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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE WILLIAM G. COBB, MAGISTRATE JUDGE
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UNITED STATES OF AMERICA, :
 :
Plaintiff, : No. In Equity No. C-125-RCJ
 : Subproceedings: C-125-B and
-vs- : C-125-C
 :
WALKER RIVER PAIUTE TRIBE, : 3:73-CV-125-RCJ-WCG
et al., : 3:73-CV-127-RCJ-WGC
 : 3:73-CV-128-RCJ-WGC
Defendants. :
 : August 6, 2013
 :

TRANSCRIPT OF STATUS CONFERENCE

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Transcribed by: Margaret E. Griener, CCR #3, RDR
Official Reporter

(Appearances continue on next page.)

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APPEARANCES (Continued):

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RENO, NEVADA, TUESDAY, AUGUST 6, 2013, 1:38 P.M.

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THE CLERK: This is the date and time set for a status conference in case number 3:73-CV-125-RCJ-WGC, 3:73-CV-127-RCJ-WGC, and 3:73-CV-128-RCJ-WGC, United States of America versus Walker River Irrigation District and others.

Counsel, may I please ask that you state your appearance and on whose behalf you represent starting with counsel present today.

MR. GUARINO: Your Honor, for the United States, my name is Guss Guarino. I represent the United States particularly with respect to the interests associated with the Walker River Tribe.

MR. HERSKOVITS: Good afternoon, your Honor. On behalf of Mineral County, I'm Simeon Herskovits, counsel for the county. With me on the telephone, I believe, is Iris Thornton, also counsel for Mineral County.

THE COURT: Who's on the telephone with you? I'm sorry.

MR. HERSKOVITS: Iris Thornton --

THE COURT: Oh, okay.

MR. HERSKOVITS: -- is also --

MR. DePAOLI: Good afternoon, your Honor. Gordon DePaoli on behalf of the Walker River Irrigation

1 District.

2 MR. FERGUSON: Good afternoon, your Honor. Dale
3 Ferguson on behalf of the Walker River Irrigation District.

4 MR. SWAINSTON: Good afternoon, your Honor.
5 Harry Swainston on behalf of Swainston-Wiggins Farms.

6 MR. MIXSON: Good afternoon, your Honor. Chris
7 Mixson of the Wolf Rifkin law firm on behalf of the National
8 Fish and Wildlife Foundation.

9 THE COURT: Thank you. Hold on one second.

10 (Discussion held off the record.)

11 THE COURT: Excuse me. Please go ahead.

12 MS. URE: Good afternoon. This is Therese Ure
13 with Schroeder law office on behalf of the Circle Bar N Ranch
14 and Mica Farms.

15 THE COURT: Ms. Peterson, I note that you're
16 there in the audience with our water commissioner, Water
17 Master, Mr. Shaw.

18 MS. PETERSON: Thank you.

19 MR. SHAW: Thank you, your Honor.

20 THE COURT: And we have some telephonic
21 appearances?

22 MS. ADAMS: Your Honor, this is -- excuse me,
23 this is Marta Adams for the Nevada Department of Wildlife.

24 MR. STOCKTON: This is Bryan Stockton for Nevada
25 Department of Wildlife.

1 MR. NEVILLE: Good afternoon, your Honor. This
2 is Michael Neville for the California state agencies in
3 San Francisco.

4 Also on the line is Erin Mahaney, counsel for
5 one of those agencies, the State Water Resources Control
6 Board.

7 MR. NEGRI: Your Honor, David Negri with the
8 Justice Department for the United States particularly with
9 regards to the U.S. Army, Marines, Bureau of Land Management,
10 and Forest Service.

11 MR. BENESCH: George Benesch for Lyon County.

12 MS. SIMON: Stacy Simon for Mono County.

13 MS. NGUYEN: Good afternoon, your Honor. This
14 is Nhu Nguyen from the California Attorney General's office on
15 behalf of the California state agencies from the Sacramento
16 office.

17 MR. WILLIAMS: Your Honor, this is Wes Williams,
18 Jr., on behalf of the Walker River Paiute Tribe.

19 MS. THORNTON: Good afternoon, your Honor. This
20 is Iris Thornton on behalf of Mineral County.

21 THE COURT: It appears that everyone has stated
22 their appearances.

23 I would ask counsel to remain seated during
24 their comments and presentations. Please state your name
25 beforehand so the record is complete and accurate.

1 Before I proceed, I would like to introduce some
2 guests who are visiting the justice system from Spain and the
3 Basque country.

4 (The Court introduced visitors in the
5 courtroom for the record.)

6 Counsel, although at the hearing two weeks ago I
7 mentioned that we wouldn't need an agenda, last week I got to
8 thinking that we do, and I did -- I think you've all received
9 the proposed agenda I distributed for this hearing, and then
10 Walker River added an additional comment about an agenda item
11 for this hearing, and I think it all revolves around this
12 issue of what are we going to do about service.

13 Judge Jones does not appear to be enamored of
14 the e-service issue -- e-service order as to, I would say, one
15 component.

16 We have those who have elected to receive
17 e-service, and according to Ms. Lia Griffin, who is here, of
18 the 950 copies of the order that were sent, 142 elected to
19 receive service via e-mail, 75 stated they could not handle
20 e-mail and wanted to receive traditional service through the
21 USPS, 113 were returned undeliverable, which is the same
22 problem I noted at the last hearing, and 620 have not
23 responded, and I think it's mainly the failure to respond
24 group that we need to address.

25 Judge Jones suggested the parties consider some
type of notification process via postcard which is somewhat

1 problematic for the Court. What we would have to do is I
2 don't think physically compatible with postcard mailings here,
3 and I'm not quite sure how we would have to work that out,
4 although I suppose with a capital overlay of money we don't
5 have, we could overcome that hurdle.

6 Anyway, we don't have minutes from that hearing
7 yet, we don't have a transcript, and I can't be specific as to
8 what Judge Jones noted as due process concerns, but that's my
9 recollection.

10 Does anybody want to take the lead on that
11 issue? Maybe, since it's a 127 issue, Mr. Guarino, do you
12 want to address it, or --

13 MR. GUARINO: Yes, I'll start, your Honor. For
14 the record, Guss Guarino for the United States.

15 My recollection -- I too have spoken with
16 Ms. Griffin about where we're at on sort of -- with the
17 universe of folks out there, and I agree with the Court's
18 description that the focus should be on I think particularly
19 those 620 who have not responded. I think that was the
20 concern that Judge Jones expressed in our hearing last.

21 As I understand it, this notion of sending a
22 postcard out is similar to what is going on in the Orr
23 Ditch-Truckee River case. I am unfamiliar with that
24 litigation --

25 THE COURT: Let me just give everyone the

1 citation for that. It's 3:73-CV-31, and the particular order
2 is Document 1198.

3 MR. GUARINO: Thank you, your Honor.

4 I had talked to other counsel, particularly
5 Mr. Mixson and I had a brief conversation, I think, last time
6 after the hearing, and he described it briefly how it works in
7 the Orr Ditch-Truckee River litigation with these -- to these
8 postcards. I think that's what -- my recollection or
9 understanding is that's what Judge Jones was getting at when
10 we were -- when we were here last.

11 I don't know if Mr. Mixson can describe for the
12 Court and the rest of the parties here what he described to me
13 about how that postcard system works, but I don't want to try
14 it because I haven't done it yet.

15 THE COURT: Well, before we get to that, let me
16 add just one more comment.

17 And I think what we're focusing here on that
18 e-service order is paragraph 17 which stated that,

19 "Any unrepresented party who fails to
20 complete and return the attached notice shall be
21 deemed to have consented to receive subsequent notice
22 and service of all filings in this matter by taking
23 responsibility to check the public website at," the
24 web address, "and shall be deemed to have received
25 notice of all subsequent orders and other filings in

1 this matter."

2 And I think that's the provision that Judge Jones
3 had some qualms about.

4 And I think it affects not only the Court and what
5 we have to send out and the scope of what we send out, but the
6 parties. Let's say when you do your briefing on these
7 threshold issues, that probably has to be served on everyone
8 so --

9 MR. GUARINO: Or at least this idea of notice --

10 THE COURT: Yeah, what are you going to do.

11 So I'm sorry, go ahead.

12 MR. MIXSON: Good afternoon, your Honor. For
13 the record, it's Chris Mixson for the National Fish and
14 Wildlife Foundation.

15 And Mr. Guarino and I did discuss this briefly
16 at the end of the last status conference, and there's other
17 attorneys representing parties here who are also involved in
18 the Truckee River matters who may also be able to fill any
19 gaps I may leave.

20 But the way it essentially works is I think that
21 we only provide notice for sort of the substantive filings.

22 THE COURT: Okay. What's the substantive
23 filings?

24 MR. MIXSON: Well, that's obviously, you know,
25 in the eye of the beholder, but, I mean, obviously, briefs,

1 any motions, orders, that kind of thing --

2 THE COURT: Notice --

3 MR. MIXSON: Changes of address, changes of
4 attorney I don't think --

5 THE COURT: Notice of a hearing?

6 MR. MIXSON: Notice of a hearing I would expect,
7 yeah.

8 THE COURT: This notice -- or this hearing was
9 noticed, and, Ms. Griffin, correct me if I'm wrong, but that
10 was mailed to everyone in this case, was it not?

11 MS. GRIFFIN: Yes, your Honor.

12 MR. MIXSON: So what happens is a party e-files
13 a document, you know, through their attorney if they're a
14 represented party, and then they prepare a postcard that then
15 goes out to all the parties in the case.

16 And on the postcard is a notice of the name of
17 the pleading or filing and directions on how to go to a
18 website where that document can be viewed for free and
19 downloaded for free and also the address of a local public
20 library, I believe it's in Fernley, Nevada, for the Truckee
21 River --

22 THE COURT: That's in the Orr Ditch case, they
23 use Fernley.

24 MR. MIXSON: That's right, your Honor.

25 THE COURT: And there were several libraries

1 mentioned here, but no one really said if the libraries are
2 going to be capable of receiving these things and what do they
3 do with them.

4 What if they say we don't want them and throw
5 them away? Does that satisfy due process?

6 MR. MIXSON: I don't know. I'm not prepared to
7 answer that right now.

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

10 On that point, you know, it is our position that
11 we are meeting due process by the steps we've already taken.
12 We are dealing with those folks who have been given notice and
13 served and actually have entered their appearance on this
14 action.

15 We are, I think, taking an exceptional step by
16 contemplating doing what -- what we're contemplating doing in
17 sending this extra notice out to individuals.

18 THE COURT: What notice do you send out?

19 MR. GUARINO: Right now -- well, right now we've
20 sent out -- we've served the folks with our -- with our
21 package giving notice of this lawsuit.

22 THE COURT: Right.

23 MR. GUARINO: They have returned -- that's what
24 these folks are. They have returned either a waiver of
25 service, or they entered their appearance, either them --

1 they've returned delivery of service and/or they have either
2 entered their own appearance as pro se parties, or they have
3 entered their appearance through counsel, and that's how we
4 come down to this about 1100 folks or 950 folks that we're
5 talking about here.

6 I would argue we have met due process.

7 THE COURT: Well, you've met due process to that
8 point.

9 MR. GUARINO: Yes.

10 THE COURT: You've given them notice.

11 But if you file a motion for summary judgment in
12 this case, you have to serve everyone, don't you?

13 MR. GUARINO: Yes.

14 THE COURT: So what are you going to do about
15 those -- you have 20 attorneys going to get it by e-service.
16 What are you going to do about the other 930?

17 MR. GUARINO: Well, we've provided them the
18 opt-in or opt-out which is what Ms. Griffin had described.

19 THE COURT: You mean, the e-service order.

20 MR. GUARINO: Yes.

21 THE COURT: Which Judge Jones said is not going
22 to fly.

23 MR. GUARINO: Yes, I -- I understand that. I
24 have a different opinion than Judge Jones, and Judge Jones is
25 the judge, so we're going to comply with what the judge says.

1 THE COURT: Good advice.

2 MR. GUARINO: They teach you that in law school.

3 But we are being, I think, extremely safe with
4 trying to contact folks giving them notice.

5 Giving them this postcard notice is, I think, an
6 extra step that we can, of course, do. It is very
7 expensive -- it is more than insignificant in cost given that
8 we're talking about several hundred folks per pleading.

9 I think we should consider limiting that to
10 those motions that only affect substantive rights. Briefs
11 obviously would be one of those things.

12 But I think if a party files something, a change
13 of address, a -- a request to be heard telephonically, then
14 the party can put some statement at the end of their pleading
15 saying that this -- this motion, this request, this notice
16 doesn't affect the substantive rights of any other party and
17 therefore we have not provided any postcard notice as required
18 by the e-service order, that sort of thing, to try to keep
19 this reasonable.

20 THE COURT: The government convinced me to
21 modify the CMO by saying why not just go with what the Federal
22 Rules of Civil Procedure provide.

23 MR. GUARINO: Yes.

24 THE COURT: And I bought into that and, I think,
25 rightly so. I still embrace this supplemental CMO.

1 But does what you just proposed about just
2 giving notice of substantive issues comply with the federal
3 rules?

4 MR. GUARINO: I think as long as the parties
5 have been provided the notice to their last known address.

6 I think -- I think the key here is, your Honor,
7 these are folks who have been provided notice, and under the
8 rules, there's -- once a party is served -- under Rule 5, once
9 a party is served, the United States -- any party is allowed
10 to rely upon the last known address for service, and that's
11 what --

12 THE COURT: Well, I'm not quarrelling with that.

13 MR. GUARINO: Right.

14 THE COURT: I'm just saying about these -- what
15 we do serve upon those for whom we do have a last known
16 address.

17 MR. GUARINO: Yes. And so what we've done is
18 we've sent the order to the -- to people at their last known
19 address instructing them that this is what they have to do.

20 And I don't see why -- from the position of the
21 government, it seems reasonable to instruct people to take
22 steps to be informed about this court, about this court's
23 actions.

24 And so I do think the CMO and the electronic
25 service order, to the extent that it's been drafted described

1 now, is compliant with the Federal Rules of Civil Procedure.

2 I am here to try and work with the Court and all
3 parties as well to try and come up with a good solution to
4 address the concerns that Judge Jones described.

5 THE COURT: Do you think it's only paragraph 17
6 we need to modify?

7 MR. GUARINO: At this time, yes, Judge, I agree
8 with the Court.

9 THE COURT: Does anybody else wish to make a
10 comment of how we modify the e-service order to comply with
11 Judge Jones' direction?

12 MR. DePAOLI: Yes, your Honor. Gordon DePaoli
13 on behalf of Walker River Irrigation District.

14 Your Honor, I know or I agree that Judge Jones
15 was focused primarily or exclusively, I guess, on the folks
16 who did not respond at all.

17 But I want to note that in Orr Ditch Judge
18 George, in the provisions that he made for postcard notice
19 there, was focused on the folks who also -- well, in that case
20 there wasn't any specific provision for anyone who didn't
21 respond, and I don't know to what extent people did not
22 respond, but he was focused on the people who actually
23 responded and requested notice by mail.

24 And as I heard Judge Jones the other day, he was
25 indicating that those who have requested service by mail would

1 actually be served by mail with a complete copy of whatever is
2 filed, and I think you indicated that there's probably 45 of
3 those at least at this point in time.

4 But the e-service order --

5 THE COURT: Seventy-five.

6 MR. DePAOLI: Seventy-five?

7 But the e-service order also, in paragraph 4,
8 stated that the Court was going to determine later the nature
9 and scope of what would be served on the mail-only parties.

10 And one of the things that Judge George was
11 concerned with was not burdening the other parties in the case
12 with so much service that they simply decided not to
13 participate.

14 And so he wanted to strike a balance between
15 getting notice to people who had requested notice by mail and
16 the ability for individuals to participate in the proceeding,
17 and that's how he, I think, decided to go with the postcard
18 notice that Mr. Mixson describes.

19 THE COURT: Let me -- Mr. DePaoli, I think
20 you're entirely correct. At page 2 of Judge George's order he
21 says,

22 "To ensure notice to those participants who
23 are not represented by counsel and who have elected
24 to receive notice by mail and to limit costs
25 necessarily incurred."

1 So I think what Mr. DePaoli is noting is accurate as
2 to what Judge George did.

3 But the way I read his order, it doesn't -- he
4 didn't seem to address at all those who have not made any
5 return effort or --

6 MR. DePAOLI: And I do not know to what extent
7 there was that situation. There were very many -- there's a
8 very long list of folks who requested by mail in that -- in
9 that proceeding.

10 Rule 5, it seems to me, does allow -- and Judge
11 Reed in the case management order originally spoke to or
12 provided for ways to deal with service at this point in time.

13 But Rule 5 does -- does indicate that the -- in
14 cases where there are multiple defendants, that the Court may
15 make other orders pursuant to Rule 5(c).

16 I have not researched that to know how that
17 might apply to a plaintiff and a plaintiff's obligation to
18 make service on other defendants, but I do believe that it
19 expressly allows for defendants to not to have to serve other
20 defendants with their pleadings, and I think that's what --
21 one of the things that paragraph 4 of the e-service order was
22 intending to address when we got to this point.

23 THE COURT: I thought paragraph 4 was more
24 determining what we've discussed with Mr. Mixson about what is
25 and is not a substantive document.

1 MR. DePAOLI: Well, I --

2 THE COURT: And I think down the road maybe I
3 was supposed to determine that this is substantive, serve it,
4 this is not substantive, don't serve it.

5 MR. DePAOLI: At least -- and when I was working
6 with Susan Schneider on that, what I had in mind was not only
7 what, but I also had in mind the concept of a postcard type
8 notice as we have in the Orr Ditch -- in the Orr Ditch
9 proceeding.

10 THE COURT: How would you use the postcard
11 notice apparatus in this case and under what circumstances?

12 MR. DePAOLI: I think I would use it, the
13 postcard notice, if we're going to -- and I think we are going
14 to do postcard notice. I would use it for those who haven't
15 responded and for those who have requested service by mail.

16 I think that the -- the -- one of the things
17 that we need to do some further investigation on, however, is
18 the extent to which the libraries that we spoke about at the
19 status conference on the 25th have the ability and the
20 willingness to be a repository for what gets filed here and
21 will keep it on file.

22 One of the things that came up in Orr Ditch was
23 the fact that from time to time public libraries just dispose
24 of things that have been sitting around for awhile. And so it
25 would have to be worked out.

1 The other thing about the Judge George order is
2 that it specifies that the Fernley library is a place where
3 someone can go and actually obtain, if they pay for it, a copy
4 of what was filed as distinguished from just going there to
5 look at it.

6 So I think if we're going to do the postcard
7 notice along the lines that was discussed on July 25th, we
8 need to identify a library or libraries where we are trying to
9 set up a repository, and then make sure that they can and will
10 cooperate with that.

11 And finally, I do think at some point we should
12 consider the part of Rule 5(c) which would relieve defendants
13 from serving other defendants.

14 THE COURT: What if you were to file a motion
15 for summary judgment?

16 MR. DePAOLI: If I were to file a motion for
17 summary judgment in the C-125-B case, for example, I would
18 serve, obviously, the United States and the Tribe and provide
19 a postcard notice to the other parties if that's what is
20 continued to be required, but, if not, perhaps would not be
21 required to serve other defendants who are not represented and
22 would not be receiving it via the electronic system.

23 THE COURT: Mr. Guarino, would you concur in
24 that approach? I mean, because it would alleviate the burden
25 upon the government to make that type of service too.

1 MR. GUARINO: I think that's -- Guss Guarino for
2 the United States.

3 I think that's what Judge Jones was getting at.
4 So I would agree with what Mr. DePaoli has described and --
5 but I don't think there would be a distinction for what the
6 United States has to do as opposed to what other defendants
7 have to do to provide folks the information that the Court is
8 trying to get out to them.

9 THE COURT: Well, if you do that too, then
10 you're going to have to have an updated service list that,
11 one, includes those who are represented by counsel, those who
12 have elected to receive e-service, and those who wanted hard
13 copies, and those who didn't bother to do anything, and
14 everyone have a complete master list of either those three or
15 four different categories that's current.

16 MR. GUARINO: I am not sure -- I don't have --
17 my paralegal is on vacation for the last week. I spoke with
18 her before she left to get as much information as I could from
19 her. She's the woman who handles it from my office. And I
20 know Ms. Griffin also has information from the court's
21 perspective.

22 I'm saying this, Judge, because I'm trying to
23 think about who's getting this information when a party sends
24 in the information saying I want mail service or I want
25 electronic-only service.

1 I believe -- does it go to us or the courts?

2 MS. GRIFFIN: That goes to the service clerk, I
3 think the order said, which is me.

4 MR. GUARINO: So that's being -- so that
5 information largely is starting there.

6 We're obviously working with the service clerk
7 to make sure that our lists are -- that we have a complete
8 list ourselves. But I'm not sure if it's the United States'
9 responsibility to keep that list accurate and updated because
10 the information is going to be going to the courts.

11 THE COURT: You know, I went back to Judge
12 Reed's order. Somehow it clicked in my mind that maybe some
13 of that issue is addressed in that order, you know, the one he
14 did affirming Judge Leavitt's decision on service?

15 MR. GUARINO: Yes.

16 THE COURT: That's Document 1711. You know, you
17 all might want to pull that out again because I think -- and
18 it's a 27-page order, and it just dawned on me shortly before
19 this hearing that that may have some bearing on it. I just
20 didn't go through it. So you all might be wanting to take a
21 look at that.

22 MR. GUARINO: Yes, your Honor. As a matter of
23 fact -- Guss Guarino for the United States.

24 I have looked at that in anticipation and in
25 preparation for this hearing, and, you know, I was noting that

1 the Court in that circumstance was describing that once
2 folks -- once -- the United States in that circumstance could
3 not be expected to keep track with the transfers of ownership
4 of the rights.

5 It's not particularly on -- it's not directly on
6 point to what we're discussing today, but it is getting to
7 this point of trying -- once a person has been served or given
8 notice of this Court, where does the obligation fall. Does it
9 fall upon that person to stay up with these proceedings to the
10 extent they want to be involved in these proceedings, or is it
11 the other way around.

12 And I think -- I understand that Judge Jones has
13 expressed a view that is more similar to what's going on in
14 the Orr Ditch litigation, but to the extent the order was
15 addressing that in 2012, I think that's what it was -- that's
16 what he was focused upon.

17 But to the extent that a list can be generated
18 and kept up-to-date, I do think the United States certainly
19 would work with the courts to make sure that that information
20 is up-to-date so that that list is available from the court to
21 all parties so that there's no confusion about that.

22 THE COURT: There was also something in Judge
23 Reed's order that probably would have been helpful if we
24 mentioned it at that hearing.

25 At page 10 he discusses the issue of *in rem*

1 versus *in personam* jurisdiction, and I bring it up at this
2 time because Judge Reed noted that due process requirements
3 apply regardless of whether a case is characterized as *in rem*
4 or *in personam*.

5 He also noted that because *in personam*
6 jurisdiction is secured by the power of the court over the
7 res, the degree of notice and service of process required for
8 a judgment is less than in an *in personam* action.

9 So if this case is characterized appropriately
10 as *in rem* as Judge Reed seems to note, which may answer one of
11 Judge Jones's questions, then the -- it gets to Mr. DePaoli's
12 point that perhaps the higher degree of notice and service is
13 not required in this matter.

14 That brought a resounding chorus of response.

15 MR. HERSKOVITS: Your Honor, Simeon Herskovits
16 for Mineral County.

17 I do believe that that is a sensible reading of
18 that part of Judge Reed's April 2012 order. In terms of what
19 kind of --

20 THE COURT: But that only applied to the 127
21 case and not yours.

22 MR. HERSKOVITS: It was actually in all of the
23 cases.

24 THE COURT: Oh, was it?

25 MR. HERSKOVITS: Yes.

1 THE COURT: Okay.

2 MR. HERSKOVITS: And that order, in addressing
3 the question of jurisdiction and the nature of the
4 jurisdiction, to the extent it provides some guidance or sheds
5 some light on this question of what level of service or notice
6 is required, I think the Court is correct in suggesting that
7 that might be a reason for following Mr. DePaoli's suggestion
8 and utilizing postcard notice for both defendants who have
9 requested service by mail and defendants who have not
10 responded at all.

11 MR. DePAOLI: Your Honor --

12 THE COURT: I kind of -- go ahead, Mr. DePaoli.

13 MR. DePAOLI: Your Honor, Gordon DePaoli.

14 I was going to indicate, I was not -- what I was
15 suggesting really wasn't dependent I don't think on whether
16 the proceeding is *in rem* or *in personam*.

17 And actually I think at some point maybe we're
18 going to have to brief that question because I have -- I know
19 that courts often regard water proceedings as in the nature of
20 *in rem*, but I'm not convinced that this proceeding today or
21 the prior proceedings were *in rem* in the traditional sense.

22 But I don't think that what we do here -- for
23 the folks who have elected service by mail and those who
24 haven't responded at all, I don't think that has to turn one
25 way or the other on that question.

1 I do think that the rules allow for this kind of
2 special notice in a proceeding like this one and that we could
3 proceed, whether it's *in personam* or *in rem*, in that fashion.

4 THE COURT: You don't think Judge Reed's order
5 is the law of the case that this is *in rem* or quasi-*in rem*?

6 MR. DePAOLI: My recollection -- and I don't
7 have the order -- my recollection is that I thought he
8 indicated it was in the nature of *in rem* or quasi-*in rem*.

9 THE COURT: And maybe I'm reading it too
10 expansively too, because he seemed to talk about in
11 generalities and didn't reach the specific conclusion of the
12 jurisdictional nature of this case.

13 But what I do think is instructive is the notion
14 that generally these cases are considered *in rem* or quasi-*in*
15 *rem* and that as a result the degree of notice is less than in
16 an *in personam* action which I think provides the grounds
17 perhaps for the postcard notification procedure.

18 I kind of detect a consensus here among at least
19 the attorneys who have spoken that you think there's a
20 framework that could be reached for modifying the e-service
21 order that would be consistent with your interpretation of
22 what the law is and what Judge Jones directed be employed
23 here.

24 Am I reading that correctly, Mr. Herskovits,
25 Mr. Guarino?

1 And actually this is really more of a 127
2 question right now because we haven't gotten to the 128
3 e-service order yet, and whatever I think happens here is
4 probably going to be a pattern for yours, Mr. Herskovits.

5 But, Mr. DePaoli -- anyone else? Mr. Swainston,
6 you wanted to say something there?

7 MR. SWAINSTON: Yes, your Honor. I have not
8 responded. Harry Swainston.

9 Our problem is not so much with respect to the
10 notice. I'm on the e-filing mailing list, and I will get all
11 the notices that are sent through that process.

12 Where I'm having a problem is that if I have to
13 serve all the defendants, and there's thousands of them, I
14 just won't be able to do it. I cannot burden a very small
15 farming interest with that kind of cost.

16 And so the other prong that goes along with due
17 process, which is the opportunity to be heard, necessarily
18 comes into play. Notice doesn't mean too much if you don't
19 have an opportunity to be heard.

20 So I was encouraged somewhat by your Honor's
21 comment that the rules of civil procedure will be relaxed. I
22 hope -- I hope they'll be relaxed enough so that even though I
23 have not filed a brief on a particular substantive motion,
24 that I would still be allowed to be heard at oral argument,
25 for instance. And I know that stretches the rules a bit, but

1 in order to have an opportunity to be heard, the opportunity
2 that's afforded has to be reasonable.

3 THE COURT: Well, we have given notice of the
4 events that are pending in the near future is what I asked
5 Ms. Griffin earlier, that we did serve everyone with the
6 notice of this hearing and the notice of the upcoming oral
7 arguments.

8 A couple of months ago, on June 4th, we served
9 the notice of pendency of the Walker River motion to intervene
10 and told anyone if they wanted to respond, they could do so,
11 but they have until August -- excuse me, July 31st. Then we
12 gave Mineral County or anyone else until August 16 to file
13 reply memorandum.

14 And I think there's only one person who
15 responded, and that was a one-pager that just said don't take
16 my water.

17 Anyway, that was a notice that the court gave,
18 and we mailed that out to -- I think Ms. Griffin said there's
19 some 2,000 parties in the 128 case? Is that your
20 understanding, Mr. Herskovits?

21 MR. HERSKOVITS: Actually, your Honor, I will be
22 meeting with Ms. Griffin tomorrow morning to talk about and go
23 over the list of defendants for whom mail has been returned as
24 undeliverable.

25 I believe the number of defendants who have been

1 served and have entered any kind of appearance in the 128 or
2 125-C case is much smaller actually than that.

3 THE COURT: Oh, is it?

4 MR. HERSKOVITS: Yes.

5 THE COURT: Well, how many have been served, I
6 mean, versus those who have responded?

7 MR. HERSKOVITS: Over a thousand.

8 THE COURT: All right. So they're both about a
9 thousand in each case?

10 MR. GUARINO: Your Honor --

11 MR. HERSKOVITS: No, it's --

12 MR. GUARINO: Your Honor --

13 THE COURT: In 127 I think we mailed out 970.

14 MR. GUARINO: Yes, sir, and my last report is
15 that we have 3,849 defendants in the action itself, 1,190 have
16 appeared according to the records that my paralegal has
17 provided me.

18 THE COURT: So, Ms. Griffin, to whom was the
19 e-service order sent in 127?

20 MS. GRIFFIN: Your Honor, the mailing list was
21 generated by the government. We looked through it together,
22 but it was generated by the government, and it was as of
23 December 2012, December something 2012, so there would have
24 been more respondents coming in after that time.

25 THE COURT: But the ones that the e-service

1 order went out to were those who made some type of affirmative
2 effort to respond to being served.

3 MS. GRIFFIN: Yes.

4 THE COURT: But it doesn't include the other
5 2,000 who ignored it.

6 MR. GUARINO: Completely, yes.

7 THE COURT: So you do have 3,000 defendants in
8 the 127 case.

9 MR. GUARINO: Thirty-eight -- closer to -- 3800.

10 THE COURT: Thirty eight hundred.

11 MR. GUARINO: Yes.

12 THE COURT: Well, I think that calls into play
13 Mr. Swainston's concerns even more so and maybe as to what
14 we're doing here as to who's getting notification of what's
15 going on in this case.

16 MR. GUARINO: Yes, sir. But those -- those --
17 but the one thousand -- approximately 1,100 are -- that we
18 were, I believe, focused upon at the beginning of today's
19 hearing are those who have responded to say we're entering our
20 appearance and we're participating.

21 The difference between the two numbers are the
22 many folks who don't want to be bothered -- I think it's a
23 very reasonable interpretation to think that the people who
24 have now been served by either mail or by personal service and
25 have done nothing in this case at all want nothing to do with

1 this case.

2 THE COURT: But the analysis might be different
3 for those -- how we treat those people in the 127 versus 128.

4 Because in 127 the government on behalf of the
5 Tribe is seeking additional allocation of unreserved surface
6 water rights and perhaps groundwater, and the concept is it's
7 not taking from anyone else but it's reinforcing what should
8 have gone to them originally.

9 Is that -- maybe not a very good paraphrase.

10 MR. GUARINO: I understand what the Court's
11 describing, yeah.

12 THE COURT: But -- and Mr. Herskovits, in the
13 128 case, it's a different concept where Mineral County wants
14 a readjudication of the existing water rights in the Walker
15 River Basin or the Walker Basin. Am I mischaracterizing that?

16 MR. HERSKOVITS: I don't know if we would phrase
17 it that way, your Honor.

18 I think that we -- we filed the motion to
19 intervene and are seeking to intervene in order to assert a
20 right or a duty, it could be framed either way, under the
21 Public Trust Doctrine to provide certain minimum level of flow
22 into the lake, into Walker Lake, to maintain its integrity or
23 health as a lake.

24 THE COURT: Under the Public Trust Doctrine.

25 MR. HERSKOVITS: That's correct, your Honor,

1 that was the basis for our --

2 THE COURT: But in order to implement the Public
3 Trust Doctrine, that would necessarily require readjudication
4 of water rights from those who have prior rights in order to
5 be able to support the public trust requirement.

6 MR. HERSKOVITS: I don't know, your Honor, if
7 that is quite the most accurate way to characterize what the
8 Court would be required or what we've requested the Court to
9 do.

10 I think if, for the sake of argument, we assume
11 that Mineral County were to prevail and that a water right or
12 a duty to provide minimum inflows to the lake were
13 established, it would have a priority date that would antedate
14 any of the specific appropriative water rights that have been
15 issued under whatever system by the state since the state was
16 admitted to the union. It would be more like a constraint
17 or -- but it would affect all of the water rights in the
18 system, if that's essentially what we're talking about.

19 But I don't know that the specific water right
20 that each individual water right owner or holder has would
21 have to be modified in any way whatsoever. It would remain
22 the same.

23 If you had a right to 20 acre feet of water with
24 a certain year priority, you would still have that right, but
25 it would be affected by the overall systemic constraint or

1 requirement that a certain amount be required to at least on
2 average flow to the lake.

3 THE COURT: Well, it probably impacts what
4 Mr. Shaw may send down the pipeline to various water right
5 holders.

6 Other than the tribes, what's the oldest -- is
7 it '63?

8 UNKNOWN SPEAKER: Sixty.

9 THE COURT: 1860? So if the -- Mr. Shaw, could
10 you come to the podium a second and introduce yourself.

11 Thank you. Go ahead and introduce yourself.

12 MR. SHAW: Jim Shaw, Walker River Water Master.
13 Thank you, your Honor.

14 THE COURT: Okay. Mr. Shaw, if the -- and I'm
15 only asking these questions from the standpoint of the degree
16 of service that's going to be required as Judge Reed noted in
17 that order.

18 If per chance Walker or Mineral County were
19 granted a right that predated the 1860, and if you had to fund
20 or supply the water for an 1859 Mineral County public trust
21 right, would that have any impact on the water rights that had
22 a later vesting right or vesting year?

23 MR. SHAW: It definitely would because the water
24 that's in the system -- let me give you a little bit of an
25 example on this.

1 March 1 is when irrigation water starts
2 regardless of what the demand is. If there is no demand on
3 the system regardless of what the year is, and say I have a
4 hundred CFS in both rivers, I can at that time set a priority
5 of full decree so that anybody within the system, whether it's
6 a 1917 or 1911 right or an 1860 right, depending again on when
7 the Tribe's start date is with that 1859 right, I can declare
8 a full decree so that we can serve everybody at that point in
9 time.

10 If you were to implement an earlier decree
11 right, Public Trust Doctrine or not, that would give Mineral
12 County the right of, say, prior to 1859 at X water, they would
13 be entitled to all of the water or whatever waters were
14 available at that time.

15 So would it impact -- it would impact everybody
16 upstream of the reservoir with an 1859 right because you would
17 not have that water available whether it be through storage
18 rights or whatever.

19 THE COURT: Upstream of the lake.

20 MR. SHAW: Upstream of Walker Lake, yes, sir.

21 THE COURT: Okay. Well, thank you, Mr. Shaw. I
22 appreciate your comments.

23 I don't know -- you know, obviously I'm not the
24 one making the decision. You still have to address the issue
25 of Mineral County's request to intervene, and then down the

1 road someplace somebody is going to have to address the Public
2 Trust Doctrine.

3 But I was just looking at it from the standpoint
4 of the due process requirements for service which may be
5 different in the Mineral County case, and we probably don't
6 have to address that today, Mr. Herskovits.

7 But getting back to Mr. Guarino, Mr. DePaoli and
8 Mr. Swainston and other people's concerns here, I think you
9 all tend to agree that some lower -- I don't say quantum, but
10 some lower standard of service might be appropriate to save
11 everybody money including in court. The last notice we sent
12 out cost over \$450, and that adds up and adds up.

13 My thought is, is that perhaps you all can come
14 together with a proposal to modify the e-service order,
15 perhaps accompanied by a joint memorandum if you all can
16 agree, and so far it sounds like you can, to submit it to
17 Judge Jones as to how the e-service order might be modified.

18 Does anyone wish to comment on that proposal?

19 Mr. DePaoli?

20 MR. DePAOLI: Gordon DePaoli, your Honor.

21 I think we should do that. I think we should
22 try to do that.

23 THE COURT: All right. When -- do you think
24 maybe -- I think before it goes to Judge Jones, we ought to
25 have another status conference in this case to just see how

1 that reads and to see if everyone is on the same wavelength.

2 Do we have another status conference set before
3 that to November? And I know Judge Jones has a hearing on the
4 intervention thing in September.

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

7 Another thing that we probably should take a
8 look at is the transcript itself from the hearing of the 25th,
9 and my understanding is, is that it might not -- it might not
10 be until towards the end of the month at the earliest.

11 I'm not sure how that plays in other than to
12 push is out a bit longer. I mean, we could -- we could
13 potentially -- we could start working on it, obviously, but it
14 sure would be nice to take a look at that transcript.

15 THE COURT: Yes, I agree. That's one of the
16 problems with this hearing today, that we don't have that
17 transcript.

18 Well, how much time do you think you would need?
19 Do you want to wait until after the -- you're going to have
20 that transcript to have another hearing date? I would kind of
21 like to go ahead with the hearing date because it's sort of
22 like trial dates settling cases.

23 MR. GUARINO: Yeah -- maybe that -- let's set a
24 date, your Honor, and we can -- the parties will work
25 together, and I think we can use our at least collective

1 memory at this point to try and put something together that
2 gets us -- gets us there, and if we don't have the transcript
3 by the time the status hearing comes up, we'll adjust it
4 accordingly.

5 Early September?

6 THE COURT: What are we looking at that week --
7 the 2nd is Labor Day, and I think I have criminal calendar
8 that week too, don't I?

9 THE CLERK: Yes.

10 THE COURT: Yes, great.

11 MR. GUARINO: This might be a refreshing break.

12 THE COURT: And I'm going to be at an
13 e-discovery conference in Philadelphia from the 9th through
14 the 12th. I would love to come back from Philadelphia to a
15 full day of hearing on this case.

16 MR. GUARINO: We could go to Philadelphia -- no,
17 we couldn't. No, we couldn't.

18 THE COURT: What are we looking at in -- what
19 about the 6th, September 6th? We have a naturalization
20 ceremony in the afternoon that I have to do, but say if we set
21 this at nine or ten o'clock -- say, ten o'clock on the 6th?

22 MR. GUARINO: That works for the United States.

23 THE COURT: Can you perhaps maybe -- how would
24 you recommend going about submitting some type of proposed
25 amendment to the e-service order?

1 MR. GUARINO: We -- I think the parties could
2 work to try and have something together by the end of the
3 month?

4 MR. DePAOLI: Yes. Yes, that should work.

5 THE COURT: All right. Maybe do a notice of
6 proposed amendments to the e-service order or something?

7 MR. GUARINO: By the -- say, Friday,
8 August 30th, to give the Court a chance to look at it?

9 THE COURT: Could you make it by close of
10 business on Thursday, the 29th?

11 MR. GUARINO: We could do that -- I could do
12 that. Yes. Yes, your Honor.

13 THE COURT: Thank you.

14 I -- the only thing I can think of is just
15 asking counsel to try and come up with something that you all
16 can agree on that you can make your collective arguments to
17 Judge Jones on how that should be modified.

18 I think Mr. Swainston raises some really
19 significant cost issues that the smaller participants --
20 actually everybody in this case.

21 Now, you still have your oral arguments on the
22 Mineral County motion for intervention, but that's not until
23 September 23, and notice of that was served.

24 I guess I'm perplexed about the idea here too
25 about those who have been served with those service packages

1 of the government and haven't done anything.

2 I guess there's no obligation as to somebody who
3 has not taken any affirmative response. Maybe you want to
4 address that in your e-service amendments or proposed
5 amendments, so I think -- so Judge Jones has a better handle
6 on that.

7 MR. GUARINO: On precisely who the universe of
8 players is.

9 THE COURT: Exactly, and it would help me too.

10 MR. GUARINO: That's fine. Okay.

11 THE COURT: All right. Now, I heard
12 Mr. Herskovits note that he's meeting with Ms. Griffin
13 tomorrow, and, Mr. Guarino, did you meet with her today?

14 MR. GUARINO: I spoke with Ms. Griffin yesterday
15 on the phone before this hearing.

16 THE COURT: I mentioned at the last hearing I'm
17 concerned about the number of returns, and I forgot how Judge
18 Reed really ruled on that issue, if he did, in his order of
19 last year.

20 MR. GUARINO: He didn't address that issue, your
21 Honor.

22 And I did, after the hearing on the 25th, speak
23 with my paralegal specifically about the returns, and, again,
24 these were the list of folks who were served either by mail or
25 by personal service who have entered their appearance telling

1 the court yes, here I am, but we have provided the information
2 to their last known address, and it's coming back -- it's
3 coming back undeliverable for whatever reason, they've moved
4 and not notified the Court.

5 We do get -- we do get updates from the Walker
6 River Irrigation District for folks who have moved and changed
7 addresses, and when that happens, we do update the -- our
8 list.

9 The Court's number that you described at the
10 beginning of the hearing was 113 undeliverables. That's
11 approximately ten percent of the folks who were served and
12 indicated they wanted to participate but are no longer -- we
13 can't track them.

14 To the extent we can correct it, we will, but we
15 have provided them notice, and they have indicated they wanted
16 to participate, and they haven't provided us with any updated
17 address, and they're -- I think we've met our obligation to
18 contact them and keep in touch with them, and we'll continue
19 to update our records based upon any information we receive.

20 THE COURT: You know, Ms. Griffin gave me a
21 series of letters that she received about people who state
22 they no longer own the property or have died or something to
23 that effect, and I don't know if you have addressed that with
24 Mr. Guarino, Ms. Griffin. She's shaking her head no. So at
25 the end of the hearing I'll make sure this goes back to her so

1 you have this information.

2 MR. GUARINO: Certainly.

3 THE COURT: We have received several people
4 who -- requesting either personal service or something else,
5 and I'm going to be liberal in granting those. I'm not going
6 to force someone on this case. So that's something I can
7 address with Ms. Griffin later.

8 Let's return to our agenda such as it is.

9 I think I need a few more documents on the bench
10 here.

11 Mr. DePaoli, I think your suggestion as to
12 discussion topics in paragraph 1 referring to A and C have
13 been sufficiently addressed at this time.

14 MR. DePAOLI: Yes, your Honor.

15 THE COURT: And I think that covers topics A and
16 C in the agenda notice I sent out.

17 Topic D is implementation of briefing on the
18 threshold issues. I'm inclined to hold off on any briefing
19 schedule on threshold issues until we get this question of
20 service clarified. Any comment?

21 MR. DePAOLI: Your Honor, Gordon DePaoli.

22 I agree with that, your Honor, and in addition,
23 and I'm not sure exactly how this was left on the 25th, but it
24 seems to me we need to get in place the necessary amendments
25 to the case management order as well because there was

1 definitely a change in a direction of sorts there, and I'm
2 sure we all have some ideas as to where we thought that would
3 go.

4 But I think -- I don't think we can address
5 the -- the motions and schedule motions or any of that until
6 we know how the case management order would be changed.

7 THE COURT: Well, again, we don't have the
8 benefit of the transcript, but my recollection is at the end
9 of the hearing Judge Jones, for lack of a better term,
10 ratified both the CMO and supplemental CMO and said they're
11 going to remain in force and effect.

12 He had some discussions about applying the CMO
13 to 128. I think at that hearing I expressed some reservations
14 as to how you're going to do that because I see them as two
15 different animals, they're two different cases.

16 I am not inclined to go modifying the CMO at
17 this time, or the supplemental CMO, as I'm unclear as to what
18 direction Judge Jones wants to proceed, and I think I'm going
19 to defer to Judge Jones to let him enter any order either
20 modifying the CMO or entering a new CMO so that it would apply
21 to the 128 case. In other words, I'm punting on that.

22 Go ahead, Mr. Herskovits. You had a question or
23 comment?

24 MR. HERSKOVITS: Yes, your Honor. Simeon
25 Herskovits for Mineral County.

1 You have perhaps already just now addressed an
2 issue that I wanted to raise with the Court which was, from
3 Judge Jones' -- Chief Judge Jones' comments at the last
4 hearing it seemed to me that he intended or envisioned perhaps
5 a more limited case management order that extended at least
6 this bifurcation of threshold issues concept, and only that
7 perhaps, to the 128 subproceeding, sort of importing it from
8 the 127 subproceeding.

9 His reasoning seemed to be that he wanted to
10 sort of create that division in different types of threshold
11 issues with the jurisdiction and *res judicata* issues maybe
12 being addressed first, and he wanted that to occur since he
13 saw them as applying to 128, which I don't have a response to
14 right now. But assuming they apply to 128 in a somewhat
15 similar or analogous way, he wanted that to be briefed and
16 addressed and ruled on and then potentially appealed at the
17 same time.

18 So I was going to inquire of the Court today --

19 THE COURT: But how do you do that if you're
20 briefing it as a threshold issue? What do you do with a
21 threshold issue?

22 MR. GUARINO: Your Honor, Guss Guarino --

23 THE COURT: It's like a law review article.

24 MR. GUARINO: No, but I think -- I heard Chief
25 Judge Jones describe that it would be still raised in the form

1 of a motion. The issues would be raised in the form of a
2 motion, not just briefed as a general matter.

3 THE COURT: Well, getting back to the 128 case,
4 wouldn't you have to first rule that Mineral County may
5 intervene, and then the motion would be filed to say it's
6 barred by claim preclusion, *res judicata* or whatever.

7 Now, Mr. DePaoli, as I remember reading your --
8 the WRID opposition sometime back, or response, it wasn't on
9 *res judicata*, it was more of an argument that what Walker
10 River -- or Mineral County is trying to do here is to set
11 aside the decree and it should be advocated in that fashion.

12 MR. DePAOLI: Gordon DePaoli, your Honor.

13 Yes, I think at some point we're going to have
14 to actually see what it is Mineral County is claiming here
15 because, if Mineral County is claiming a water right, then
16 maybe *res judicata* and claim preclusion will apply.

17 I just -- we kind of go back and forth. And so
18 I think you're exactly right, we have to see if they're
19 allowed to intervene, and then we'll have to see what they're
20 asserting before we can decide it -- how to address it.

21 I -- and maybe we have to wait to see what the
22 transcript says. Clearly we have to wait to see what the
23 transcript says.

24 I, at least, understood Judge Jones to be
25 suggesting that the initial waive of motions be limited to

1 jurisdictional issues, and that he wanted the jurisdictional
2 issues, to the extent they applied, to pertain to the tribal
3 claims, the federal claims and to Mineral County's claims
4 before moving to any kind of motion that's in the supplemental
5 case management order that might be under Rule 12(b)(6) or for
6 judgment on the pleadings.

7 And so that at least is how I understood much of
8 what he said --

9 THE COURT: Well, a *res judicata* motion or
10 motion on *res judicata* grounds would not be jurisdictional.

11 MR. DePAOLI: It would not, your Honor.

12 THE COURT: So what you have to do first is have
13 Mr. Herskovits' motion heard, ruled on, and then file your
14 motions.

15 But tell me, what kind of motion do you
16 contemplate or would there be on jurisdiction grounds? I
17 mean --

18 MR. DePAOLI: It -- with respect to 125-B?
19 Well, I think that --

20 MR. GUARINO: C.

21 MR. DePAOLI: -- Judge Jones was looking at
22 Judge Reed's case management order, and the list that began on
23 page 10, I believe, as to the tribal -- as to the tribal
24 claims, I believe there is a jurisdictional issue as to
25 whether a Court which has rendered a judgment and which

1 continues to simply supervise that judgment has the power
2 under supplemental jurisdiction or whatever to adjudicate new
3 claims to water rights. I believe that has to occur in a
4 separately filed new action.

5 And I think that ultimately the C 125-B case
6 will have to be treated as if it is a new case and not a case
7 that is simply an extension of the case that ended in 1940.

8 THE COURT: Well, isn't that what you've argued
9 in your response to their motion for intervention?

10 MR. DePAOLI: To Mineral County -- no, as to
11 Mineral County's motion to intervene, I think that is an
12 entirely different issue.

13 I -- I understood, based on what Mineral County
14 has filed, is that what they are seeking is to modify the
15 existing decree which is potentially something that could be
16 heard in C-125 or might have to be heard as an independent
17 action for relief from a judgment.

18 THE COURT: Oh, good, we're going to have 129?

19 MR. DePAOLI: I don't think they'll change much
20 but they may get a new number.

21 THE COURT: Okay. Maybe one of our agenda items
22 when the government prepares its agenda ought to be a
23 discussion of what -- how we're going to handle the threshold
24 issues versus preliminary briefing issues on jurisdiction.

25 I still have a difficult time understanding how

1 that would be addressed other than in the form of a 12-B
2 motion of some kind.

3 But we still have to go back and make sure we're
4 all satisfied with the e-service order and how service is
5 going to proceed in this matter, because if Walker River
6 Irrigation District goes files some motion on the grounds that
7 there is no jurisdiction here, or if, say, Mineral County were
8 to file some position point that there is jurisdiction, it
9 seems like everyone ought to have notice of that in some
10 fashion, either the postcard, e-service or whatever.

11 So I still think one of the preliminary things
12 we have to do is resolve this e-service issue and service
13 issue, and then we can start setting briefing schedules.

14 Now, I know Judge Jones is concerned about
15 piecemeal appeals to the Ninth Circuit. If he grants your
16 motion, that's moot, you're not going to get to the Ninth
17 Circuit at this stage. If he denies your motion, presumably
18 you have immediate right of appeal.

19 MR. HERSKOVITS: Yes, your Honor. That's our
20 understanding.

21 THE COURT: I guess you just have to cross that
22 proverbial bridge when you come to it.

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

25 So, I agree with the Court, we need to address

1 this e-service issue, and we should resolve that first.

2 And then with respect to the threshold issues, I
3 guess the way I see it is when Judge Jones was discussing
4 addressing the jurisdictional elements of the case, that he
5 wanted to bring 125-C and 125-B together, I contemplated that
6 it would be sort of, as it were, worked out in the wash, that
7 if there were a jurisdictional challenge that applied to
8 Mineral County that also applied to the United States, any one
9 of the claims that we're bringing, then it would be raised.

10 THE COURT: Would you necessarily agree with
11 that, Mr. DePaoli?

12 MR. GUARINO: And I guess my final thought is,
13 and if it wasn't, if there wasn't a specific jurisdictional
14 challenge along the same lines, then there would be nothing
15 for them to raise, and so --

16 THE COURT: Well, they can't assert a
17 jurisdictional challenge to Mineral County because Mineral
18 County is not in this case yet.

19 MR. GUARINO: Assuming that they would be in the
20 case, I'm sorry.

21 THE COURT: Okay. But do you think the same
22 jurisdictional issues apply to the USA-Tribe's cases, the
23 federal claims and the Mineral County claims?

24 MR. DePAOLI: I didn't. If Mineral County is
25 going to be asserting a new water right, then perhaps, yes.

1 If Mineral County is seeking to modify the decree, perhaps no.
2 But --

3 THE COURT: What's the difference between what
4 you just said?

5 MR. DePAOLI: Well, I think that I have always
6 understood that what Mineral County is seeking to do is to
7 impose a public trust obligation on existing water rights
8 which to me means modifying existing water rights.

9 If Mineral County is going to claim that there
10 is some common law claim to a first-on-the-system water right
11 for Walker Lake, then it seems to me that they're making a new
12 claim under some legal theory that I'm unfamiliar with.

13 But that -- if that's what they're doing, then I
14 don't think the Court that rendered the decree in 1940 has the
15 jurisdiction to decide the claims for new water rights. I
16 think that has to be part of a separate action.

17 THE COURT: But you're saying the Court would
18 have jurisdiction to modify the decree to give new water
19 rights.

20 MR. DePAOLI: Not and give new water rights, no.

21 THE COURT: Isn't the net result, whether you
22 call it A or B, the same thing on additional water rights
23 going to Walker Lake that didn't exist before, or allegedly
24 didn't exist before, because, I think, under the Public Trust
25 Doctrine their argument is it's always been there.

1 MR. HERSKOVITS: Yes, your Honor. That's
2 correct.

3 THE COURT: It just hasn't been properly
4 recognized.

5 MR. HERSKOVITS: Yes, your Honor, that's
6 correct.

7 And I would -- if I could just add that I'm not
8 entirely sure where Mr. DePaoli is focused when he says that
9 he thinks there's now been a shift in Mineral County's
10 position. There really has not.

11 In our filings on intervention, I think we made
12 it clear that we are seeking a recognition of this public
13 trust duty or obligation to provide these minimum flows to the
14 lake.

15 But I think, your Honor, you have a very good
16 practical point, in that if we're talking about certain
17 required flows or amounts of water being allowed to get to
18 Walker Lake as opposed to the current situation, it has the
19 same practical impact as a first-in-time water right to the
20 Walker Lake would have on a practical level.

21 THE COURT: Well, if, as Mr. Guarino said, Judge
22 Jones wants that type of thing addressed in a motion,
23 practically how can you do that when the intervention issue
24 has not yet been decided?

25 MR. HERSKOVITS: Well, your Honor -- again, this

1 is Simeon Herskovits for Mineral County.

2 It was my clear understanding that Judge Jones
3 intended for the motion on intervention to be ruled on first,
4 and then the next step chronologically would be to go to that
5 first phase of jurisdictional threshold issues, if you will,
6 and I think he did intend for it to be 12 --

7 THE COURT: I think if he rules against you,
8 you're appealing it to the Ninth Circuit and taking that
9 piecemeal approach that he did not want.

10 MR. HERSKOVITS: Well, that is a good point,
11 your Honor.

12 I suppose if we need to appeal to the Ninth
13 Circuit, then we wouldn't be participating if the schedule
14 moved forward while our appeal is pending in the Ninth
15 Circuit, and we would have to come back and then deal with
16 those issues again in the 128 subproceeding if we were to
17 prevail on the appeal.

18 I don't know what to say about that because I --
19 I think in terms of what the Court and the parties have
20 control over, I don't think it would make sense to not plan
21 out some sort of schedule for those initial threshold issues
22 or those jurisdictional issues until a possible appeal, until,
23 you know, we get to the point where we know whether there's an
24 appeal or that the appeal is fully disposed of which could
25 take, as we know, a couple of years.

1 THE COURT: Let me get back to that pondering
2 question I had earlier as what is a threshold issue and what
3 is briefing on it and what do you do with it?

4 MR. HERSKOVITS: Well, at least from my
5 understanding, your Honor, and we all may have somewhat
6 different understandings, I don't know -- certainly I didn't
7 take away from the last hearing a clear definition from Judge
8 Jones' comments of what constitutes a threshold issue, but I
9 did take away a clear understanding that he wants
10 jurisdictional questions raised first. He sees those at least
11 as threshold issues.

12 I thought he was alluding to *res judicata* as
13 another -- or claim preclusion as another type of issue that
14 he might characterize as a threshold issue.

15 It seems to me --

16 THE COURT: Well, I can see both those --

17 MR. HERSKOVITS: -- that they fit into the
18 motion to dismiss.

19 THE COURT: I can see both of those as a federal
20 Rule 12 motion that would be asserted pursuant to our
21 supplemental CMO.

22 MR. HERSKOVITS: Absolutely, your Honor. I
23 think that's correct.

24 THE COURT: But I'm not so sure that falls in --
25 squares with his concept of case management in this case.

1 Maybe if you look at the definition of threshold
2 being issues that we ought to address first before we go off
3 under this case.

4 And I assume when the time comes that we say
5 make your motions, Mr. DePaoli is going to be making the
6 motion in the 127 case that *res judicata* bars us, or it's time
7 barred, or something like that, which are all part -- there's
8 no jurisdiction, which are all considered a threshold, we have
9 to address first.

10 Maybe I was too expansive in that description.

11 But, again, you can't do that in the 128 case
12 until after that intervention question has been decided.

13 I don't know that we need to address this any
14 more. You know, let's just add it as an agenda item to see if
15 anyone else has come up with any brainstorms by then based
16 upon what's in the minutes.

17 The other topics I had here, various deadlines
18 for motions, E, that's now moot in light of what we said about
19 getting -- we have to resolve this service issue.

20 Correlation of undeliverable mail to service
21 list, I think counsel is working on that with Ms. Griffin.

22 The last one is whether the parties will proceed
23 with service by publication, and I don't know whether we
24 shouldn't wait on that until this service issue is decided
25 because somebody is going to be making a motion here to

1 complete service in this case by publication.

2 MR. GUARINO: Yes.

3 THE COURT: And I see different issues popping
4 up, whether that motion is made in the 127 case versus the 128
5 case.

6 Now, in the 127 case, you've pretty much served
7 the universe of anyone who had any touching of water in the
8 Walker River Basin.

9 MR. GUARINO: Surface and groundwater users,
10 yes, your Honor.

11 THE COURT: Right. Including those dormant
12 riparian right holders --

13 MR. GUARINO: In California, yes.

14 THE COURT: -- in California who aren't hiding
15 behind some gated doors in Tiburon.

16 MR. GUARINO: Yes, and we, in the 127 case,
17 still have the 40 or so left to personally serve.

18 I anticipate there will -- 127 is going to be a
19 little different from 128 in that we have -- we're going to
20 identify at least one, maybe two or three individuals or
21 entities that we were unable to effect personal service in
22 which a notice would be to a -- a publication would be to
23 individuals as well as a more -- a broader category of anyone
24 else holding an interest that hasn't otherwise been notified
25 that Judge Reed was contemplating previously.

1 That's not so true in the 128 case because they
2 served everybody that they had identified or that's been
3 identified in that case.

4 THE COURT: Just in Nevada.

5 MR. GUARINO: Yes.

6 MR. HERSKOVITS: No, your Honor, it's all
7 holders or claimants, identified holders or claimants of
8 appropriative water rights to the surface waters of the Walker
9 River and its tributaries.

10 THE COURT: In California as well?

11 MR. HERSKOVITS: That was -- well, some of them
12 are in California as well as in Nevada, and that is a category
13 and a universe of identified defendants that is more
14 circumscribed because it fits within the confines of what's
15 been recognized, I think, for a long time as within the ambit
16 of the original decree.

17 THE COURT: It doesn't include the groundwater
18 users.

19 MR. HERSKOVITS: It does not include groundwater
20 users, your Honor. We've never requested that the Court -- or
21 taken a position that the Court should be expanding its
22 jurisdiction to groundwater for the purposes of our claim or
23 at all.

24 THE COURT: You don't --

25 MR. HERSKOVITS: We've asserted a public --

1 THE COURT: -- have to get into the hydro --
2 hydraulic or -- how would you say it? -- hydrogeologic
3 connection between surface water and groundwater, if any?

4 MR. HERSKOVITS: No, I don't believe the Court
5 needs to address our claim, your Honor.

6 I think there may be a difference in that
7 regard -- there is a difference in that regard between Mineral
8 County's claim which relates to surface flows to the lake and
9 the Tribe and the United States Agencies' claims.

10 THE COURT: Well, how about these dormant
11 riparian water right holders in California, have they been
12 served?

13 MR. HERSKOVITS: Well, your Honor -- they are
14 not, and they are not within the universe or the list of
15 identified defendants that makes up the caption in 125-C or
16 the 128 subproceeding, and they never have.

17 And when that was established by the court in
18 1998, the response from the state of California was that the
19 list was acceptable with a proviso that they were requesting
20 or seeking publication in the paper of record in Mono County,
21 the portion of the basin that's in California.

22 So the riparian water rights are different than
23 appropriative water rights holders or claimants --

24 THE COURT: How so --

25 MR. HERSKOVITS: -- so they have never been part

1 of the list.

2 THE COURT: How do they differ --

3 MR. HERSKOVITS: Well, as a legal category, I
4 don't think the riparian water right holders have ever been --
5 I don't think it comes under the decree, the Walker River
6 Decree, that the court entered.

7 And especially with the suppositions about
8 potential so-called dormant riparian water rights that have
9 never been asserted yet but that in theory could be asserted
10 on a system that's also subject to prior appropriation and has
11 been so heavily appropriated already and governed by a
12 comprehensive decree of surface water rights or at least, for
13 the most part, comprehensive, those were not even raised in
14 the 125-B subproceeding until a few months ago, I guess, or
15 several months ago by the state of California and/or Mono
16 County.

17 I think we would have conversations with Mono
18 County and the state of California to find out what exactly
19 their concerns are and what their thoughts are. But I don't
20 believe that they are necessarily a part of the 125-C
21 subproceeding, the claim for Walker Lake.

22 MS. SIMON: Your Honor --

23 THE COURT: Well, eventually somebody is going
24 to be making a motion for service by publication, I take it,
25 and maybe we raise it or address it at that time.

1 I presume that might have been Stacy Simon
2 wanting to make a comment?

3 MS. SIMON: Yes, it was. Thank you, your Honor.
4 Stacy Simon on behalf of Mono County.

5 And I took this position of Mono County in 1999
6 and have been representing the county in this litigation since
7 that time, and I notice Mr. Herskovits mentioned something
8 that the State of California may have said in 1998, and I'm
9 not aware of that.

10 It has always been Mono County's position
11 that -- and I believe there are filings to this effect both
12 from Mono County and the state of California, to the effect
13 that dormant or nondormant riparian water rights holders have
14 valid claims to water rights under the laws of the state of
15 California, and that if there is any remedy in this matter
16 sought which could affect their rights, then they need to be
17 served.

18 THE COURT: And I think Mr. Herskovits' comment
19 is that they have been served except for the exclusion of
20 riparian water rights which he states don't fall in the
21 category of appropriative water rights, and I take it you
22 disagree with that position.

23 MS. SIMON: Well, again, I think that's what I'm
24 referring to, are they riparian water rights which are valid
25 water rights under the laws of the state of California.

1 So I'm not quite sure how -- of the distinction
2 between an appropriative right that is through the water
3 process versus a riparian right. They're all valid water
4 rights.

5 MS. MAHANEY: Your Honor, this is Erin Mahaney
6 with the California State Water Resources Control Board.

7 Just to clarify, as Ms. Simon has mentioned, and
8 as you know, California has both riparian water rights and
9 appropriative water rights.

10 The Walker River Decree, it is my understanding
11 that the litigation initially only involved the appropriative
12 water rights.

13 There is one riparian claim in the decree. I
14 believe it was entered -- my memory is a little fuzzy, but I
15 believe it was amended after the 1936 decree, maybe a few
16 years later, to include one riparian right.

17 But this does go to one of the issues that we
18 have -- we visited throughout the litigation which is to what
19 extent the initial action was meant as a comprehensive
20 adjudication of the entire stream system versus a quiet title
21 action between certain named parties.

22 And to the extent that parties or persons whose
23 valid water rights under state law may be affected by these
24 cases but who have not been -- had their rights adjudicated in
25 the decree I think has been an issue that's been put off over

1 time.

2 And so at various times this issue of riparians
3 has come up, and I think that California has taken the
4 position, well, if their rights will not be affected, maybe
5 they don't need to be named now, but if their rights will be
6 affected down the road, they will have to be included later
7 within the adjudication.

8 THE COURT: Well, I don't know, again, that we
9 need to reach this issue, but I just make two comments.

10 I don't see how you could grant the relief that
11 Mineral County seeks without impacting those people that you
12 just mentioned.

13 And, secondly, Judge Reed's order that I
14 referred to earlier, his April 23, 2012 order, notes how that
15 when this litigation began in 1924, the United States sued the
16 WRID and others to quiet title to a federal reserve water
17 right claim for the Reservation and to determine the relative
18 rights to water of parties in Nevada and California.

19 But he states,

20 "The initial action by the United States led
21 to a decree entered by this Court which was deemed to
22 determine all of the rights of the parties to this
23 suit and their successors in interest in and to the
24 waters of the Walker River and its tributaries."

25 So maybe the distinction is that maybe some people

1 weren't parties at that time and their successors were never
2 involved. But I just provide that for the good of the order
3 to see how Judge Reed looked at it, an interpretation of what
4 the original decree stated.

5 The bottom line is I guess we don't have to get to
6 publication now either because we get back to the issue of
7 service because publication may impact a lot of people, maybe
8 more so in 128 than 127.

9 Mr. Herskovits?

10 MR. HERSKOVITS: Yes, your Honor.

11 I just wanted to point out that the issue that
12 has come up about service does need to be addressed sometime
13 in the near future because Mineral County for many years now
14 has been working with a list of identified defendants and
15 caption from that list that was identified by the court in
16 1998, and the court provided an opportunity and took into
17 account the comments or objections of parties and came to a
18 conclusion about that.

19 That has been the basis for our service efforts,
20 and we filed a final service report and modified it following
21 the March 13th status conference to take care of the fairly
22 minor language issues that were raised at that status
23 conference which were the only objections raised at that time.

24 And that final service report requests that the
25 Court find that as to the identified defendants, not the

1 unidentified defendants who were always intended to be served
2 by publication, but as to the identified defendants or
3 proposed defendants, since we're not intervenors yet, that the
4 Court find that service is complete and so that we can move to
5 publication.

6 THE COURT: How can you identify somebody as an
7 unidentified defendant? They're either a defendant or they're
8 not a defendant. I think you're talking about maybe
9 unidentified water right holders.

10 MR. HERSKOVITS: Yes, you're right, your Honor.

11 THE COURT: And you then -- you wouldn't have
12 those if, in fact, your service list was complete. If you
13 identified the universe of water right holders, you shouldn't
14 have any unidentified water right holder.

15 MR. HERSKOVITS: Well, I think that's where we
16 are.

17 I mean, I think that there were categories of
18 water rights holders such as the groundwater rights holders,
19 and I think that the upstream riparian water rights holders in
20 California were not a part of the list that was developed in
21 the early years of the case and was agreed as the set of
22 identified water holders -- water right holders or water right
23 claimants who make up then the identified defendants.

24 THE COURT: Then you wouldn't need service by
25 publication if you had a complete list.

1 MR. HERSKOVITS: Well, that question has been
2 raised by Mr. Guarino in our discussions about publication
3 because we've been coordinating both with regard to the
4 e-service orders in the two subproceedings and publication.

5 And all I can tell you, your Honor, is that
6 there seems to have been a recognition from the outset in the
7 case that when service was completed on the identified water
8 rights holders or claimants who would be the identified
9 defendants, that publication would still be required because
10 there might be other people out there perhaps in the basin or
11 the community at large who either would have an interest in
12 the case or would come forward -- who are not reflected
13 anywhere in any records but who may come forward and assert
14 that they have some sort of a right or interest that entitles
15 them to participate in the action.

16 So I think publication from an early point was
17 contemplated by and actually approved in orders of Judge Reed.
18 That's why we've moved forward with the assumption that
19 publication would be required.

20 And I think there has been a -- there was a
21 recognition at the time that the universe of defendants for
22 the 128 action was defined or set by the Court, that there is
23 some level of uncertainty or possibility that there could be
24 some sort of water right holder or some claimants who somehow
25 wouldn't be captured and therefore publication needs to occur

1 in this sort of an action.

2 THE COURT: Do you need, in your case, to have
3 the service list issue and how it's going to be served
4 resolved before you proceed with a motion for service by
5 publication? Because those people have already been served
6 and why would they be objecting to serving someone else by
7 publication if they themselves have been served?

8 Am I making any sense in that question?

9 MR. HERSKOVITS: Yes, your Honor, I think that
10 does make sense as a question.

11 I guess people who have been served wouldn't
12 have a basis for -- well, in general, I don't think most of
13 them would have a basis for objecting to service by
14 publication or notice by publication at this stage.

15 However, as we've heard, it may be that the
16 issue will be resolved through conversations between myself
17 for Mineral County and the attorneys for Mono County and the
18 State of California.

19 But there may be some of these principal
20 defendants who have been participating in all the proceedings
21 who do raise questions or objections to the motion for
22 publication, I don't know. So I --

23 THE COURT: Well, when do you anticipate, either
24 one of you, you or Mr. Guarino, moving for service by
25 publication?

1 MR. GUARINO: Your Honor, Guss Guarino for the
2 United States.

3 I anticipate that we would move for -- in the
4 127 case, we would move for publication once we have completed
5 personal service or service to the extent with our identified
6 defendants, and once that happens, we would -- we would file a
7 motion with the court.

8 In the meantime, what I anticipate and what I
9 can tell you -- I can tell the Court what we've been doing
10 with Mineral County is we have exchanged drafts of the motion,
11 proposed order, notice, and that sort of thing.

12 There are just a couple of items that we want --
13 that Mr. Herskovits and I want to clear up between ourselves
14 to make sure that we're not making anything -- saying anything
15 substantively different between our two cases. There are some
16 circumstances that are unique in each one of our cases that
17 are just the nature of our cases.

18 Then, as soon as we have that -- our common
19 voice on the motions -- because to the extent we're asking for
20 publication, we think we would be doing it in the same way --
21 I anticipate that we would be circulating that for some
22 comment with the other principal parties that the Court is
23 familiar with and who are either on the line or in the
24 courtroom with the Court here.

25 MR. NEVILLE: Your Honor, could I just inject

1 here. This is Michael Neville for the California state
2 agencies.

3 We've had good cooperation in the past from
4 Mineral County and the U.S. in these matters, and would just
5 request -- and I'm sure that it will be forthcoming that they
6 will consult with us, you know, before filing the motions so
7 that we'll have a chance to review that and see that the
8 language is adequate for these purposes.

9 I don't know if we're -- I don't know how close
10 that is, but we would like to be -- and I think Mono County as
11 well would like to be in the loop on that, and, as I said,
12 we've had good cooperation in the past.

13 THE COURT: Well, I guess the whole publication
14 issue hinges on completion of service which I think we got a
15 report from the government back in March or April that said it
16 should be done in May, and then we got a report said it should
17 be done in July, and do we have a report when it's going to be
18 done next?

19 MR. GUARINO: I'd prefer not to at this time,
20 your Honor, just because I seem to have to change that every
21 time I make a prediction.

22 I can tell the Court where we're at, and we're
23 at 40 individuals left identified. We've run out of money to
24 continue the employ of our process server. We hope to
25 recharge the account to allow him to complete his work. I've

1 been told that that might happen by October.

2 If that happens, my guess is by the time --
3 let's say -- so let's say the prediction that I'm given is
4 correct, that we have the money in place by end of October,
5 it's going to take, after the money is in place, another six
6 weeks to probably finish up with the 40.

7 THE COURT: So we're looking at a motion for
8 service by publication from the government in 2014.

9 MR. GUARINO: I'd like it not to be, but that's
10 quite possible.

11 THE COURT: Yeah, well, I don't think we need to
12 address it any further at this time because we don't have the
13 motions for publication and I think it's premature to schedule
14 a date to proceed on those. Does anyone disagree?

15 MR. HERSKOVITS: Your Honor, I don't disagree.
16 This is Simon Herskovits for Mineral County again.

17 But I do just want to say that as soon as
18 Mr. Guarino and I have worked out whether or not there are any
19 inconsistencies that are inadvertent between our approaches to
20 publication, and I'd be happy to follow up with the attorneys
21 from California, and, of course, we'll circulate this proposed
22 order to all parties, but we would anticipate filing the
23 motion -- not order, motion with a proposed order, but the
24 motion for publication much sooner than that.

25 Our view, as I've explained, is that we've

1 completed service.

2 THE COURT: Well, I don't think you're bound by
3 what they're doing so go ahead. Why don't you add that as an
4 agenda item, though, for our September conference.

5 Mr. Guarino and Mr. Herskovits, I'm going to
6 just leave these with Ms. Ogden. What they are, are
7 extractions of the undeliverable notices that appeared in the
8 docket sheet which may just be of assistance to you in pinning
9 down some of the letters or notices which have been returned
10 to us as being undeliverable. So you may want to get that
11 back from -- or get that from Ms. Ogden.

12 I don't know that there's anything else we need
13 to address at this time. Does anyone have any issues you want
14 to raise or any comments you want to make?

15 Gleefully, I say, I hear none. So we'll be
16 adjourned. Thank you all very much.

17 -o0o-

18
19 I certify that the foregoing is a correct
20 transcript from the electronic recording of
proceedings in the above-entitled matter.

21 /s/Margaret E. Griener 9/3/2015
22 Margaret E. Griener, CCR #3, FCRR
23 Official Reporter
24
25

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