

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE WILLIAM G. COBB, MAGISTRATE JUDGE
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5 United States of America, : No. 3:73-cv-0125-RCJ-WGC
6 Plaintiff, : 3:73-cv-0127-RCJ-WGC
7 : 3:73-cv-0128-RCJ-WGC
8 :
9 -vs- : February 7, 2013
10 :
11 Walker River Irrigation :
12 District, et al., : United States District Court
13 : 400 S. Virginia Street
14 Defendant. : Reno, Nevada 89501
15 :
16 _____ :

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18 **TRANSCRIPT OF STATUS CONFERENCE**

19 A P P E A R A N C E S:

20 FOR THE UNITED STATES: Guss Guarino
21 Susan Schneider
22 Eileen Rutherford
23 David L. Negri
24 USDOJ Attorneys Office

25 FOR PETITIONER/DEFENDANT(s): George N. Benesch
Marta Adams
Michael Neville
Therese Ure
Michael Hoy
Christopher Watson
Attorneys at Law

FOR THE SWAINSTON TRUST: Harry Swainston

FOR WALKER RIVER PAIUTE TRIBE: Wes Williams
Attorney at Law

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

2

3 FOR WALKER RIVER
4 IRRIGATION DISTRICT: Gordon DePaoli
 Dale Ferguson
 Attorneys at Law

5

6 FOR MINERAL COUNTY: Simeon Herskovits
 Attorney at Law

7

8 FOR MONO COUNTY: Stacey Simon
 Attorney at Law

9 FOR U.S. WATER COMMISSIONER'S
10 BOARD:

10

Karen Peterson
Attorney at Law

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Jim Shaw
Watermaster

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13

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

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4 THE CLERK: Please rise.

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

8 THE COURT: Please be seated everyone.

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

14 If I may have plaintiffs' counsel begin.

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

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

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

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

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

25 MR. FERGUSON: Dale Ferguson for the Walker

1 River Irrigation.

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

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

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

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

11 MR. BENESCH: George Benesch, Lyon County.

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

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

16 MS. SIMON: Stacey Simon for Mono County.

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

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

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

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

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

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

10 Ms. Schneider, I thought you retired.

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

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

15 MR. SWAINSTON: Yes, Your Honor.

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

21 Who wants to proceed with the agenda?

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

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

25 THE COURT: Go ahead.

1 MR. GUARINO: Thank you.

2 With respect --

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

12 Am I missing something here?

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

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

18 THE COURT: Is that 1779?

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

21 THE COURT: All right.

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

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

1 the website.

2 MS. SCHNEIDER: Right.

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

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

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

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

25 Any comments here for the good of the order?

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

5 THE COURT: Okay. Hold on a second.

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

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

13 MR. GUARINO: Sure.

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

16 MR. GUARINO: Thank you, Your Honor.

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

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

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

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

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

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

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

12 MR. GUARINO: I have no idea.

13 THE COURT: Good answer.

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

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

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

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

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

9 MR. GUARINO: Yes, I believe so.

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

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

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

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

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

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

1 THE COURT: Oh. All right.

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

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

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

14 Is that what's causing confusion?

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

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

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

1 interest in the matter.

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

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

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

18 So, that would --

19 MS. SCHNEIDER: That's right.

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

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

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

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

14 THE COURT: All right. Thank you.

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

17 MR. GUARINO: It does, Your Honor.

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

20 (No response.)

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

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

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

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

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

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

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

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

1 to address that.

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

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

8 (No response.)

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

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

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

16 State your name, please, and your title.

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

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

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

5 THE COURT: All right. Thank you.

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

7 THE COURT: Thank you, Mr. Shaw.

8 MR. SHAW: Thank you.

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

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

25 THE COURT: Maybe this is a fundamental question

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

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

10 Ms. Schneider?

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

13 THE COURT: Then what --

14 MS. SCHNEIDER: No.

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

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

20 THE COURT: Would be the riparian water rights?

21 MS. SIMON: Uh-huh.

22 THE COURT: Yes?

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

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

5 MR. DEPAOLI: Your Honor --

6 THE COURT: Just a second.

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

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

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

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

1 underlying adjacent to all reserve lands.

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

4 Ms. Schneider, would that be more appropriate?

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

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

12 UNIDENTIFIED FEMALE SPEAKER: Weber.

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

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

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

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

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

25 THE COURT: Does anyone else have any comment

1 as to 1-A(2)?

2 (No response.)

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. HERSKOVITS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: I think you're right.

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

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

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

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

16 (No response.)

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

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

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

25 MR. HERSKOVITS: We should --

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

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

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

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

23 MR. HERSKOVITS: I think that --

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

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

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

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

9 (No response.)

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

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

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

22 THE COURT: All right.

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

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

3 (No response.)

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

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

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

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

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

1 County's Motion For Intervention?

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

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

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

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

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

24 THE COURT: I --

25 MR. HERSKOVITS: Oh --

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. HERSKOVITS: That's correct.

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

16 MR. HERSKOVITS: '94.

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

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

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

4 MR. DEPAOLI: No, Your Honor.

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

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

10 THE COURT: And no response?

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

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

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

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

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

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

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

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

5 THE COURT: Right.

6 (Judge reviewing document.)

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

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

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

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

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

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

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

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

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

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

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

2 (No response.)

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

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

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

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

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

10 MR. GUARINO: That's okay.

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

13 Have we heard back from Ms. Griffin?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. GUARINO: Precisely, Your Honor.

13 MR. HERSKOVITS: Yes.

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

16 MR. GUARINO: I believe so.

17 MR. HERSKOVITS: Yes.

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

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

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

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

16 Mr. DePaoli.

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

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

1 possibility that intervention is or is not appropriate?

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

8 THE COURT: Oh, I see your point.

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

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

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

1 to rights, you better take note of the pending lawsuit.

2 Something like that.

3 All right. Good distinction. Thank you.

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

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

14 MR. HERSKOVITS: Yes, Your Honor.

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

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

1 notice --

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

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

6 MR. HERSKOVITS: In March?

7 THE COURT: -- at the next conference.

8 MR. HERSKOVITS: Uh-huh.

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

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

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

20 (No response.)

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

1 form and content of 1779-1.

2 Am I mistaken in that belief?

3 (No response.)

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

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

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

21 Does anyone think differently?

22 (No response.)

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

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

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

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

10 Mr. Herskovits.

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

13 THE COURT: Okay.

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

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

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

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

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

8 What about the 13th, Wednesday?

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

11 THE COURT: What time is that hearing?

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

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

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

18 THE COURT: 1:00?

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

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

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

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

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

12 (No response.)

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

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

22 (Recess taken.)

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

24 THE COURT: Please be seated.

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

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

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

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

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

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

20 With that Mr. Guarino, go ahead.

21 MR. GUARINO: Thank you, Your Honor.

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

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

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

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

23 THE COURT: Magistrate judge.

24 MR. GUARINO: Magistrate judge. Sorry.

25 THE COURT: That's the official title since

1 1990.

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

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

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

9 MR. GUARINO: Possibly; yes.

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

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

1 any party from doing so.

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

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

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

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

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

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

24 MR. GUARINO: Sure.

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

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

4 MR. DEPAOLI: Yes.

5 THE COURT: What?

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

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

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

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

1 original litigation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 would be entered.

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

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

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

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

23 MR. GUARINO: Let me backup --

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

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

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

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

25 THE COURT: Any by implication, though, what

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

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

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

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

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

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

23 MR. GUARINO: Okay.

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

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

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

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

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

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

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

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

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

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

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

3 MR. GUARINO: Yes, Your Honor.

4 THE COURT: Why is that?

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

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

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

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

25 MR. GUARINO: Depending on the challenges

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

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

18 MR. GUARINO: Uh-huh.

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

22 MR. GUARINO: Yes.

23 THE COURT: Okay.

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

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

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

25 THE COURT: And your argument is the Court ought

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

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

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

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

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

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

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

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

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

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

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

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

1 in which a Rule 56 motion would be filed.

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

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

14 MR. GUARINO: Exactly, Your Honor.

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

21 MR. GUARINO: Uh-huh.

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

25 MR. GUARINO: Sure.

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

3 MR. GUARINO: Uh-huh.

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

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

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

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

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

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

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

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

14 MR. DEPAOLI: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: Well, what --

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

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

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

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

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

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

7 MR. DEPAOLI: Well, I --

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

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

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

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

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

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

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

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

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

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

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

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

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

10 THE COURT: Okay. Continue. Thank you.

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

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

1 that there is no such federally reserved right?

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

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

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

1 any water, in my judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: And are there any boundaries

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Just a second.

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

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

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

17 THE COURT: You did. I agree.

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

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

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

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

18 MR. DEPAOLI: I think --

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

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

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

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

11 MR. DEPAOLI: Right.

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

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

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

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

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

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

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

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

9 MR. DEPAOLI: Yes.

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

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

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

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

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

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

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

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

23 THE COURT: Well, I tend to agree.

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

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

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

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

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

19 MR. DEPAOLI: Yes.

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

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

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

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

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

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

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

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

10 Thank you.

11 THE COURT: Thank you, Mr. DePaoli.

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

14 (No response.)

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

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

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

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

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

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

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

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

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

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

17 Does that respond to the Court's inquiry?

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

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

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

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

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

11 Explain what that is to me.

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

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

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

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

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

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

3 THE COURT: Underneath.

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

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

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

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

25 MR. GUARINO: Sure.

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

4 MR. GUARINO: Yes.

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

7 MR. GUARINO: Yes.

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

10 MR. GUARINO: Yes.

11 THE COURT: But those are groundwater rights?

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

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

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

18 THE COURT: -- Quantification of water rights.

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

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

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

25 MR. GUARINO: Precisely.

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

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

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

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

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

1 is. I think --

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

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

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

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

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

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

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

1 claims.

2 MR. GUARINO: Happening simultaneously?

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

7 MR. GUARINO: Yes, sir.

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

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

13 THE COURT: Yes.

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

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

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

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

9 MR. GUARINO: Yes, Your Honor.

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

13 MR. GUARINO: Yes, Your Honor.

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

18 What happened to the other 2200?

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

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

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

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

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

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

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

17 THE COURT: Thank you.

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

1 counter-claims and Tribal counter-claims."

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

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

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

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

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

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

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

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

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

15 MR. GUARINO: I believe so.

16 THE COURT: Without discovery?

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

19 THE COURT: Sure. I understand that.

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

1 converting it to a Rule 56.

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

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

10 THE COURT: Okay. Thank you.

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

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

23 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Is there any question or discussion?

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

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

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

14 MR. GUARINO: We'll do that.

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

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

21 THE COURT: Yes.

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

24 (No response.)

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

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

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

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

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

9 Thank you all.

10 (Court Adjourned.)

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

/s/ Kathryn M. French

February 13, 2013

KATHRYN M. FRENCH, RPR, CCR
Official Reporter

DATE