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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12

13 WALKER RIVER PAIUTE TRIBE,
14 Plaintiff-Intervenor,
15

16 v.

17 WALKER RIVER IRRIGATION DISTRICT,
a corporation, et al.,
18 Defendants.
19

) IN EQUITY NO. C-125-RCJ
) SUBFILE NO. C-125-B
) 3:73-CV-00127-RCJ-WGC
)
)
)

) **WALKER RIVER IRRIGATION**
) **DISTRICT'S REPLY POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION TO DISMISS CLAIMS OF**
) **UNITED STATES BASED UPON**
) **STATE LAW**
)
)
)

20 UNITED STATES OF AMERICA,
WALKER RIVER PAIUTE TRIBE,
21 Counterclaimants,
22

23 v.

24 WALKER RIVER IRRIGATION DISTRICT,
et al.,
25 Counterdefendants.
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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Procedural Background	3
III. This Court Does Not Have Exclusive Jurisdiction to Determine Additional Water Right Claims Within the Walker River Basin	6
A. The Entry of a Decree in a Water Adjudication Does Not Give the Court Which Entered the Decree the Jurisdiction to Determine All Additional Claims for Water Thereafter	6
B. The Court Did Not Retain Jurisdiction to Determine Additional Water Rights Within the Walker River Basin	11
C. The Court Has Not Previously Decided That It Has Continuing Jurisdiction to Determine Claims for Additional Water	15
IV. The Court Has the Power to Treat the Amended Counterclaims As a New Action	16
V. The Court Does Not Have Supplemental Jurisdiction Over the State Law Claims	17
VI. On Its Face, the United States’ Amended Counterclaim Shows That Some of Its State Law Claims Are Not Ripe for Determination	18
VII. The Court Does Not Have Jurisdiction Over Pumping of Ground Water Outside the Boundaries of Any Reservation Based Upon the Allegations of the Amended Counterclaims	19
VIII. Conclusion	20

1
2
3
4
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LIST OF EXHIBITS

- A 42 U.S. Stat. 849
- B Petition of Mineral County and Walker Lake Working Group for Writ of Mandamus and Writ of Prohibition In the Supreme Court for the State of Nevada, No. 36352 (June 26, 2000)
- B Nevada Application No. 3369
- D Nevada Certificate of Appropriation for Application No. 3369
- E Order Appointing U.S. Board of Water Commissioners, entered May 12, 1937
- F Order Amending May 12, 1937 Order, entered January 28, 1938

TABLE OF AUTHORITIES

<u>Case Law</u>	<u>Page</u>
<i>Arizona v. San Carlos Apache Tribe</i> 463 U.S. 545 (1983)	9
<i>Colorado River Water Conservation District v. Akin</i> 424 U.S. 800 (1976)	9
<i>Crane v. Stevinson</i> 5 Cal.2d 387, 54 P.2d 1100 (1936)	10
<i>Duckworth v. Watsonville Water & Light Co.</i> 158 Cal. 206, 110 P. 297 (1910)	10
<i>In Re Phillipini</i> 66 Nev. 17, 202 P.2d 535 (1949)	10
<i>In Re Right to Uses of Water in Bighorn River</i> 753 P.2d 76 (Wyo. 1988), <i>aff'd</i> 492 U.S. 406 (1989)	19
<i>Kline v. Burke</i> 260 U.S. 226 (1922)	9
<i>Miller & Lux v. Rickey</i> 127 F. 573 (Cir. Ct., D. Nev. 1904)	6, 9

1	<i>Mineral County v. Nevada</i>	
2	20 P.3d 800 (Nev. 2001)	10
3	<i>Nevada v. United States</i>	
4	463 U.S. 110 (1983)	4, 8
5	<i>Rickey Land and Cattle Co. v. Miller and Lux</i>	
6	152 F. 11 (9th Cir. 1907)	8
7	<i>Rickey Land and Cattle Company v. Miller and Lux</i>	
8	218 U.S. 258 (1910)	8
9	<i>United States v. Alpine Land and Reservoir Co.</i>	
10	503 F.Supp. 877 (D. Nev. 1983)	7
11	<i>United States v. Alpine Land & Reservoir Co.</i>	
12	174 F.3d 1007 (9th Cir. 1999)	8
13	<i>United States v. Orr Water Ditch Co., et al.</i>	
14	In Equity No. A-3 (D. Nev.)	4
15	<i>United States v. Orr Water Ditch Co.</i>	
16	600 F.3d 1152 (9th Cir. 2010)	9, 20
17	<i>United States v. Walker River Irrig. Dist.</i>	
18	11 F.Supp. 158 (D. Nev. 1935)	5, 13, 14
19	<i>United States v. Walker River Irrigation District</i>	
20	104 F.2d 334 (9th Cir. 1939)	4, 5
21	<i>Walsh v. Wallace</i>	
22	26 Nev. 299 (1902)	10
23	<i>Winters v. United States</i>	
24	207 U.S. 564 (1908)	4, 5
25	<u>Federal Law</u>	
26	Fed. R. Civ. P. 1	17
27	Fed. R. Civ. P. 8	17
28	28 U.S.C. § 1331	2
	28 U.S.C. § 1345	2, 3, 16, 18

1	28 U.S.C. § 1362	2
2		
3	28 U.S.C. § 1367	1
4	28 U.S.C. § 1651	1
5	42 U.S. Stat. 849	7
6		
7	<u>California Law</u>	
8	Cal. Water Code § 1225	10, 12
9		
10	<u>Nevada Law</u>	
11	N.R.S. § 533.030	10, 12
12	N.R.S. § 533.325	10, 12
13		
14	<u>Other</u>	
15	1 Moore’s Federal Practice and Procedure, § 1.21[1][a] at 1-45 (3d ed.)	17
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1 **I. INTRODUCTION.**

2 The Walker River Irrigation District (“District”) has moved to dismiss the state law
3 claims made by the United States in its Amended Counterclaim. Dkt. 1981. It has also asked the
4 Court to dismiss any and all claims related to the interference by ground water pumping outside
5 the boundaries of federal reservations with recognized and future water rights based upon federal
6 law inside the boundaries of those federal reservations. *Id.*

7 In its Motion, the District examined each of the six bases alleged in the Amended
8 Counterclaims for subject matter jurisdiction. Dkt. 1981-1 at 4. As a result of that examination,
9 the District concluded that the Court does not have subject matter jurisdiction to adjudicate
10 claims for new water rights to the Walker River or its tributaries under the retention of
11 jurisdiction provision in the Walker River Decree, and that the provisions of 28 U.S.C. § 1367
12 and 28 U.S.C. § 1651 do not expand that retained jurisdiction. Dkt. 1981-1 at 7-11.

13 The United States, in its Response to the Motion to Dismiss (Dkt. 2022), and the Tribe, in
14 its Opposition to the Motion to Dismiss (Dkt. 2004-1), contend that this Court has exclusive and
15 ongoing jurisdiction to hear and determine all additional water right claims in the Walker River
16 Basin, whether based upon state or federal law. Dkt. 2022 at 5; Dkt. 2004-1 at 7. The United
17 States also argues that the exclusive and ongoing jurisdiction encompasses all water in the Basin,
18 including “domestic water rights, groundwater rights, reserved rights for other federal lands,
19 commercial use rights, natural resource development use rights, water rights created/developed
20 subsequent to 1924.” Dkt. 2022 at 11.

21 The Tribe and the United States base their contentions of exclusive jurisdiction on two
22 grounds. The first is that because claims to surface water were heard and determined by this
23 Court in another action commenced in 1902 and decided in 1919, this Court obtained exclusive
24 jurisdiction to hear and determine all claims to water in the Walker River Basin thereafter. Dkt.
25 2022 at 6-8; Dkt. 2004-1 at 8-10. The second ground for their position is that pursuant to
26 Paragraph XIV of the Walker River Decree, this Court retained jurisdiction to hear and
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1 determine all claims to water within the Walker River Basin. Dkt. 2022 at 8-20; Dkt. 2004-1 at
2 10-15.

3 Neither, the Tribe nor the United States, defines what is meant by exclusive jurisdiction
4 to “determine and incorporate additional water rights” into the Walker River Decree. The United
5 States comes close by saying that the Court has the “ability to determine in the first instance
6 whether claimed additional water rights exist.” Dkt. 2022 at 20, n. 13. The District recognizes
7 that this Court may incorporate into the Walker River Decree additional surface water rights
8 which should properly be administered by the Court’s Water Master. Ground water and rights to
9 surface water which does not reach the Walker River or any of its tributaries need not be
10 administered. As is explained more fully below, the “determination” of such rights, which have
11 their roots in state law, must be made in accordance with state substantive law and procedures.
12 Once such rights are finally approved and perfected under that state law, they exist. The
13 “determination” of rights which are based upon federal law can be made by a federal court, or in
14 an appropriate situation, under the McCarran Amendment, 43 U.S.C. § 666, pursuant to state law
15 adjudication procedures.

16 In its Motion, the District concluded that the Court has subject matter jurisdiction to
17 consider the claims to surface and ground water under the federal implied reservation of water
18 doctrine based upon 28 U.S.C. § 1362 and 28 U.S.C. § 1331 and § 1345. However, it contends
19 that the Court does not have supplemental jurisdiction over the claims made by the United States
20 under state law, and that its jurisdiction over those state law claims under 28 U.S.C. § 1345
21 should not be exercised because most, if not all, such claims are not ripe for determination.
22 Finally, absent allegations that the pumping of ground water outside the boundaries of the federal
23 reservations is presently and actually interfering with the exercise of recognized rights to water
24 based upon federal law, the Court does not have jurisdiction over that pumping.

25 On the one hand, the United States appears to place the fate of the subject matter
26 jurisdiction question solely on the Court’s retained or continuing jurisdiction. Dkt. 2022 at 21-
27 23. It argues it has not filed a new action and has not waived its immunity for a new action, and
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1 that the District cannot transform this matter into a new action. *Id.* On the other hand, the
2 United States argues that the Court has jurisdiction under 28 U.S.C. § 1345 to hear its state water
3 claims. *Id.* at 26-30.

4 The United States argues the Court has supplemental jurisdiction over its water claims
5 based upon state law. Dkt. 2022 at 24-26. Its principal arguments are that its state and federal
6 claims would ordinarily be tried together, and that it will present identical evidence of present
7 and past water use on both. *Id.* It also contends that its state law claims are ripe for adjudication,
8 and therefore there is jurisdiction under 28 U.S.C. § 1345. *Id.* at 26-30.

9 Although both the Tribe and the United States recognize that there is no present way for
10 the Court to determine whether off-reservation ground water pumping will interfere with yet to
11 be determined federal rights, if any, they contend the Court should not dismiss any such claim.
12 Dkt. 2022 at 30-31; Dkt. 2004-1 at 19, Ins. 18-20, In. 11. Neither the Tribe, nor the United
13 States, directly address the threshold issue at para. 11(h) of the CMO.

14 The District addresses each of these arguments below.

15 **II. PROCEDURAL BACKGROUND.**

16 The background information provided by the United States and Tribe concerning the
17 litigation which ultimately resulted in the Walker River Decree (Dkt. 2022 at 3-5; Dkt. 2004-1 at
18 5-6; Dkt. 2004-1 at 2-5) is carefully written in anticipation of future aspects of this litigation not
19 presently before the Court. For example, whether lands were “restored” or “added” to the
20 Reservation from 1918-1961, and the legal significance of the difference, if any, between
21 restoration or addition, will be important on the merits of the federal claims made for those lands.
22 *See*, Dkt. 2004-1 at 4, Ins. 18-26.

23 Whether in 1924 the “United States asserted the Tribe’s surface water irrigation rights
24 from the direct flow of the Walker River” (Dkt. 2022 at 4), and “did not bring a storage right
25 claim for Weber Reservoir,” (Dkt. 2022 at 12); whether “the Court determined the surface water
26 irrigation rights of the Reservation from the direct flow of the Walker River based on irrigation
27 uses as they existed at the time,” (Dkt. 2022 at 10), and “was aware that the United States had an
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1 anticipated, obvious claim for storage water that was not resolved under the Decree,” (Dkt. 2022
2 at 14) all relate to whether some or all of the claims being made here are barred based upon
3 principles of *res judicata* and the decision of the Supreme Court in *Nevada v. United States*, 463
4 U.S. 110 (1983). The facts and law related to *res judicata*, and the accuracy of those carefully
5 crafted characterizations are not before the Court under the District’s Motion.

6 However, there is some important information related to the litigation which resulted in
7 the Walker River Decree which bears on the issue of the Court’s jurisdiction and on the meaning
8 of the Decree’s retained jurisdiction provision. The claim asserted by the United States in 1924
9 for the Reservation was based upon the implied reservation of water doctrine. That doctrine was
10 first recognized in 1908 by the United States Supreme Court in *Winters v. United States*, 207
11 U.S. 564 (1908). Not long after *Winters*, the United States commenced two actions in this
12 District of Nevada asserting implied reserved water rights. One action, filed in 1913, *United*
13 *States v. Orr Water Ditch Co., et al.*, In Equity No. A-3 (D. Nev.), involved the Truckee River
14 and the Pyramid Lake Indian Reservation. The one filed here in 1924 involved the Walker River
15 and Walker River Indian Reservation.

16 The two Reservations have a parallel history. Both were the subject of the same
17 November, 1859 letter from F. Dodge to the Commissioner of Indian Affairs where Dodge had
18 referred to both Reservations as “embracing large fisheries.” Both were the subject of a letter by
19 the Commissioner of Indian Affairs on November 29, 1859. Both were set aside in the same
20 letter to the Utah Territory United States Surveyor General on December 8, 1859, and both were
21 confirmed by executive orders on March 23, 1874. *United States v. Walker River Irrigation*
22 *District*, 104 F.2d 334, 338-39 (9th Cir. 1939).

23 Ultimately, the litigation with respect to the Pyramid Lake Indian Reservation was
24 resolved by a stipulated judgment in 1944. *Nevada v. United States*, 463 U.S. at 117-118. The
25 implied reserved water right for that Reservation was limited to sufficient water to irrigate 5,875
26 acres of land. Many years later, litigation seeking an additional federal reserved water right for
27 the Pyramid Lake Indian Reservation would result in the decision in *Nevada v. United States*.

1 The Walker River litigation was not resolved by settlement. Because *Winters* had placed
2 strong reliance on a treaty with the Indians, it was argued that it was distinguishable from
3 situations where the Reservation was established by executive order. The trial court here agreed,
4 holding that the water right for the Walker River Reservation was “to be adjudged, measured,
5 and administered in accordance with the laws of appropriation as established by the state of
6 Nevada.” *United States v. Walker River Irrig. Dist.*, 11 F.Supp. 158, 167 (D. Nev. 1935).
7 [Emphasis added]. It awarded the United States water rights with priority dates and quantities
8 based upon actual beneficial use, i.e., based upon state law principles of appropriation. Walker
9 River Decree at 10.

10 On appeal, the Ninth Circuit found no difference between reservations established by
11 treaty and those established by executive order. It held that “there was an implied reservation of
12 water to the extent reasonably necessary to supply the needs of the Indians.” *United States v.*
13 *Walker River Irrigation Dist.*, 104 F.2d 334, 339-40 (9th Cir. 1939).

14 The Court of Appeals next turned to the question as to the quantity of water to which the
15 United States was entitled. The Court turned to the report of the Special Master. That report
16 indicated that about 1,900 acres were in cultivation in 1886, and that at the time the complaint
17 was filed, about 2,000 acres were in irrigation. The report also indicated that the population on
18 the reservation had been fairly stable since 1866. The Special Master had recommended a
19 cultivated area of 2,100 acres with a water right of 26.25 cubic feet per second. The Court
20 accepted that recommendation, and said that it was “a fair measure of the needs of the
21 government as demonstrated by 70 years’ experience.” *Id.* at 340.

22 Therefore, when the Walker River Decree was written, and more particularly, when its
23 reservation of jurisdiction provision, Paragraph XIV, was written, the Judge who wrote it had
24 ruled that all of the water rights, including those for the Walker River Indian Reservation, had to
25 be and were based upon state law.

1 **III. THIS COURT DOES NOT HAVE EXCLUSIVE JURISDICTION TO**
2 **DETERMINE ADDITIONAL WATER RIGHT CLAIMS WITHIN THE**
3 **WALKER RIVER BASIN.**

4 The United States and Tribe base their claim that this Court has exclusive jurisdiction to
5 determine additional water right claims within the Walker River Basin on cases which have
6 stated that *in personam* quiet title actions involving water rights are in the “nature of *in rem*
7 proceedings.” Dkt. 2022 at 5; Dkt. 2004-1 at 8. However, none of those cases hold that as a
8 result of having entered a decree in an action quieting title to surface water rights, the decree
9 court thereafter obtained exclusive jurisdiction to determine all claims for additional water on the
10 source, and certainly not to all claims for water within the entire watershed regardless of source
11 They also base their claim of exclusive jurisdiction on the language of Paragraph XIV of the
12 Walker River Decree. We address each in turn.

13 **A. The Entry of a Decree in a Water Adjudication Does Not Give the Court**
14 **Which Entered the Decree the Jurisdiction to Determine All Additional**
15 **Claims for Water Thereafter.**

16 There is nothing in the Complaint or Amended Complaint filed in this matter in 1924 and
17 1926 which suggests that the United States asked the Court to assume, or that the Court assumed
18 *in rem* jurisdiction over the Walker River in Nevada. There is certainly nothing in either which
19 supports a claim that the United States asked the Court to assume or that the Court assumed *in*
20 *rem* jurisdiction over all of the water in the Walker River Basin regardless of source. The Court
21 could not have assumed such jurisdiction over the Walker River and other sources in California
22 because they are outside the boundaries of the District of Nevada. *See, Miller & Lux v. Rickey,*
23 *127 F. 573, 575 (Cir. Ct., D. Nev. 1904).*

24 Relevant provisions of the Amended Bill of Complaint recognize that portions of the
25 Walker River were in California. Amended Bill of Complaint at para. I. In addition, the
26 Amended Bill of Complaint very clearly concerned itself only with the Walker River and its
27 tributaries. *See, e.g.,* Amended Bill of Complaint at paras. IV, V, VI. Judge St. Sure described
28 the action as one “in equity brought by the United States, as plaintiff, . . . against 253 defendants,
all appropriators and users of the waters of Walker River, East Walker River, West Walker

1 River, and the tributaries thereof, in the irrigation of lands in the Walker River Basin owned or
2 possessed by defendants.” *United States v. Walker River Irrigation Dist.*, 11 F.Supp 158, 159
3 (D. Nev. 1939). This Court has previously said it “did not concern itself in any way with
4 underground water rights,” and this Court does not administer underground water rights. Dkt. 30
5 at 3, lns. 9-11; *see also*, Dkt. 81 at 3; Dkt. 2022 at 24, n. 16.

6 Judge St. Sure also stated that the action was brought under the provisions of 42 U.S.
7 Stat. 849. That statute was approved on September 19, 1922, and in effect for only three years.
8 It allowed a proceeding to be brought by the United States in any district where any one of the
9 defendants being a necessary party was an inhabitant. It allowed service of process to run in any
10 other district where a defendant was found as if service happened in the district where the action
11 was brought. It gave the Court personal jurisdiction over persons and entities in California.¹ A
12 copy of 42 U.S. Stat. 849 is attached as Exhibit A.

13 None of the cases relied upon by the United States or the Tribe hold that a court which
14 enters a water decree thereafter has exclusive jurisdiction to determine additional claims for
15 water from the source involved in its decree, and certainly not to determine claims for all water
16 within a watershed regardless of source.² *See*, Dkt. 2022 at 5-7; Dkt. 2004-1 at 8-10. Those
17 cases recognize that such actions are *in personam* actions. For a variety of reasons, those courts
18 have said that, although quiet title actions are *in personam* actions, because they involve
19 property, they are in the nature of *in rem* actions. The reasons they have done that do not support
20 the position of the United States and Tribe here.

21 _____
22 ¹ That statute was also used by the United States to bring a similar action in 1925 involving water
23 users on the Carson River in both Nevada and California. *See, United States v. Alpine Land and*
Reservoir Co., 503 F.Supp. 877, 878 (D. Nev. 1983).

24 ² The United States contends that the fact that it filed new actions when it commenced this one in
25 1924 and when it sought more water for the Pyramid Lake Indian Reservation in 1973 has
26 nothing to do with retained jurisdiction. Dkt. 2022 at 18-19. Although neither circumstance
27 bears directly on the proper interpretation of Paragraph XIV of the Walker River Decree, both
28 apply directly to the assertion that by the mere entry of a water decree, thereafter the decree court
has exclusive jurisdiction to determine all water rights from that source, and from all sources
within the entire watershed. If that is the law, then in 1924, the United States would have filed
its claims in the *Pacific Livestock* action and in 1973 in the *Orr Ditch* action.

1 *and Lux*, 152 F. 11, 17 (9th Cir. 1907); *Miller and Lux v. Rickey*, 127 F. 573, 575-80 (Cir. Ct. D.
2 Nev. 1904).

3 The United States' and Tribe's reliance on the policy of the McCarran Amendment, 43
4 U.S.C. § 666, and cases applying it, is also misplaced. *See*, Dkt. 2022 at 8-9; Dkt. 2004-1 at 9-
5 10. The McCarran Amendment provides a waiver of immunity so that the United States may be
6 made a party to comprehensive water adjudications. The cases relied upon by the Tribe and the
7 United States involved issues of whether federal actions initiated to determine federal water
8 rights should be dismissed because of the pendency of similar and more comprehensive
9 adjudications in another court. *See, Colorado River Water Conservation District v. Akin*, 424
10 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Neither case, nor
11 the McCarran Amendment itself, stands for the proposition that once a decree is entered in such
12 an adjudication, the decree court has exclusive jurisdiction thereafter to determine water rights
13 on the source, or to all sources within the watershed.

14 Similarly, *Kline v. Burke*, 260 U.S. 226 (1922) does not support the position of the United
15 States and Tribe here. *See*, Dkt. 2022 at 5-6; Dkt. 2004-1 at 8. It involved two competing cases
16 involving the same issues. Both actions were *in personam*. The court held that both could
17 proceed. Its dicta concerning two competing *in rem* cases involving the same property does not
18 apply here. Two different courts are not seeking to adjudicate the claims the United States and
19 Tribe bring here. The issue here is whether this Court, having entered a decree involving other
20 claims in 1936, has the exclusive jurisdiction to determine additional claims.

21 The Tribe also relies on *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir.
22 2010). *See*, Dkt. 2004-1 at 8-9 That decision supports the conclusion that this Court does not
23 have exclusive jurisdiction to determine additional water rights. The Ninth Circuit stated that the
24 decree court, the Orr Ditch Court, did not have jurisdiction with respect to the Pyramid Tribe's
25 Truckee River water right appropriated under state law long after the Orr Ditch Decree was
26 entered. 600 F.3d at 1160.

1 Both the United States and the Tribe misstate the holding of the Nevada Supreme Court
2 in *Mineral County v. Nevada*, 20 P.3d 800 (Nev. 2001). See, Dkt. 2022 at 7; Dkt. 2004-1 at 9.
3 The Nevada Supreme Court did not determine that this Court has exclusive jurisdiction to
4 determine additional claims to the water of the Walker River or other waters in the Walker River
5 Basin. It determined that this Court was the proper forum for the relief which Mineral County
6 sought there, and for other reasons, including the fact that the Court did not have jurisdiction
7 over all necessary parties.

8 In its original filing with the Nevada Supreme Court, Mineral County sought a Writ of
9 Mandamus “compelling [the Nevada State Engineer] to reconsider the appropriation and
10 allocation of the waters of the Walker River system to provide for an annual instream flow to
11 Walker Lake reasonably calculated to ensure the sustainability of the lake’s public trust uses,
12 including fisheries, recreation and wildlife.” A copy of the Petition filed with the Nevada
13 Supreme Court is attached hereto as Exhibit B. Mineral County was asking the Nevada Supreme
14 Court to direct the Nevada State Engineer to modify the Walker River Decree, something which
15 Mineral County was already asking this Court to do. The Nevada Supreme Court acknowledged
16 that only this Court could consider and effectively modify the Walker River Decree. It did not
17 say or even suggest that this Court has the exclusive jurisdiction to determine claims for
18 additional water from the Walker River, or from all sources in the Walker River Basin.

19 The most important reason why this Court does not have exclusive jurisdiction to hear
20 and determine claims for water from the Walker River and within the Walker River Basin, is the
21 law of Nevada and California. Before 1905, under Nevada law, and before 1914, under
22 California law, water was appropriated by placing it to beneficial use. *Walsh v. Wallace*, 26
23 Nev. 299, 321 (1902); *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 206, 211, 110 P.
24 297 (1910). However, after 1905 in Nevada, and after 1914 in California, an appropriative water
25 right may only be established by an application to and permit from the Nevada State Engineer or
26 the California State Water Resources Board. See, N.R.S. §§ 533.030(1); 533.325; Cal. Water
27 Code § 1225; *In Re Phillipini*, 66 Nev. 17, 202 P.2d 535 (1949); *Crane v. Stevinson*, 5 Cal.2d 387,
28

1 54 P.2d 1100, 1105-1106 (1936). The laws of both states preclude this Court and any other court
2 from determining additional water rights from the Walker River. That jurisdiction is exclusively
3 granted as a matter of Nevada law to the Nevada State Engineer, and as a matter of California
4 law to the California State Water Resources Control Board. As is discussed *infra* at p. 12, the
5 Walker River Decree expressly recognizes those facts.

6 **B. The Court Did Not Retain Jurisdiction to Determine Additional Water**
7 **Rights Within the Walker River Basin.**

8 The United States and Tribe assert that the Court has retained jurisdiction to determine
9 claims to all water within the Walker River Basin. They argue that such jurisdiction was
10 retained by the plain language of the Walker River Decree. Dkt. 2022 at 8-12; Dkt. 2004-1 at
11 10-13. The United States seeks to bolster its argument by asserting an awareness on the part of
12 the Court of potential additional claims, and by previous Court rulings. Dkt. 2022 at 12-15. The
13 plain language of the Decree, particularly the context in which the relevant provision, Paragraph
14 XIV, was written, and the previous rulings of the Court in this matter make it clear that the Court
15 did not retain such jurisdiction.

16 In relevant part, Paragraph XIV of the Walker River Decree provides:

17 The Court retains jurisdiction of this cause for the purpose of changing the
18 duty of water or for correcting or modifying this decree; also for regulatory
19 purposes, including a change of the place of use of any water

20 Walker River Decree at Para. XIV. The United States and the Tribe in essence argue that the
21 retained jurisdiction for “modifying” the Decree means that the Court “retains exclusive
22 jurisdiction to determine all subsequent appropriations of water from the Walker River and from
23 all other sources of water within the Walker River Basin.” Both contend that the District’s
24 position renders the term “modifying” superfluous. Neither is the case.

25 The Tribe and the United States rely on principles of construction of decrees, including
26 consent decrees. Dkt. 2022 at 9-10; Dkt. 2004-1 at 10-11. Those principles include presuming
27 the language used was the result of “thoughtful and deliberate action,” and that the meaning of a
28 decree should be “discerned within its four corners.” *Id.* at 9-10. The District not dispute those

1 principles. Their application here shows that retaining jurisdiction for “modifying” the Walker
2 River Decree is not a retention of exclusive jurisdiction to determine additional water rights to
3 the Walker River, or to all sources of water within the Walker River Basin.

4 The time when Paragraph XIV was written, and its author’s understanding of the law at
5 the time, both bear on its meaning. Paragraph XIV was written by Judge St. Sure in 1936. The
6 paragraph was not modified when the Walker River Decree was amended in 1940. At the time
7 he wrote that language, Judge St. Sure had ruled that all water rights in the Decree had to be
8 acquired under state law. *See*, p. 5, *supra*. In addition, he knew that since 1905 in Nevada and
9 since 1914 in California, appropriative water rights could only be obtained under state law by an
10 application for and a permit issued by the appropriate state agency. *See*, N.R.S. §§ 533.030(1);
11 533.325; Cal. Water Code §§ 1225, *et seq*. He knew that no court could simply determine and
12 grant an appropriative water right established in either State after those dates.

13 Other provisions within the Decree also bear on the meaning of Paragraph XIV, and
14 recognize the authority of the state agencies over water of the Walker River. Paragraph IX of the
15 Decree tabulates numerous applications made to the Nevada State Engineer for permits to
16 appropriate water. The Decree states that all such applications and permits were subject to “final
17 action by the State Engineer upon such applications.” Walker River Decree at 66-70. It says the
18 same thing with respect to California in Paragraph VIII of the Decree. *Id.* at 65.

19 Judge St. Sure knew that in some cases, after compliance with the requirements of
20 Nevada law, the amount of water actually appropriated as determined by the State Engineer
21 might well be different than the amount applied for and initially permitted. For example, at page
22 68 of the Decree, a water right is recognized for “Perry, Oliver A.” under Application No. 3369.
23 The Decree shows that 2.4 CFS for 240 acres had been applied for. *Id.* The Application shows
24 the same thing. *See*, Exhibit C. However, ultimately the State Engineer limited the water right,
25 as the Decree allows, to .638 CFS for only 63.80 acres. *See*, Exhibit D.

26 The language used by Judge St. Sure in Paragraph XIV was thoughtful and deliberate.
27 Other thoughtful and deliberate provisions of the Decree show that he did not intend to retain
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1 jurisdiction to determine claims to all Walker River water. He intended precisely the opposite.
2 He recognized that subsequent appropriations would be determined by the respective Nevada and
3 California agencies charged with that responsibility.

4 There is no information in the Walker River Decree or in Judge St. Sure's opinion in
5 *United States v. Walker River Irrigation Dist.*, 11 F.Supp 158 (D. Nev. 1935), including in the
6 lengthy quote from the "Blomgren Report," which supports any conclusion that the Court
7 intended to retain jurisdiction to determine additional claims of the United States for the Walker
8 River Indian Reservation not brought in the 1924 litigation, including a storage water right for
9 Weber Reservoir, or that the language in the Decree reserved jurisdiction for the Court to decide
10 those additional claims.³

11 The United States would have the Court infer that in 1936, the District itself "embraced
12 the Blomgren Report" and accepted the notion that the Court retained jurisdiction to determine a
13 storage right for Weber Reservoir. The United States quotes from a brief filed by the District in
14 1936. Those quotes are taken entirely out of context. *See*, Dkt. 2022 at 13-14.

15 In the opinion issued on June 6, 1935, in *United States v. Walker River Irrig. Dist.*, 11
16 F.Supp. 158 (D. Nev. 1935), Judge St. Sure ruled on the findings of the Special Master on the
17 water right for the Walker River Reservation and on the United States' exceptions to them. 11
18 F.Supp. at 163-167. In addition, he referred the case back to the Master to take evidence on
19 certain claims of Sierra Pacific Power Company. After that hearing, the Master was to prepare
20 and submit his findings and conclusions to the court. The parties were to have ten days to object.
21 11 F.Supp. at 172-173.

22 The United States filed a Brief of Exceptions on November 1, 1935, and used the
23 opportunity to reargue issues related to the water right for the Reservation which had been
24

25 ³ At an appropriate time, the Court will be asked to consider the applicability of *res judicata* to
26 the claims being asserted here by the United States and the Tribe for the Walker River Indian
27 Reservation, including for Weber Reservoir. Suffice it to say that there is nothing in the Decree
28 or in the law which allows the United States to split its claim for an implied reserved water right
for the Walker River Indian Reservation. The pleadings in this case are virtually identical to the
pleadings that the Supreme Court considered in *Nevada v. United States*.

1 decided in the June 6, 1935 decision. In that Brief, and as part of its argument, the United States
2 told the Court that a particular reservoir referenced in the Blomgren Report “has never been
3 built.” United States Brief on Exceptions to the Master’s Findings, Conclusions and Proposed
4 Decree, November 1, 1935 at 14, Ins. 13-14. The United States did not tell the Court that Weber
5 Reservoir had in fact been built. The District merely informed the Court of that misleading
6 omission, and explained that the Weber site was referenced in the Blomgren Report.
7 Memorandum of Walker River Irrigation District and Other Defendants in Answer [to United
8 States’] Brief on Exceptions filed April 22, 1936 at 6-8.

9 In *United States v. Walker River Irrigation District*, 11 F.Supp. 158 (D. Nev. 1935),
10 Judge St. Sure did not recognize or even suggest that he would reserve jurisdiction to hear a
11 claim based upon federal law for storage of water in Weber Reservoir. He had ruled that rights
12 of the United States “are to be adjudged, measured and administered in accordance with the laws
13 of appropriation as established by the State of Nevada.” 11 F.Supp. at 167. He would not have
14 retained jurisdiction to hear such a claim when he in fact had ruled that such an appropriation
15 would have to be made in accordance with the laws of the State of Nevada. There would need to
16 be an application to, and a permit issued by and determined by, the Nevada State Engineer.

17 Thus, the principles of construction of thoughtful and deliberate action and consideration
18 of the four corners of the Decree establish that the word “modifying” in Paragraph XIV of the
19 Decree cannot be reasonably construed as a retention of jurisdiction to determine additional
20 claims to water from the Walker River, much less from every source of water within the Walker
21 River Basin.

22 This interpretation of the word “modifying” does not render it superfluous and
23 unnecessary. The District does not contend that the word “modifying” should be read as
24 synonymous with the word “correct.” The Court can and has modified the Decree in ways which
25 are not corrections of it. “Modify” means to change something in the Decree, even if what is
26 changed was originally correct.

1 The Court has in the past modified the Decree to reflect new points of diversion and new
2 places of use. *See*, C-125, Dkt. 805. It has also modified the Decree to reflect new owners of
3 water rights. *Id.* It effectively modified the provisions of the Decree concerning appointment of
4 a Water Master when it issued orders appointing a United States Board of Water Commissioners.
5 *Compare* Walker River Decree Para. XV with Order Appointing U.S. Board of Water
6 Commissioners entered May 12, 1937, attached hereto as Exhibit E, and Order Amending May
7 12, 1937 Order entered January 28, 1938, attached hereto as Exhibit F. The Court also modified
8 the Decree when it entered the Order for Entry of Amended Final Decree on April 24, 1940.
9 Mineral County also seeks modifications to the Decree. The Court may also modify the Decree
10 to reflect final water right determinations by the Nevada State Engineer and California State
11 Water Resources Control Board. None of these modifications are “corrections,” as the Tribe and
12 the United States contend. Paragraph XIV of the Walker River Decree is not a retention of
13 jurisdiction to determine additional claims to water from the Walker River, or within the Walker
14 River Basin from all sources.

15 **C. The Court Has Not Previously Decided That It Has Continuing Jurisdiction**
16 **to Determine Claims for Additional Water.**

17 The United States argues that, absent the Order entered by Judge Reed in 1990 (Dkt.
18 1981-2), the California State Water Resources Control Board would have no authority to
19 determine additional water rights to the Walker River under California law. Dkt. 2022 at 20.
20 The 1990 Order is not a recognition that the Court had “continuing jurisdiction under the 1936
21 Decree to determine additional claims in the first instance” (Dkt. 2022 at 20), as the United
22 States contends. Actually, it is the Court’s recognition that the California State Water Resources
23 Control Board has that exclusive jurisdiction under California law. There is no inconsistency
24 between that and also recognizing that once such water rights from the Walker River are
25 “determined” by the appropriate state agency, that there be a supplemental decree so that they
26 may be administered in priority, along with all of the other water rights recognized in the Decree.

1 The October 27, 1992 Order (Dkt. 15) referenced by the Tribe and United States was not
2 a determination that this Court had retained jurisdiction to determine additional claims to water
3 from the Walker River, or in the Walker Basin, or even to hear the claims being made here by
4 the United States and Tribe. *See*, Dkt. 2022 at 14-15; Dkt. 2004-1 at 12. In that Order, the Court
5 ruled that, although the claims being made were not counterclaims, they could proceed as cross-
6 claims. The Court did not decide that by reason of the Walker River Decree, it had exclusive
7 jurisdiction to hear and determine all claims to water from the Walker River, or from all water
8 sources within the Walker River Basin. Indeed, in the Case Management Order, the very same
9 Judge listed as a threshold issue “whether this Court has jurisdiction to adjudicate the Tribal
10 Claims.” Dkt. 108 at 9, Ins. 23-24.

11 **IV. THE COURT HAS THE POWER TO TREAT THE AMENDED**
12 **COUNTERCLAIMS AS A NEW ACTION.**

13 The United States contends it has not initiated a new action, and that the District cannot
14 transform the Amended Counterclaims into an action the United States did not bring. Dkt. 2022
15 at 21-23. It seems to argue that by suggesting the Court treat the Amended Counterclaims as a
16 new action, and challenging the subject matter jurisdiction which the United States itself has
17 alleged, the District is asking the Court to provide an advisory opinion. *See*, Dkt. 2022 at 21. Its
18 argument proceeds from the incorrect conclusion that the Court has retained jurisdiction to
19 determine the claims made in the Amended Counterclaims, which conclusion is simply not
20 correct. *See*, pp. 6-16, *supra*.

21 On the one hand, the United States contends that 28 U.S.C. § 1345 is not a waiver of
22 immunity and that the District cannot make the United States a plaintiff to a new action (Dkt.
23 2022 at 22), and on the other, it argues that this Court has jurisdiction under 28 U.S.C. § 1345 to
24 hear its state water claims, presumably as a plaintiff. *See*, Dkt. 2022 at 26-27. It cannot have it
25 both ways. If the United States is retracting its other allegations of jurisdiction in its Amended
26 Counterclaim, to rely solely on the retained jurisdiction allegation, then the Court should dismiss
27 its Amended Counterclaim.

1 The United States does not elaborate on why all of these claims would ordinarily be tried
2 together. A claim under state law which requires compliance with state processes before the
3 Nevada State Engineer, or the California State Water Resources Control Board, would be “tried”
4 before the state agency, and separate from any federal claim. Indeed, such Nevada and
5 California claims would be tried separately from each other before the administrative agency of
6 each state. Not only does the United States not address why state law claims which depend for
7 their existence on permits in good standing issued from either the Nevada State Engineer or the
8 California State Water Resources Control Board must be “tried” in a federal action with claims
9 based upon federal law, it does not explain why they must be tried at all.

10 There is no supplemental jurisdiction over the state law claims of the United States.

11 **VI. ON ITS FACE, THE UNITED STATES’ AMENDED COUNTERCLAIM SHOWS**
12 **THAT SOME OF ITS STATE LAW CLAIMS ARE NOT RIPE FOR**
13 **DETERMINATION.**

14 The District agrees that the issue of ripeness relates to the pleadings, and not proof.
15 However, in some cases, the United States’ Amended Counterclaim alleges that its appropriative
16 rights are the subject of “applications,” or “permits” in Nevada or California. Dkt. 59 at paras.
17 62, 73. An “application” is not ripe to be brought before this Court for any reason. Moreover,
18 any rights which require state approval are not ripe to be brought before this Court until all state
19 law processes are complete, and then only if the right in question should appropriately be
20 administered by this Court under the Walker River Decree. *See*, Dkt. 1981-2 at 3-4.

21 The United States misunderstands the ripeness issue related to ground water. The District
22 concedes that if the United States seeks to have the Court determine that the United States has a
23 right to ground water established under Nevada law before a permit from the State Engineer was
24 required to establish that right, the Court has jurisdiction to determine it under 28 U.S.C. § 1345,
25 with or without a comprehensive ground water adjudication. However, if the Nevada ground
26 water right requires a permit, then the United States must have a Nevada permit, and absent a
27 comprehensive adjudication, there is nothing for the Court to do. The United States does not
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1 need a judgment from a court confirming it holds a Nevada permit to use ground water. It either
2 does, or it doesn't.

3 Similarly, in California, the United States must have a permit if the ground water is not
4 percolating ground water. A permit is not needed for an overlying right to ground water in
5 California. In either case, absent a ground water adjudication, there is nothing for the Court to
6 do. The United States does not need a judgment from a court confirming the law of the State of
7 California concerning overlying rights to ground water.

8 On the other hand, if this matter did involve a ground water adjudication in one or more
9 of the ground water basins in Nevada or California, there would be something to determine. The
10 Court would be determining the relative rights of the United States and other claimants to the
11 ground water in question. Absent that, a claim to ground water based upon a Nevada permit, or a
12 claim to an overlying right in California does not present any ripe issue for the Court to
13 determine.

14 **VII. THE COURT DOES NOT HAVE JURISDICTION OVER PUMPING OF**
15 **GROUND WATER OUTSIDE THE BOUNDARIES OF ANY RESERVATION**
16 **BASED UPON THE ALLEGATIONS OF THE AMENDED COUNTERCLAIMS.**

17 The Tribe and the United States acknowledge that it is "premature" to determine whether
18 the Court does or does not have jurisdiction over off-Reservation ground water pumping.⁴ Dkt.
19 2004-1 at 16; Dkt. 2022 at 31. The Tribe acknowledges, and the United States implicitly
20 recognizes, that they have not yet demonstrated that off-Reservation ground water uses interfere
21 with water rights based upon federal law. Dkt. 2004-1 at 18; Dkt. 2022 at 31. The Pyle
22 Affidavit (Dkt. 62, Attachment 1) does not allege otherwise.

23 The District does not simply take "issue with a somewhat routine request in the United
24 States' prayer for relief." Dkt. 2022 at 30. The issue is one which the Case Management Order

25 ⁴ The Supreme Court of the United States has never decided that the *Winters* doctrine applies to
26 ground water, and that is not an issue to be decided on these motions. As the United States
27 notes, some courts have said that it does. *See*, Dkt. 2022 at 31, n. 22. However, others have said
28 that it does not. *See, In Re Right to Uses of Water in Bighorn River*, 753 P.2d 76, 99-100 (Wyo.
1988), *aff'd* 492 U.S. 406 (1989) (equally divided court).

1 directed be addressed. Dkt. 108 at para. 11(h). It is also a question which the Court directed be
2 addressed at the July 25, 2013 status conference. *See*, July 25, 2013 Transcript of Proceedings at
3 p. 23, lns. 2-11. The threshold issue to be addressed is whether the issue of interference needs to
4 be decided as part of the determination of the federal rights. Dkt. 108 at para. 11(h). The Tribe
5 and the United States seem to concede that it does not. *See*, Dkt. 2022 at 31 (“Consideration of
6 that issue can occur once such claims are adjudicated.”); Dkt. 2004-1 at 19 (“Until the
7 Reservation rights are determined, the steps the Court may have to take to protect Reservation
8 ground water use cannot be determined.”). Importantly, the users of ground water outside the
9 boundaries of any Reservation cannot be left in the position of guessing whether, by reason of a
10 routine provision that they are “enjoined from asserting any adverse rights, title or other interests
11 in or to the [federal] rights,” they may be in violation through continued pumping of their
12 existing ground water right when there has been no showing of actual interference.

13 At this stage of the proceedings, the United States and Tribe are not required to
14 “demonstrate” such interference. They are merely required to allege it. They have not done so,
15 and as a result, there is no jurisdiction. *United States v. Orr Water Ditch Co.*, 600 F.3d 1152,
16 1154; 1159-1161.

17 **VIII. CONCLUSION.**

18 The Court should dismiss the United States’ claims based upon state law, with the
19 exception of any claim to ground water based upon Nevada’s common law.

20 Dated: June 30, 2014.

21 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 30th day of June, 2014, I electronically filed the foregoing 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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/ s / Holly Dewar

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