

1 Wes Williams Jr.
Nevada Bar #6864
2 Law Offices of Wes Williams Jr.
A Professional Corporation
3 3119 Lake Pasture Rd.
P.O. Box 100
4 Schurz, Nevada 89427
(775)773-2838
5 wwilliams@stanfordalumni.org
Attorney for the Walker River Paiute Tribe

6
7
8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA
10

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 WALKER RIVER PAIUTE TRIBE,)

14 Plaintiff-Intervenor,)

15 vs.)

16 WALKER RIVER IRRIGATION)
17 DISTRICT,)
18 a corporation, et al.,)

19 Defendants.)
20
21
22
23
24
25
26
27
28

3:73-CV-00127-RCJ-WGC
IN EQUITY NO. C-125-ECR

**WALKER RIVER PAIUTE TRIBE'S
POINTS AND AUTHORITIES IN
SUPPORT OF RESPONSE IN
OPPOSITION TO MOTIONS TO
DISMISS FILED BY WALKER
RIVER IRRIGATION DISTRICT,
NEVADA DEPARTMENT OF
WILDLIFE AND CIRCLE BAR N
RANCH**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THE CLAIMS ASSERTED BY THE TRIBE AND THE UNITED STATES ON
THE TRIBE’S BEHALF ARE WITHIN THE COURT’S CONTINUING
JURISDICTION UNDER THE DECREE 2

 A. BACKGROUND..... 2

 1. The Tribe and Its Reservation..... 2

 2. The History of this Litigation..... 5

III. ARGUMENT..... 8

 A. MODIFICATION INCLUDES CONSIDERATION OF ADDITIONAL
CLAIMS TO SERVE THE WALKER RIVER INDIAN RESERVATION..... 10

 B. THE COURT HAS JURISDICTION OVER THE GROUNDWATER CLAIMS
ASSERTED BY THE TRIBE AND THE UNITED STATES ON THE TRIBE’S
BEHALF 16

IV. CONCLUSION..... 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Arizona v. California, 373 U.S. 546 (1963)..... 13

Arizona v. California, 376 U.S. 340 (1964)..... 13

Arizona v. California, 493 U.S. 886 (1989)..... 14

Arizona v. California, 530 U.S. 392 (2000)..... 14

Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545 (1983) 9, 17, 19, 20

Benson v. JPMorgan Chase Bank, N.A., 673 F.3d 1207 (9th Cir. 2012)..... 8, 17

Boise Cascade Corp. v. U.S. Envtl. Prot. Agency,
942 F.2d 1427 (9th Cir. 1991)..... 11

Bowsher v. Merck & Co., 460 U.S. 824 (1983) 11

Colo. River Water Conservation. Dist. v. United States,
424 U.S. 800 (1976) 9, 10, 19, 20

Fed. Commc’ns Comm’n v. Pacifica Found., 438 U.S. 726 (1978) 11

Heidritter v. Elizabeth Oil Cloth Co., 112 U.S. 294 (1884) 8

In re General Adjudication of All Rights to Use Water in Gila River
Sys. & Source, 35 P.3d 68 (Ariz. 2001) 15

In re General Adjudication of All Rights to Use Water in Gila River
Sys. & Source, 989 P.2d 739 (Ariz. 1999) 15, 17, 18

Kline v. Burke Const. Co., 260 U.S. 226 (1922)..... 8

Miller & Lux v. Rickey, 123 F. 604 (D. Nev. 1903)..... 5

Mineral County v. State of Nevada, 20 P.3d 800 (Nev. 2001)..... 5, 9, 15

Moses H. Cone Mem’l Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983) 9, 19

N. Paiute Nation v. United States, 16 Indian Cl. Comm’n 215 (1965)..... 3

N. Paiute Nation v. United States, 7 Indian Cl. Comm’n 322 (1959),
aff’d, 393 F.2d 786 (Ct. Cl. 1968)..... 3

Nebraska v. Wyoming, 507 U.S. 584 (1993)..... 13

1	<i>Nevada v. United States</i> , 463 U.S. 110 (1983)	8
2	<i>Prince v. Jacoby</i> , 303 F.3d 1074 (9th Cir. 2002).....	11
3	<i>Rhoades v. Avon Prods., Inc.</i> , 504 F.3d 1151 (9th Cir. 2007)	17
4	<i>Rickey Land & Cattle Co. v. Miller & Lux</i> , 152 F. 11 (9th Cir. 1907),	
5	<i>aff'd</i> , 218 U.S. 258 (1910).....	9
6	<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974), <i>abrogated on other</i>	
7	<i>grounds by Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	17
8	<i>U.S. v. 144,774 Pounds of Blue King Crab</i> ,	
9	410 F.3d 1131(9th Cir. 2005).....	11
10	<i>United States v. Alpine Land & Reservoir Co.</i> ,	
11	503 F. Supp. 877 (D. Nev. 1980).....	10
12	<i>United States v. Cappaert</i> , 508 F.2d 313 (9th Cir. 1974),	
13	<i>aff'd</i> , 426 U.S. 128 (1976).....	17, 18, 20
14	<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	11
15	<i>United States v. New Mexico</i> , 438 U.S. 696 (1978).....	15
16	<i>United States v. Orr Water Ditch Co.</i> , 600 F.3d 1152 (9th Cir. 2010).....	8-9, 18, 19
17	<i>United States v. S. Pac. Transp. Co.</i> , 543 F.2d 676 (9th Cir. 1976).....	3
18	<i>United States v. Walker River Irrigation Dist.</i> , 104 F.2d 334 (9th Cir. 1939).....	3, 5
19	<i>United States v. Wenner</i> , 351 F.3d 969 (9th Cir. 2003).....	11
20	<i>Winters v. United States</i> , 207 U.S. 564 (1908)	13
21	Statutes	
22	Act of May 27, 1902, 32 Stat. 245	4
23	Act of June 21, 1906, 34 Stat. 352	4
24	Act of June 22, 1936, 49 Stat. 1806	4
25	Agreement of May 25, 1906	4
26	Desert Land Act, 43 U.S.C. § 321.....	20
27	Executive Order of March 19, 1874.....	3
28	Indian Reorganization Act of 1934, 25 U.S.C. 461-79	4

1 Joint Resolution of June 19, 1902, 32 Stat. 744..... 4
2 McCarran Amendment, 43 U.S.C. § 666..... 9, 19
3 Proclamation of September 26, 1906, 34 Stat. 3237..... 4
4
5 **Other Authorities**
6 EDWARD C. JOHNSON, WALKER RIVER PAIUTES:
7 A TRIBAL HISTORY (2d ed. 1978)..... 3
8 REPORT ON INDIAN AFFAIRS BY THE ACTING COMM’R, FOR THE YEAR 1867 (1868) 3
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2
3 Pursuant to the Court’s order issued at a hearing held on November 4, 2013, *Minutes of*
4 *Proceedings* at 3 (Nov. 4, 2013) (Doc. 1958), the Walker River Paiute Tribe (“Tribe”), a
5 sovereign, federally recognized Indian tribe and Plaintiff-Intervenor in this matter, herein
6 responds to the following motions to dismiss and supporting memoranda: *Walker River*
7 *Irrigation District’s Motion to Dismiss Claims of United States Based Upon State Law Pursuant*
8 *to Fed. R. Civ. P. 12(b)(1)* (Mar. 31, 2014) (Doc. 1981); *Walker River Irrigation District’s*
9 *Points and Authorities in Support of Motion to Dismiss Claims of United States Based Upon*
10 *State Law Pursuant to Fed. R. Civ. P. 12(b)(1)* (Mar. 31, 2014 (Doc. 1981-1) (“WRID Brief”);
11 *Points and Authorities of Circle Bar N Ranch, LLC, et al. in Support of Its Joinder to Walker*
12 *River Irrigation District’s Motion to Dismiss Claims of United States Based Upon State Law*
13 *Pursuant to Fed. R. Civ. P. 12(b)(1), and Supplemental Argument* (Mar. 31, 2014) (Doc. 1983-1)
14 (“Circle Bar N Ranch Brief”); and *Motion to Dismiss Concerning Threshold Jurisdictional*
15 *Issues* (Mar. 31, 2014) (Doc. 1980) (“NDOW Brief”). The Tribe timely files this response by
16
17
18
19 May 30, 2014.

20 The Tribe directs this response to the arguments advanced by the Walker River Irrigation
21 District (“WRID”), Nevada Department of Wildlife (“NDOW”) and Circle Bar N Ranch that the
22 assertion of claims for water to serve lands within the Walker River Indian Reservation
23 (“Reservation”) that were not addressed in the Decree should be part of a separate proceeding or
24 some other proceedings in various courts. WRID Brief at 5, 7-8; Circle Bar N Ranch Brief at 4,
25 10-11; NDOW Brief at 5, 7. For the reasons set forth herein, the claims asserted by the Tribe
26 and the United States on the Tribe’s behalf to serve needs on the Reservation which were not
27 addressed in the Decree properly are part of the instant proceedings and within the Court’s
28

1 retained jurisdiction under the Decree. In addition, consistent with its comprehensive
2 jurisdiction over the Walker River system and modern understanding of the interrelationship
3 between surface water and groundwater in the Walker River Basin, the Court has jurisdiction
4 over groundwater within the Reservation and outside the Reservation to the extent that such off-
5 Reservation groundwater uses interfere with Reservation uses and needs. *Contra* WRID Brief at
6 6 (“Court does not have subject matter jurisdiction . . . regarding the pumping of ground water”);
7 Circle Bar N Ranch Brief at 9 (federal court only has jurisdiction “over the adjudicated surface
8 water uses”); NDOW Brief at 4-5 (“Court’s jurisdiction does not extend outside Reservation
9 boundaries, and claims to surface water and groundwater “do not proceed from a common core
10 of facts”). Well-settled jurisprudence supports the conclusion that the Court has jurisdiction to
11 consider and determine the rights claimed by the Tribe and the United States on the Tribe’s
12 behalf.
13
14

15
16 **II. THE CLAIMS ASSERTED BY THE TRIBE AND THE**
17 **UNITED STATES ON THE TRIBE’S BEHALF ARE**
18 **WITHIN THE COURT’S CONTINUING JURISDICTION**
19 **UNDER THE DECREE**

20 **A. BACKGROUND.**

21 **1. The Tribe and Its Reservation.**

22 The Tribe’s home is its Reservation, located in what are now known as Mineral, Lyon
23 and Churchill Counties, Nevada. The Tribe’s name for itself is Agai Dicutta, which means
24 “Trout Eater,” or Numu, which means “the People.” The Tribe has occupied the area north of
25 and surrounding Walker Lake – known to the Tribe as Agai Pah or “Trout Lake” – since time
26 immemorial and has always exercised sovereignty over its territory and people. The Reservation
27 is located approximately 100 miles southeast of Reno, Nevada. The area now encompassed by
28 the State of Nevada, which joined the Union in 1864, has been part of the United States territory

1 since the 1848 Treaty of Guadalupe Hidalgo. The Reservation encompasses the Walker River,
2 which empties into Walker Lake, a terminal desert lake fed primarily by the Walker River. The
3 Walker River is an interstate stream that begins in the Sierra Nevada Mountains in California,
4 and ends at Walker Lake in Nevada. The 350,000 acre Reservation is but a remnant of the
5 Tribe's much larger aboriginal territory. *See generally N. Paiute Nation v. United States*, 7
6 Indian Cl. Comm'n 322 (1959), *aff'd*, 393 F.2d 786 (Ct. Cl. 1968); *N. Paiute Nation v. United*
7 *States*, 16 Indian Cl. Comm'n 215 (1965).

9 The Reservation was set aside for the Tribe's benefit by action of the Department of the
10 Interior on November 29, 1859, to serve as the Tribe's permanent home and to enable the Tribe
11 to transition from a subsistence way of life in which fish from the Walker River and Walker
12 Lake played a central role in the Tribe's survival, to an agricultural way of life. *United States v.*
13 *Walker River Irrigation Dist.*, 104 F.2d 334, 335 (9th Cir. 1939). The Executive Order of March
14 19, 1874 formally confirmed the Reservation. *United States v. S. Pac. Transp. Co.*, 543 F.2d
15 676, 681 (9th Cir. 1976). The original Reservation encompassed Walker Lake, upon which the
16 Tribe traditionally relied for its food source and continued existence. *Walker River Irrigation*
17 *Dist.*, 104 F.2d at 335; REPORT ON INDIAN AFFAIRS BY THE ACTING COMM'R, FOR THE YEAR 1867
18 at 9-10 (1868).¹ Around the time of the Reservation's establishment, gold was discovered in the
19 area and non-Indian encroachment on the Tribe's land and resources began to occur with much
20 frequency. EDWARD C. JOHNSON, WALKER RIVER PAIUTES: A TRIBAL HISTORY 30 (2d ed.
21 1978). In addition, non-Indians were unhappy with the Tribe's right to fish in Walker Lake. *See*
22 Letter from Sen. W.M. Stewart to Secretary of Interior at 1-2 (Mar. 3, 1888); Letter from W.D.C.
23

24 ¹ Although not part of the Tribe's claims in these proceedings, the Tribe's connection to
25 Walker Lake is profound and the lake has always served as a central element of the Tribe's
26 history, culture and spiritual life.

1 Gibson, Indian Agent, to D.C. Atkins, Comm’r of Indian Affairs, at 9-10 (May 2, 1888); Letter
2 from T.J. Morgan, Comm’r of Indian Affairs, to Secretary of Interior at 1-2 (Nov. 3, 1891). The
3 desire of non-Indians to divert water from the Walker River and Walker Lake also created
4 pressure to open the Reservation to non-Indian settlement. *See, e.g.*, Letter from Acting Comm’r
5 Tonner to Secretary of Interior (Nov. 1, 1904).
6

7 As a result of these pressures, and at the behest of the United States, the Tribe ceded large
8 portions of its original Reservation lands under the Act of May 27, 1902, 32 Stat. 245, 260-61,
9 the Agreement of May 25, 1906, and the Proclamation of September 26, 1906, 34 Stat. 3237. As
10 a result, the Tribe’s confinement to the Reservation forced it to abandon its fish-dependent way
11 of life in favor of agriculture, in accordance with the federal allotment policy. In 1902, the
12 federal government allotted the Reservation, allocating 20 acres each to heads of household.
13 Joint Resolution of June 19, 1902, 32 Stat. 744; *see also* Act of June 21, 1906, 34 Stat. 352, 358
14 (setting aside timberland tracts for the Tribe to use “for fuel and improvements”). Allotment,
15 albeit in much smaller increments than on other Indian reservations, furthered the United States’
16 intent to convert the Tribe from fish-dependent to agriculture-dependent. Consistent with the
17 effort to turn the Tribe away from its traditional reliance on the Walker Lake fish resource in
18 favor of molding the Tribe’s members into allotment-bound agriculturalists, from 1918 to 1961,
19 the Secretary of the Interior restored to the Reservation various segments of the lands the Tribe
20 previously ceded. In particular, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C.
21 §§ 461-79, on June 22, 1936, Congress authorized the restoration of approximately 170,000
22 acres to the Reservation. Act of June 22, 1936, 49 Stat. 1806. The Secretary restored those
23 lands to the Reservation in September of 1936, after the effective date of the Decree in this case.
24
25
26
27
28

1 In the early 1930's, the Bureau of Indian Affairs constructed the Walker River Indian
2 Irrigation Project ("Project") on the Reservation in order to deliver the Tribe's water rights to the
3 irrigable lands on the Reservation. An important component of the Project is Weber Dam,
4 behind which lies Weber Reservoir which was designed and built to store 13,000 acre-feet of
5 water. Weber Reservoir in part serves the critical function of enabling the Tribe to deliver the
6 26.25 cubic feet per second ("cfs") to the 2,100 decreed acres on the Reservation during the 180
7 day irrigation season, as set forth in the Decree. Weber Reservoir is the closest storage facility to
8 the Tribe's decreed lands, but its storage is a fraction of two much larger storage facilities on the
9 east and west branches of the Walker River upstream from the Reservation – Topaz and
10 Bridgeport reservoirs, each of which has storage capacity up to 50,000 acre feet. *See Mineral*
11 *County v. State of Nevada*, 20 P.3d 800, 804 (Nev. 2001) ("WRID owns, operates, and holds
12 water rights for two reservoirs within the Walker River Basin.").

13 **2. The History of this Litigation.**

14
15
16
17 This litigation² dates back to 1924 when the United States initiated the case to assert
18 water rights to serve the Reservation. Although the United States originally sought water rights
19 in the amount of 150 cfs from the flow of the Walker River to serve 10,000 acres of irrigable
20 lands on the Reservation, the Court found that the Tribe's needs at the time only required 26.25
21 cfs to serve 2,100 acres on the Reservation during a 180 day irrigation season. *Walker River*
22 *Irrigation Dist.*, 104 F.2d at 340. Following the Ninth Circuit's ruling, the Court entered the
23
24

25
26 ² This case responds to litigation brought in 1902 among parties variously located in
27 California and Nevada, not including the United States or the Tribe. *Miller & Lux v. Rickey*, 123
28 F. 604 (D. Nev. 1903). The United States brought the instant litigation in 1924 in order to
vindicate the surface water irrigation rights of the United States on behalf of the Tribe. This
litigation was necessary since the *Miller & Lux* line of cases could not have included the United
States because it had not waived its sovereign immunity for purposes of joinder.

1 Decree in April of 1940, with an effective date of April 14, 1936, consistent with the Ninth
2 Circuit's determination. *Decree* (Apr. 14, 1936), *as amended by Order for Entry of Amended*
3 *Final Decree to Conform to Writ of Mandate Etc.* (Apr. 22, 1940) ("1936 Decree"). The Tribe's
4 right under the 1936 Decree is the senior right in the Walker River system, with a priority date of
5 November 29, 1859.

7 Unlike the Tribe's right to irrigate the 2,100 acres of land identified by the Ninth Circuit
8 as necessary for the Tribe's survival within the confines of the Reservation boundaries, the lands
9 restored to the Reservation in September of 1936 do not presently have a decreed water right.
10 Accordingly, the Tribe, and the United States on the Tribe's behalf, filed claims pursuant to the
11 Court's continuing jurisdiction over the entirety of the Walker River system for additional water
12 from the Walker River to serve the restored lands, for storage in Weber Reservoir on the
13 Reservation, and for groundwater underlying the Reservation, none of which were considered in
14 the proceedings resulting in the 1936 Decree. *First Amended Counterclaim of the Walker River*
15 *Paiute Tribe* (July 31, 1997) ("Tribe's First Amended Counterclaim") (Doc. 58); *First Amended*
16 *Counterclaim of the United States of America* (July 31, 1997) ("United States' First Amended
17 Counterclaim") (Doc. 59) (collectively "First Amended Counterclaims"). The United States'
18 and Tribe's claims look to the Court's retention of continuing jurisdiction under the 1936 Decree
19 "for the purposes of changing the duty of water or for correcting or modifying this decree; also
20 for regulatory purposes, including a change of point of diversion or of the place of use of any
21 water user." 1936 Decree art. XIV.³

26 ³ Circle Bar N Ranch misquotes the 1936 Decree provision by which the Court retained
27 jurisdiction. "The Court *shall* retains jurisdiction of this cause for the purpose of changing the
28 duty of water or for correcting or modifying *the this decree to be entered*; also for *other*
regulatory purposes, including a change **of point of diversion or** of the place of use of any water
user." Circle Bar N Ranch Brief at 5 (italics showing words added by Circle Bar N Ranch that

1 Prior to addressing the merits of the First Amended Counterclaims, the Court ordered the
2 Tribe and the United States to complete service of process on all water rights claimants in the
3 Walker River Basin whose rights could be affected by the Tribe's and the United States' claims
4 for additional water. *See, e.g., Case Management Order* at 5-6 (Apr. 18, 2000) (Doc. 108)
5 ("CMO"), *as amended by Supplemental Case Management Order (No. 1)* (Apr. 11, 2013) (Doc.
6 1865). The Tribe and the United States filed a joint motion asking the Court to allow them to
7 serve groundwater claimants along with the other affected water rights claimants in the Walker
8 River Basin. *United States' and Walker River Paiute Tribe's Joint Motion for Leave to Serve*
9 *First Amended Counterclaims, to Join Groundwater Users, to Approve Forms for Notice and*
10 *Waiver, and to Approve Procedure for Service of Pleadings Once Parties Are Joined* (Aug. 20,
11 1998) (Doc. 62). WRID, the State of Nevada and the State of California objected by asserting
12 that the motion was not ripe, and questioned the propriety of including groundwater in the
13 adjudication where the 1936 Decree did not consider groundwater. WRID and the State of
14 Nevada added that the State has jurisdiction over groundwater in any event, and the State
15 Engineer is the appropriate administrator to handle groundwater claims. The Tribe and the
16 United States provided an expert affidavit demonstrating the hydrologic connection between
17 groundwater and surface water in the Walker River Basin, requiring this Court's consideration of
18 groundwater in any modification of the 1936 Decree. *Affidavit of Peter M. Pyle* (Aug. 5, 1998)
19 ("Pyle Affidavit") (Attachment 1 to Doc. 62).⁴

20 do not appear in the 1936 Decree, and bold showing letters and words that Circle Bar N Ranch
21 omitted from the 1936 Decree). The misquoted language implies that no decree was entered in
22 April of 1936, which is incorrect, and mistakenly suggests by the use of the word "other" that all
23 of the Court's retained jurisdiction was for regulatory purposes.

24
25
26
27
28 ⁴ WRID, NDOW and Circle Bar N Ranch are, therefore, wrong when they assert that the
Tribe and the United States have made no showing that groundwater pumping may have an

1 water rights.”); *Rickey Land & Cattle Co. v. Miller & Lux*, 152 F. 11, 18 (9th Cir. 1907) (“it has
2 been firmly established that the court first acquiring jurisdiction of the subject-matter of the
3 action or suit, and of the parties, is entitled to maintain it until the controversy is at an end and
4 the rights of the parties are fully administered”), *aff’d*, 218 U.S. 258 (1910). Consistent with this
5 well-established rule, addressing Mineral County’s claim for water to serve Walker Lake which
6 was not considered in the 1936 Decree, the Nevada Supreme Court recognized that this Court is
7 the exclusive tribunal for consideration of all claims to water from the Walker River system,
8 whether claims already adjudicated in the 1936 Decree or additional claims to water from the
9 Walker River system: “We conclude that the Decree Court, which has had continuing
10 involvement in the monitoring of the Walker River for more than eighty years, is the proper
11 forum for the redress that Petitioners seek.” *Mineral County*, 20 P.3d at 807.

12
13
14 By compelling that new claims related to the Walker River system be brought in this
15 Court, the Nevada Supreme Court ensured that the United States’ use of water from the Walker
16 River would remain subject to judicial supervision by this Court under the terms of the 1936
17 Decree. And while this case is not a McCarran Amendment proceeding, *see* 43 U.S.C. § 666, the
18 maintenance of jurisdiction in one court to supervise all the uses of water from a stream system
19 carries out the policy underlying that federal legislation of “avoidance of piecemeal adjudication
20 of water rights in a river system.” *Colo. River Water Conservation. Dist. v. United States*, 424
21 U.S. 800, 819 (1976); *accord Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 569-70
22 (1983) (McCarran Amendment requires comprehensive consideration of rights to a stream
23 system in a single forum); *Moses H. Cone Mem’l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1,
24 16 (1983) (The “most important” consideration of the McCarran Amendment is “the ‘clear
25
26
27
28

1 federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system.”
2 (quoting *Colo. River*, 424 U.S. at 819)).

3
4 **A. MODIFICATION INCLUDES CONSIDERATION OF ADDITIONAL
CLAIMS TO SERVE THE WALKER RIVER INDIAN RESERVATION.**

5 The 1936 Decree, which constitutes the legal structure that governs the Walker River
6 system, enumerates various components of the Court’s continuing jurisdiction “for the purpose
7 of *changing the duty of water* or for *correcting* or *modifying* this decree; also *for regulatory*
8 *purposes*, including a change of point of diversion or of the place of use of any water user.”

9
10 1936 Decree art. XIV (emphasis added). At least four separate elements make up the Court’s
11 continuing jurisdiction: changing the duty of water, correcting the 1936 Decree, modifying the
12 1936 Decree, and regulating decreed water rights. The Court retained jurisdiction over the 1936
13 Decree for more than enforcement. *See* WRID Brief at 5 (suggesting that jurisdiction is limited
14 to enforcement). Correction and modification are plainly inconsistent with enforcement. To
15 enforce the Decree is to protect its terms in practice; to modify or correct the Decree is to change
16 the terms of the Decree itself.⁵

17
18
19 None of the individually enumerated terms in the 1936 Decree may be construed as
20 repetitive of another. It is a fundamental canon of construction that courts must interpret
21 statutory or legal phrases “as a whole, giving effect to each word and not interpreting the
22 provision so as to make other provisions meaningless or superfluous.” *U.S. v. 144,774 Pounds of*
23

24 ⁵ “Changing the duty of water” means to become or make different “the amount of water
25 reasonably necessary to grow” a particular type of crop. *United States v. Alpine Land &*
26 *Reservoir Co.*, 503 F. Supp. 877, 887 (D. Nev. 1980). “Correcting” means to make something
27 right, true, and proper. *See* <http://www.merriam-webster.com/dictionary/correct>. “Modifying”
28 means to change some parts of something while not changing other parts. *See*
<http://www.merriam-webster.com/dictionary/modify>. “Regulating” means to bring something
under the control of authority, and to make rules or laws that control. *See* <http://www.merriam-webster.com/dictionary/regulate>.

1 *Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005); *accord Bowsher v. Merck & Co.*, 460 U.S.
2 824, 833 (1983) (“settled principle of statutory construction that we must give effect, if possible,
3 to every word of the statute”); *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003); *Boise*
4 *Cascade Corp. v. U.S. Evtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991). “The cardinal
5 principle of statutory construction is to save and not destroy. It is [the court’s] duty to give
6 effect, if possible, to every clause and word of a statute.” *Prince v. Jacoby*, 303 F.3d 1074,
7 1080 (9th Cir. 2002) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).
8 Further, use of the disjunctive “or” to separate a list of words typically signifies that each word in
9 the list has independent meaning. *Fed. Commc’ns Comm’n v. Pacifica Found.*, 438 U.S. 726,
10 739-40 (1978); *Blue King Crab*, 410 F.3d at 1135; *Prince*, 303 F.3d at 1080. Indeed, the Court
11 recognized that “modifying” means consideration of matters that were not adjudicated in the
12 1936 Decree. *Transcript of Status Conference* at 29-31 (July 25, 2013) (“Transcript”)
13 (discussing Mineral County’s claim that the public trust doctrine applies to Walker Lake,
14 constituting “a modification of the ’34 [sic] decree”).
15
16

17
18 Even though “modifying” must be read as something different than “correcting” or
19 “regulatory purposes,” WRID nevertheless reads the term “modifying” narrowly, excluding
20 claims for water that were not considered in the 1936 Decree. *See* WRID Brief at 5 (merely
21 stating, without support, that under the 1936 Decree the Court did not retain jurisdiction over
22 new water rights claims); *accord* Circle Bar N Ranch Brief at 4-6 (same); *but see* Transcript at
23 68 (with regard to Mineral County’s intervention in the C-125 proceedings to claim a water right
24 for Walker Lake which was not part of the 1936 Decree, WRID argued “that essentially [Mineral
25 County’s motion to intervene] is and ought to be treated as a motion to modify the existing
26 decree or an independent action to modify the existing decree”). This narrow reading is incorrect
27
28

1 because if the term “modifying” referred only to rights decreed in 1936, such a reading of the
2 1936 Decree would render the term superfluous since the Decree already uses the words
3 “correcting” and “for regulatory purposes.” Rather, “modifying” is a broad term that must
4 include consideration of additional claims. *See* Transcript at 68. That “modifying” is a broad
5 term encompassing old and new water rights claims alike is consistent with the Court’s prior
6 orders in this case which reach this conclusion: all claims to the Walker River are part of the C-
7 125 proceedings.

8
9
10 According to Rule 13 of the Federal Rules of Civil Procedure a cross-
11 claim against a co-party is appropriate whenever the claim arises out of the same
12 transaction or occurrence relating to any property that i[s] the subject matter of
13 the original action. *The Tribe’s and the United States’s claim against the District*
14 *arises out of the property rights established, and not established in the Walker*
15 *River Decree.* The District’s claim against the Board also arises out of the
16 property rights established in the Decree. Since both claims arise out of the same
17 transaction or occurrence, *[t]he Tribe’s and the United States’ claim against the*
18 *District is appropriately brought here.* The Court will treat the claim as if it were
19 brought as a cross-claim.

20

21
22 In this case the Tribe and the United States want the Court to recognize
23 additional water rights for the Tribe and integrate these rights into the Decree.
24 Such a recognition might have the effect of reducing the water allocated to other
25 federal rights holders or altering the priority which their allocation is given. Such
26 a recognition may also give the Tribe’s newly recognized rights priority over
27 claimants who acquired their rights through a state permit.

28 *Order* at 4-6 (Oct. 27, 1992) (Doc. 15). There has never been a question in the Court’s mind that
its continuing jurisdiction under the 1936 Decree includes new claims as well as correction and
regulation of rights decreed in 1936. *See id.* at 5.⁶

⁶ This interpretation of the 1936 Decree is consistent with its provisions other than Article XIV. Because Article XI enjoined any interference with the rights established in the 1936 Decree, the Court retained jurisdiction to consider other claims to the waters of the Walker River system to ensure that those rights do not conflict with the rights recognized in the 1936 Decree.

1 This is not the first time a final decree has been entered with retained jurisdiction
2 language allowing for modification to the final decree. In *Nebraska v. Wyoming*, the Court
3 addressed the standard for modification of a prior final decree entered in 1945 and distinguished
4 enforcement of the decree from its modification:
5

6 [W]e find merit in Wyoming’s contention that, to the extent Nebraska seeks
7 modification of the decree rather than enforcement, a higher standard of proof
8 applies. The two types of proceeding are markedly different. In an enforcement
9 action, the plaintiff need not show injury. . . . *In a modification proceeding, by*
10 *contrast, there is by definition no pre-existing right to interpret or enforce. At*
11 *least where the case concerns the impact of new development, the inquiry may*
12 *well entail the same sort of balancing of equities that occurs in an initial*
13 *proceeding to establish an equitable apportionment.*

14 507 U.S. 584, 592 (1993) (emphasis added).⁷ The unsupported statement by WRID and Circle
15 Bar N Ranch that modification is not materially different from correction or regulation of the
16 rights set forth in the Decree contravenes the Supreme Court’s recognition that modification is
17 something different than enforcement. Simply stating, without more, as WRID and Circle Bar N
18 Ranch do, that the term “modifying” does not include consideration of additional water rights
19 claims does not make it so. *See* WRID Brief at 5, 7; Circle Bar N Ranch Brief at 5.

20 Circle Bar N Ranch’s recitation of Article IX of the 1964 decree in *Arizona v. California*,
21 376 U.S. 340, 353 (1964), Circle Bar N Ranch Brief at 5, does not demonstrate that every time a

22 ⁷ Unlike an equitable apportionment of an interstate stream, as was at issue in *Nebraska*,
23 there would be no balancing of equities in the consideration of modification of the 1936
24 Decree. Rights to water from the Walker River system to serve the Tribe and the Reservation are
25 based upon the inherent authority of the federal government “to reserve the waters and exempt
26 them from appropriation under the state laws [which power] is not denied, and could not be.”
27 *Winters v. United States*, 207 U.S. 564, 577 (1908); *see Arizona v. California*, 373 U.S. 546, 597
28 (1963) (“The doctrine of equitable apportionment is a method of resolving water disputes
between States. . . . An Indian Reservation is not a State. . . . [E]ven were we to treat an Indian
Reservation like a State, equitable apportionment would still not control since, under our view,
the Indian claims here are governed by the statutes and Executive Orders creating the
reservations.”).

1 court examines additional claims to water from a particular source, it does so in a new action.
2 Rather, all of the *Arizona v. California* proceedings have been part of the same action,⁸ and the
3 key to reopening the decree was certainly not the use of the word “supplementary.” There have
4 been three amendments to the 1963 decree in *Arizona v. California*, each of which is titled
5 “supplementary” but it has always been the same action. This is evidenced by the fact that the
6 United States failed to make a claim for certain disputed boundary lands for the Quechan
7 Reservation in the litigation that led to the 1964 decree. The state parties opposed consideration
8 of the boundary claims which the United States sought to determine in subsequent proceedings:
9 “According to the State parties, the United States could have raised a boundary lands claim for
10 the Fort Yuma [Quechan] Reservation in the *Arizona I* proceedings based on facts known at that
11 time, just as it did for the Fort Mojave and Colorado River Reservations, but deliberately decided
12 not to do so.” *Arizona v. California*, 530 U.S. 392, 406-07 (2000). But that failure did not
13 preclude the Supreme Court from addressing the excluded Quechan Reservation boundary lands
14 in subsequent proceedings in the same case after entry of the 1963 decree. *See id.* at 406-08; *see*
15 *also Arizona v. California*, 493 U.S. 886 (1989) (“The motion of the state parties to reopen the
16 decree to determine disputed boundary claims with respect to the Fort Majave [sic], Colorado
17 River and Fort Yuma Indian Reservations is granted.”). Thus, Circle Bar N Ranch’s focus on the
18 word “supplementary” is misplaced and mischaracterizes what the Supreme Court did in *Arizona*
19 *v. California*. Rather, the case supports the assertion of additional water rights here, which were
20 not addressed in the 1936 Decree. Like *Arizona v. California*, changed circumstances on the
21 Reservation support the Court’s consideration of new claims to serve the Reservation.
22
23
24
25
26
27

28 ⁸ It is worth noting that *all* decisions in *Arizona v. California* are under the same docket number: No. 8 Original.

1 The Walker River Paiute Tribe asserts additional water right claims to make its
2 Reservation a livable, permanent homeland. *See In re General Adjudication of All Rights to Use*
3 *Water in Gila River Sys. & Source (Gila III)*, 989 P.2d 739, 747(Ariz. 1999) (water, whether
4 from above or below ground sources, “is necessary to accomplish the purpose of the
5 reservation”). The United States has an obligation to support the Tribe’s claims for the necessary
6 additional water. That is the purpose of the First Amended Counterclaims. Because the singular
7 purpose of an Indian reservation is to provide the Tribe with a permanent homeland, there can be
8 no distinction between primary/secondary purposes of an Indian Reservation. *Contra* Circle Bar
9 N Ranch Brief at 7-8 (citing *United States v. New Mexico*, 438 U.S. 696, 702 (1978)), which is
10 not applicable here because it addressed federal lands that were not Indian reservation lands, and,
11 therefore, not permanent homelands for anyone); WRID Brief at 13 (same). Even if, as Circle
12 Bar N Ranch asserts, that lands restored to the Reservation in September 1936 may have been for
13 timber and grazing purposes, *see* Circle Bar N Ranch Brief at 8, which were not the stated
14 purposes of the 1936 restoration, it would not preclude the Court’s determination of water rights
15 to serve those restored lands. *See In re General Adjudication of All Rights to Use Water in Gila*
16 *River Sys. & Source*, 35 P.3d 68, 77-79 (Ariz. 2001) (PIA is not the only standard for quantifying
17 federal reserved water rights to serve permanent homeland purposes).⁹ And it is within the
18 Court’s continuing jurisdiction to consider all of the additional claims asserted by the Tribe and
19 the United States in the First Amended Counterclaims. *See Mineral County*, 20 P.3d at 807.
20
21
22
23
24
25
26
27

28 ⁹ In any event, the examination of the purpose of the Reservation is not before the Court at this time.

1 **B. THE COURT HAS JURISDICTION OVER THE GROUNDWATER CLAIMS**
2 **ASSERTED BY THE TRIBE AND THE UNITED STATES ON THE TRIBE’S**
3 **BEHALF.**

4 WRID, NDOW and Circle Bar N Ranch argue strenuously that the Court should dismiss
5 all claims relative to groundwater uses outside of the exterior boundaries of the Reservation.
6 WRID Brief at 19-21; NDOW Brief at 4-7; Circle Bar N Ranch Brief at 8-11. These arguments,
7 however, are premature. The Court need not engage in a determination of whether or not it has
8 jurisdiction to examine off-Reservation groundwater uses until the Tribe and the United States
9 establish that off-Reservation groundwater use constitutes an interference with the Tribe’s rights,
10 whether surface water or groundwater, on the Reservation. *See* Tribe’s First Amended
11 Counterclaim ¶¶ 3 at 14, 15 at 16, 22 at 17, 3 at 18; United States’ First Amended Counterclaim
12 ¶¶ 15 at 13, 17 at 13, 4 at 31. These proceedings have not yet reached the stage at which the
13 Tribe’s and the United States’ additional water rights claims have been addressed by the parties
14 and the Court, even though the United States has made a prima facie showing that there is a
15 hydrologic connection between surface water and groundwater in the Walker River Basin. *See*
16 Pyle Affidavit. WRID, NDOW and Circle Bar N Ranch have admitted that the Court’s
17 jurisdiction extends to groundwater underlying the Reservation. WRID Brief at 11-12, 19 (“If
18 the underlying claim is based on federal law, the Court has jurisdiction.”); NDOW Brief at 4-5
19 (Court has jurisdiction over groundwater within Reservation); Circle Bar N Ranch Brief at 8-10
20 (Court has jurisdiction over claims to groundwater asserted under federal law to serve
21 Reservation). Whether the Court must invoke its jurisdiction to curtail off-Reservation
22 groundwater pumping depends upon a showing that such off-Reservation pumping is interfering
23 with the on-Reservation rights. That issue is not yet appropriate for the Court’s consideration
24 and, therefore, it is premature to determine whether such claims should be dismissed. “[W]here,

1 as here, no evidentiary hearing has been held, all facts alleged in the complaint are presumed to
2 be true.” *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1211 (9th Cir. 2012) (quoting
3 *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007)); accord *Scheuer v. Rhodes*,
4 416 U.S. 232, 236 (1974) (For purposes of considering a motion to dismiss, “[t]he issue is not
5 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to
6 support the claims. . . . Moreover, it is well established that, in passing on a motion to dismiss,
7 whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause
8 of action, the allegations of the complaint should be construed favorably to the pleader.”),
9 *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

12 Even if it were not premature to examine the Court’s jurisdiction to enjoin groundwater
13 uses that interfere with tribal, on-Reservation water rights, settled precedent demonstrates that
14 the Court clearly has that jurisdiction. Courts must look at water sources comprehensively when
15 claims are asserted to them. *San Carlos Apache Tribe*, 463 U.S. at 569-70. The comprehensive
16 judicial examination includes surface water and groundwater where use of one affects the
17 availability of the other. *United States v. Cappaert*, 508 F.2d 313, 320 (9th Cir. 1974) (affirming
18 that interference by non-federal entities with water rights/uses within federal enclaves from
19 outside groundwater pumping can be enjoined to protect the federal rights/uses), *aff’d*, 426 U.S.
20 128 (1976). This is especially true where groundwater is necessary to protect the permanent
21 homeland purpose of the Reservation. *Gila III* held that federal reserved water rights extend to
22 groundwater and that a holder of federal reserved water rights “may invoke federal law to protect
23 its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its
24 reserved right.” 989 P.2d at 750; *contra* WRID Brief at 5. *Gila III* also held that groundwater
25 serving federal reserved rights is entitled to better protection than non-federal groundwater
26
27
28

1 rights. 989 P.2d at 748. *Orr Ditch* reached the same result: the district court decree which
2 allocated to the Pyramid Lake Paiute Tribe senior rights to water in the Truckee River did not
3 adjudicate only rights to surface water in the river, but also forbade groundwater allocations that
4 adversely affected the tribe’s decreed water rights. 600 F.3d at 1158-59.

5
6 Given the settled rule that a federal court may enjoin water uses that interfere with rights
7 within and to serve federal enclaves, WRID incorrectly characterizes the Tribe’s and the United
8 States’ claims for groundwater underlying the Reservation, and for Court oversight of off-
9 Reservation groundwater pumping to the extent that it interferes with the rights held by the Tribe
10 and the United States on the Tribe’s behalf to serve the Reservation, as an attempt by the Tribe
11 and the United States to get the Court to assert jurisdiction over off-Reservation groundwater
12 use. *See* WRID Brief at 6 (“the Court does not have subject matter jurisdiction with respect to
13 state law claims for or regarding the pumping of ground water.”). That is not what the First
14 Amended Counterclaims seek; rather they seek the Court’s protection, should it be necessary, of
15 the water rights which serve the Tribe’s Reservation as its permanent homeland. As in
16 *Cappaert*, off-Reservation water uses may interfere with the Reservation rights, and it is up to
17 the Tribe and the United States to demonstrate to the Court, at the appropriate time, whether
18 outside water uses necessitate the Court’s off-Reservation oversight, such as was exercised in the
19 *Orr Ditch* case. Thus, there is no merit in NDOW’s assertion that “the United States and the
20 Tribe bear the heavy burden to overcome the presumption that this Court does not have
21 jurisdiction over groundwater users outside the boundaries of the federal reservations.” NDOW
22 Brief at 4-5; *see* Circle Bar N Ranch Brief at 9. There is no such presumption.

23
24
25
26
27
28
NDOW is wrong in its characterization of the Tribe’s and United States’ claims for the
Reservation as “disputes over the title to water” as opposed to claims made against groundwater

1 users as “a dispute over the effect of groundwater pumping on established water rights,” and that
2 these should be “two actions that must be tried separately as they do not proceed from a common
3 core of facts.” NDOW Brief at 5.¹⁰ The Court must address all water rights claims in the
4 Walker River stream system together, a policy evinced by the McCarran Amendment, 43 U.S.C.
5 § 666. As the Supreme Court has made clear, the adjudication of rights to a stream system must
6 be comprehensive. *San Carlos Apache Tribe*, 463 U.S. at 569 (McCarran Amendment permits
7 adjudication of Indian water rights in state court so long as they are part of “comprehensive
8 water adjudications”). Significantly, the McCarran Amendment does not require the
9 adjudication of federal rights in state courts where there is no comprehensive stream
10 adjudication, and where “the federal suit at issue is well enough along that its dismissal would
11 itself constitute a waste of judicial resources and an invitation to duplicative effort.” *Id.* (citing
12 *Colo. River*, 424 U.S. at 820; *Moses H. Cone Mem’l Hospital*, 460 U.S. at 16). Over one
13 hundred years of litigation is “well enough along” to counsel against any proceeding to
14 determine water rights in the Walker River system in any court other than the present one.

15
16
17
18 In the end, the Court cannot determine whether off-Reservation groundwater is in the
19 case until there is a demonstration that such off-Reservation groundwater use is interfering with
20 the on-Reservation rights. Ripeness, therefore, is not part of the analysis. *See* WRID Brief at 6,
21 19-20. Until the Reservation rights are determined, the steps the Court may have to take to
22 protect Reservation groundwater use cannot be determined. The question whether the
23 groundwater claims are ripe is, therefore, premature. *Contra* NDOW Brief at 6 (premature
24 argument that Court cannot consider groundwater claims because it needs “to know the exact
25
26

27
28 ¹⁰ In any event, NDOW contradicts itself later by quoting the holding in *Orr Ditch*, 600 F.3d at 1160, that “a single court should have jurisdiction over an interrelated system of water rights.” NDOW Brief at 7-8.

1 nature and extent of the federal water rights before it could begin to determine whether
2 groundwater pumping adversely affects the federal rights.”¹¹

3
4 The Court should adhere to “the general proposition, expressed in *Colorado River*, that
5 federal courts have a ‘virtually unflagging obligation . . . to exercise the jurisdiction given
6 them.’” *San Carlos Apache Tribe*, 463 U.S. at 571 (quoting *Colo. River*, 424 U.S. at 817). The
7 Court clearly believed it has jurisdiction to require joinder of groundwater users to determine
8 whether their interests would be affected by Tribe’s and United States’ additional claims. CMO
9 at 5-6 (describing the groundwater users to be joined). Nothing in the arguments advanced by
10 WRID, Circle Bar N Ranch or NDOW dictate otherwise.

12 **IV. CONCLUSION**

13 The arguments advanced in the motions to dismiss filed by WRID, NDOW and Circle
14 Bar N Ranch are without merit. The purpose of this litigation, which has been the Court’s
15 province for over 100 years, is to address all claims regarding the Walker River system.
16 Consideration of all aspects of the sources of water in the Walker River system, whether from
17 the branches or mainstream of the Walker River, from tributaries or flood waters, or from surface
18 or groundwater, requires this Court’s careful attention and comprehensive exercise of its retained
19 jurisdiction. There can be no exclusions from the subject matter of this case. Thus, the dispute,
20 as fleshed out in the WRID, NDOW and Circle Bar N Ranch Briefs, is over the meaning and
21 scope of Article XIV of the 1936 Decree. As shown here, that provision of the 1936 Decree
22 preserves the Court’s jurisdiction over the res which is the entirety of the Walker River and all of
23 the water sources that feed it. By Article XIV the Court preserved its oversight of the Walker
24
25
26

27
28 ¹¹ The Desert Land Act, 43 U.S. C. § 321, is inapplicable here, *see* Circle Bar N Ranch
Brief at 10, because it only applies outside of federal reservations insofar as appropriation of
water is concerned. *See Cappaert*, 508 F.2d at 320.

1 River system, including consideration of claims that were not included in 1936. The Tribe's
2 permanent homeland needs require the Court's continued vigilance and protection.

3
4 Respectfully submitted this 30th day of May, 2014

5 /s/

6

Wes Williams Jr. Nevada Bar #6864
7 Law Offices of Wes Williams
8 A Professional Corporation
9 3119 Lake Pasture Rd.
10 P.O. Box 100
11 Schurz, Nevada 89427
12 (775)773-2838
13 wwilliams@stanfordalumni.org
14 Attorney for the Walker River Paiute Tribe
15
16
17
18
19
20
21
22
23
24
25
26
27
28