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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	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**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

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I. INTRODUCTION.

The Walker River Irrigation District ("District") seeks dismissal of the state law claims made by the United States in its Amended Counterclaim, and asks the Court to dismiss any and all claims related to interference with existing and claimed water rights based upon federal law inside the boundaries of federal reservations because of ground water pumping outside the boundaries of those federal reservations. Dkt. 2161. The District replies to the Responses of the Walker River Paiute Tribe (the "Tribe") and of the United States. Dkts. 2184 and 2185, respectively.

II. THE COURT DOES NOT HAVE ONGOING JURISDICTION TO DETERMINE ADDITIONAL WATER RIGHT CLAIMS WITHIN THE WALKER RIVER BASIN.

A. Introduction.

The United States and the Tribe contend that this Court has exclusive and ongoing jurisdiction to hear and determine all additional water right claims in the Walker River Basin, whether based upon state or federal law. Dkt. 2185 at 5-7; Dkt. 2184 at 7-9. The United States asserts that this jurisdiction encompasses all water in the Basin, including "domestic water rights, groundwater rights, water rights for other federal lands, commercial use rights, natural resource development use rights, water rights created/developed subsequent to 1924." Dkt. 2185 at 10.

Neither states exactly what is meant by exclusive jurisdiction to "determine and incorporate additional water rights" into the Walker River Decree. The United States comes close by saying that the Court has the "ability to determine in the first instance whether claimed additional water rights exist." Dkt. 2185 at p. 15, n. 11. As is explained more fully below, the "determination" of such rights, which have their roots in state law, must be made in accordance with state substantive law and procedures. Once such rights are finally approved and perfected under that state law, they exist. The "determination" of rights which are based upon federal law can be made by a federal court, or in an appropriate situation, under the McCarran Amendment, 43 U.S.C. § 666, pursuant to state law adjudication procedures. Certainly, after rights have been "determined," this Court may incorporate into the Walker River Decree additional surface water rights which should properly be administered pursuant to that Decree. Rights to surface water

which does not reach the Walker River or any of its tributaries, and rights to ground water need not be incorporated into the Decree for administration.

The assertion of exclusive and ongoing jurisdiction is based on two grounds. The first is that because claims to surface water were heard and determined by this Court in another action commenced in 1902 and decided in 1919, this Court obtained exclusive jurisdiction to hear and determine all claims to water in the Walker River Basin thereafter. Dkt. 2185 at 5-7; Dkt. 2184 at 7-10. The second is that pursuant to Paragraph XIV of the Walker River Decree, this Court retained jurisdiction to hear and determine all claims to water within the Walker River Basin. Dkt. 2185 at 8-13; Dkt. 2184 at 10-16. We address each in turn.

B. The Entry of a Decree in a Water Right Quiet Title Action Does Not Give the Court Which Entered the Decree the Jurisdiction to Determine All Additional Claims for Water Thereafter.

There is nothing in the Complaint or Amended Complaint filed in this matter in 1924 and 1926 which suggests that the United States asked the Court to assume, or that the Court assumed *in rem* jurisdiction over the Walker River in Nevada, or over all of the water in the Walker River Basin regardless of source. Relevant provisions of the Amended Complaint recognize that portions of the Walker River were in California. Amended Complaint at para. I. The Court could not have assumed such jurisdiction over the Walker River and other sources in California because they are outside the boundaries of the District of Nevada. *See, Miller & Lux v. Rickey*, 127 F. 573, 575 (Cir. Ct., D. Nev. 1904).

In addition, the Amended Complaint very clearly concerned itself only with the Walker River and its tributaries. *See, e.g.*, Amended Complaint at paras. IV, V, VI. The Court described 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 River, and the tributaries thereof, in the irrigation of lands in the Walker River Basin owned or possessed by defendants." *United States v. Walker River Irrigation Dist.*, 11 F.Supp 158, 159 (D. Nev. 1939). This Court has previously said it "did not concern itself in any way with underground water rights," and this Court does not administer underground water rights. Dkt. 30 at 3, lns. 9-11; *see also*, Dkt. 81 at 3.

The 1924 action was brought under the provisions of 42 U.S. Stat. 849. That statute was

approved on September 19, 1922, and in effect for only three years. It allowed a proceeding to be brought by the United States in any district where any one of the defendants being a necessary party was an inhabitant. It allowed service of process to run in any other district where a defendant was found as if service happened in the district where the action was brought. It gave the Court personal jurisdiction over persons and entities outside of Nevada, including in California.[1] A copy of 42 U.S. Stat. 849 is attached as Exhibit A.

The cases relied upon by the United States and the Tribe do not hold that a court which enters a water decree thereafter has exclusive and ongoing jurisdiction to determine additional claims for water from the source involved in its decree, and certainly not to determine claims for all water within a watershed regardless of source. *See*, Dkt. 2185 at 5-7; Dkt. 2184 at 7-10. Those cases recognize that such actions are *in personam* actions. For a variety of reasons, those courts have said that, although quiet title actions are *in personam* actions, because they involve property, they are in the nature of *in rem* actions. The reasons they have done that do not support the position of the United States and Tribe here.

In *Nevada v. United States*, 463 U.S. 110 (1983), that statement was made in the context of determining whether persons who appropriated water subsequent to the entry of the Orr Ditch Decree on the Truckee River, were protected by *res judicata* from the claim being made by the United States for additional water for the Pyramid Lake Indian Reservation. Holding that they were, the Court ruled that because water adjudications are in the nature of *in rem* proceedings, non-parties, such as subsequent appropriators, can rely on and are entitled to rely on the previously issued water decree. Such subsequent appropriators are entitled to hold reservations to the claims made in the original decree. 463 U.S. at 143-144. Importantly, the subsequent appropriators there were persons who had appropriated water under Nevada law subsequent to the Orr Ditch Decree and without any "determination" of their rights by the Orr Ditch Court.

The same observation about the *in rem* nature of an *in personam* quiet title action was made in *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013-1014 (9th Cir.

[1] That statute was also used by the United States to bring a similar action in 1925 involving water 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).

1999). There, a state court sought to review a State Engineer decision approving a change to a water right which had been originally adjudicated in the federal Carson River or "Alpine" Decree. The Ninth Circuit held that the *Alpine* Court had exclusive jurisdiction to review the change to a water right in its decree. It did not suggest that the decree court had exclusive jurisdiction to determine additional water rights to the Carson River, or to all sources of water within the entire Carson River basin.

In *Rickey Land and Cattle Company v. Miller and Lux*, 218 U.S. 258 (1910), the Court considered which of three actions should proceed, the one first brought in federal court in Nevada, or two later actions brought in state court California. The court simply decided that the action should proceed in Nevada because it was the first action filed. 218 U.S. at 262. Moreover, the district court and the Ninth Circuit Court of Appeals in that proceeding recognized that the jurisdiction was *in personam*, and could not be *in rem* with respect to any property outside the boundaries of the district court in Nevada. *See*, *Rickey Land and Cattle Co. v. Miller and Lux*, 152 F. 11, 17 (9th Cir. 1907); *Miller and Lux v. Rickey*, 127 F. 573, 575-80 (Cir. Ct. D. Nev. 1904).

The United States' and Tribe's reliance on the policy of the McCarran Amendment, 43 U.S.C. § 666, and cases applying it, is also misplaced. *See*, Dkt. 2185 at 8; Dkt. 2184 at 10. The McCarran Amendment provides a waiver of immunity so that the United States may be made a party to comprehensive water adjudications. The cases relied upon by the Tribe and the United States involved issues of whether federal actions initiated to determine federal water rights should be dismissed because of the pendency of similar and more comprehensive adjudications in another court. *See*, *Colorado River Water Conservation District v. Akin*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Neither case, nor the McCarran Amendment itself, stands for the proposition that once a decree is entered in such an adjudication, the decree court has exclusive and ongoing jurisdiction thereafter to determine water rights on the source, or to all sources within the watershed.

Kline v. Burke, 260 U.S. 226 (1922) also does not support the position of the United States and Tribe here. *See*, Dkt. 2185 at 5-6; Dkt. 2184 at 8. It involved two competing cases involving the same issues. Both actions were *in personam*. The court held that both could

proceed. Its dicta concerning two competing *in rem* cases involving the same property does not apply here. Two different courts are not seeking to adjudicate the claims the United States and Tribe bring here. The issue here is whether this Court, having entered a decree involving other claims in 1936, has the exclusive and ongoing jurisdiction to determine all additional claims.

The Tribe also relies on *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010). *See*, Dkt. 2184 at 8. That decision supports the conclusion that this Court does not have exclusive and ongoing jurisdiction to determine additional water rights. The Ninth Circuit stated that the decree court, the Orr Ditch Court, did not have jurisdiction with respect to the Pyramid Tribe's Truckee River water right appropriated under state law long after the Orr Ditch Decree was entered. 600 F.3d at 1160.

Both the United States and the Tribe misstate the holding of the Nevada Supreme Court in *Mineral County v. Nevada*, 20 P.3d 800 (Nev. 2001). *See*, Dkt. 2185 at 7; Dkt. 2184 at 8-9. The Nevada Supreme Court did not determine that this Court has exclusive jurisdiction to determine additional claims to the water of the Walker River or other water sources in the Walker River Basin. It determined that this Court was the proper forum for the relief which Mineral County sought there, and for other reasons, including the fact that it did not have jurisdiction over all necessary parties. *Mineral County*, 20 P.3d at 807.

In its original filing with the Nevada Supreme Court, Mineral County sought a Writ of Mandamus "compelling [the Nevada State Engineer] to reconsider the appropriation and allocation of the waters of the Walker River system to provide for an annual instream flow to Walker Lake reasonably calculated to ensure the sustainability of the lake's public trust uses, including fisheries, recreation and wildlife." A copy of the Petition filed with the Nevada Supreme Court is attached hereto as Exhibit B. Mineral County was asking the Nevada Supreme Court to direct the Nevada State Engineer to modify the Walker River Decree, something which Mineral County was already asking this Court to do. The Nevada Supreme Court acknowledged that only this Court could consider and effectively modify the Walker River Decree. *Mineral County*, 20 P.3d at 807. It did not say or even suggest that this Court has any jurisdiction to determine state law based claims for additional water from the Walker River, or from all sources in the Walker River Basin.

The most important reason why this Court does not have exclusive jurisdiction to hear and determine state law based claims for water from the Walker River and within the Walker River Basin, is that two sovereign states, Nevada and California, control the water and additional rights to use water from those sources is determined under their respective laws. When this Court quieted title and determined the relative rights of water users in the Walker River Decree, it was determining the use rights of the parties. It was not carving up ownership of the Walker River per se. Nevada and California hold that ownership.

The laws of Nevada and California preclude this Court and any other court from granting additional state law based rights to use water from the Walker River. That jurisdiction is exclusively granted as a matter of Nevada law to the Nevada State Engineer, and as a matter of California law to the California State Water Resources Control Board. California law provides that "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Cal. Water Code, § 102. Similarly, Nevada law provides that the "water of all sources of water supply within the boundaries of the State, whether above or beneath the surface of the ground, belongs to the public. N.R.S. § 533.025. After 1905 in Nevada, and after 1914 in California, an appropriative water right may only be established by an application to and permit from the Nevada State Engineer or the California State Water Resources Board. *See*, N.R.S. §§ 533.030(1); 533.325; Cal. Water Code § 1225; *In Re Fillipini*, 66 Nev. 17, 202 P.2d 535 (1949); *Crane v. Stevinson*, 5 Cal.2d 387, 54 P.2d 1100, 1105-1106 (1936).

In both states, what is meant by a "water right," is a right to use the water -- to divert it from its natural course. The "right of property in water is usufructory, and consists not so much of the fluid itself as the advantage of its use." *Eddy v. Simpson*, 3 Cal. 249, 252 (1853); *see also, McCormick v. Dist. Court*, 69 Nev. 214, 246 P.2d 805, 811 (1952) (water user is "the owner of the usufruct").

Both California and Nevada state law thus support the conclusion that this Court has continuing *quasi-in rem* jurisdiction over the administration of and changes to the rights to use water as decreed; decreed water right usufructs, but it neither has nor retains any jurisdiction to determine new state law rights to the use of water. It is contrary to Nevada's and California's

sovereign authority over their waters for the Court to bypass their respective administrative procedures and determine new state law based rights to the use of water. Nothing this Court has done in connection with the Walker River Decree gives it jurisdiction, exclusive or otherwise, to determine additional rights to use water for sources of water within the Walker River Basin.

C. The Court Did Not Retain Jurisdiction to Determine Additional Water Rights Within the Walker River Basin.

1. Introduction.

The United States and Tribe argue that the Court retained jurisdiction to determine claims to all water within the Walker River Basin by the plain language of the Walker River Decree. Dkt. 2185 at 8-11; Dkt. 2184 at 10-14. The United States seeks to bolster its argument by asserting an awareness on the part of the Court in 1936 of potential additional claims, and by recent Court rulings. Dkt. 2185 at 11-14. The plain language of the Decree, particularly the context in which the relevant provision, Paragraph XIV, was written, and recent Court rulings do not support their position.

The background information provided by the United States and Tribe concerning the litigation which ultimately resulted in the Walker River Decree (Dkt. 2185 at 3-5; Dkt. 2184 at 5-6; Dkt. 2184 at 2-5) is carefully written in anticipation of future aspects of this litigation not presently before the Court. For example, whether lands were "restored" or "added" to the Reservation from 1918-1961, and the legal significance of the difference, if any, between restoration or addition, may be important on the merits of the federal claims made for those lands. *See*, Dkt. 2184 at 4, lns. 5-24. Whether in 1924 the "United States asserted the Tribe's surface water irrigation rights from the direct flow of the Walker River" (Dkt. 2185 at 4), and "did not bring a storage right claim for Weber Reservoir," (Dkt. 2185 at 12); whether "the Court determined the surface water irrigation rights of the Reservation from the direct flow of the Walker River based on irrigation uses as they existed at the time," (Dkt. 2185 at 9), and "was aware that the United States had an anticipated, obvious claim for storage water that was not resolved under the Decree," (Dkt. 2185 at 13) all relate to whether some or all of the claims being made here are barred based upon principles of finality and repose. The facts and law related to those principles, and the accuracy of those carefully crafted characterizations in that context, are not directly before the Court under the District's Motion.

However, there is some important information related to the litigation which resulted in the Walker River Decree which bears on the issue of the Court's jurisdiction and on the meaning and breadth of the Decree's retained jurisdiction provision. The claim asserted by the United States in 1924 for the Reservation was based upon the implied reservation of water doctrine. That doctrine was first recognized in 1908 by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). Not long after *Winters*, the United States commenced two actions in the District of Nevada asserting implied reserved water rights. One action, filed in 1913, *United States v. Orr Water Ditch Co., et al.*, In Equity No. A-3 (D. Nev.), involved the Truckee River and the Pyramid Lake Indian Reservation. The other was this one. The Pyramid Lake and Walker River Reservations have a parallel history. Both were set aside and confirmed by the same executive actions. *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 338-39 (9th Cir. 1939).

Ultimately, the litigation with respect to the Pyramid Lake Indian Reservation was resolved by a stipulated judgment in 1944. *Nevada v. United States*, 463 U.S. 110, 117-118 (1983). The implied reserved water right for that Reservation was limited to sufficient water to irrigate 5,875 acres of land. Many years later, litigation seeking an additional federal reserved water right for the Pyramid Lake Indian Reservation would result in the decision in *Nevada v. United States* that the claim for additional water was barred by *res judicata*.

The Walker River litigation was not resolved by settlement. Because *Winters* had placed strong reliance on a treaty with the Indians, it was argued that it was distinguishable from situations where a Reservation was established by executive order. The trial court here agreed, holding that the water right for the Walker River Reservation was "<u>to be adjudged, measured, and administered in accordance with the laws of appropriation as established by the state of Nevada</u>." *United States v. Walker River Irrig. Dist.*, 11 F.Supp. 158, 167 (D. Nev. 1935). [Emphasis added]. It awarded the United States water rights with priority dates and quantities based upon actual beneficial use, i.e., based upon state law principles of appropriation. Walker River Decree at 10. Therefore, when the Walker River Decree was entered, with its retention of jurisdiction provision, Paragraph XIV, the Judge had ruled that all of the water rights in it, including those for the Walker River Indian Reservation, had to be and were based upon state

law.

The Ninth Circuit reversed, and found that "there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians." *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 339-40 (9th Cir. 1939). On the question of the quantity of water to which the United States was entitled, the Court turned to the report of the Special Master. That report indicated that about 1,900 acres were in cultivation in 1886, and that at the time the complaint was filed, about 2,000 acres were in irrigation. The report also indicated that the population on the reservation had been fairly stable since 1866. The Special Master had recommended a cultivated area of 2,100 acres with a water right of 26.25 cubic feet per second. The Court accepted that recommendation, and said that it was "a fair measure of the needs of the government as demonstrated by 70 years' experience." *Id.* at 340.

2. In Retaining Jurisdiction to Modify the Decree, the Court Did Not Retain Jurisdiction to Determine Additional Water Rights.

The United States relies on *Arizona v. California*, 460 U.S. 605 (1983) ("Arizona II") as authority for a court to retain jurisdiction to modify its decree in the future. Dkt. 2185 at 8. The Tribe relies on *Arizona v. California*, 530 U.S. 392 (2000) and *Arizona v. California*, 493 U.S. 886 (1989) to generally support the position that a new action is not required for the claims being made here. Dkt. 2184 at 14-15. However, neither refers the Court to the provisions of the original decree which allows for modifications.

In *Arizona v. California*, 373 U.S. 546 (1963) and in the Decree resulting therefrom (376 U.S. 340 (1964)), the Court had made it clear that "not all aspects of the case were finally resolved by the 1964 decree." *Arizona II*, 560 U.S. 610. Because the Court had found it was unnecessary for the Special Master to have resolved boundary disputes as to certain of the reservations, the 1964 Decree provided, in Paragraph II(D), that the quantities of water provided for the Fort Mojave Indian Reservation and the Colorado River Indian Reservation "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona II*, 460 U.S. at 611. In addition, Article IX of the Decree provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Arizona v. California, 376 U.S. at 353.

In *Arizona II*, the Court concluded that those provisions granted it the "power to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the decree." *Arizona II*, 460 U.S. at 618. The language of the Walker River Decree and the relevant facts suggest that all aspects of this case were resolved when the Walker River Decree was entered. The Court did not intend to retain jurisdiction for the broad purposes as did the Court in *Arizona v. California*.

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

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

Walker River Decree at Para. XIV. The United States and the Tribe read the provision to mean that the Court "retains exclusive jurisdiction to determine all subsequent claims to water based upon federal or state law from the Walker River and from all other sources of water within the Walker River Basin." Both contend that the District's position renders the term "modifying" superfluous. Neither is the case.

The Tribe and the United States rely on principles of construction of decrees, including consent decrees. Dkt. 2185 at 8-9; Dkt. 2185 at 11-12. Those principles include presuming the language used was the result of "thoughtful and deliberate action," and that the meaning of a decree should be "discerned within its four corners." Dkt. 2185 at 9. The District does not dispute those principles. Their application here shows that retaining jurisdiction for "modifying" the Walker River Decree is not a retention of exclusive jurisdiction to determine additional water rights to the Walker River, or to all sources of water within the Walker River Basin, or even to determine a "storage" water right for Weber Reservoir.

What is now paragraph XIV of the Walker River Decree was submitted in 1932 to the Court by the Special Master in a Proposed Decree. It was included in the Decree by the Court without change in 1936. It was not modified when the Walker River Decree was amended in

1940. When Judge St. Sure signed the Decree in 1936, he had ruled that all water rights in the Decree had to be acquired under state law. *See*, p. 8, *supra*. In addition, he knew that since 1905 in Nevada and since 1914 in California, appropriative rights to the use of water could only be obtained under state law by an application for and a permit issued by the appropriate state agency. *See*, N.R.S. §§ 533.030(1); 533.325; Cal. Water Code §§ 1225, *et seq.* He knew that no court could simply determine and grant an appropriative right to use water established in either State after those dates.

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

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

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

The United States asserts that it "did not bring a claim for Weber Reservoir when it initiated this action in 1924," ostensibly because Congressional appropriations for the Reservoir were not secured and construction was not begun on it until after 1932. Dkt. 2185 at 12; n. 10. The need for Congressional appropriations to actually implement irrigation on a reservation does

not prevent the United States from asserting a claim to water under the implied reservation of water doctrine, nor does that need allow the United States to split its claim for such a right based upon the level of funding in existence at the time the action was filed. A reservoir is a facility for managing water, not unlike canals, ditches and headgates, which are also needed.

The Amended Complaint filed in 1926 confirms that the United States was not constrained in the claim it made by the presence or absence of funding to build facilities. Even though at the time of trial only about 2,000 acres on the reservation were being irrigated, the Amended Complaint sought a water right of 150 cubic feet per second with an 1859 priority for purposes of irrigating in excess of 10,000 acres. *United States v. Walker River Irrigation District*, 104 F.2d at 335; 340. Substantial additional funding would have been needed to build the many facilities required to place in excess of 10,000 acres into cultivation. Had the United States prevailed on its claim, it would have a water right sufficient to fill Weber Reservoir many times over.

Contrary to the assertion of the United States, the Court did not recognize "that the water rights it decreed for the Tribe did not address or meet 'all needs' of the Tribe and there remained at least the important, outstanding, unmet need for reservoir storage." Dkt. 2185 at 12. That argument takes what the Court said entirely out of context. First, the Court found the following statement in the Blomgren Report "illuminating:"

> Taking the records available and interpreting them in the light of experience, it is my judgment that even though it were possible to restore natural conditions -- that is, blot out all development on the river above the reservation -- the uncontrolled stream flow would be adequate for the full-season irrigation of the total irrigable area (10,000 acres) of the reservation only one *season of every two*. (Italics supplied.)

Walker River, 11 F.Supp. at 164. Based upon that quote, the Court observed that "the construction of the proposed dam and reservoir would undoubtedly greatly increase the present supply and probably insure water sufficient for all needs of the reservation throughout the year." *Id.* at 165. It did not suggest it would retain any jurisdiction to address a water right for the reservoir. Instead, it determined that the rights of the United States would be "adjudged, measured, and administered in accordance with the laws of appropriation as established by the State of Nevada." *Id.* at 167.

Whatever the Court might have known in 1936 about Weber Reservoir, nothing supports the claim that it knew the "United States had an anticipated, obvious claim for storage water not resolved under the Decree, or that "it retained broad jurisdiction to modify the Decree so that it could adjudicate additional water rights in the future." Dkt. 2185 at 13. The United States supports that argument based upon a brief filed by the District in 1936. It argues that in 1936, the District itself "embraced the Blomgren Report" and accepted the notion that the Court retained jurisdiction to determine a storage right for Weber Reservoir. Its quote from the District's brief is taken entirely out of context. *See*, Dkt. 2185 at 12-13.

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

The United States filed a Brief of Exceptions on November 1, 1935, and used the opportunity to reargue issues related to the water right for the Reservation which had been decided in the June 6, 1935 decision. In that Brief, and as part of its argument, the United States told the Court that a particular reservoir referenced in the Blomgren Report "has never been built." United States Brief on Exceptions to the Master's Findings, Conclusions and Proposed Decree, November 1, 1935 at 14, lns. 13-14. The United States did not tell the Court that Weber Reservoir had in fact been built. The District merely informed the Court of that misleading omission, and explained that the Weber site was referenced in the Blomgren Report. Memorandum of Walker River Irrigation District and Other Defendants in Answer [to United States'] Brief on Exceptions filed April 22, 1936 at 6-8.

Thereafter, the Court issued another short opinion in response to the United States' assertion that there had been an implied reservation of water under federal law. *United States v. Walker River Irrigation District*, 14 F. Supp. 10 (D. Nev. 1936). That opinion, which, in part, is based upon detrimental reliance, supports a conclusion that the Court would have rejected a request, had one been made, to leave open for future litigation additional claims for the

Reservation. Had a request been made, the Judge would not have retained jurisdiction to hear such a claim because he knew there would need to be an application to, and a permit issued by and determined by, the Nevada State Engineer.

The principles of construction of thoughtful and deliberate action and consideration of the four corners of the Decree establish that the word "modifying" in Paragraph XIV of the Decree cannot be reasonably construed as a broad retention of jurisdiction to determine additional claims to water from the Walker River, much less from every source of water within the Walker River Basin, or even to determine a storage right for Weber Reservoir. Rejection of that interpretation of the word "modifying" does not render it superfluous and unnecessary. The District does not contend that the word "modifying" should be read as synonymous with the word "correct." The Court can and has modified the Decree in ways which are not corrections of it. "Modify" means to change something in the Decree, even if what is changed was originally correct.

The Court has in the past modified the Decree to reflect new points of diversion and new places of use. *See*, C-125, Dkt. 805. It has also modified the Decree to reflect new owners of water rights. *Id.* It effectively modified the provisions of the Decree concerning appointment of a Water Master when it issued orders appointing a United States Board of Water Commissioners. *Compare* Walker River Decree Para. XV with Order Appointing U.S. Board of Water Commissioners entered May 12, 1937, attached hereto as Exhibit E, and Order Amending May 12, 1937 Order entered January 28, 1938, attached hereto as Exhibit F. The Court also modified the Decree when it entered the Order for Entry of Amended Final Decree on April 24, 1940. The Court may also modify the Decree to reflect final surface water right determinations by the Nevada State Engineer and California State Water Resources Control Board. None of these modifications are merely "corrections," as the Tribe and the United States contend.

D. The Court Has Not Previously Decided That It Has Ongoing Jurisdiction to Determine Claims for Additional Water.

Two previous orders of this Court do not support the ongoing jurisdiction claims made by the United States and the Tribe. The United States argues that, absent the Order entered by Judge Reed in 1990 (Dkt. 2161-2), the California State Water Resources Control Board would have no authority to determine additional water rights to the Walker River under California law. Dkt. 2185 at 18. The 1990 Order is not a recognition that the Court had "continuing jurisdiction

under the 1936 Decree to determine additional claims in the first instance" (Dkt. 2185 at 18), as the United States contends. It is the Court's recognition that the California State Water Resources Control Board has that exclusive jurisdiction under California law. There is no inconsistency between that and also recognizing that once such water rights from the Walker River are "determined" by the appropriate state agency, that there be a supplemental decree so that they may be administered in priority, along with all of the other water rights recognized in the Decree.

The October 27, 1992 Order (Dkt. 15) referenced by the Tribe and United States was not a determination that this Court had retained jurisdiction to determine additional claims to water from the Walker River, or in the Walker Basin, or even to hear the claims being made here by the United States and Tribe. *See*, Dkt. 2185 at 13-14; Dkt. 2184 at 12-13. In that Order, the Court ruled that, although the claims being made were not counterclaims, they could proceed as cross-claims. The Court did not decide that by reason of the Walker River Decree, it had exclusive jurisdiction to hear and determine all claims to water from the Walker River, or from all water sources within the Walker River Basin. In the Case Management Order, the very same Judge listed as a threshold issue "whether this Court has jurisdiction to adjudicate the Tribal Claims." Dkt. 108 at 9, lns. 23-24.

III. THE COURT HAS THE POWER TO TREAT THE AMENDED COUNTERCLAIMS AS A NEW ACTION.

The United States contends it has not initiated a new action, and that the District cannot transform the Amended Counterclaims into an action the United States did not bring. Dkt. 2185 at 19-22. On the one hand, the United States contends that 28 U.S.C. § 1345 is not a waiver of immunity and that the District cannot make the United States a plaintiff to a new action (Dkt. 2185 at 20), and on the other, it argues that this Court has jurisdiction under 28 U.S.C. § 1345 to hear its state water claims, presumably as a plaintiff. *See*, Dkt. 2185 at 24-25. It cannot have it both ways. If the United States retracts its other allegations of jurisdiction in its Amended Counterclaim, and relies solely on exclusive and retained jurisdiction allegations, the Court should dismiss its Amended Counterclaim.

The Court has the power to treat the Amended Counterclaims as a new action. The District's request that the Court treat the Amended Counterclaims as a new action is based upon

the provisions of Fed. R. Civ. P. 1 and 8(e) and the Court's inherent power. Fed. R. Civ. P. 1 requires that the Federal Rules be "construed and administered to secure, the just, speedy and inexpensive determination of every action and proceeding." Rule 1 allows the Court to treat the Amended Counterclaims as a new action in order to avoid outright dismissal of an action which will simply be filed again. *See*, 1 Moore's Federal Practice and Procedure, § 1.21[1][a] at 1-45 (3d ed.) ("[M]andate of Rule 1 is to authorize court to exercise discretion in construction and application of procedural rules").

In keeping with the general mandate in Rule 1, Fed. R. Civ. P. 8(e) requires that pleadings be construed to do substantial justice. There is no question that the Amended Counterclaims meet the requirements of Rule 8(a) and constitute a complaint, regardless of their label. The Court has adequate power to treat the Amended Counterclaims as a new action.

IV. THERE IS NO SUPPLEMENTAL JURISDICTION OVER THE STATE LAW CLAIMS.

In contending that there is supplemental jurisdiction over its state law claims, the United States argues that its state and federal claims arise out of a common factual nucleus, and would ordinarily be tried together in the same proceeding. Dkt. 2185 at 23-24. The common factual nucleus is argued to be identical water and identical use. *Id.* at 24.

In its Motion, the District highlighted the difference between the operative facts related to the United States' claims under federal law and those related to its claims under state law. Dkt. 2161 at 13-15. The fact that a federal claim and a state claim may involve the same water source does not mean that the claims arise out of a common nucleus of operative facts. As a matter of fact, the source of the water has nothing to do with the essential elements of the claim. There is much more to the state law claims than just water use, and the claims based upon federal law do not depend on water use. There is no common factual nucleus.

The United States does not elaborate on why all of these claims would ordinarily be tried together. A claim under state law which requires compliance with state processes before the Nevada State Engineer, or the California State Water Resources Control Board, would be "tried" before the state agency, and separate from any federal claim. Indeed, such Nevada and California claims would be tried separately from each other before the administrative agency of each state. Not only does the United States not address why state law claims which depend for

their existence on permits in good standing issued from either the Nevada State Engineer or the California State Water Resources Control Board must be "tried" in a federal action with claims based upon federal law, it does not explain why they must be tried at all.

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

V. ON ITS FACE, THE UNITED STATES' AMENDED COUNTERCLAIM SHOWS THAT SOME OF ITS STATE LAW CLAIMS ARE NOT RIPE FOR DETERMINATION.

The District agrees that the issue of ripeness relates to the pleadings, and not proof. However, in some cases, the United States' Amended Counterclaim alleges that its appropriative rights are the subject of "applications," or "permits" in Nevada or California. Dkt. 59 at paras. 62, 73. Ripeness is "a doctrinal notion made up of . . . the case or controversy requirement of Article III of the Constitution of the United States [and prudential] policy considerations." *Sandell v. Federal Aviation Administration*, 923 F.2d 661, 664 (9th Cir. 1990). An "application" is not ripe to be brought before this Court for any reason. Moreover, any rights which require state approval are not ripe to be brought before this Court until all state law processes are complete, and then only if the right in question should appropriately be administered by this Court under the Walker River Decree. *See*, Dkt. 2161-2 at Exhibit B.

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

Similarly, in California, the United States must have a permit if the ground water is not percolating ground water. A permit is not needed for an overlying right to ground water in California. In either case, absent a ground water adjudication, there is nothing for the Court to

do. The United States does not need a judgment from a court confirming the law of the State of California concerning overlying rights to ground water.

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

VI. 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.

The Tribe and the United States acknowledge that it is "premature" to determine whether the Court does or does not have jurisdiction over off-Reservation ground water pumping.[2] Dkt. 2184 at 16; Dkt. 2185 at 28. The Tribe acknowledges, and the United States implicitly recognizes, that they have not yet demonstrated that off-Reservation ground water uses interfere with water rights based upon federal law. Dkt. 2184 at 18-19; Dkt. 2185 at 28-29. The Pyle Affidavit (Dkt. 62, Attachment 1) does not allege otherwise.

The District does not simply take "issue with a somewhat routine request in the United States' prayer for relief." Dkt. 2185 at 28. The issue is one which the Case Management Order directed be addressed. Dkt. 108 at para. 11(h). It is also a question which the Court directed be addressed at the July 25, 2013 status conference. *See*, July 25, 2013 Transcript of Proceedings at p. 23, lns. 2-11. The threshold issue to be addressed is whether the issue of interference needs to be decided as part of the determination of the claims based upon federal law. Dkt. 108 at para. 11(h). The Tribe and the United States seem to concede that it does not. *See*, Dkt. 2185 at 29 ("Consideration of that issue can occur once such claims are adjudicated."); Dkt. 2184 at 20 ("Until the Reservation rights are

[2] The Supreme Court of the United States has never decided that the *Winters* doctrine applies to ground water, and that is not an issue to be decided on these motions. As the United States notes, some courts have said that it does. *See*, Dkt. 2185 at 29, n. 26. However, others have said 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).

determined, the steps the Court may have to take to protect Reservation ground water use cannot be determined.”).

Importantly, the users of ground water outside the boundaries of any Reservation cannot be left in the position of guessing whether, by reason of a routine provision that they are “enjoined from asserting any adverse rights, title or other interests in or to the [federal] rights,” they may be in violation through continued pumping of their existing ground water right when there has been no showing of actual interference, or even of the relative priority relationship of their rights to those of the Tribe or United States. At this stage of the proceedings, the United States and Tribe are not required to “demonstrate” such interference. They are merely required to allege it. They have not done so, and as a result, there is no jurisdiction. *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1154; 1159-1161.

VII. CONCLUSION.

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

Dated: April 20, 2015.

WOODBURN AND WEDGE

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 20th day of April, 2015, 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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