

1 LAURA A. SCHROEDER, ESQ, NSB#3595
LYNN L. STEYAERT, NSB#3337
2 Schroeder Law Offices, P.C.
1915 N.E. 39th Avenue, P. O. Box 12527
3 Portland, Oregon 97212-0527
PHONE – (503) 281-4100 FAX – (503) 281-4600
4 counsel@water-law.com
Attorney for the Defendants
5
6
7

8 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

9 UNITED STATES OF AMERICA AND
10 THE WALKER RIVER PAIUTE TRIBE,

11 Plaintiff(s),

12 vs.

13 THE WALKER RIVER IRRIGATION
14 DISTRICT, et al,

15 Defendant(s).

IN EQUITY NO. C-125-B-ECR_
3:73-cv-00125-ECR-(RAM)

PRELIMINARY LEGAL THEORIES

16
17 Pursuant to this Court’s Order reflected in the Minutes of Proceeding of August 20, 2007
18 (Doc. 1221) as modified by the Order of December 14, 2007, Defendants Circle Bar N Ranch,
19 L.L.C., et al., represented by Laura A. Schroeder and Schroeder Law Offices, P.C., submit the
20 following preliminary legal theories. The legal theories relate to the amended counterclaims
21 asserted by the Walker River Tribe and by the United State with regard to the Walker River
22 Indian Reservation only; they do not relate to counterclaims of the United States that have been
23 bifurcated pursuant to the Case Management Order filed April 18, 2000.

24 This document is not intended to represent an all-inclusive list of Defendants’ legal
25 theories. Furthermore, because Defendants have been precluded from proceeding with discovery
26 under the Case Management Order, the legal theories relied upon may be modified following



1 access to information from the United States and the Walker River Indian Tribe (“Tribe”).
2 Defendants reserve the right to modify these theories or to assert additional or different theories
3 during the pendency of this case.

4 **I. LEGAL THEORIES RELATING TO CLAIMS BY TRIBE AND UNITED STATES**

5 **A. General Legal Principals Governing These Proceedings**

6 This case is governed by the federal reserved water rights doctrine, the provisions of the
7 Walker River Decree, the doctrine of *res judicata*.

8 **1. Federal impliedly reserved rights are limited to those necessary to fulfill the**
9 **primary purpose(s) of the reservation.**

10 The counterclaims alleged by the Tribe and the United State are for implied reserved
11 federal water rights. This court-made doctrine recognizes an implied grant for the use of water
12 to support the primary purpose(s) of the federal reservation. *United State v. Adair*, 723 F.3d
13 1394, 1408-1409 (1984) (“*Adair IP*”). Water rights for a reservation may be implied only where
14 water is necessary to fulfill the very purposes for which federal reservation are created. The
15 amount is limited to that amount needed for the primary purpose, no more. Implied reserved
16 rights are not allowed where they are merely valuable for secondary uses of the reservation.
17 *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012 (1978).

18 **2. The provisions of the Walker River Decree limit these proceedings.**

19 The United States and Walker River Indian Tribe, whose interests were represented in the
20 Walker River decree case, *United States v. Walker River Irr. Dist.*, 11 F.Supp. 158 (D.C. Nev.
21 1935), are bound by the Decree. *See, Nevada v. United. States*, 463 U.S. 110, 135, 103 S.Ct.
22 2906, 77 L.Ed. 509 (1983).

23 The Decree provides:

24 XI. Each and every party to this suit and their and each of their servants, agents
25 and attorneys and all persons claiming by, through or under them, and their
26 successors and assigns in and to the water rights and lands herein described be
and each of them hereby is forever enjoined and restrained from claiming any
rights in or to the waters of Walker River and/or its branches or tributaries, except



1 the rights set up and specified in this decree. . . .

2 The United State and the Walker River Indian Tribe are enjoined from claiming any
3 additional rights to the Walker River for the lands of the Reservation as it existed at the
4 time the initial decree was issued by the District Court.

5 **3. United States and Tribe are precluded by the doctrine of *res judicata* from**
6 **requesting enlargement of existing rights for reservation lands.**

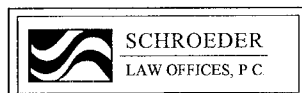
7 The doctrine of *res judicata* precludes any claim for additional federal impliedly reserved
8 water, whether surface or groundwater, for the Reservation as it existed at the time the District
9 Court issued the decree on April 14, 1936, as the needs of the Reservation were determined at
10 that time.

11 The United States Supreme Court in *Nevada*, addressed the issue of the ability of the
12 United States and Pyramid Lake Indian Tribe to claim additional federally reserved rights for the
13 existing reservation following an adjudication of the Truckee River. *See also, Arizona v.*
14 *California*, at 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed.2d 318 (1983)

15 The Court concluded that the Orr Ditch Decree litigation established the full “implied-
16 reservation-of-water rights” for the Pyramid Lake Indian Reservation. Similarly, the Walker
17 River Decree litigation as concluded by the issuance of the 1940 Decree, established the full
18 “implied- reservation-of water rights” for the Walker River Indian Reservation. Neither the
19 United States nor the Tribe may make piecemeal claims for other types of water use under the
20 Winters Doctrine. *See Nevada*, 463 U.S. at 134.

21 As a further consideration, if the court chooses to pursue a course that recognizes that a
22 hydrological connection between groundwater and Walker River surface waters exists, the
23 doctrine of *res judicata* would preclude the award of groundwater rights for these lands as
24 discussed below.

25 That is not so say that with regard to these lands, the Tribe would be precluded from
26 obtaining additional waters. However, just as in the case of any other federal reservation,



1 additional rights would need to be acquired “in the same manner as any other public or private
2 appropriator.” *United States v. New Mexico*, 438 U.S. 696, 701, 98 S.Ct. 3012, 3015, 57 L.Ed.2d
3 1052 (1978); *see also United States v. Washington*, 375 F. Supp. 2d 1050, 1059 (W.D.Wash.
4 2005).

5 **B. Legal Theories Relating To Specific Claims Made By The Unites States And Tribe**

6 The counterclaims seek additional water over and above the direct rights of use awarded
7 to the United States for the benefit of the Walker River Indian Reservation in the Decree.
8 Tribe’s amended counterclaims consist of a request for relief declaring and quieting title to the
9 right to (1) to store water in Walker Reservoir for use on the Reservation including the lands
10 added to the Reservation in 1936; (2) to use water on the lands added to the Reservation in 1936;
11 (3) to use groundwater underlying and adjacent to the Reservation on the lands of the
12 Reservation including land added to the Reservation; and (4) to use groundwater underlying and
13 adjacent to lands added to the Reservation in 1936 on lands of the Reservation including lands
14 restored to the Reservation in 1936. The United States’ amended counterclaims relating to the
15 Walker River Indian Reservation consist of a request for the right (1) to store to store 13,000
16 acre-feet of water plus evaporation and seepage in Walker Reservoir; (2) to use water on lands
17 added to the Reservation for all purposes recognized under federal law; (3) groundwater for all
18 lands within Walker River Reservation.

19 **1. The doctrine of *res judicata*, the language of the Decree and the 1936 legislation**
20 **preclude the United States and Tribe from claiming additional water for storage.**

21 The Tribe claims a right to store water from the Walker River in Weber Reservoir for all
22 purposes recognized under federal law. The United States claims a right to store water in Weber
23 Reservoir for all purposes including but not limited to irrigation, stock watering, fish and
24 wildlife, and domestic use. There can be no entitlement to federally reserved rights to additional
25 Walker River water over and above decreed right for storage purposes.
26



1 The doctrine of *res judicata* and the provisions of the Decree, as discussed above,
2 preclude the Tribe and United States for claiming additional water for the Reservation as it
3 existed at the time the District Court issued the decree on April 14, 1936. Therefore, storage
4 rights, at least in relation to the portion of the Reservation for which Winters rights were
5 adjudicated, must be limited to the decreed amount of water. Therefore, the only water that may
6 be stored in Weber with regard to these lands is 26.25 cubic feet per second of the natural flow of
7 the Walker River during the irrigation season, in addition to whatever is reasonably necessary for
8 domestic and stockwatering purposes, and power purposes. The United States and Tribe are
9 “forever enjoined and restrained from claiming any rights in or to the waters of Walker River
10 and/or its branches or tributaries, except the rights set up and specified in this decree.”

11 With regard to the 1936 addition to the Reservation, the legislation setting aside the
12 lands for the Walker River Indian Reservation specifically provided that the withdrawal of those
13 lands “shall not affect any valid rights initiated prior to the approval” of the reservation. Ch.
14 698, 49 Stat. 1807 (1936).

15 **2. The United States and Tribe may not claim federally reserved water rights for**
16 **reacquired lands as the Desert Land Entry Act effected a severance of all waters upon the**
17 **public domain.**

18 In 1906 the Tribe ceded 268,000 non irrigable acres of its reservation lands to the United
19 States. The ceded lands were open to settlement by a Presidential Proclamation of 1906. In
20 1936, the United States reserved certain reacquired lands as well as other lands for the Tribe as a
21 result of a Congressional legislation. The United States and Tribe are claiming rights for these
22 lands with a 1936 priority.

23 The primary purpose of this reservation was to provide an additional “grazing lands” for
24 the Tribe. Additionally, “1,440 acres of woodland” was included in the withdrawal “for fuel and
25 improvements.” S. Rep. No. 74-1750 (1936). If any water rights were to be awarded, they would
26 have to be limited to the minimum amount of water needed to support the primary purpose of the



1 reservation. *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976);
2 *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978).

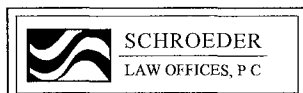
3 However, given the fact that these lands were opened for entry under the Desert Lands
4 Act as part of the public domain, the ability to claim an implied federally reserve right for the
5 reacquired lands is questionable. *See, California Oregon Power v. Portland Beaver Cement*, 295
6 U.S. 142, 164, 55 S.Ct. 725, 79 L.Ed. 1356 (1935) (Supreme Court decided that the Desert Lands
7 Act, Act of Mar. 3, 1877, ch. 107, 19 Stat. 377, codified at 43 U.S.C. §§321 et seq., “effected a
8 severance of all waters upon the public domain, not theretofore appropriated, from the land
9 itself”).

10 **3. Claims for implied reserved water rights associated with lands for which the**
11 **Tribe has previously received an award of compensation by the Court of Claims are**
barred.

12 The doctrine of *res judicata* precludes the United State and Walker River Indian Tribe
13 from claiming implied reserved rights in all cases where the Tribe has received an award of
14 compensation for the taking of any lands or fisheries by the Court of Claims. *United States v.*
15 *Dann*, 873 F.2d 1189 (9th Cir. 1989), *cert denied*, 493 U.S. 890, 110 S.Ct. 234, 107 L.Ed.2d 185
16 (1989). *See also, Dept. of Ecology v. Yakima*, 850 P.2d 1306, 1325 (1993).

17 **4. Claims for surface water and groundwater rights associated with lands added to**
18 **the Walker River Indian Reservation in 1936 are barred by the doctrine of laches.**

19 If the court finds that implied rights were reserved for the added lands, any reservation of
20 federally implied rights “reserves only that amount water necessary to fulfill the purposes of the
21 reservation, no more.” *Adair II*, 723 F.2d at 1409, quoting *Cappaert v. United States*, 426 U.S.
22 128, 141, 96 S.Ct. 2062, 2071, 48 L.Ed.2 523 (1976). Unlike the case for the Colville Tribe
23 (*Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (1981)), where the grant of the
24 reservation failed to reveal the primary purpose of the reservation, the identified purpose for
25 reserving the 1936 Reservation was to provide additional lands for stock grazing.
26



1 However, the United States' and Tribe's claim for impliedly reserved rights should be
2 barred by the doctrine of laches, as the parties failed to pursue any action to force recognition of
3 such reserved rights for over 70 years. The Congressional legislation providing for the addition
4 of lands to the Reservation was enacted in June 1936, shortly after the Decree was issued on
5 April 15, 1936. In 1935, the United States District Court, District of Nevada opined that
6 government's silent encouragement of the settlement of lands along the Walker River by white
7 settlers who applied all appropriable water to beneficial use, and the lack of diligence on the part
8 of the United States to apply water to its lands with no protest or objection to the growing use of
9 water, warranted the denial of the claimed right for the Reservation. While the Ninth Circuit
10 reversed the District Court's holding, that court limited the award of water to 26.25 cubic feet of
11 water per second as opposed to the requested 150 second feet, recognizing the hardship on
12 upstream farmers and the potential for waste that might be induced if additional water were to be
13 awarded. *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 340 (9th Cir. 1939). Both
14 courts recognized the inherent problem created by the United States' dilatory claim. Given this
15 recognition by the courts, the United States and the Tribe should have addressed recognition of
16 these rights by the District Court immediately upon their reservation for the Walker Indian Paiute
17 Tribe, rather than waiting another 70 years.

18 **5. The Tribe's and United States' reliance upon *Cappaert* with regard to its claim**
19 **for groundwater adjacent to reserved lands is misplaced.**

20 The Tribe has requested the following relief:

- 21 (1) use of groundwater underlying and adjacent to the Reservation on the lands of the
22 Reservation including land added to the Reservation; and
23 (2) use of groundwater underlying and adjacent to lands added to the Reservation in 1936
24 on lands of the Reservation including lands restored to the Reservation in 1936.
25
26

1 The United States has claimed the right to use groundwater of the Walker River Basin
2 located in, under adjacent or otherwise appurtenant to all lands of the Walker River Indian
3 Reservation to fulfill the purposes of the Reservation.

4 A question exists as to whether the reserved rights doctrine may be applied to
5 groundwater, as the United States Supreme Court did not reach that issue in *Cappaert*. See,
6 *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (Devil's Hole pool was construed to be
7 surface water, so the issues of the applicability of the doctrine of implied reservation of water
8 rights was not addressed by the Court).

9 However, assuming for the sake of argument that groundwater is subject to the federally
10 reserved rights doctrine, the Tribe would not be entitled to additional implied reserved rights for
11 groundwater for the pre-1936 Reservation, as the doctrine of *res judicata* would defeat such
12 claim. The United States as trustee for the Walker River Indian Tribe was granted the full extent
13 of its Winters rights by the Decree. Further, if the court recognizes an interrelationship between
14 groundwater and surface water, a second basis exists for preclusion of these claims if there is a
15 determination that use of groundwater depletes Walker River flows. The Decree forever enjoins
16 and restrains the parties to the Decree from claiming any rights in or to the waters of Walker
17 River and/or its branches or tributaries, except those rights specified in the Decree.

18 With regard to the lands added in 1936 to the Reservation, if the court deems
19 groundwater to be impliedly reserved, because the implied rights are tied to a specific primary
20 purpose, the extent of those rights would be limited to "that amount of water necessary to fulfill
21 the purpose of the reservation, no more." *New Mexico*, 438 U.S. at 700, quoting *Cappaert*, 426
22 U.S. 141. Therefore the right would be limited to the minimum amount needed for stock grazing
23 purposes.

24 If the interrelationship between groundwater and surface water is recognized by the
25 court, the claim would be barred by the terms of the Decree and the terms of the 1936 legislation
26



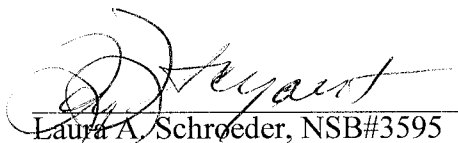
1 providing for the withdrawal of lands for the reservation, as the legislation specified that “the
2 withdrawal shall not affect any valid rights initiated prior to the approval.”

3 **6. Alternatively, regulation of groundwater is within the States’ jurisdiction, not**
4 **that of the Decree Court.**

5 The State Engineer has statutory jurisdiction over groundwater in Nevada pursuant to
6 Chapter 534 of the Nevada Revised Statutes. Similarly, the State of California, as well as local
7 water agencies, have statutory jurisdiction for management and regulation of groundwater in
8 California. *See*, Cal. Water Code §§ 104-105; Cal. Water Code §§ 10750-10753.9.

9 Submitted this 28th day of December, 2007.

10 SCHROEDER LAW OFFICES, P.C.

11
12 

13 _____
14 Laura A. Schroeder, NSB#3595
15 Lynn L. Steyaert, NSB#3337
16 Attorneys for Circle Bar “N” Ranch L.L.C., et al.
17 PO Box 12527
18 Portland, OR 97212
19 Phone: (503) 281-4100