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

UNITED STATES OF AMERICA,)	IN EQUITY NO. C-125-B-ECR
)	
Plaintiff,)	
)	SUBMISSION OF PRELIMINARY
WALKER RIVER PAIUTE TRIBE,)	LEGAL THEORIES BY THE WALKER
)	RIVER PAIUTE TRIBE AND THE
Plaintiff-Intervenor,)	UNITED STATES OF AMERICA
)	
vs.)	
)	
WALKER RIVER IRRIGATION DISTRICT,)	
a corporation, et al.,)	
)	
Defendants.)	
_____)	

Pursuant to the Court’s order of August 20, 2007, *Minutes of Proceeding* (Aug. 20, 2007), the Walker River Paiute Tribe (“Tribe”) and the United States of America (“United States”) make the following joint filing of legal theories that one or both of them consider applicable to this case. As discussed with the Court and other parties, this filing and a related filing of legal theories required of certain defendants by December 17, 2007, *see id.*, are intended primarily to assist the parties’ efforts to identify threshold issues. These filings are intended to

be brief and are not necessarily all-inclusive or dispositive of the various parties' legal positions.

The Tribe and the United States each reserve the right to change these theories or to assert additional or different theories during the pendency of this case. Although this is a joint filing, the Tribe and the United States have filed separate counterclaims. *See First Amended Counterclaim of the Walker River Paiute Tribe* (July 30, 1997) ("*Tribal Amended Counterclaim*"); *First Amended Counterclaim of the United States of America* (July 30, 1997) ("*U.S. Amended Counterclaim*"). Consequently, each reserves the right to change their respective legal positions. Furthermore, the efforts of the Tribe and the United States to collect, compile, and review documents is not complete, so that their efforts to ascertain relevant facts and related law are continuing.

The Tribe asserts three claims for relief in which it asserts rights to water. *Tribal Amended Counterclaim*. The United States asserts eleven claims of relief; three of these claims relate to the Tribe, in which the United States seeks the right to water on its own behalf and for the use and benefit of the Tribe. *U.S. Amended Counterclaim* (Claims 1 - 3). As a general matter, the Tribe and the United States each seek the right to water for: 1. Weber Reservoir; 2. lands transferred to the Walker River Paiute Reservation ("*Reservation*") after April 14, 1936; and 3. groundwater associated with the entire Reservation.

The Walker River Paiute Indian Reservation was established as a permanent homeland for the members of the Walker River Paiute Indian Tribe. The various additions to the Reservation were meant to assist in accomplishing that objective. *See, e.g.*, Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*; the Act of June 22, 1936 (Pub. L. 748, 74th Cong.). As explained in *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68,

76 (Ariz. 2001):

[I]t seems clear to us that each of the Indian reservations in question was created as a “permanent home and abiding place” for the Indian people, as explained in *Winters*, 207 U.S. at 565, 28 S. Ct. at 208. This conclusion comports with the belief that “[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). Such a construction is necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency. See Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. 103-434, § 102(a)(1), 108 Stat. 4526; Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101-628, § 402(a)(1), 104 Stat. 4469, 4480; *Greely*, 712 P.2d at 768.

A. Weber Reservoir

The Tribe and the United States each assert that the United States as trustee for the Tribe is entitled to store water from the Walker River in Weber Reservoir for all purposes recognized under federal law and assert a priority date for the Tribe’s right to store water in Weber Reservoir of April 15, 1936. *Tribal Amended Counterclaim* at ¶ 18; *U.S. Amended Counterclaim* at ¶ 10. That the federal reserved water rights of the Tribe may be served from stored water follows significant legal precedent, including a seminal decision and decree from the U.S. Supreme Court in *Arizona I*. See *Arizona v. California*, 373 U.S. 546, 600 (1963) (“*Arizona I*”), decree entered, 376 U.S. 340 (1964); *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032, 1033, 1035 (9th Cir.), *cert. denied sub nom. Sunnyside Valley Irr. Dist. v. United States*, 474 U.S. 1032 (1985) (upholding district court’s order requiring Reclamation to release from project facilities water that would otherwise be stored in order to protect treaty-reserved fisheries of the Yakama Nation); *State Dep’t of Ecology v. Acquavella, Memorandum Opinion Re: Motion to Limit Treaty Water Right For Fish for Natural Flow*, Superior Court for Yakima County, No. 77-2-01484-5, at 32 (Apr. 2, 1996) (holding “storage water may be released to maintain fish pursuant to the orders and rulings of this Court and the Ninth Circuit” in

subsequent adjudication of Yakama Nation's reserved water rights); *Joint Board of Control of Flathead, Mission and Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987), *cert. denied, sub nom. Joint Board of Control of Flathead, Mission and Jocko Irr. Districts v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 486 U.S. 1007 (1988) (affirming BIA irrigation project operations necessary for the Confederated Salish and Kootenai Tribes' reserved rights).

The purposes for Weber Dam and Reservoir are two-fold. First, Weber Dam and Reservoir together serve as a regulatory mechanism to deliver the water right adjudicated for the Tribe's benefit in the *Decree* ¶ I, *United States v. Walker River Irrig. Dist.*, No. C-125 (D. Nev. Apr. 14, 1936), *as amended, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (D. Nev. Apr. 24, 1940) ("Decree"). The priority date for the right adjudicated for the Tribe's benefit in the Decree is November 29, 1859. Second, Weber Dam and Reservoir were constructed to store water to irrigate lands in addition to the 2,100 acres of Reservation land adjudicated under the Decree. Accordingly, the Reservoir may be used to irrigate lands that were added to the Reservation subsequent to April 14, 1936. The priority date for the storage right to serve such additional lands may be as early as April 15, 1936.

The regulatory and storage rights in Weber Dam and Reservoir ("Weber Dam" or "Weber Reservoir") are federal reserved rights for the benefit of the Tribe, with respect to both the right adjudicated for the Tribe's benefit in the Decree, and the storage right to serve lands added to the Reservation following entry of the Decree. The Tribe's claim for Weber Reservoir is consistent with settled law that water reserved for the benefit of Indian tribes must "satisfy the future as well as the present needs of the Indian Reservations. . . ." *Arizona I*, 373 U.S. at 600. The amount of

water set aside must reflect the tribes' "need to maintain themselves under changed circumstances." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981), *cert. denied* 454 U.S. 1092 (1981). And, when lands are set aside as a home for Indian people, sufficient water is reserved "to make the reservation livable." *Arizona I*, 373 U.S. at 599.

Whether a court examines the purpose of an Indian reservation as a permanent home for its Indian citizens or whether it considers the objectives behind the creation of a particular reservation, the inquiry must result in the recognition of that quantity of water required to make the reservation a permanent and livable home, both now and in the future. *Id.*

As stated in both counterclaims, "Weber Reservoir is a federally-constructed reservoir located on the [Walker River Paiute Indian] Reservation with a storage capacity of approximately 13,000 acre feet." *Tribal Amended Counterclaim* at ¶ 9; *U.S. Amended Counterclaim* at ¶ 10. Portions of the reservoir were completed in 1935, and floodgates were added in 1937. *Id.* The construction of Weber Dam by the predecessor of the Bureau of Indian Affairs was consistent with the well-documented understanding among the various interests in the Walker River Basin, including the parties to the Decree, that the Tribe would need a storage reservoir to irrigate its lands. Indeed, one of the primary issues in the debate over the construction of Weber Dam and Reservoir was who would pay for it; upstream users understood the need for a reservoir to meet the water rights of the Tribe, but felt that the cost should be borne by the federal government.

The United States indeed bore the cost of constructing Weber Dam and Reservoir. Congress authorized the construction of Weber Dam under the Emergency Conservation Act of March 31, 1933, 48 Stat. 22, which delegated authority to the President "to provide for employing citizens of the United States who are unemployed, in the construction, maintenance and carrying

on of works of a public nature . . . on . . . Government reservations” The construction of Weber Dam and Reservoir and the Walker River Indian Irrigation Project are evidence of Congress’s intent to develop water necessary to serve lands within the Reservation and provide a homeland for the Tribe.

It was not necessary for the United States to seek to obtain storage rights for Weber Dam and Reservoir pursuant to Nevada law because it is entirely within a federal Indian reservation that pre-dated statehood and which lands never became part of the public domain. Accordingly, the storage and use of water in Weber Reservoir is strictly a matter of federal law, and, as a matter of law, there is no need to look to state law to establish a storage and use right for Weber Reservoir. *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 336-37 (9th Cir. 1939).

The existence of Weber Reservoir and its use for storage over the last seventy years, independent of the direct flow right, has been common knowledge. Activities such as the Nevada-California Interstate Compact, indicate that water users on the Walker River system and the states of Nevada and California, were not only aware of how Weber Reservoir water was being used, but recognized and acquiesced to that usage.

B. Lands Transferred to the Reservation

The Tribe and the United States seek rights to the use and storage of water in, on, underlying or adjacent to and otherwise necessary to serve land transferred to the Reservation pursuant to the authority of the Act of June 22, 1936 (Pub. L. 748, 74th Cong.) (“1936 Act”), and implemented pursuant to Executive Order 4668, An Order Adding Certain Public Domain Lands to the Walker River Indian Reservation, Sept. 25, 1936, 1 FR 2090, 1936 WL 4668 (Exec. Ord.),

and subsequent documents. *Tribal Amended Counterclaim* at ¶¶ 12, 20; *U.S. Amended Counterclaim* at ¶¶ 14. Lands were transferred to the Reservation pursuant to the 1936 Act on several occasions subsequent to 1936; these and other lands added to the Reservation should be included in the total lands for which water rights are sought. Because the 1936 Decree established rights of the parties as of April 14, 1936, it neither included nor addressed water rights for any land transferred to the Reservation at any time thereafter.

The United States and the Tribe seek federal reserved water rights for lands added to the Reservation. Pursuant to the authority of *Winters v. United States*, 207 U.S. 564 (1908), and related cases, when the United States withdraws and reserves its lands for a federal purpose, the federal government, by implication, also reserves an amount of then-unappropriated water needed to accomplish the purpose of the reservation. The Ninth Circuit has concluded in this litigation that the reserved rights doctrine applies to the Walker River Indian Reservation. *United States v. Walker River*, 104 F.2d at 339-40. The quantification of these water rights will depend, in part, on the standard to be applied by the Court. *See, e.g., Winters; Arizona v. California*, 373 U.S. 546, 600-601 (1963); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005); *Gila River*, 35 P.3d at 74.

This claim, which is set forth in the Second Claims for Relief of the United States and the Tribe, overlaps to some extent with the First Claims for Relief in that the claims include use of water from Weber Reservoir on the transferred lands. This claim also overlaps to some extent with the Third Claims for Relief in that they include groundwater beneath the transferred lands. Some of the transferred lands had been in the original Reservation and other lands may not have been in the original Reservation. The United States has sought a priority date for the transferred

lands of the date of restoration, while the Tribe has not specified the applicable priority date(s).

The applicable priority date for each such tract of land depends on its prior status. *See, e.g., United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Investigation into the applicable facts and related law is continuing.

C. Groundwater

The Tribe and the United States seek rights to the use the groundwater of the Walker River basin underlying and adjacent to or otherwise necessary to serve all land within the Reservation. The federal reserved water rights doctrine includes the right to use both surface and groundwater to achieve the purpose for which a federal reservation was established. *In Re The General Adjudication of All Rights to Use Water In the Gila River System and Source*, 989 P.2d 739, 747 (Ariz. 1999); *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098-99 (Mont. 2002); *see also* William C. Canby, Jr., *American Indian Law* 407 (3d ed. 1998) (“there seems little doubt that Indian reserved rights also exist in ‘ground water’”); A. Dan Tarlock, *Law of Water Rights and Resources* § 9.07[3] (1989) (“little, if any, doubt remains that Indian tribes have groundwater as well as surface water rights” under the *Winters* doctrine). Once the United States establishes a federal reserved right, it may invoke federal law to protect its water from subsequent diversion by state law water right holders to the extent such protection is necessary to fulfill its reserved right. *Gila River*, 989 P.2d at 750. As stated above,

the quantification of these water rights will depend, in part, on the standard to be applied by the Court.

Dated: October 18, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2007, I mailed the foregoing by first class U.S. mail, postage prepaid, upon the following:

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