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**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>WALKER RIVER PAIUTE TRIBE,<br>Plaintiff-Intervenor,<br>v.<br>WALKER RIVER IRRIGATION DISTRICT, A corporation, et al.,<br>Defendants. | IN EQUITY NO. C-125-B-ECR<br><br>**NEVADA DEPARTMENT OF WILDLIFE'S PRELIMINARY LEGAL THEORIES** |

Pursuant to the Court's August 20, 2007 Order, the Nevada Department of Wildlife (NDOW) submits the following preliminary legal theories. These preliminary legal theories are not intended to represent an all-inclusive list of NDOW's legal positions. As this litigation proceeds and discovery is conducted, NDOW's legal theories may change and will be modified.

**1. (Res Judicata)**

The water rights incident to the Walker River Decree were fully adjudicated by this Court. *United States v. Walker River Irrigation District,* 11 F.Supp. 158 (D.Nev. 1935); rev'd. *United States v. Walker River Irrigation District,* 104 F.2d 334 (9th Cir. 1939). Under the

doctrine of *res judicata*, the water rights established in the Walker Right decree are final. *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906 (1983).

**2. (Res Judicata)**

Construction of Weber Dam was complete or nearly complete by the time the Walker River Decree was entered. If an additional water right for the benefit of the Walker River Paiute Tribe (Tribe) was contemplated, it would have been included in the original adjudication. *Id.*

**3. (Public Trust)**

Operation of Weber Dam and Reservoir by the U.S. Bureau of Indian Affairs has deprived NDOW of water that in certain years should have inured to the benefit of Walker Lake and NDOW's state-issued water right for the fishery in Walker Lake. E.g., *Mineral County v. Nevada*, 117 Nev. 235, 20 P.3d 800 (Nev. 2001); State v. Bunkowski, 88 Nev. 623, 503 P.2d 1231 (Nev. 1972).

**4. (Waste)**

Water use along the Walker River, particularly by phreatophytes on the lower reaches of the river, results in the waste of water to the detriment of Walker Lake. NRS 533.460.

**5. (Winters Doctrine)**

The purpose of the Walker River Reservation, with the exception of irrigation on 2100 acres accommodated in the Walker River Decree, is for *dryland grazing*. No additional water rights for irrigation are needed to accomplish this purpose. *Winters v. United States*, 207 U.S. 564 (1908).

**6. (Extinguishment of claims by ICC payment)**

The Indian Claims Commission determined that the Walker River Indians' land was taken from them on December 31, 1862. *Northern Paiute Nation and the Bands Thereof, et al. v. U.S.*, 7 Ind. Cl. Com. 615 (June 4, 1959) The value of the land taken from the Paviotso, or Northern Paiutes, including the Walker River Indians, was determined. *Northern Paiute Nation and the Bands Thereof, et al. v. U.S.*, 16 Ind. Cl. Com. 215 (November 4, 1965). The

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valuation of $15,790,000 was upheld on appeal. *Northern Paiute Nation v. U.S.*, 183 Ct. Cl. 321, 393 F.2d 786 (April 10, 1968).

In addition to a land claim, the Walker River Paiute Tribe made several other claims for compensation under the Indian Claims Commission Act, 605 Stat. 1060, 25 U.S.C. § 70(a), et seq.. *Northern Paiute Nation v. U.S.*, 8 Cl. Ct. 470 (July 11, 1985). Among these was a claim that the United States failed to provide a sufficient water supply to irrigate the Tribe's land, described as Count IV in Docket No. 87-A, which claim was proved. *Id.* at 488.

On March 23, 1989, a Stipulation for Compromise Settlement and Entry of Final Judgment was filed in *Northern Paiute Nation v. U.S.*, Docket no. 87-A. On March 24, 1989, judgment for $4,300,000 was given to the Walker River Tribe for all claims of loss suffered as the consequences of the United States' alleged failure to provide an irrigation system sufficient to supply water to the irrigable lands of the Walker River Indian Reservation.

On November 23, 1992, judgment for $2,500,000 was awarded to the Walker River Tribe, in Docket No. 87-A for grazing and fiscal claims. The case was dismissed on January 13, 1993.

A fisheries claim originally presented in Docket No. 87 was segregated from the main docket and designated Docket No. 87-E. A judgment was paid. *Northern Paiute Nation v. U.S.*, 8 Cl. Ct. 470 at 477, n.6. The amount of the award and the specific findings of the court are not known. Discovery is needed to support this preliminary legal theory.

**7. (Diminishment of reservation; reestablishment for *dry land grazing*)**

The 1906 cession altered the boundaries of the reservation so that the ceded lands were no longer within the limits of the reservation and were restored to the public domain. *U.S. v. Southern Pac. Transp. Co.*, 543 F.2d 676, 694, 696 (9th Cir. 1976).

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**8. (State regulation of groundwater)**

Regulation of groundwater in Nevada is within the State Engineer's statutory jurisdiction (NRS Chapter 534) and is not part of the Walker River Decree.

Dated: December 17, 2007.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 17th day of December 2007, I served a copy of the foregoing **Nevada Department of Wildlife's Preliminary Legal Theories**, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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