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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 SUBFILE NO. C-125-B **WALKER RIVER IRRIGATION DISTRICT'S PRELIMINARY LEGAL THEORIES IN SUPPORT OF DEFENSES TO THE TRIBAL CLAIMS**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

I. INTRODUCTION.

Pursuant to the Court's August 20, 2007, Order (Doc. No. 1221), the Walker River Irrigation District (the "District") submits preliminary legal theories supporting its defenses to the First Amended Counterclaim filed by the Walker River Paiute Tribe (the "Tribe") and the First, Second and Third Claims for Relief asserted in the First Amended Counterclaim of the United States, which claims are referenced in the Case Management Order (Doc. No. 108) as the "Tribal Claims." These "defensive legal theories" are preliminary, and will evolve as this matter moves forward.

The District's preliminary defensive legal theories are intended to assist the parties and the Court in developing the threshold issues which the Case Management Order requires be addressed at the outset of this litigation. They are based upon a review of the Tribe's First Amended Counterclaim, the United States' First Amended Counterclaim, the Submission of Preliminary Legal Theories by the Walker River Paiute Tribe and the United States of America dated October 18, 2007 (the "Tribe and United States Preliminary Legal Theories"), and background information presently available to the District. Although the defensive legal theories are preliminary, some detail is included, in part to also assist the parties and the Court in developing discovery which the Case Management Order provides is to be allowed with respect to the threshold issues.

II. THE WALKER RIVER DECREE.

Based upon the Tribe and United States Preliminary Legal Theories, it is clear that the Tribal Claims are based entirely upon the federal implied reservation of water doctrine. The 1908 decision of the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908), is regarded as the case which gave birth to that doctrine. *Winters* has come to stand for the proposition that the United States, in establishing Indian Reservations, impliedly reserved enough water to fulfill the purposes of the Reservation.

Not long after *Winters* was decided, the United States commenced an action (the "Walker River Action") in the United States District Court for the District of Nevada asserting an implied reserved water right for the Walker River Indian Reservation which had been set aside on November 29, 1859, and formally established by executive order on March 23, 1874. The Complaint in the Walker River Action was filed on July 3, 1924, and an Amended Complaint was filed on March 19, 1926. See, *United States v. Walker River Irrigation District*, 11 F.Supp. 158 (D. Nev. 1935). However, before the Walker River Action was filed, pursuant to Acts of Congress in 1902 and 1906 and an Agreement between the United States and Tribe of July 20, 1906, about 268,000 acres of the original Reservation were ceded to the United States. These lands were opened to entry by a Proclamation of President Theodore Roosevelt on October 29, 1906. See, *Northern Paiute Nation v. United States*, 8 Cl. Ct. 470, 473-475 (1985).

The claim asserted by the United States in the Walker River Action was based upon the implied reservation of water doctrine. The court summarized the Amended Complaint filed by the United States as follows:

> [T]he United States on November 29, 1859, being the owner of the lands now constituting Walker River Indian Reservation, reserved and set aside lands for the use of the Pahute and other Indians for the purpose of affording them the opportunity to acquire the arts of husbandry and civilization; that said lands are arid and incapable of producing crops without artificial irrigation; that approximately 11,000 acres of said lands are susceptible to irrigation from Walker River and have no other source of water supply . . . . 150 cubic feet of water per second of time from said river are necessary for the irrigation of the irrigable lands of said reservation, and without said water said lands will become of little or no value; that the government by the reservation of said lands reserved 150 cubic feet of water per second for the irrigation thereof . . . .

United States v. Walker River Irrigation District, 11 F.Supp at 159-60.

The *Winters* court had placed strong reliance on the treaty between the United States and the Indians. It was argued in the Walker River Action that *Winters* was distinguishable because the

Walker River Indian Reservation had been established by executive order. The trial court agreed, and held that:

> The rights of the government, in its use of waters of the Walker River and its tributaries for purposes of irrigation, like the rights of all other diverters in the Walker River Basin, are to be adjudged, measured, and administered in accordance with the laws of appropriation as established by the state of Nevada.

Id., 11 F.Supp at 167.

Therefore, the water rights awarded to the United States by the trial court were limited both as to priority date and quantity based upon actual beneficial use on the Reservation. Based upon that conclusion, a decree (the "Walker River Decree") was entered on April 14, 1936.

On appeal, the Ninth Circuit found no difference between reservations established by treaty and those established by executive order. It noted that it would be irrational to assume that in establishing an Indian reservation by executive order, the United States set aside the arid soil without reserving the means of rendering it productive. The court held 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 District*, 104 F.2d 334, 339-40 (9th Cir. 1939). This holding anticipated the Supreme Court's similar ruling on the same issue in *Arizona v. California*, 373 U.S. 546, 598 (1963).

The court next turned to the question as to the quantity of water necessary to supply the needs of the Tribe. The court noted that the "tillable land reserved" is an area of approximately 10,000 acres. However, speaking to the issue of quantification, the court said:

> The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary and could only be demonstrated by experience.

104 F.2d at 340.

The United States sought a decree limiting the quantity of water for the Reservation to 150 cubic feet per second. Noting that a decree of this sort would "tend greatly to depreciate the value of the water rights of the upstream owners," 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 for 180 days during the irrigation season. Accepting those recommendations, the court said that this was "a fair measure of the needs of the government as demonstrated by 70 years experience." Id., at 340.

On April 24, 1940, the Nevada District Court amended the Walker River Decree consistent with the mandate of the court of Appeals. Thus, the Walker River Action confirmed the existence of an implied reserved water right for the Walker River Indian Reservation, and determined the quantity of water needed to fulfill the purpose of that reservation.

It is against this background that the District submits its preliminary defensive legal theories to claims now moving forward nearly 72 years after entry of the Walker River Decree. Although these defensive legal theories are, to a certain extent, common to all of the Tribal Claims, the District addresses each of the Tribal Claims separately.

III. THE WEBER RESERVOIR CLAIMS.

A. Background.

In their Amended Counterclaims, the Tribe and the United States each claim a right to store 13,000 acre feet of water in Weber Reservoir, plus evaporation and seepage, with a priority date of April 15, 1936. The United States asserts that Weber Reservoir was practically completed in 1935, and the Tribe alleges that portions of the Reservoir were completed in 1935. Both allege that

through the use of Weber Reservoir for the storage of water, the Tribe may irrigate more land than the 2,100 acres for which a water right was recognized in the Walker River Action.

Neither, the Tribe, nor the United States, differentiates in the First Amended Counterclaims between the use of Weber Reservoir to "regulate" the 26.25 cubic feet per second water right recognized by the Walker River Decree, and the use of Weber Reservoir for "conservation storage" independent of that recognized water right.[1] Neither, the United States, nor the Tribe, differentiates in the First Amended Counterclaims between the use of water from Weber Reservoir to irrigate lands which were included in the Reservation when the Walker River Decree was entered, and lands which were added to the Reservation in 1936 after the Decree was entered.

However, in the Tribe and United States Preliminary Legal Theories, the United States and the Tribe do appear to differentiate between use of Weber Reservoir to regulate the water right recognized in the Walker River Decree, and the use of Weber Reservoir for conservation storage for purposes of irrigating lands in addition to the land for which a water right is allowed under the terms of the Walker River Decree. In addition, in those Preliminary Legal Theories, the United States and the Tribe also appear to differentiate between use of Weber Reservoir to irrigate lands within the Reservation when the Decree was entered, and lands added to the Reservation subsequent to the date of entry of the Decree. See, Tribe and United States Preliminary Legal Theories, at pg. 4. Because it is not clear at this point in time that the United States and the Tribe are conceding that Weber Reservoir may only be used for regulatory purposes in connection with the irrigation of land which formed a part of the Reservation at the time the Decree was entered, the District submits its Preliminary Defensive Legal Theories based upon the assumption that such a concession has not

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[1] "Regulation" would involve no additional water beyond that recognized by the Walker River Decree. "Conservation storage" would involve water over and above the water right recognized by the Walker River Decree.

been made.

B. Storage on the Reservation.

Although it will be necessary to conduct extensive discovery related to Weber Reservoir, it does not seem credible that Weber Reservoir, which was constructed and substantially completed by 1935, a year **before** the trial court's decision in the Walker River Action, was intended to provide conservation storage to irrigate lands which are not arable and would not be added to the Reservation until **after** that decision. Indeed, the facts appear to be otherwise.

Construction of a storage reservoir for purposes of irrigating land on the Walker River Indian Reservation was suggested and considered by the United States at least as early as 1900. The Weber Reservoir site itself was investigated some years prior to 1926. Congress expressly authorized further study by an Act approved June 30, 1926, Public Law No. 422, 69th Congress, S 2826. A detailed report on storage for the Reservation was submitted by the Department of the Interior to Congress in December 1926 (the "Blomgren Report"). Some of this happened before the Walker River Action was filed, and much of it happened while that action was in its initial stages, and before a judgment was entered.

Moreover, the Blomgren Report suggests that throughout the pendency of the Walker River Action, the United States contemplated construction of a reservoir for several purposes. First, the United States had determined that, even if it was awarded the earliest priority on the river for 150 cubic feet per second for the irrigation of 10,000 acres, the Walker River in its natural condition (no upstream use of water), would be adequate for the full season irrigation of the total irrigable area of 10,000 plus acres of the Reservation, only one season of every two. The United States had determined that a first priority right for 150 cubic feet per second would only allow for the every season irrigation of 4,000 acres on the Reservation. Thus, it contemplated conservation storage of

water over and above the claim it was asserting. Second, during that same time frame, the United States contemplated the construction of a storage reservoir for purposes of "regulating" any water right which was granted to the Tribe. Finally, it contemplated the use of a reservoir to store water during the peak runoff period, so that during the low flow period later in the year, upstream diverters would not be required to cease diversions to meet the Tribe's first priority water right. During the low flow period, the United States had determined that losses in conveying water to the Reservation could be 35%.

C. Preliminary Defensive Legal Theories - Weber Reservoir Claims.

Based upon the foregoing, and the factual information presently available to the District, the District's Preliminary Defensive Legal Theories with respect to the Weber Reservoir Claims are as follows:

1. The implied reservation of water rights doctrine does not encompass a claim for conservation storage of water.

2. Any claim for a conservation storage water right for Weber Reservoir for purposes of irrigating lands within the Reservation when the Walker River Decree was entered is barred by the doctrines of claim preclusion and issue preclusion.

3. Any claim for a conservation storage water right for Weber Reservoir for purposes of irrigating lands added to the Reservation after the date the Walker River Decree was entered is barred by the doctrines of claim preclusion and issue preclusion.

4. Lands added to the Reservation after the entry of the Walker River Decree were not added for purposes of irrigation, and are not practically irrigable.

5. Through its commencement and resolution of claims against the United States, the Tribe's claims for a conservation storage water right for Weber Reservoir has been waived and is

extinguished.

6. Any claim for a conservation storage water right for Weber Reservoir is barred by the doctrine of laches. See, e.g., *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d. Cir. 2005) cert. den. 126 S.Ct. 2022 (2006).

7. Any claim for a conservation storage water right for Weber Reservoir is barred by the doctrine of estoppel.

IV. THE CLAIMS FOR LANDS ADDED TO THE RESERVATION AFTER ENTRY OF THE WALKER RIVER DECREE.

A. Background.

In their First Amended Counterclaims, the United States and the Tribe contend that they are entitled to a water right for lands added to the Reservation by an order dated September 25, 1936, and made pursuant to an act of Congress of June 22, 1936, 49 Stat. 1806-07 (the "Added Lands"). In their Joint Submission of Preliminary Legal Theories, the United States and the Tribe base this claim on the implied reservation doctrine, and state that quantification of the implied reserved water right "will depend, in part, on the standard to be applied by the court." Tribe and the United States Preliminary Legal Theories, at pg. 7.

B. Preliminary Defensive Legal Theories - Added Lands Claims.

Based upon the foregoing and the factual information presently available to the District, the District's Preliminary Defensive Legal Theories with respect to the Added Lands Claims are as follows:

1. Any claim for a water right for the Added Lands is barred by the doctrines of claim preclusion and issue preclusion.

2. The primary purpose for adding the Added Lands to the Walker River Indian Reservation does not require water.

3. The implied reservation of water doctrine requires, at the time of reservation, that the water source be within the lands being reserved; when added to the Reservation, neither the Walker River nor any of its tributaries flowed through the Added Lands, and therefore the Walker River was not a source from which the United States could impliedly reserve water.

4. The Tribe's historic connection with the Added Lands does not require water use; irrigation of the Added Lands is not practically or economically feasible; and the Added Lands are not susceptible to future economic development. Therefore, no water should be quantified for the Added Lands.

5. By any quantification standard, the Added Lands are not susceptible of sustained irrigation, are not arable, and cannot be feasibly irrigated at a reasonable cost. Quantification of a water right for the Added Lands under the implied reservation doctrine is inconsistent with existing and relied upon water rights of the States of Nevada and California, political subdivisions of those States, including the District, and other private appropriators.

6. Through its commencement of and resolution of claims against the United States, the Tribe's claims for a water right for the Added Lands has been waived and is extinguished.

7. Any claim for a water right for the Added Lands is barred by the doctrine of laches.

8. Any claim for a water right for the Added Lands is barred by the doctrine of estoppel.

V. THE CLAIMS FOR UNDERGROUND WATER.

A. Background.

In their claims for a water right for underground water, the United States and the Tribe contend that the original Walker River Action did not adjudicate the groundwater rights of any of the parties in the litigation. They each contend that the Tribe is entitled to use underground water on all lands, including those within the Reservation on the date of entry of the Walker River Decree, and

those added to the Reservation after the Decree was entered, all with a priority date of November 29, 1859. In their Joint Submission of Preliminary Legal Theories, the Tribe and the United States base this claim on the implied reservation of water doctrine, and also state that the quantification of the underground water right will depend in part on the standard to be applied by the Court. Tribe and United States Preliminary Legal Theories, at pgs. 8-9.

B. Preliminary Defensive Legal Theories - Underground Water Claims.

Based upon the foregoing and the factual information presently available to it, the District's preliminary defensive legal theories with respect to the claims for underground water are as follows:

1. The implied reservation of water rights doctrine does not support a claim to underground water.

2. The implied reservation of water rights doctrine involves the reservation of sufficient unappropriated water to meet a reservation's needs from sources available on the reservation, and a reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. The quantity of water required to accomplish the purpose of the Walker River Indian Reservation was litigated and determined in the Walker River Action. Therefore, any claim to additional water from an underground source is barred by the doctrines of claim and issue preclusion, both with respect to lands included in the Reservation at the time the Decree was entered, and with respect to lands added to the Reservation after the Decree was entered.

3. Water for lands added to the Reservation after the Decree was entered is not required to fulfill the primary purpose for their addition to the Reservation.

4. The Tribe's historic connection to the Added Lands does not require use of underground water; irrigation of the Added Lands with underground water is not practically or economically feasible; and the Added Lands are not susceptible to future economic development

based upon use of underground water. Therefore, no underground water should be quantified for Added Lands.

5. By any quantification standard, the Added Lands are not susceptible of sustained irrigation, are not arable, and cannot be feasibly irrigated at a reasonable cost. Quantification of a water right from underground water for the Added Lands under the implied reservation doctrine is inconsistent with existing and relied upon water rights of the States of Nevada and California, political subdivisions of those States, including the District, and other private appropriators.

6. Through its commencement of and resolution of claims against the United States, the claims for a water right from underground sources has been waived and is extinguished.

7. Any claim for a water right from underground sources is barred by the doctrine of laches.

8. Any claim for a water right from underground sources is barred by the doctrine of estoppel.

DATED this 28th day of December, 2007.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 28th day of December, 2007, I electronically served the foregoing *Walker River Irrigation District's Preliminary Legal Theories in Support of Defenses to the Tribal Claims* to the following via their email addresses:

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