honor. I'm  
10 Susan Schneider, I represent the United States.

11 I want to talk about the service -- the  
12 objections to the service cut-off order. It sounds like there  
13 aren't that many objections that remain with WRID, but I think  
14 it's important to point out --

15 THE COURT: Sounds to me like the only real  
16 issue there was he just wants a new notice -- at least to  
17 those who have been served and/or who responded or didn't  
18 respond, a new notice of a deadline for responding to the  
19 initial motion.

20 MS. SCHNEIDER: That actually is in the C case,  
21 that is Mr. Herskovits's.

22 THE COURT: Right. You're not addressing that.

23 MS. SCHNEIDER: He can deal with that.

24 The issue with the service cut-off deals with  
25 the C-125-B case which is the case that the United States has

1 brought in conjunction now on behalf and for the benefit of  
2 the Walker River Paiute Tribe.

3 The issue there is when do you stop -- where's  
4 the cut-off for service so the Court can, as a practical  
5 matter, go ahead and decide and litigate the threshold issues  
6 for phase 1.

7 If you look at the case management order, it  
8 makes it very clear the Court can't do anything until service  
9 is finished in terms of dealing with phase 1. Phase 1 is not  
10 just the identification of the threshold issues, it's also the  
11 litigation of the threshold issues.

12 And so all we're saying is that there's a  
13 cut-off of water rights in existence as of the end of December  
14 of 2009 for purposes of phase 1 of the adjudication.

15 If you go and you take a look at the case  
16 management order, it indicates at -- and I'm sorry I've lost  
17 my place here. It indicates at paragraph 14 that, upon  
18 completion of phase 1, it may be necessary to join additional  
19 parties.

20 And so from what I can see in looking at the  
21 case management order is that the judge has already set out a  
22 couple of places where -- at least one so far, where it might  
23 be appropriate, it may be appropriate for the Court, the  
24 magistrate judge, to go back and take a look at the parties  
25 who have been served. But that's at the end of phase 1.



1           And so I think that if we're dealing with the  
2           service cut-off for the purposes of phase 1, whatever that  
3           contemplates, then I think we're on the same page.

4           Does the Court have any other questions for me  
5           on the service cut-off order?

6           THE COURT:   No.

7           MS. SCHNEIDER:   All right.

8           If I could, at the risk of wading back into  
9           things, I would like to address a few of the other issues that  
10          have come up here.

11          In the very beginning your Honor raised the  
12          issue of *Nevada v U.S.* and wanted to know what made this case  
13          different, and Mr. DePaoli noted that, first of all, Weber  
14          Reservoir, which is one of the claims in the case where the  
15          United States and the Tribe --

16          THE COURT:   Weber is just outside the boundaries  
17          or inside the boundaries of --

18          MS. SCHNEIDER:   It's inside the boundaries which  
19          is also relevant because it's -- one of the other issues out  
20          there, it was built pursuant to federal law which is something  
21          again that would be in front of Judge Reed, but Weber's  
22          completion was after the April 1936 date of the decree.

23          The second point, as Mr. DePaoli raised, is that  
24          there were lands added to the Reservation pursuant to  
25          statutory authority from I believe it was September of 1936,

1 and that lands were added at various times beginning in 1936  
2 and thereafter.

3 THE COURT: Are these just generally  
4 federally-held or BLM lands that are added under permission of  
5 the statute? What are these lands? They're not lands  
6 originally part of the agreed treaty, they're lands that under  
7 the treaty and subsequent statute may be added.

8 MS. SCHNEIDER: Well, the Reservation was  
9 created in the late 1800s -- I'm going to be very -- not  
10 specific here, but the Reservation was created in the mid  
11 1800s, and, in the early 1900s, land was taken away from the  
12 Reservation and some of it was opened up to settlement, some  
13 of it remained public land.

14 In the lands that went back to the Reservation  
15 or were given to the Reservation, 1936 and thereafter, some of  
16 them may have been still in public domain, some of them may  
17 have been in other uses.

18 That really is going to require -- it's a very  
19 fact specific determination and analysis to be made at a later  
20 time.

21 But, at any rate, when the Tribe's initial water  
22 right was adjudicated in 1936, it did not include these lands,  
23 so it's something that goes -- it's beyond the scope of the  
24 decree.

25 The third issue that Mr. DePaoli mentioned is

1 that there was -- groundwater was never a part of the --

2 THE COURT: Well, a reserved right, we all  
3 recognize, and I think all the cases recognize, is a great big  
4 gaping hole and exception to the *res judicata* effect and prior  
5 adjudication of water rights. We all recognize that.

6 And, clearly, in water law, the reserved right  
7 of an Indian Tribe under treaty to reasonable use of water  
8 thereto is a big gaping hole in that normal, common principle,  
9 and that's, of course, why you're proceeding, pursuing it now.

10 MS. SCHNEIDER: In part.

11 The use of groundwater was not part of the  
12 original Walker River case. It was -- I don't even think  
13 Nevada had a groundwater water statute until 1939.

14 THE COURT: Is groundwater part of that concept  
15 of reserved water for Indian tribes under their treaties and  
16 relative to their Reservations?

17 MS. SCHNEIDER: The United States' position is  
18 that it is, and there are certainly cases in other states  
19 holding that the reserved right extends to groundwater.

20 THE COURT: Has the Supreme Court ever held  
21 that? You know, they have their own cases, especially  
22 involving disputes between states where they have their own  
23 masters appointed. Have they ever recognized that?

24 MS. SCHNEIDER: I don't believe so, your Honor,  
25 but I would probably -- before I'd say for sure, I would go

1 and check it out some more, but I don't believe so.

2 But there's a fourth area -- a fourth issue I  
3 wanted to mention to the Court that makes this case different  
4 from the Pyramid Lake case, and that is, in 1940, after the  
5 Ninth Circuit reversed a portion of -- a part of the Walker  
6 River Decree and required that -- among other things, that the  
7 Tribe's right be considered to be a user of right, the parties  
8 entered into a stipulation that said that the decree -- and I  
9 don't have it in front of me, but it is quoted in our  
10 pleadings -- but that the decree covers the water rights as of  
11 the date of April 15th or 14th of 1936.

12 And so -- and that --

13 THE COURT: In other words, it excepted out  
14 reserved rights that may arise in the future.

15 MS. SCHNEIDER: That's correct, among other  
16 things, and so that's one of the other things that makes this  
17 case very different from the Pyramid Lake case.

18 The other thing I wanted to touch upon, your  
19 Honor, is that you and Mr. DePaoli raised some issues about  
20 groundwater, and one of the concerns you had was that somehow  
21 this case is becoming bigger and broader and broader.

22 And I think it's important to point the Court,  
23 first of all, to the case management order from 2000 that  
24 directs the United States and the Tribe to make service on  
25 nine categories of persons and entities. A number of them are

1 surface water users, a number of them are groundwater users.

2 And so the reason -- part of the reason that  
3 we're asking questions about successors-in-interest is --  
4 dealing with groundwater is not that we want to broaden the  
5 case, we want to deal with the directions we were given by  
6 Judge Reed.

7 Before the 2000 case management order was in  
8 place, or when we were -- excuse me, when we were briefing and  
9 arguing the question of what should be in a case management  
10 order, there was sort of a chicken-and-egg question that was  
11 present to the Court.

12 THE COURT: What issues are we dealing with  
13 before we can answer the service question?

14 MS. SCHNEIDER: Well, who -- do we serve the  
15 groundwater -- well, let me back up even a little further.

16 The initial case developed, the initial  
17 pleadings that were filed by the United States --

18 THE COURT: That's why I made the argument that  
19 it really is *in personam*.

20 I mean, I can certainly see why the adjudication  
21 of the Tribal right or the county's right is an *in rem*  
22 proceeding. As to all the world, this is what this right  
23 consists of. That's *in rem* it sounds to me.

24 But when you are identifying the issues -- we're  
25 identifying the fact that it affects downstream

1 successor-in-interest users, people who live in the next  
2 century, and therefore we want the input of anybody at least  
3 who now we can determine has a present use or a use that may  
4 be affected, for example like a groundwater user, we want to  
5 serve those people.

6 It seems to me that as to them, it's clearly *in*  
7 *personam*. But we want their input. If we want to cut off  
8 their right to give input or to hereafter object, you can't  
9 cut off the rights of somebody in the future.

10 MS. SCHNEIDER: Your Honor, let me go back and  
11 talk a little bit about the groundwater issue that you had  
12 mentioned because you had said at one point that we shouldn't  
13 deal with broadening the case.

14 THE COURT: Right.

15 MS. SCHNEIDER: The point is Judge Reed  
16 broadened it for us, and in the case management order he  
17 directed us to go out, and there has now been over \$1.5  
18 million being spent on getting service.

19 THE COURT: You bet. But you need to understand  
20 why that he did, right?

21 I had an old judicial colleague who once told  
22 me, he said if you dance to a crazy tune, you're going to  
23 dance a crazy dance.

24 So this has ballooned into a  
25 one-and-a-half-million-dollar problem. It doesn't need to do

1     that.

2                 Judge Reed required you to serve all these  
3     people because he realized, just like you acknowledged, that  
4     it had an effect on certain people who were present users.  
5     That's why he required you to serve all those people other  
6     than just the original parties to the decree lawsuit.

7                 The reason for doing that relates to an *in*  
8     *personam* need, that is, to cut off their right to be heard,  
9     cut off their right to object, cut off their right to give  
10    what we want, their input and objection.

11                Your dealing with the Tribal right is *in rem*  
12    clearly. It's as to all the world. Only this Court that has  
13    *in rem* jurisdiction over that right, under its decree and  
14    continuing jurisdiction, only this Court has cognizable  
15    jurisdiction over the scope of that right.

16                We don't want to have any effect on somebody  
17    else's use, their priority, where they can take out the  
18    transfer. We don't need to have that effect. So appreciate  
19    why Judge Reed said that.

20                I understand that you felt the need to balloon  
21    this into a million and a half dollars, the parties have done  
22    that, but we're dancing to a crazy tune and therefore we have  
23    a million-and-a-half-dollar dance. We don't need to do that.

24                MS. SCHNEIDER: Well, and then the question then  
25    that's before the Court is how much more money do we have to

1 spend serving people who we have already served.

2 Again, if you -- if the Court --

3 THE COURT: Let's see how Judge Reed answers  
4 that, but I don't see that you have to spend any more money.  
5 I think just delete those two sentences, agree to a procedure  
6 like Judge George adopted for giving notice, e-mail notice  
7 without mail costs at all, and we've solved the problem.  
8 Let's dance to a clearer tune.

9 MS. SCHNEIDER: The basic legal position is that  
10 successors-in-interest are bound after the original party has  
11 been served.

12 If we do not bind successors, then Mr. DePaoli  
13 will be standing up here in a few years, or maybe his son will  
14 be standing up here in a few years saying that because there  
15 was no binding of successors, that we will then have to go out  
16 and re-serve people unrelated to the case.

17 THE COURT: Why not leave it to the judge who  
18 lives in the next century who will have that case? Why not  
19 leave it to them? Why should we deal with that issue now?

20 I made argument to counsel, isn't your successor  
21 bound anyway if what's being sold is an inchoate right? Just  
22 like I buy a lawsuit, I know I take it subject to whatever the  
23 Court on that lawsuit may do.

24 So he's got a problem in representing his son in  
25 the next century who wants to make that argument. So why



1 should we involve ourselves -- let him make that argument to  
2 the judge that lives in the next century. Why should we  
3 resolve that question now?

4 MS. SCHNEIDER: Let me return to the point that  
5 I was -- hadn't quite finished, and I apologize for that.

6 We were working on the case management order.  
7 One of the issues that the judge wrestled with was whether the  
8 case management order should require all the service that  
9 might have to be made or -- before the Court did the threshold  
10 issues, or whether the Court should, with a small group of  
11 parties, address the threshold issues making a determination  
12 as to whether he, for example, wanted to exercise the  
13 jurisdiction over groundwater users.

14 And it's Judge Reed who made the determination  
15 that the nine categories of water rights would be served, and  
16 that included the substantial number of groundwater users.

17 And that's how -- I mean, the Court has  
18 expressed some concern about the case being broadened, but  
19 it's because when the issue came up as to whether groundwater  
20 was legitimately part of the case, this was the Court's  
21 response, basically, go out and serve all -- find out who owns  
22 all the groundwater rights here in these categories that he  
23 identified and go and serve them, and we did that. And so  
24 that's how it is that we come here today trying to figure out  
25 what the next steps are.

1 THE COURT: Right. I think we've got it fully  
2 for Judge Reed's benefit, and there are several different  
3 courses he could take for judicial efficiency and to get this  
4 thing off dead center and get it into the merits phases.

5 He may well decide I'm just going to affirm the  
6 magistrate judge's rulings because it gets it on track for  
7 reaching a conclusion.

8 My recommendation is maybe change course a  
9 little bit, just simply say the December 31st, 2009 date is  
10 great.

11 All we wanted, anyway, in mandating that you  
12 serve all these people, is we wanted their input, their right  
13 to object to what we all recognize will affect them.

14 We are, however, dealing with an *in rem* lawsuit  
15 or motion, rather, and that is *in rem* as to an existing right  
16 that's considered under the decree.

17 We will issue a decree as to the extent and  
18 nature, especially the extent of that right, and it's *in rem*  
19 as to all the world. But the only people that we need input  
20 from are those who would have been affected as of  
21 December 31st, 2009.

22 We have the cut-off date, the order is fine.  
23 Just delete those two sentences. That's my recommendation to  
24 Judge Reed.

25 I recognize that he could take that course, or

1 he may take the course, just to get this thing off dead  
2 center, I'm just going to affirm the magistrate judges who  
3 have done their very best effort in this process.

4 So I think we've got all the arguments. I'm not  
5 deciding it, Judge Reed is deciding it. Unless there's really  
6 something else you want his ears to hear, which I'll let you  
7 state now, I think we've got it.

8 MS. SCHNEIDER: One other clarification.

9 In the pleadings for the successor-in-interest  
10 order, the objectors and the party plaintiffs both agreed that  
11 it was a nondispositive order that was within the authority of  
12 the magistrate judge.

13 I think Mr. DePaoli may have slipped -- there  
14 may have been a slip of the tongue when he said it was  
15 dispositive, but everybody has agreed in their pleadings it's  
16 a nondispositive motion that would be subject to the court  
17 order unless we --

18 THE COURT: Well, he just said that those two  
19 sentences make it dispositive. As to anybody who exists in  
20 the future, it's dispositive because it says they are bound.

21 MS. SCHNEIDER: And we respectfully disagree.  
22 Our points are set out in our pleading and including the prior  
23 findings of Judge Reed that this case is *in rem*.

24 Thank you.

25 THE COURT: Please, final comment.

1 MR. HERSKOVITS: Your Honor, I apologize. I  
2 have now actually had a chance here to address the third  
3 order, the C-125-C service report order.

4 Mr. DePaoli went through a number of the issues  
5 that WRID had objected to and --

6 THE COURT: Most of which have been resolved.

7 MR. HERSKOVITS: Most have been resolved, and I  
8 think we can present them back to the magistrate judge in the  
9 form of a request for implementation, direction for  
10 implementation.

11 THE COURT: You bet.

12 MR. HERSKOVITS: There's one area of  
13 disagreement. I think we've addressed it adequately in our  
14 written pleadings, but I do need to respond to Mr. DePaoli  
15 with regard to the February 9, 1995 order entered by Judge  
16 Reed.

17 Now, since Judge Reed is deciding this and is  
18 also the judge who entered this order, it will obviously be  
19 his construction or interpretation of what the order was  
20 intended to do that decides this.

21 I just want to point out that we believe that  
22 WRID is misinterpreting or mischaracterizing the relevant  
23 portions of this order to eliminate the need for defendants  
24 who are properly served to have made any kind of response  
25 whatsoever.

1           We are agreeing that essentially defendants here  
2 did not make any appearance and did not file any kind of  
3 waiver or notice in lieu of summons, who did absolutely  
4 nothing despite having proper Rule 4 service, and the schedule  
5 that he is alluding to is a schedule that relates to the  
6 responses to the motion to intervene.

7           It's not the same as making an appearance, or at  
8 least that preliminary response of some sort by a defendant  
9 who is served in a case, and that's why we believe that with  
10 regard to those particular defendants who perhaps, because  
11 they didn't believe the case mattered, or were hostile to it,  
12 or didn't care, did not do a single thing whatsoever.

13           And we believe that the order Judge Reed entered  
14 in February of 1995 really does conclusively put those  
15 defendants or those individuals in the position of having been  
16 deemed to have notice of all subsequent pleadings.

17           Thank you.

18           THE COURT: We'll note that.

19           Anything else finally?

20           MR. DePAOLI: Your Honor, just very briefly.

21           I just want -- because a long time has gone by  
22 in these proceedings, I want to just respond to the idea that  
23 Judge Reed broadened this proceeding when -- in the C-125-B.

24           When C-125-B was started, the United States and  
25 the Tribe were making claims only as to surface water. There

1 were no claims as to groundwater at all. Judge Reed entered  
2 the service order.

3 And they came back to Judge Reed and actually  
4 said should we serve groundwater users when the pleadings were  
5 in that state, and actually took the position that, yes, we  
6 ought to serve all the groundwater users in the basin. Judge  
7 Reed answered that with another order saying no, we don't need  
8 to serve groundwater users.

9 Then they amended their pleadings to include  
10 claims against groundwater, and that's when Judge Reed took a  
11 look at do we need groundwater folks in this litigation, and  
12 that's how that developed.

13 THE COURT: Okay. I think that's enough. I  
14 think we've got a full discussion for him. It will be very  
15 entertaining to him.

16 I appreciate the arguments, and you've got some  
17 heavy issues.

18 I strongly appreciate and express gratitude for  
19 the issues you've been able to resolve. You'll handle that by  
20 stipulation for amendment of the order, or however you may  
21 handle it, by stipulation.

22 And we will present this tape -- I'll ask Madam  
23 Clerk to prepare a tape, not a transcript at this juncture,  
24 unless the parties ask for it, but simply a tape-recording for  
25 Judge Reed, and I'm sure somewhere down the road the parties

1 or somebody will be asking for a transcript, but at this  
2 juncture simply for a tape. Okay?

3 All right. Thank you very much. Thank you for  
4 your attention.

5 -o0o-

6  
7 I certify that the foregoing is a correct  
8 transcript from the record of proceedings  
in the above-entitled matter.

9 /s/Margaret E. Griener 2/21/2012  
10 Margaret E. Griener, CCR #3, FCRR  
11 Official Reporter  
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	65:2, 72:14, 82:9, 82:21	<b>9</b>	69:14, 71:4, 73:9, 81:11, 84:2	<b>agrees</b> [1] - 34:22
<b>'95</b> [3] - 41:3, 42:11, 54:3	<b>2011</b> [1] - 35:9 <b>2012</b> [3] - 1:8, 3:1, 22:6	<b>9</b> [1] - 84:15 <b>9th</b> [1] - 38:22	<b>addressed</b> [4] - 10:12, 11:20, 69:25, 84:13	<b>ahead</b> [5] - 5:15, 5:19, 27:9, 41:5, 72:5
<b>/</b>	<b>2020</b> [2] - 58:9, 58:16	<b>A</b>	<b>addresses</b> [2] - 50:7, 65:15	<b>akin</b> [1] - 59:24
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