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UNITED STATES DISTRICT COURT

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-RCJ Subproceedings: C-125-B & C-125-C 3:73:CV-00127-RCJ-WGC & 3:73: CV-00128-RCJ-WGC **NEVADA DEPARTMENT OF WILDLIFE'S PROPOSED THRESHOLD ISSUES**
MINERAL COUNTY, Proposed-Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Proposed Defendants.	

The Nevada Department of Wildlife (NDOW), through its counsel Catherine Cortez Masto, Nevada Attorney General, and Chief Deputy Attorney General, Marta Adams, submits the following preliminary list of Threshold Issues requested by the Court during its August 2, 2012 status conference. On June 24, 2008, NDOW, in conjunction with Joseph and Beverly Landolt, Circle Bar N Ranch, LLC, et al., and the Walker River Irrigation District, filed

Proposed Threshold Issues in this case. (*See,* Document 1361). On September 5, 2008, NDOW also filed an Opening Brief on Threshold Issues. (*See*, Document 1413). For purposes of this filing, NDOW suggests that appropriate 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) resolution of which would facilitate this Court's management of the case.

In its earlier brief, NDOW suggested the following six threshold issues addressing jurisdiction, the scope of the litigation, and certain equitable defenses consistent with those enumerated in the Case Management Order (CMO).

THE CASE MANAGEMENT ORDER CONTEMPLATES CONSIDERATION OF THRESHOLD ISSUES AFTER COMPLETION OF SERVICE.

The CMO carefully lays out categories of water rights' holders and users subject to service. In addition and relevant for purposes of determining appropriate threshold issues, the CMO directs the Magistrate Judge to address threshold issues directed toward resolution of the Tribal claims. In fact, the Tribal claims are to be addressed in Phase 1 following service of process. CMO at 8. Only when service of process has been completed on designated categories of water right holders and water users, the Magistrate Judge is directed 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.

Based on the express direction from the Court, the threshold issues are intended to address the Tribal claims themselves in order to focus the litigation and possibly resolve those issues capable of resolution. To that end, NDOW respectfully submits that this Court's determination of threshold issues should include those issues which go to the merits of the Tribal claims.

With respect to the Tribal claims, the Walker River Paiute Tribe (Tribe) and the United States seek approximately 13,000 acre feet of water as a storage 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 land added to the Reservation

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by Order of the Secretary of the Interior on September 25, 1936. Finally, the Tribe and the United States on its behalf seek a federal reserved right to groundwater located in, under, and adjacent to the Walker River Reservation.

The following threshold issues are offered to assist the Court in its management of this case.

1. 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.

2. Does this Court have jurisdiction to determine the Tribe's new claims to groundwater?

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 purposes of the Reservation. Although not considered in the original action, this Court's determination of its jurisdiction to consider the Tribe's claims to groundwater has serious implications both for the management of the litigation and the State of Nevada's administration of Nevada's groundwater resources.

3. What is the underlying purpose of the Reservation with respect to the lands added to it 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

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dry land stock grazing, a purpose which requires significantly less water than that needed for irrigated agriculture.

4. 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.

5. 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 180 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 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).

6. 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 50 plus years intervening

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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.

Submitted this 20th day of August, 2012.

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CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada, Office of the Attorney General and on this 20th day of August 2012, I electronically filed the foregoing **NEVADA DEPARTMENT OF WILDLIFE'S PROPOSED THRESHOLD ISSUES** with the Clerk of the U.S. District Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case; and I further certify that I served a copy of the foregoing on the following non-CM/ECF participants by U.S. Mail, postage prepaid, this 20th day of August, 2012:

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