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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 OPENING BRIEF ON THRESHOLD ISSUES**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

I. INTRODUCTION.

A. The Claims of the United States and Tribe.

In this litigation, the Walker River Paiute Tribe (the "Tribe") and the United States seek recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation. They do not differentiate between the use of water stored in Weber Reservoir to irrigate lands which were part of the Reservation when the Walker River Decree was entered, and lands added to the Reservation thereafter (the "Added Lands").[1] They also seek a federal reserved water right for the 167,460 acres of Added Lands. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. These claims are made against both surface water from the Walker River and underground water.

The United States also makes additional claims to surface water and underground water in the Walker River Basin for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps, and the Bureau of Land Management. It also advances claims for surface and underground water for the Yerington Reservation, the Bridgeport Paiute Indian Colony, and several individual Indian allotments.

B. The Court's Management of the Claims of the United States and Tribe - the Case Management Order.

After extensive briefing, on April 19, 2000, the Court entered the Case Management Order ("CMO"). *See*, Subfile C-125-B, Docket No. 108. In the CMO, the Court recognized that the case as a whole is simply too big and too complex to process on a reasonable basis without bifurcation and other management. It, therefore, entered an order to manage the case, and that management is

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[1] They also do not differentiate between use of Weber Reservoir to "regulate" the water right recognized in the Walker River Decree and to "conserve" water over and above that recognized water right.

directly relevant to the question of whether an issue is a threshold issue and, if so, how and when it should be addressed.

The CMO bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). Except as expressly provided in the CMO, all discovery and other proceedings in the action are stayed. *CMO*, p.4, lns. 20-24. The CMO requires the Tribe and United States to serve their amended pleadings and related service documents on and thereby join numerous individuals and entities who hold surface and underground water rights within the Walker River Basin. It groups these individuals and entities into nine different categories. *CMO*, pp. 5-6.

The CMO expressly provides that no answers or other pleading will be required except upon further order of the Magistrate Judge. It also provides that no default shall be taken for failure to appear. *CMO*, p. 12, lns. 22-25. The United States and the Tribe have commenced phased service as required by the CMO. That service is not yet complete.

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I will consist of "threshold issues as identified and determined by the Magistrate Judge." Phase II will "involve completion and determination on the merits of all matters relating to [the] Tribal Claims." *CMO*, pg. 11, lns. 11-18. Additional phases of the proceedings will "encompass all remaining issues in the case." *Id.*, p. 11, lns. 25-26.

The identification of threshold issues is left to the Magistrate Judge, and those issues shall "not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." *CMO*, p. 9. Included among the possible threshold issues to be considered for inclusion by the Magistrate Judge are issues related to the Court's jurisdiction and equitable defenses to the Tribal Claims. *See*, *CMO*, pgs. 9-11.

The CMO also directs the procedures to be followed in connection with the disposition of the threshold issues. First, it allows for discovery on those issues. Second, it allows for written discovery concerning the bases for the Tribal Claims. It stays all other discovery. *CMO*, p. 13, lns. 4-15. It provides for disposition of the threshold issues by motion, evidentiary hearing, or both. *Id.*, p. 13, ln. 16 - p. 14, ln. 2.

It is clear that through the threshold issues, the Court sought to further manage the Tribal Claims in ways which might defer costly and possibly unnecessary proceedings in the interests of judicial economy and the convenience of the parties. The Court suggested that such issues included defenses which might bar some or all of the Tribal Claims. Depending on the determination of defense issues, the merits (Phase II) of the Tribal Claims may not proceed at all. Alternatively, some, but not all, or all, of those claims will proceed on the merits. Additional issues included the extent to which the Court may, or should, become involved in issues related to underground water and its uses within the Walker River Basin. The potential outcomes there range from not at all, to in a limited way, to a separate adjudication of rights to underground water, and, finally, to an adjudication of surface and underground water as a single source of supply. Again, depending on how those issues are determined, the scope of the merits (Phase II) of the Tribal Claims may be broad or narrow. The Court's suggestions for threshold issues did not preclude consideration of other issues.

C. The Walker River Decree.

In order to identify and decide the management of threshold issues here, it is important to place the Tribal Claims in the context of the litigation which was ended with the final Walker River Decree. The United States commenced this action asserting an implied reserved water right for the Reservation which had been set aside on November 29, 1859, and formally established by executive

order on March 23, 1874. The Complaint in this 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 this 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 this 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 decision which gave birth to the implied reserved water rights doctrine, *Winters v. United States*, 207 U.S. 564 (1908), had placed strong reliance on a treaty between the United States and the Indians. It was argued here 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 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 of Appeals 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, this Court amended the Walker River Decree consistent with the mandate of the court of Appeals. Thus, the final Walker River Decree 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.

II. THE COURT SHOULD IDENTIFY AND ORGANIZE THRESHOLD ISSUES IN A MANNER WHICH MAY BE WHOLLY OR PARTIALLY DISPOSITIVE OF THE TRIBAL CLAIMS AND WHICH MAY AVOID USING LEGAL AND JUDICIAL RESOURCES ON CLAIMS WHICH ARE NOT NOW AND MAY NEVER BECOME RIPE FOR CONSIDERATION.

A. Introduction.

It is clear from the above history of this litigation and of the CMO that the Court should approach the identification of and manner of addressing threshold issues in a way which aids in processing this litigation on a reasonable and economic basis. This litigation has already consumed a great deal of judicial and party resources and it is likely to consume even more of those resources as the matter progresses. Any separation of issues that has the potential to reduce the burden on the Court and the parties is appropriate. The litigation is in its second decade and has the potential to continue for additional decades. The Court should address issues whose resolution might shorten or simplify the litigation sooner rather than later.

The Court should identify and address threshold issues in a way that deals with easier,

potentially dispositive issues first, before proceeding to more costly and possibly unnecessary proceedings. Resolution of potentially dispositive issues may obviate the need for further trial on those issues. Additionally, resolving potentially dispositive issues may simplify any issues that require further trial.

The factors which courts consider when authorizing a separate trial on an issue or claim under F.R.C.P., Rule 42(b) are relevant here. A separate trial on an issue or claim is appropriate under Rule 42(b) F.R.C.P. when the separation is in the interests of judicial economy, will further the parties' convenience, or will prevent undue prejudice. *Cook v. United Servs. Automobile Ass'n.*, 169 F.R.D. 359, 361 (D.Nev. 1996). The decision to bifurcate is committed to the sound discretion of the trial court based upon the circumstances of the litigation before it. *Id.* Bifurcation is particularly appropriate when resolution of a claim or issue may obviate the need for further trial. *Id.* In such a situation bifurcation advances the judicial interest in expedient resolution of litigation. *Id.*, at 361-362. Bifurcation can also simplify the issues for trial. *Id.*, at 362. The court's interest in judicial economy warrants the bifurcation of potentially dispositive claims or issues. *Id.*, at 362.

In *Cook v. United Servs. Automobile Ass'n.*, plaintiffs sued their underinsured motorist liability carrier for breach of contract and bad faith. *Cook v. United Servs. Automobile Ass'n.*, 169 F.R.D. 359, 360 (D.Nev. 1996). The district court granted defendant's motion to bifurcate the breach of contract claim from the extra-contractual claims because the contract claim was potentially dispositive and could therefore obviate the need for further trial. *Id.*, at 362. Bifurcation of the contract claim was appropriate because if plaintiffs did not prevail on that claim there could be no basis for the extra-contractual claim. *Id.*, at 361. Judicial economy warranted bifurcation because resolution of the contract claim had the potential to obviate the need for further trial and would simplify any issues at trial. *Id.*, at 361-362.

Avoiding a difficult question by first dealing with an easier possibly dispositive issue is a favored purpose of bifurcation. *Danjaq LLC v. Sony Corp.* 263 F.3d 942, 961 (9th Cir. 2001). In *Danjaq*, defendant asserted a counterclaim of copyright infringement. *Id.*, at 949. Following a bench trial on the issue of laches the district court dismissed defendant's counterclaim with prejudice as barred by laches. Defendant appealed challenging among other things the district court's decision to bifurcate laches from infringement. *Id.*, at 961. The appellate court affirmed the district court's decision to bifurcate the issue of laches from infringement concluding that the district court did not abuse its discretion in doing so. *Id.*, at 963. The court reasoned that the district court's decision to separate the issue of laches from that of infringement was consistent with a favored purpose of bifurcation, avoiding a difficult issue by first dealing with an easier dispositive issue. *Id.*, at 961; see also, *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 998 (9th Cir. 2001) (action involving breach of contract, fraud, and racketeering, bifurcated to consider whether contract was a sham because the validity of the contract directly informed resolution of the other claims).

A bifurcated trial (under Rule 42(b) F.R.C.P.) should be ordered on the affirmative defenses of res judicata or collateral estoppel and related defenses if such a separate trial is the most convenient and expeditious means of disposing of those questions. *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10, 12 (D.Nev. 1975). *Id.*, at 13. In *Truckee-Carson Irrigation District*, in water rights litigation brought by the United States and intervening Pyramid Lake Paiute Tribe of Indians, the court issued a memorandum addressing among other things the need for and scope of a bifurcated trial under Rule 42(b) F.R.C.P. on the defense of res judicata or collateral estoppel and related defenses. *Id.*, at 12. The court ordered a separate trial on these affirmative defenses. *Id.*, at 12. The court reasoned that a separate trial on res judicata and collateral estoppel would be the most convenient and expeditious means disposing of those questions. *Id.*, at 13.

The factors a court considers when certifying an otherwise unappealable order for immediate appeal under 28 U.S.C. § 1292(b) are also relevant here. A district court may properly certify an order for interlocutory appeal under 28 U.S.C. § 1292(b) if the certification requirements of that statute are met. See, *In Re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026, 64 A.L.R. Fed. 415, 1982-1 Trade Cases P 64,515 (9th Cir. 1982). The statute requires that there is a controlling question of law, as to which there is a substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. *In Re Cement*, 673 F.2d at 1026, 28 U.S.C. § 1292(b) (2008). The question of whether a defense that will defeat the claim is available is a controlling issue of law. See, *S.E.C. v. Rind*, 991 F.2d 1486, 1488 (9th Cir. 1993); see also, *Total T.V. v. Palmer Communications Inc.*, 69 F.3d 298, 300-301 (9th Cir. 1995) (review of denial of federal preemption defense); James Wm. Moore et al., *Moore's Federal Practice and Procedure*, § 203.31(2) (3d ed. 2008).

The issues which are identified below are issues which satisfy the foregoing requirements for a separate trial under Rule 42(b) and for certification under 28 U.S.C. § 1292(b). They should be identified and managed as threshold issues here.

B. Jurisdiction.

An issue which the Court should consider is as follows:

> Whether this Court has jurisdiction to adjudicate new claims for additional surface and/or underground water in Case C-125, a case in which a final judgment has been entered, or must a new and separate action form the basis for these claims; and if so, to what extent should the Court exercise its jurisdiction in these matters?

The essence of that issue is whether a court in an action which has gone to final judgment has jurisdiction after entry of that final judgment to adjudicate new claims for additional water, or whether such claims must be the subject of a new and separate action.

C. Issues of Law on Which the Course and Scope of the Litigation May Turn Should Have Threshold Status.

The Tribal Claims present a number of issues which appear to be purely legal issues and which should be decided and perhaps reviewed sooner, rather than later. See, *In Re Rights to the Use of the Gila River*, 830 P.2d 442,445 n. 2 (Ariz. 1992) (errors on significant questions of law should be corrected before, rather than after, decades of litigation). Such issues should be considered in conjunction with the broader issues described in D. and F. below. These issues are:

> Whether a claim to a right for conservation storage of water in Weber Reservoir may be made under the implied reservation of water rights doctrine, which was established in *Winters v. United States*, 207 U.S. 564 (1908), or under any other theory of federal common law?
>
> Whether a claim to a right for underground water may be made under the implied reservation of water rights doctrine, which was established in *Winters v. United States*, 207 U.S. 564 (1908), or under any other theory of federal common law?

There is another issue which involves minimal facts which is raised by the claims for surface water from the Walker River for the Added Lands. That issue is:

> Whether the United States may reserve water, under the federal implied reservation of water doctrine, from a water source that is not within the lands being reserved.[2]

This issue should be considered in conjunction with the primary purpose issue described in F. below.

D. Affirmative Defenses Based Upon Claim and Issue Preclusion Should Receive Threshold Status.

The existence of the Walker River Decree, a valid and final judgment which established and quantified an implied reserved water right for the Reservation, gives rise to a number of issues related to claim and issue preclusion. See, *Nevada v. United States*, 463 U.S. 110, 129-145 (1983). Those issues are as follows:

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[2] At this point, the District has not determined that the facts are actually as expressed in that issue. However, if they are, it is an appropriate threshold issue.

Whether the doctrine of claim (res judicata) and/or issue preclusion (collateral estoppel) bar any claim for:

a. federally reserved surface water rights for the Added Lands;

b. additional water from an underground source for lands that were within the Reservation at the time the Walker River Decree was entered;

c. additional water from an underground source for the Added Lands;

d. storage rights, other than those for regulatory purposes, for those lands that were within the Reservation at the time the Walker River Decree was entered; and

e. storage rights, other than those for regulatory purposes, for the Added Lands.

The parties and the Court should not be required to expend the time and resources associated with the merits of the Tribal Claims if the answer to some or all of those questions is "Yes." It is apparent that those issues may be wholly or partially dispositive of the Tribal Claims. See, *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10 (D. Nev. 1975).

E. Affirmative Defenses Based on Laches and Estoppel Should Receive Threshold Status.

The facts that the bases for the Tribal Claims have been known and in existence since at least 1936 and were not asserted until 1992 give rise to possible additional equitable defenses. Those equitable defenses and the issues they raise are as follows:

a. Whether the doctrines of laches and estoppel bar the conservation storage claims of the United States and the Tribe for the lands within the Reservation as it existed at the time of entry of the Walker River Decree?

b. Whether the doctrines of laches and estoppel bar the United States' and the Tribe's claims for a water right from underground sources for the Reservation as it existed at the time of the entry of the Walker River Decree?

c. Whether the doctrines of laches and estoppel bar the United States' and Tribe's claims for federally reserved water rights including surface water,

underground water, and/or conservation storage claims for the Added Lands?

F. The Primary Purpose for Adding Lands to the Reservation in 1936 and After Is a Factual Issue Which Merits Threshold Status.

The claims for the Added Lands present a serious and potentially dispositive issue on an essential element of a claim for water under the implied reservation of water doctrine. That essential element is proof that the reservation's primary purpose cannot be fulfilled without water. That principle is perhaps best expressed in *United States v. New Mexico*, 438 U.S. 595 (1978) where the court said:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 702.

The serious issue present here is as follows:

> Whether any water, surface or underground, was impliedly reserved when lands were added to the Reservation in light of the following: (1) the language and history of the Act of Congress that authorized the addition of those lands; (2) the fact that prior to their addition to the Reservation, those lands were designated as public domain and opened to entry under the Desert Lands Act; and (3) the fact that the lands were added for grazing purposes.

The parties and the Court should not be required to expend the time and resources associated with all of the other issues on the merits, if the ultimate answer to that question is "No."

G. The Surface Water - Underground Water Relationship Issues Should Be Deferred for the Present Time.

The CMO identifies the following threshold issues which the District characterizes as "surface water-underground water relationship issues:"

(c) If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law subject to different protections than those provided by State law?

(d) Whether the court has jurisdiction over groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the Tribe's rights under federal law to use water from the Walker River system. If so, should the court exercise that jurisdiction?

* * *

(f) Whether, regardless of the extent of hydrologic connection between surface and groundwater, this court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law.

(g) Are the holders of surface water rights established under federal law entitled to protection from the use of groundwater beyond the protection provided to holders of surface water rights established under state law.

(h) If the only jurisdiction of this court with respect to groundwater issues is to protect surface water rights established under federal law from interference by junior groundwater users, must the issues of interference be decided as a part of the adjudication of federal surface water claims.

Consideration of these issues should await the determination of other threshold issues, the determination of which will help define the extent to which these surface water-underground water relationship issues are actually, rather than hypothetically, involved in this case. For example, if it is determined that the Tribe has no right to pump underground water under federal law, issue (c) above need not be considered. By way of additional example, if the Tribe has no rights to surface water beyond those presently recognized in the Walker River Decree, it may not be necessary to consider (d), (f), (g) and (h) in light of the priority of the Tribe's recognized and existing surface water right.

III. PROPOSED ORGANIZATION AND MANAGEMENT OF THRESHOLD ISSUES.

The District suggests that a schedule be established for briefing and ultimately deciding the jurisdictional issue. The remaining threshold issues identified by the District, not including the

surface water-underground water relationship issues, should be bifurcated from the remainder of the Tribal Claims. Those issues should be the subject of a discovery plan under LR 26-1, which plan includes all of the requirements of LR 26-1(e), except there should be no further amendments to pleadings or additions of parties, unless authorized by separate order of the Court. To the extent necessary, any threshold issue which is not resolved by dispositive motion should become the subject of a pretrial order as provided in LR 26-1(e)(5), and a trial should be held on such issues. After any such trial is complete, the Court should consider and decide what would be certified for appeal under 28 U.S.C. § 1292(b).

In summary, then there would be discovery on the res judicata issues, laches and estoppel, and on the primary purpose of the Added Lands. That discovery would be followed by dispositive motions, if any, on those issues as well as on legal issues. If there were no dispositive motions, or if the Court concluded that there were genuine issues of material fact which required a trial, for example on res judicata or on the primary purpose of the Added Lands, then such matters would proceed to separate trial. As the District noted, the surface water-underground water relationship issues would be held in abeyance until at least the end of any separate trial, and perhaps until available appellate review is exhausted.

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Proceeding in this fashion is consistent with the CMO, and provides the best opportunity to avoid potentially unnecessary and costly proceedings, as well as to simplify any issues which may remain.

DATED this 5th day of September 2008.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 5th day of September, 2008, I electronically served the foregoing *Walker River Irrigation District's Opening Brief on Threshold Issues* to the following via their email addresses:

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