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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA
10

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 THE WALKER RIVER PAIUTE TRIBE,
14 Plaintiff-Intervenor,
15 v.
16 THE WALKER RIVER IRRIGATION
DISTRICT, a corporation, et al.,
17 Defendants.

IN EQUITY NO. C-125-B-ECR
3:73-CV-00127-ECR-(RAM)

**REPLY BRIEF ON THRESHOLD
ISSUES FOR CIRCLE BAR N RANCH,
L.L.C., ET AL.**

18
19 UNITED STATES OF AMERICA,
WALKER RIVER PAIUTE TRIBE,
20 Counterclaimants,
21 v.
22 WALKER RIVER IRRIGATION
DISTRICT, et al.,
23 Counterdefendants.
24

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26 ///



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1 Defendant Circle Bar N Ranch L.L.C., et al. (“Circle Bar N”), by and through their
2 counsel, Laura A. Schroeder and Schroeder Law Offices, P.C., hereby joins in the Walker River
3 Irrigation District’s Reply Brief on Threshold Issues and also submits the following reply to the
4 responses of the United States and Walker River Paiute Tribe (“Plaintiffs”) and Mineral County
5 regarding the proposed threshold issues.

6 **I. Defendants’ Proposed Threshold Issues Are Consistent with the Federal Rules of Civil
7 Procedure and the Case Management Order.**

8 The United States, the Tribe and Mineral County appear to be directly challenging the
9 provisions and legitimacy of the Case Management Order, (“CMO”), (Doc. No. 108) by their
10 assertions that the Defendants’ threshold issue proposals are inconsistent with the Federal Rules
11 of Civil Procedure. The Defendants’ threshold issues are consistent with those identified within
12 the CMO, which provides for a phased resolution of the merits of the Plaintiffs’ claims in a
13 manner consistent with those rules.

14 A review of the CMO establishes that the Plaintiffs’ allegations regarding the Defendants
15 proposed threshold issues lack merit. The CMO provides that once Plaintiffs have effectuated
16 service, the Magistrate Judge may proceed with Phase I of the Proceedings. As acknowledged
17 by the Plaintiffs, Phase I of the proceedings is to consist of the threshold issues that have been
18 identified and determined by the Magistrate Judge. (CMO at 11). The Court anticipated that
19 certain of the threshold issues would involve factual issues, and provided for this contingency in
20 its management order by instructing the Magistrate Judge to allow discovery relating to the
21 threshold issues once a final determination is made as to which proposed issues constituted
22 threshold issues. Additionally, at the same time discovery could be had on the bases for the
23 Tribal Claims. (CMO at 13). Following the opportunity for discovery, the CMO provides for
24 the filing of dispositive and partially dispositive motions. It also provides for an evidentiary
25 hearing before the Court to the extent that the threshold issues are not resolved by motion. *Id.*

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1 Phase II follows resolution of the threshold issues, and involves completion and
2 determination on the merits of all matters relating to the Tribal Claims. (CMO at 11.) Additional
3 phases may be scheduled to encompass all remaining issues in the case, however, the Court
4 specifically provided that it anticipated that additional phases would not be scheduled until the
5 threshold issues had been decided on the merits. (CMO at 11-12.) The CMO specifically
6 provides that threshold issues shall address jurisdiction, claim preclusion, applicable law,
7 equitable and other defenses, amongst other issues. (CMO at 9.) Given the Court's mandate
8 regarding these issues, and the procedures created to allow for adequate case development and a
9 fair and full hearing on the issues, it is unclear how the Plaintiffs and Mineral County can
10 reasonably assert that the Defendants' threshold issues, which are consistent with those identified
11 by the Court, are nevertheless inconsistent with the Federal Rules of Civil Procedure.

12 **II. The Case Management Order Establishes that Service Issues Are Not Construed To Be**
13 **Threshold Issues, As Service Is To Be Completed Prior To the Initiation of Phase I of the**
14 **Litigation.**

15 Issues relating to the form and manner of service are not construed under the CMO to be
16 "Threshold Issues" and should not be included in Phase I proceedings. As pointed out above, the
17 CMO specifically provides that prior to resolution of the identification of the threshold issues by
18 the Magistrate Judge, the U.S./Tribe shall affect service on all of the members of identified
19 categories of surface rights holders in Nevada and California, and on certain Nevada
20 groundwater rights holders. (CMO at 5-7.) The issues of personal jurisdiction raised by the
21 Plaintiffs will be resolved before the Magistrate Judge will make his determination and
22 designation of the threshold issues.

23 As noted by Walker River Irrigation District ("WRID") in its *Responsive Brief on*
24 *Threshold Issues* ("WRID Response," Doc. No. 1443 at 6), the Plaintiffs' suggestion that the
25 Court should consider the need to expand the categories of water rights holders to be served at
26 this point of the proceedings is misplaced, as the Court requires a showing that a new water right
for the Tribe could affect those falling within the new category of rights. Because no showing



1 has been made, the Plaintiffs' concern is without merit. Further, the issue of joinder of
2 any additional parties should be required is not a threshold issue under the CMO.

3 **III. The Plaintiffs' Assertions Regarding The Need To Delay Phase I Proceedings Until**
4 **Answers Are Filed Is Not Supported By The CMO.**

5 As WRID points out in its *Response*, the scheduling matters addressed in the CMO, such
6 as the filing of Defendant's answers, and the management of litigation should not be confused
7 with threshold issues. *WRID Response* at 7-8. The CMO clearly distinguishes between these
8 procedures and the threshold issues that the Magistrate Judge is to identify and determine. It
9 does not require answers from all Defendants be served on the Plaintiffs prior to the finalization
10 of the threshold issues. The Plaintiffs appear to suggest, by their assertion that answers must be
11 filed and reviewed before the list of threshold issues may be completed, that any defense that
12 might be raised in the Defendants' answers would constitute a threshold issue. This position is
13 inconsistent with their previous posture regarding what constitutes a threshold issue. See CMO
14 at 8, 9. As WRID suggests in its *Response*, there is no reason, except for purposes of delay, to
15 require answers from all Defendants before a final determination is made by the Magistrate
16 Judge as to which issues are threshold issues that may be addressed in Phase I proceedings,
17 particularly in light of the fact that all Defendants that are served will have had the opportunity to
18 submit threshold issues to the Court prior to the Judge Magistrate's determination.

19 **IV. The Parties, As Well As The CMO, Concur That The Issue Of Whether The Court Has**
20 **Jurisdiction To Address The Plaintiffs' Claims in Case C-125 Should Be Addressed As A**
21 **Threshold Issue.**

22 The parties appear to have reached consensus regarding the need for resolution of the
23 threshold issue relating to whether the Court has jurisdiction to adjudicate new and additional
24 claims for surface and/or underground water in Case C-125. However, the Plaintiffs' assertion
25 that the Defendants' formulation of the issue is improper, as it is a case management issue, is
26 incorrect. The issue of whether the Court has jurisdiction to reopen the Decree in order to
adjudicate new and additional claims may not be reduced to a procedural question.



1 **A. The impact of the finality of the Walker River Decree must be acknowledged.**

2 The Tribe's and United States' recitation of the history of litigation in Case No. C-125,
3 ignores the finality of the judgment entered by the court on April 24, 1940. The *Decree, United*
4 *States of America v. Walker River Irrigation District, et al.*, as amended by the *Order for Entry*
5 *of Amended Final Decree to Conform to Writ of Mandate* (D Nev. Apr. 24, 1940), ("Decree"), as
6 amended, established the extent of the federally reserved rights for the lands of the Walker River
7 Paiute Reservation as of April 14, 1936. Plaintiffs' assertion that the finality of the Decree does
8 not impact the ability of the Court to address their claims for new and additional water for the
9 Walker River Indian Reservation in Case C-125 is incorrect.

10 The final Walker River Decree was issued in 1940. Once a final decree is issued by a
11 court, the court lacks jurisdiction to modify the provisions of a decree, unless that court
12 specifically retains jurisdiction for that purpose. As noted by the United States Supreme Court in
13 *Nevada v. United States*, 463 U.S. 110, 130 (1983) quoting *Commissioner v. Sunnen*, 333 U.S.
14 591, 597 (1948), a "final 'judgment puts an end to the cause of action, which cannot again be
15 brought into litigation between the parties on any ground whatsoever.'"

16 **B. The Court's ability to "modify" the Decree is limited by the Decree itself.**

17 The Walker River Decree provides for the retention of jurisdiction by the Court for
18 specific limited purposes: 1) "the purpose of changing the duty of water or for correction or
19 modifying this decree" and 2) regulatory purposes, including a change of the place of use of any
20 water user....." These purposes may not be read as providing the Court with jurisdiction to
21 undermine the finality of Case C-125's comprehensive adjudication of the Walker River and its
22 tributaries. There is no suggestion in the Decree's language that a supplemental adjudication
23 may be had, as has been seen in other decrees. See *Arizona v. California*, 460 U.S. 605, 618
24 (1983).

25 Subsequent provisions of the Decree indicate that the Court will make regulations
26 addressing applications for change or modification of the Decree or for change of place and



1 manner or place of use. The Administrative Rules and Regulations¹ adopted by the Court do not
2 allow for enlargement of the United States' or the Tribe's rights as proposed by the Plaintiffs.
3 Such would be inconsistent with other provisions of the Decree, as Paragraph XI specifically
4 provides:

5 Each and every party to this suit . . .and all persons claiming by, through or under
6 them, and their successors and assigns in and to the water are forever enjoined
7 and restrained from claiming any rights in or to the waters of Walker River and/or
8 its branches and/or its tributaries, except the rights set up and specified in this
9 decree. . . .

10 While the issue of the Court's jurisdiction to adjudicate new claims in Case C-125 must
11 be resolved at the outset of the Phase I proceedings. Defendants did not propose that Plaintiffs
12 re-file their claims under a new case number and re-serve all the previously served defendants.
13 Rather, as WRID suggested , the jurisdictional issue could be quickly resolved, "by stipulation
14 that Case C-125-B, for all purposes, shall be treated as a new and entirely separate proceeding
15 wholly and completely independent from the action which lead to the final judgment which is the
16 Walker River Decree" *WRID Response* at 12. This issue should not be resolved, however,
17 by reframing the threshold issue as one that merely addresses whether the Court is deprived of
18 jurisdiction as a result of a procedural error.

19 **V. Jurisdictional Issues Relating To Surface And Underground Water Relationships, And**
20 **The Law To Be Applied To Groundwater Claims, And Whether The Court Has**
21 **Jurisdiction To Enforce Tribal Rights To Groundwater Outside Of The Reservation Need**
22 **Not Be Considered Until Resolution Of Other Threshold Issues.**

23 As previously argued, a prior determination of other threshold issues² may obviate the
24 need for a judicial determination as to the Court's jurisdiction to address those threshold issues

25 _____
26 ¹ Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place
of Use of Water of the Walker River and Its Tributaries and All Amendments Thereto as adopted by the Court. *See*
Doc. No. 687

² Resolution of threshold issues, such as whether claim or issue preclusion bars Plaintiffs' claims for
additional surface and groundwater on the land forming the reservation at the time the Decree was issued, and the
extent of the federal reserved rights that may be claimed given the primary purpose of the reservation, and whether
other equitable defenses may bar groundwater claims, may establish that the Plaintiffs have no rights to water
beyond those presently recognized in the Walker River Decree. *See Circle Bar N's Opening Brief Identifying*
Threshold Issues ("Circle Bar N Ranch Opening Brief"), Doc. No 1415 at 11-12.



1 that deal with groundwater/surface water interactions and the applicability of state/federal law to
2 groundwater claims. *Circle Bar N Ranch Opening Brief*, Doc. No. 1415 at 11-12. The Plaintiffs
3 acknowledge that advisory opinions are disapproved by the courts. *See Plaintiffs' Response* at
4 18, (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 101 (1998)). To require
5 resolution of these issues at the outset of Phase I proceedings is unreasonable. Until the initial
6 threshold issues of whether the Plaintiffs may claim groundwater under the reserved rights
7 doctrine and whether any such claims may be barred as a result of equitable defenses, the
8 hypothetical nature of these issues should preclude them from being addressed by the Court until
9 a later stage of the proceedings.

10 **VI. The Case Management Order Establishes The Court's Recognition For The Need For**
11 **Early Resolution of Threshold Issues, Including Applicable Law, Claim Preclusion, And**
12 **Equitable And Other Defenses.**

13 **A. In the interests of judicial economy, the legal standards to be applied in this case**
14 **must be addressed and resolved in Phase I of the proceedings.**

15 In the United States' and the Tribe's recitation of the myriad of problems with the
16 Defendants' proposed threshold issues, they suggest that the Defendants assume legal standards
17 that this Court has yet to address. *Plaintiffs' Response* at 5. Ironically, it is precisely the issue of
18 what legal standards or "applicable law," is to be applied to this case that the Defendants are
19 seeking to have identified in the Phase I proceedings.

20 For example, Plaintiffs take issue with Circle Bar N's proposal that the purpose of a
21 federal reservation defines what rights, if any, are impliedly reserved by that reservation. Their
22 assertion as to the "ultimate purpose" of the reservation as a homeland for tribal members, and
23 the subsequent citation to state law for support, exemplifies why the issue of what is meant by
24 the "purpose" of a federal reservation needs to be clarified during Phase I of the proceedings.

25 The Plaintiffs misconstrue the legal basis for determining an impliedly reserved water
26 right associated with federally reserved lands. The United State Supreme Court in *Cappaert v.*
United States, 426 US 128 (1976), succinctly explained the Supreme Court's position on



1 impliedly reserved water rights:

2 This Court has long held that when the Federal Government withdraws its land
3 from the public domain and reserves it for a federal purpose, the Government, by
4 implication, reserves appurtenant water then unappropriated to the extent needed
5 to accomplish the purpose of the reservation. In so doing the United States
6 acquires a reserved right in unappropriated water which vests on the date of the
7 reservation and is superior to the rights of future appropriators. Reservation of
8 water rights is empowered by the Commerce Clause, Art. I, § 8, which permits
9 federal regulation of navigable streams, and the Property Clause, Art. IV, §3,
10 which permits federal regulation of federal lands. *The doctrine applies to Indian
11 reservations and other federal enclaves*, encompassing water rights in navigable
12 and nonnavigable streams. (citations omitted)

13 *Cappaert*, 426 US at 137. (Emphasis added.)

14 One of the legal standards to be addressed in Phase I is what constitutes the primary
15 purpose, not the ultimate purpose, of the federal reservation. The Plaintiffs' reliance on state
16 law, as found in *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and
17 Source*, 35 P.3d 68, 76 (Ariz. 2001), for their position that a general homeland purpose creates
18 the basis for an award of water rights is misplaced. While the federal cases cited to by the
19 Plaintiffs, *United States v. Adair*, 723 F 2d 1394 (1984), *cert den sub nom Oregon v. United
20 States*, 967 US 1252 (1984) and *Colville Confederated Tribes v. Walton*, 647 F. 2d 42 (9th
21 Cir.1981), contain language that speaks to a general purpose, both cases hold that "water may be
22 reserved under the Winters Doctrine only for the primary purposes of the federal reservation."
23 *United States v. Adair*, 723 F 2d at 1408. Therefore, the primary purpose of the federal
24 reservation defines the scope of the reserved water rights.

25 As is apparent from the above discussion, the parties strongly disagree about the legal
26 standard to be applied in this case. This legal standard is not a fact-based issue, as alleged by the
27 Plaintiffs. It is a legal issue, and as such, must be resolved at the outset of the litigation so as to
28 insure the Court's and parties' resources are not unnecessarily expended.

29 **B. The Plaintiffs' concerns that certain of Defendants' threshold issues are "fact
30 intensive" are misplaced, as the CMO provides for discovery and evidentiary
31 hearing on threshold issues involving factual matters.**

32 The Plaintiffs concerns regarding the complexity of some of the issues that were



1 presented are precisely why Circle Bar N Ranch proposed a tiered analysis of threshold issues.
2 The fact that certain legal issues should be resolved before others, however, does not preclude
3 the latter's status as a threshold issue that must be resolved in Phase I of the litigation. The CMO
4 establishes that claim preclusion and equitable and other defenses are threshold issues, and
5 mandates that threshold issues shall be addressed in the Phase I proceedings. (CMO at 9, 11.)

6 Beyond Plaintiffs' misplaced arguments that resolution of factual issues should not occur
7 in Phase I of the proceeding, Plaintiffs' assertion that the issue to be determined regarding the
8 finality of the 1936 Decree relates to the timing of the filing of the claims, not whether they are
9 meritorious or whether equitable defenses bar them, is incorrect. Similarly, their interpretation
10 of Circle Bar N's arguments relating to impact of the finality of the Decree is incorrect.

11 Threshold issues relating to the applicability of claim and issue preclusion are inextricably bound
12 to the issue of the finality of the Decree. *See Nevada v. United States*, 463 U.S. 128-130. The
13 Decree established the extent of the Walker River Indian Reservation's federally reserved water
14 right for lands existing within the reservation as of April 14, 1936.

15 **VII. Conclusion**

16 The CMO was structured to insure a fair and full hearing on the claims before the Court,
17 while reducing the burdens on the parties and Court. It specifically provides for discovery on
18 the threshold issues with deferral of any dispositive motions on the threshold issues until
19 discovery is complete, and an evidentiary hearing to be held, if the threshold issues are not
20 resolved by motion. Contrary to the Plaintiffs' and Mineral County's assertions, the structuring
21 of the case, as set out in the CMO, will "aid in the efficient presentation of a case in order to
22 maximize the chances of a fair and just result," while deferring costly and possibly unnecessary
23 proceedings. (*See Mineral County Preliminary Threshold Response Brief* at 2 (Doc. No. 1441).)

24 Circle Bar N, respectfully requests that these proceedings move forward in the manner
25 identified in the CMO, allowing for the recognition of the threshold issues identified in Circle
26 Bar N's *Opening Brief* (Doc. No. 1415) including issues relating to jurisdictional matters, issues



1 of law, and claim and issue preclusion, as well as second tier issues relating to laches, estoppel,
2 and other affirmative defenses, the resolution of which may preclude the need for further
3 litigation.

4 DATED this 3rd day of November, 2008.

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6
7 /s/ Laura A. Schroeder

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that I am an employee of Schroeder Law Offices, P.C., over the age of eighteen and not a party to the within action, and that on this date I electronically filed the foregoing document titled Reply Brief on Threshold Issues for Circle Bar N Ranch, L.L.C, et al. with the Clerk of the Court using the CM/ECF system, and I served or caused it to be served by electronic mail CM/ECF (as indicated with an asterisk) or first-class mail, postage prepaid, addressed to the following persons:

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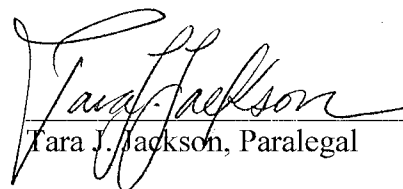
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