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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

UNITED STATES OF AMERICA, Plaintiff, **WALKER RIVER PAIUTE TRIBE,** Plaintiff, Intervenor, **v.** **WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,** Defendants, **UNITED STATES OF AMERICA WALKER RIVER PAIUTE TRIBE,** Counterclaimants, **v.** **WALKER RIVER IRRIGATION DISTRICT, et al.,** Counterdefendants.	Case No.: 03:73:cv-127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **CALIFORNIA STATE AGENCIES' SUGGESTED THRESHOLD ISSUE**

Pursuant to the Court's orders in the *Minutes of Proceeding*, dated August 20, 2007, and *Minutes of Court*, dated April 15, 2008, the California State Water Resources Control Board (California Water Board) and the California Department of Fish and Game (collectively, "California State Agencies") submit a proposed threshold issue in the C-125-B subproceeding. In general, the California State Agencies consider threshold issues to be those issues that will aid in determining the scope of litigation without requiring extensive discovery and are subject to interlocutory appeal.

Due to the California State Agencies' unique role in the C-125 litigation, we suggest only one issue at this time. Our proposed threshold issue addresses this Court's jurisdiction to conduct an adjudication of the waters of the Walker River basin. The *Case Management Order* (Doc. No. 108), dated April 18, 2000, requires members of certain categories to be named as counterdefendants in this subproceeding. These categories include holders of surface water rights under the laws of California and certain groundwater users in California. Although the State of California has responded to discovery requests from the Tribe and the United States, it has expressly noted that it does not possess information that would identify *all* individuals and entities with any claims to surface water or groundwater in the Walker River Basin. Identifying water right claimants with dormant or unexercised riparian or overlying groundwater rights likely would require identifying parcel owners who have not already been named.[1/] Accordingly, the California State Agencies submit the following threshold issue:

> Are unnamed senior water right holders in California with dormant or unexercised water rights subject to compulsory joinder in this action? Given that a District Court

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1. Under California law, a riparian right or an overlying groundwater right exists whether or not the right has been exercised. Dormant riparian rights generally are paramount to active appropriative rights, but after notice and an opportunity to be heard, the priority of an unexercised riparian right may be subordinated to that of exercised rights in a statutory adjudication under California Water Code section 2500 et seq. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339 [599 P.2d 656]; see Cal. Wat. Code, §§ 2527, 2529, subd. (c); *but see Wright v. Goleta Water Dist*. (1985) 174 Cal.App.3d 74, 87 [219 Cal.Rptr. 740, 749] [declining to apply *Long Valley* and to subordinate unexercised overlying groundwater right to current appropriative use].)

does not have jurisdiction to equitably apportion the basin between states, can this Court effectively adjudicate the Walker River basin without requiring service on these water right holders?

Additionally, the California State Agencies wish to clarify the capacity in which the agencies are being sued in this C-125-B subproceeding. As explained in the *California State Agencies' Preliminary Legal Theories* (Dec. 28, 2007, Doc. No. 1283), the California State Agencies have essentially three interests in the C-125 litigation: i) the California State Agencies as proprietary water right holders in the Walker River Basin; ii) the State of California as a sovereign entity with responsibility for regulating California water rights, for preventing the waste and unreasonable use of water, and for protecting public trust resources; and iii) the State of California as a sovereign entity with an interest in the apportionment of interstate waters. In this subproceeding, the Walker River Paiute Tribe (Tribe) has identified the California Department of Fish and Game, the California Water Board, and the California Department of Parks and Recreation as counterdefendants. Thus, the California State Agencies believe that only our interests as proprietary water right holders are currently being litigated before the United States District Court. Our proposed threshold issue is limited accordingly. If, however, the Tribe or other parties intend to litigate the State of California's sovereign interests over water rights held by others, or if the State's sovereign interests become an issue in this litigation, then the California State Agencies may request leave to submit additional threshold issues.

Dated: June 24, 2008

Respectfully submitted,

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