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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA Plaintiff, THE WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. THE WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-B 3:73-cv-00127-RCJ-WGC **CIRCLE BAR N RANCH, LLC, ET AL.'s MEMORANDUM SUMMARIZING PROPOSED THRESHOLD ISSUES**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

Defendants Circle Bar N Ranch, LLC, and Mica Farms, LLC, by and through their counsel, Laura A. Schroeder and Schroeder Law Offices, P.C., submit this Memorandum Summarizing Proposed Threshold Issues. This is memorandum in filed in response to the request

submitted to the parties by the Court at the August 2, 2012 status conference. The Court requested a short filing from each party that identifies its proposed threshold issues with reference to prior filings to assist his review and a brief summary of each proposed threshold issue. *Proposed Minutes of the Status Conference Conducted August 2, 2012 (Doc. No. 1732 at 8).*

I. Introduction

On June 24, 2008, Circle Bar N Ranch and Mica Farms, LLC ("Circle Bar N") joined with the Nevada Department of Wildlife, Joseph and Beverly Landolt, and the Walker River Irrigation District to file a list of Proposed Threshold Issues (Doc. No. 1361). Circle Bar N does not believe there is need to add or subtract from its original list of proposed threshold issues.

Circle Bar N filed a separate Opening Brief Identifying Threshold Issues on September 5, 2008 (Doc. No. 1415). Therein, Circle Bar N proposes to define a threshold issue as:

> [O]ne that should be decided in the early stages of litigation as it will limit the scope of, eliminating issues or counterclaims that are not sustainable under the Winters Doctrine. Included within this definition would be jurisdictional matters, claim and issue preclusion, and equitable and other defenses referenced by [the] sic Court in its Case Management Order filed April 19, 2000 (Doc. 108 at 9).

Doc. No. 1415 at 1-2.

To identify and prioritize resolution of initial threshold issues, Circle Bar N proposes to utilize a three-tier system. Under Circle Bar N's proposal, the "first tier" threshold issues, also referred to as primary or initial threshold issues, would take priority at the outset of proceedings. First tier threshold issues would consist of matters that pose legal questions, the resolution of which will 1) serve to simplify the proceedings, and 2) is necessary prior to considering second or third tier threshold issues.

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II. Proposed Threshold Issues

A. FIRST TIER ISSUES

1. *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?*

Summary: Circle Bar N contends the United States and Tribe improperly filed their claims in Case No. C-125. Therefore this is a primary threshold issue that must be resolved at the outset of these proceedings. No authority exists for reopening the Walker River decree to enlarge the United States' decreed rights or to provide additional rights to the Tribe in light of the fact that a final judgment was entered. In addition, a prohibition specifically precluding enlargement of a party's rights is found in the provisions of the Decree. Doc. No. 1415 at 4.

2. *Whether the express provisions of the Walker River Decree prevent the Tribe and the United States from asserting any claim in and to the waters of the Walker River and its tributaries that could have been asserted as of April 14, 1936, including a claim to a right for conservation storage?*

Summary: This as a primary threshold issue because it poses a question of law that can be resolved by the language of the Decree and the doctrine of res judicata.

3. *Whether the doctrine of claim (res judicata) and/or issue preclusion (collateral estoppel) bar any claim for 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?*

Summary: The 1936 Walker River Decree, as amended, awarded the full amount of "implied-reservation-of water" rights that were required to support the Walker River Indian Reservation. Circle Bar N therefore contends that the *viability* of the United States' and Tribe's claims for storage rights under the Winters Doctrine presents a legal question that may be resolved by the 1936 Decree and application of the doctrines of claim and issue preclusion. See Nevada v. United States, 463 U.S. 110, 133, 135 (1983). The Tribe and United States are precluded from litigating the issue of the quantity of reserved water rights need for the Walker River Indian Reservations.

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4. *Whether the doctrine of claim (res judicata) and/or issue preclusion (collateral estoppel) bar any claim for additional water from an underground source for lands that were within the Reservation at the time the Walker River Decree was entered?*

Summary: The Decree already reflects the Court's determination that the water awarded to the Tribe was sufficient to constitute the full implied-reservation-of water rights reserved for the Walker River Indian Reservation. United States v. Walker River Irr. District 104 F.2d 334 (1939). This issue is a first tier threshold issue. It is a question of law whether water from underground sources may be claimed under the Winters Doctrine.

5. *Whether any water, surface or underground, was impliedly reserved when lands were added to the Reservation in 1936 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 the lands were added for grazing purposes, and (3) 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?*

6. *Whether the United States may reserve water, under the federally implied reservation of water doctrine, from a water source that is not within the lands being reserved?*

Summary: Circle Bar N asserts that these issues must receive first tier threshold issue status because they pose legal questions that should be determined at the outset. Namely, whether the United States may legitimately claim reserved rights for the lands added to the Reservation in 1936, given the purpose of the reservation, the Desert Lands Act's severance of water from the land and that the water sources claimed are neither within nor border the land reserved.

B. <u>SECOND TIER ISSUES</u>

7. *Whether the doctrine of laches may be asserted against the counterclaims filed by the United States and Tribe?*

   a. *Whether the doctrine of laches bars 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 doctrine of laches bars 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?*

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c. Whether the doctrine of laches bars the United States' and Tribe's claims for federally reserved water rights including surface water, underground water, and/or conservation storage claims for the 1936 Lands?

Summary: Whether the doctrine of laches may be applied in the case of Indian claims is a legal question that may be addressed early in the proceedings. Circle Bar N contends that the doctrine of laches is applicable to the conservation storage claims, claims for underground water rights, and federally reserved water rights for the 1936 Lands. Limited discovery will be required before these threshold issues may be addressed and therefore these are second tier issues in nature.

8. Whether the doctrine of estoppel may be applied against the counterclaimants?

a. Whether the doctrine of estoppel bars any claim for conservation storage water rights for use on Decree Lands?

b. Whether the doctrine of estoppel bars any claim for a water right from underground sources within Decree Lands?

c. Whether the doctrine of estoppel bars any claim for conservation storage water rights for use on the 1936 Lands?

d. Whether the doctrine of estoppel bars any claim for a water right from underground sources within the 1936 Lands?

9. Whether through its commencement and resolution of claims against the United States, the Tribe's claims a) for water from underground sources, and b) for a conservation storage water right for Weber Reservoir have been waived and are therefore extinguished?

Summary: Circle Bar N believes that the viability of equitable defenses of estoppel and waiver is largely a question of law. Because 1) some discovery may be necessary, and 2) the applicability of the defense may be rendered irrelevant by first tier issues, Circle Bar N contends this matter should be a second tier matter.

C. <u>THIRD TIER ISSUES</u>

10. Whether, regardless of the extent of hydrologic connection between surface and underground water, this Court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law?

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11. 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 laws?

12. If the Tribe has no claim to underground water on the Reservation based upon the implied reservation of water doctrine, or based upon any other theory of federal common law, does the State of Nevada have jurisdiction to regulate the use of underground water on the Reservation?

Summary: Circle Bar N's proposed Third Tier Threshold Issues focus on the intersection between federal and state law with respect regulating surface and groundwaters that share a potential hydrological connection. Circle Bar N places these issues into the third tier because they address water right regulation in the future and do not pose issues that must be resolved at the very outset of the proceedings.

CONCLUSION

Within its opening brief on threshold issues, Circle Bar N requested the Court establish a schedule pursuant to which the parties would provide argument as to why a particular issue is a threshold issue, and as to how and when the issue ought to be addressed. We continue to suggest an initial filing of simultaneous briefs on those questions, with a period of time allowed for a simultaneous response to the initial filings, and finally with a time allowed for a simultaneous reply to the responses. Thereafter, the Court might schedule a hearing to determine the threshold issues.

DATED this 20th day of August, 2012.

SCHROEDER LAW OFFICES, P.C.

/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 caused the foregoing document titled: ***CIRCLE BAR N RANCH, LLC, ET AL.'s MEMORANDUM SUMMARIZING PROPOSED THRESHOLD ISSUES*** to be electronically filed with the Clerk of the Court using the CM/ECF system, and I caused it to be served by electronic mail through CM/ECF or by first-class mail, postage prepaid, addressed to the following persons:

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Dated this 20th day of August, 2012

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