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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, A corporation, et al., Defendants. ---------- UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, vs. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	CASE NO. 3:73-cv-127-ECR-RAM IN EQUITY NO. C-125-B-ECR SUBFILE NO. C-125-B **NEVADA DEPARTMENT OF WILDLIFE'S OPENING BRIEF ON THRESHOLD ISSUES**

Pursuant to the April 19, 2000 Case Management Order and the July 25, 2008 minutes of the Court, the Nevada Department of Wildlife (NDOW), through its counsel, Catherine Cortez Masto, Nevada Attorney General, and Senior Deputy Attorney General, Marta Adams, offers its recommendations for selecting initial threshold issues in this multi-tiered litigation.

For purposes of this filing, the identified threshold issues (1) logically belong at the initial phase of the litigation following service; (2) are either purely legal issues or ones which require minimal factual development and (3) if resolved, are either partially or wholly dispositive of key issues raised in this litigation. Resolution of these issues may substantially reduce the demands made on judicial and party resources and otherwise assist in management of this case.

INTRODUCTION

The Court recognized this litigation's complexity and potential to cause far reaching impacts when it issued the Case Management Order (CMO) on April 19, 2000. In addition to requiring comprehensive service on all potentially-affected owners of water rights in the Walker River Basin as well as other water users, the CMO contemplates the actual management of this multi-leveled litigation after service is complete. The Walker River Paiute Tribe (Tribe) and the United States on the Tribe's behalf are seeking additional water rights—both surface and ground—in the Walker River Basin, an area which is frequently considered water short[1] and includes a groundwater sub-basin that is subject to a fully developed, independent permit system administered by the State of Nevada.

With respect to the "tribal" claims,[2] the Tribe and the United States on behalf of the Tribe are seeking approximately 13,000 acre feet of water as a storage water right in Weber Reservoir with a priority date of April 15, 1936. In addition, the Tribe and the United States seek a federal reserved water right for approximately 167, 460 acres of lands added to the Reservation by Order of the Secretary of the Interior on September 25, 1936. Finally, the Tribe and the United States on its behalf are seeking a federal reserved right to groundwater located in, under and adjacent to the Walker River Reservation (Reservation).

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[1] A striking example of water shortages in the basin is evident at Walker Lake, the terminal lake whose primary source of water is the Walker River. While Walker Lake is not addressed in the Walker River Decree and water for it is not part of the Tribe's and the United States claims, the Lake is nevertheless illustrative of water shortages that plague the Walker River system. While the causes of Walker Lake's water deficit are in dispute, "[t]he ultimate cause of the decline is potentially attributable to a number of factors, including, but not limited to, overconsumption, declining precipitation levels, and natural lake recession over time." *Mineral County and the Walker Lake Working Group v. State of Nevada, et. al.*, 117 Nev. 235, 239; 20 P. 3d 800, 803 (2001).

[2] Claims made by and on behalf of the Walker River Tribe have been bifurcated from the remainder of the other federal claims and are to be considered by the Court first under the Case Management Order.

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While this case has been captioned as a sub-proceeding in the litigation[3] which resulted in entry of the final 1936 Walker River Decree, it is unclear whether this Court's continuing jurisdiction over the administration of the Walker River Decree can or should be extended to consider new claims seeking additional water from the fully decreed Walker River or from the groundwater resource. Unlike other decrees where supplemental orders or amendments are contemplated from the outset,[4] the Walker River Decree represents a final judgment adjudicating irrigation rights to waters of the river. *See, Nevada v. United States,* 463 U.S. 110, 103 S. Ct. 2906 (1983). Under the Walker River Decree, the United States on behalf of the Tribe received direct flow rights to irrigate 2100 acres on the Reservation with a water right of 26.25 cubic feet per second for a 180 day irrigation season. *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).

Whether the Tribe's decreed direct flow right fulfills the purpose of the Reservation is an initial issue for the Court. With respect to the Added Lands, another threshold issue involves a determination of the underlying purpose of the Added Lands and then a determination of an appropriate measure of water needed to fulfill that purpose to the extent it has not already been satisfied. Similarly, with respect to the claim to a reserved right to groundwater, the Court must initially determine whether the reserved rights of the Tribe to surface Walker River water satisfies its claims to reserved water rights before reaching the question of a reserved right to groundwater. *See, Winters v. United States,* 207 U.S. 564 (1908).

The Walker River Decree allocates water rights on the Walker River, but the Decree does not address all water uses along Walker River. The Decree does not address the Lahontan Cutthroat Trout (LCT) fishery in Walker Lake[5] nor is it applicable to groundwater resources independently administered by the State of Nevada. While this sub-proceeding

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[3] *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).

[4] An example of a decree contemplating further amendment or the establishment of a supplemental decree is discussed in *Arizona v. California*, 460 U.S. 605, 618 (1983).

[5] For the benefit of the Lahontan Cutthroat Trout (LCT) fishery in Walker Lake, NDOW has a state-issued permit in Walker Lake. This permit is satisfied only in flood years.

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does not pertain to the deteriorating condition of Walker Lake and its fishery,[6] it is clear that new or enlarged water rights to Walker River water could have profound environmental, economic and social impacts throughout the entire Walker River Basin.

Here, claims made by the Tribe and the United States on behalf of the Tribe have been bifurcated from other federal claims made in this litigation. By order of the Court, the Tribal claims are to be addressed following service of process. CMO at 4. Following service of process on designated categories of water right holders and water users, the CMO directs the Magistrate Judge to "consider and make a preliminary determination of the threshold issues to be addressed at the outset of the litigation on the U.S./Tribe counterclaims." CMO at 9. The following threshold issues are offered to assist the Court in its management of this complex litigation.

A. To what extent should this Court exercise its jurisdiction to determine the Tribe's claims to additional surface water?

The United States and the Tribe filed their claims in this Court as part of the initial action resulting in the Walker River Decree. *United States v. Walker River Irr. Dist., et al.*, 11 F.Supp. 158 (D. Nev. 1935); *United States v. Walker River Irr. Dist., et al.*, 104 F.2d 334 (9th Cir. 1939). Recognizing this Court's continuing jurisdiction to administer provisions of the Walker River Decree, it is nevertheless important as a threshold matter for the Court to determine whether the Tribe's claims to additional Walker River water should be considered at all.

B. Does this Court have jurisdiction over the Tribe's and the United States' reserved groundwater right claims?

Before reaching the Tribe's and the United States' claims to a reserved right in groundwater under and adjacent to the Reservation, the Court must, of necessity, determine whether the Tribe's 1859 direct flow rights awarded in the Decree are the full extent of the water rights to which the Tribe is entitled to carry out the purpose of the reservation. Although

[6] In C-125-C, Mineral County is seeking intervention to establish a water right based on a public trust theory for the LCT fishery in Walker Lake. Presumably, any ultimate right for the Lake resulting from this litigation would be in addition to NDOW's state-issued permit for the benefit of the LCT fishery in Walker Lake.

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not considered in the original action, this Court's determination of its jurisdiction to consider the Tribe's and the United States' claims to a reserved groundwater right has serious implications both for the management of the litigation and the State of Nevada's administration of Nevada's groundwater resources throughout the Walker River Basin.

C. What is the underlying purpose of the reservation with respect to the lands added to the Reservation in 1936?

While the purpose of the reservation of the decreed lands on the Reservation was to enable irrigation for agriculture, the lands added in 1936 to the Reservation were intended for dry land stock grazing, a purpose which requires significantly less water than that needed for irrigated agriculture. *United States v. Walker River Irr. Dist.,* 104 F.2d 334, 339 (9th Cir. 1939); S.R. 1750, 74th Cong., 2d Sess. 6-39 (1936).

D. May the Tribe's and the United States' claims for a reserved water right for storage in Weber Reservoir be established under *Winters v. United States,* 207 U.S. 564 (1908) or under another theory of federal common law?

If the United States and the Tribe are relying on a reserved water right theory other than that emanating from the *Winters* doctrine, that theory should be identified as a threshold matter.

E. Whether the doctrines of res judicata or issue preclusion bar the United States' and the Walker River Paiute Tribe's claims for additional water?

The Walker River Decree emanated from a suit in equity brought by the United States, as plaintiff, against 253 upstream users and appropriators of the waters of the Walker River to secure for the benefit of the Walker River Indian Paiute Tribe water for the irrigation of crops on 2100 acres of irrigable land on the Walker River Reservation in the amount of 26.25 second feet of water for an annual one hundred and eighty days irrigation period and the flow reasonably necessary for domestic and stock watering purposes and for power purposes during the non-irrigating season with a priority of November 29, 1859. *United States v. Walker River Irr. Dist., et al.,* 11 F.Supp. 158 (D. Nev. 1935); *United States v. Walker River Irr. Dist., et al.,* 104 F.2d 334 (9th Cir. 1939). To the extent water rights were established and became

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part of the Walker River Decree, do the doctrines of *res judicata* and *issue preclusion* bar consideration by this Court of the present Tribal claims? *See, Nevada v. United States,* 463 U.S. 110, 103 S.Ct. 2906 (1983)

An additional issue related to *claim preclusion* is whether payments to the Tribe from the Indian Claims Commission extinguish any or all of the Tribe's claims to additional water?

F. To what extent are the affirmative defenses of laches and estoppel relevant to this case?

Many of the facts giving rise to claims of the United States on behalf of the Tribe and the Tribe itself have been operative since at least 1936. The fifty plus years intervening between these facts and the counterclaims asserted may give rise to the equitable defenses of laches and estoppel. These affirmative defenses should be addressed as a threshold matter.

DATED this 5th day of September 2008.

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CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 5th day of September 2008, I served a copy of the foregoing **NEVADA DEPARTMENT OF WILDLIFE'S OPENING BRIEF ON THRESHOLD ISSUES**, by U.S. District Court CM/ECF Electronic filing to:

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I further declare that and on this 5th day of September 2008, I served a copy of the

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foregoing **NEVADA DEPARTMENT OF WILDLIFE'S OPENING BRIEF ON THRESHOLD ISSUES**, by mailing a true and correct copy thereof, properly addressed with postage prepaid, to the following:

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