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 10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF NEVADA

11
 12 UNITED STATES OF AMERICA,) IN EQUITY NO. C-125-ECR
) Subproceeding: C-125-B
 13 Plaintiff,)
) 3:73-CV-00127-RCJ-WGC
 14 WALKER RIVER PAIUTE TRIBE,)
)
 15 Plaintiff-Intervenor,)
)
 16 v.) **WALKER RIVER IRRIGATION**
) **DISTRICT’S LIST OF THRESHOLD**
 17 WALKER RIVER IRRIGATION DISTRICT,) **ISSUES AND REFERENCE TO**
 18 a corporation, et al.,) **BRIEFS CONCERNING ANSWERS**
)
 19 Defendants.)

20 _____)
)
 21 UNITED STATES OF AMERICA,)
 WALKER RIVER PAIUTE TRIBE,)
 22)
 23 Counterclaimants,)
)
 24 v.)
)
 25 WALKER RIVER IRRIGATION DISTRICT,)
 et al.,)
 26)
 27 Counterdefendants.)
 _____)

1 **I. INTRODUCTION.**

2 At the August 2, 2012 Status Conference, the Court directed the parties to prepare a
3 filing "identif[ying] and [providing] a brief summary" of threshold issues, *Transcript of Status*
4 *Conference, August 2, 2012* at p. 90, lns. 15-17. The Court also directed that the parties
5 identify in the Clerk's Record their respective briefs related to when answers need to be filed in
6 this action. *Id.* at p. 92, ln. 16 - p. 93, ln. 3. Consistent with that direction, the Walker River
7 Irrigation District ("District") submits this list of threshold issues which it has previously
8 identified, references to its briefs related thereto, and references to briefs it has previously filed
9 which address the issue of when answers need to be filed in this action.
10

11 The Case Management Order ("CMO") provides that pretrial proceedings regarding the
12 Tribal Claims be conducted in two phases, with the first phase to consist of the "threshold
13 issues." Through the threshold issue phase, the CMO seeks to further manage the Tribal
14 Claims in ways which may defer costly and possibly unnecessary proceedings in the interests
15 of judicial economy and the convenience of the parties. The CMO includes suggestions for
16 threshold issues which do not preclude consideration of other issues. *See* Doc. 108 at 9, ln. 3 -
17 11, ln. 9.
18

19 With respect to the threshold issues, the parties submitted preliminary legal theories in
20 late December, 2007 and early 2008. *See* Docs. 1279; 1280; 1287; 1288; 1289; 1290. Later in
21 2008, the Magistrate Judge ordered the parties to submit briefs on what issues should be
22 identified as threshold issues. The parties filed opening, responsive and reply briefs. *See* Docs.
23 1411-1419; 1430; 1441-1445; 1452-1455.
24

25 Magistrate Judge McQuaid also ordered briefing on the question of whether, and, if so,
26 when, answers would be filed. Briefs on that issue were subsequently filed. *See* Docs. 1487;
27 1498; 1499; 1500; 1501; 1503.
28

1 **II. THE DISTRICT'S PROPOSED THRESHOLD ISSUES.**

2 The District and other Defendants disagree with the United States and Tribe concerning
3 what issues are proper threshold issues in this matter. One important preliminary issue is thus:
4 What criteria should the Court use to identify proper threshold issues? The District has
5 addressed that preliminary issue at the direction of the Magistrate Judge. *See, e.g.*, District
6 Opening Brief on Threshold Issues, Doc. 1416 at p. 7, ln. 13 - p. 10, ln. 18; District Responsive
7 Brief on Threshold Issues, Doc. 1443 at p. 1, ln. 26 - p. 9, ln. 7; District Reply Brief on
8 Threshold Issues, Doc. 1453 at p. 2 - p. 10, ln. 11.

10 **A. Jurisdictional Issues(s).**

11 Threshold jurisdictional issues include:

12 1. Whether this Court has jurisdiction to adjudicate new claims for
13 additional surface and/or underground water in Case C-125, a case in which a
14 final judgment has been entered, or must a new and separate action form the
15 basis for these claims; and if so, to what extent should the Court exercise its
jurisdiction in these matters?¹

16 The essence of that issue is whether a court in an action which has gone to final
17 judgment has jurisdiction after entry of that final judgment to adjudicate new claims for
18 additional water, or whether such claims must be the subject of a new and separate action. *See*
19 District's Opening Brief on Threshold Issues, Doc. 1416, at p. 10, lns. 20-27; *see also* District's
20 Responsive Brief on Threshold Issues, Doc. 1443 at pp. 6-7; District's Reply Brief on
21 Threshold Issues, Doc. 1453 at pp. 10-12.

23 **B. Issues of Law.**

24 Purely legal issues include:

25 2. Whether a claim to a right for conservation storage of water in
26 Weber Reservoir may be made under the implied reservation of water rights

27
28

¹ Threshold issues identified herein are numbered sequentially.

1 doctrine, which was established in *Winters v. United States*, 207 U.S. 564
2 (1908), or under any other theory of federal common law?²

3 3. Whether a claim to a right for underground water may be made
4 under the implied reservation of water rights doctrine, or under any other theory
5 of federal common law?

6 4. Whether the United States may reserve water, under the federal
7 implied reservation of water doctrine, from a water source that is not within the
8 lands being reserved?³

9 *See* District's Opening Brief on Threshold Issues, Doc. 1416 at p. 11, Ins. 1-19;
10 District's Responsive Brief on Threshold Issues, Doc. 1443 at p. 10, Ins. 16-27.

11 **C. Defenses Based Upon Claim and Issue Preclusion.**

12 The existence of the Walker River Decree, a valid and final judgment which established
13 and quantified an implied reserved water right for the Reservation, gives rise to a number of
14 issues related to claim and issue preclusion. *See, Nevada v. United States*, 463 U.S. 110, 129-
15 145 (1983). Those issues include:

16 5. Whether the doctrine of claim (*res judicata*) and/or issue
17 preclusion (*collateral estoppel*) bar any claim for:

18 a. federally reserved surface water rights for the lands added
19 to the Reservation after entry of the Walker River Decree on April 14, 1936 (the
20 "Added Lands");

21 b. additional water from an underground source for lands
22 that were within the Reservation at the time the Walker River Decree was
23 entered;

24 c. additional water from an underground source for the
25 Added Lands;

26 ² "Conservation storage" involves storage of water over and above the water right for the
27 Reservation already recognized in the Walker River Decree for purposes of future use.

28 ³ At this point, the District has not determined that the facts are actually as expressed in that
issue. However, if they are, it is an appropriate threshold issue.

1 d. storage rights, other than those for regulatory purposes,
2 for those lands that were within the Reservation at the time the Walker River
Decree was entered;⁴ and

3 e. storage rights, other than those for regulatory purposes,
4 for the Added Lands?

5 *See* District's Opening Brief on Threshold Issues, Doc. 1416 at p. 11, lns. 22 - p. 12, ln.
6 16; District's Responsive Brief on Threshold Issues, Doc. 1443 at p. 10, ln. 28 - p. 12, ln. 2.

7 **D. Affirmative Defenses Bases on Laches and Estoppel.**

8 The facts that the bases for the Tribal Claims have been known and in existence since at
9 least 1936 and were not asserted until 1992 give rise to possible additional equitable defenses.

10 Those equitable defenses and the issues they raise are as follows:

11
12 6. Whether the doctrines of laches and estoppel bar the conservation
13 storage claims of the United States and the Tribe for the lands within the
Reservation as it existed at the time of entry of the Walker River Decree?

14 7. Whether the doctrines of laches and estoppel bar the United
15 States' and the Tribe's claims for a water right from underground sources for the
Reservation as it existed at the time of the entry of the Walker River Decree?

16 8. Whether the doctrines of laches and estoppel bar the United
17 States' and Tribe's claims for federally reserved water rights including surface
18 water, underground water, and/or conservation storage claims for the Added
Lands?

19 *See* District's Opening Brief on Threshold Issues, Doc. 1416, at p. 12, ln. 17 - p. 13, ln.
20 1; District's Responsive Brief on Threshold Issues, Doc. 1443 at p. 12, lns. 3-10.

21 **E. The "Primary Purpose" Issue.**

22 Further, the claims for the Added Lands present a serious and potentially dispositive
23 issue on an essential element of a claim for water under the implied reservation of water
24 doctrine as to those Added Lands: proof that the Reservation's primary purpose cannot be
25

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27
28 ⁴ "Storage for regulatory purposes" would involve only water from the water right for the
Reservation already recognized in the Walker River Decree.

1 fulfilled without water. *See, United States v. New Mexico*, 438 U.S. 595 (1978). That issue is
2 as follows:

3 9. Whether any water, surface or underground, was impliedly
4 reserved when lands were added to the Reservation in light of the following: (1)
5 the language and history of the Act of Congress that authorized the addition of
6 those lands; (2) the fact that prior to their addition to the Reservation, those
7 lands were designated as public domain and opened to entry under the Desert
8 Lands Act; and (3) the fact that the lands were added for grazing purposes?

9 *See* District's Opening Brief on Threshold Issues, Doc. 1416 at p. 13, lns. 3-23;
10 District's Reply Brief on Threshold Issues, Doc. 1453 at p. 4 - p. 10, ln. 11.

11 **F. Issues Identified in the Case Management Order as Possible Threshold**
12 **Issues Which the District Has Suggested Be Deferred for the Present.**

13 The CMO identifies certain issues as "threshold issues," which the District characterizes
14 as "surface water-underground water relationship issues," and which should be deferred for the
15 present because determination of other threshold issues will help define the extent to which
16 these surface water-underground water relationship issues are actually, rather than
17 hypothetically, involved in this case. Those issues are:

18 10. If the Tribe has the right to pump groundwater under federal law,
19 are such rights, as a matter of federal law subject to different protections than
20 those provided by State law?

21 11. Whether the court has jurisdiction over groundwater used
22 pursuant to State law outside the exterior boundaries of the Walker River Paiute
23 Indian Reservation if such use interferes with the Tribe's rights under federal
24 law to use water from the Walker River system; and, if so,

25 12. Should the court exercise that jurisdiction?

26 *See*, District's Opening Brief on Threshold Issues, Doc. 1416, at p. 13, ln. 24 - 14, ln.
27 24.

28 For the convenience of the Court, the District has attached a Table which lists all of the
above issues and where in the Clerk's Record the District's briefs are located.

1 **III. REFERENCES TO DISTRICT BRIEFS ON WHEN ANSWERS NEED TO BE**
2 **FILED IN THIS ACTION.**

3 The District has previously addressed the issue of when answers need to be filed in this
4 action as follows:

5 District's Responsive Brief on Threshold Issues, Doc. 1443 at p. 7, ln. 11 - p. 9,
6 ln. 7

7 District's Reply Brief on Threshold Issues, Doc. 1453 at p. 12, ln. 11 - p. 14, ln.
8 14

9 District's Response to the United States of America's and Walker River Paiute
10 Tribe's Brief Regarding When Answers Need to Be Filed in This Action, Doc.
11 1499

12 Dated: August 20, 2012

13 WOODBURN AND WEDGE

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 20th day of August, 2012, I electronically served the foregoing *Walker River Irrigation District's List of Threshold Issues and Reference to Briefs Concerning Answers* in Case No. 3:73-cv-0127-RCJ-WGC with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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