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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-RCJ Subproceedings: C-125-B 3:73-cv-00127-RCJ-WGC **JOINDER BY CIRCLE BAR N RANCH, LLC, ET AL. TO WALKER RIVER IRRIGATION DISTRICT'S MOTION TO DISMISS CLAIMS OF UNITED STATES BASED UPON STATE LAW PURSUANT TO FED. R. CIV. P. 12(b)(1), AND SUPPLEMENTAL ARGUMENT**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

JOINDER AND MOTION

Defendants Circle Bar N Ranch, LLC, et al., by and through their counsel, Laura A. Schroeder, Therese A. Ure, Matthew J. Curti and Schroeder Law Offices, P.C., hereby join in

the Walker River Irrigation District's Motion Pursuant to Fed. R. Civ. P. 12(b)(1), and hereby supplement such Motion with additional argument.

Pursuant to Fed. R. Civ. P. 12(b)(1), Circle Bar N Ranch, LLC, et al., moves for an order of this Court to 1) dismiss the Walker River Paiute Tribe's First Amended Counterclaim, 2) dismiss the United States' First Amended Counterclaim, 3) dismiss the claims, as made by both the Walker River Paiute Tribe and the United States, based upon state law, and 4) dismiss all claims made by both the Walker River Paiute Tribe and the United States regarding ground water.

Circle Bar N Ranch, LLC, et al., in its joinder, hereby adopts all arguments made by the Walker River Irrigation District in its Motion, and any argument made herein is meant to supplement that made by the Walker River Irrigation District, and should not be construed as an opposition to such.

This motion is made and based upon all of the pleadings and papers on file herein and the Points and Authorities which are filed herewith under separate cover.

DATED this 9th day of February, 2015.

SCHROEDER LAW OFFICES, P.C.

/s/ Laura A. Schroeder

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CERTIFICATE OF SERVICE

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: ***JOINDER BY CIRCLE BAR N RANCH, LLC, ET AL. TO WALKER RIVER IRRIGATION DISTRICT'S MOTION TO DISMISS CLAIMS OF UNITED STATES BASED UPON STATE LAW PURSUANT TO FED. R. CIV. P. 12(b)(1), AND SUPPLEMENTAL ARGUMENT*** 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 addressed to the following persons:

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Dated this 9th day of February, 2015.

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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-RCJ Subproceedings: C-125-B 3:73-cv-00127-RCJ-WGC **POINTS AND AUTHORITIES OF CIRCLE BAR N RANCH, LLC, ET AL. IN SUPPORT OF ITS JOINDER TO WALKER RIVER IRRIGATION DISTRICT'S MOTION PURSUANT TO FED. R. CIV. P. 12(b)(1), AND SUPPLEMENTAL ARGUMENT**
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1. Introduction

Following a public lands survey, the Walker River Reservation ("Reservation") was set apart for the Tribe by Executive Order dated March 19, 1874. The Ninth Circuit Court of Appeals concluded the establishment of the Reservation was effective the date the lands were withdrawn by the Commissioner of Indian Affairs, November 29, 1859, rather than the date of the Executive Order. *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 340 (CA 9 1939). Only waters unappropriated at the time of the establishment of the Reservation were subject to appropriation. In 1924, the United States brought a suit in equity on behalf of the Paiute Tribe against the appropriators and users of the waters of Walker River and its tributaries claiming an interest in 150 cubic feet per second ("cfs") of the river and its tributaries.

The 1925 suit resulted in a Decree issued by this Court in 1936 adjudicating the relative rights of the parties and holding that the government had failed to reserve water for use on the reservation. *United States v. Walker River Irr. Dist*, No. C-125-ECR (D.Nev. April 14, 1936). The United States appealed the holding to the Ninth Circuit Court of Appeals, which reversed the District Court's denial. *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). The Decree was amended in 1940 to conform to the Court of Appeals mandate. *Order for Entry of Amended Final Decree to Conform to Writ of Mandate* (D. Nev. Apr. 24, 1940):

> The plaintiff, United States of America, is hereby adjudged and decreed to be the owner of the right to divert a continuous flow of 26.25 cubic feet per second of the natural flow of the Walker River to be diverted from said stream upon or above the Walker River Reservation during the irrigation season of 180 days of each year for the irrigation of 2100 acres of land situate in the Walker River Indian Reservation, in addition to whatever flow of said stream is reasonably necessary for domestic and stock watering purposes and power purposes, to the extent now used by plaintiff during the non-irrigation season, all with a priority of November 29, 1859, the date of the establishment of said Indian Reservation.

Id.

Following issuance of the 1936 Decree, and before the Ninth Circuit Court of Appeals addressed the appeal, Congress legislated approximately 171,200 additional acres of ceded lands

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to the Walker River Reservation for timber and grazing purposes. This Congressional legislation provided that the minerals were reserved for the United States and the lands were "subject to mineral entry or claim under the public land mining laws." It further provided that "said withdrawal shall not affect any valid rights initiated prior to the approval hereof."

In 1991, the Walker River Irrigation District ("WRID") filed a complaint against the California Water Control Board, alleging the Board lacked authority to issue orders in conflict with the Decree. *See* Order filed October 27, 1992.(Docket # 15). In 1992, the Walker River Paiute Tribe ("Tribe" or "WRPT") filed an answer and counterclaim, requesting a right to store water in Weber Reservoir for use on the Reservation and for a federal reserved water right for lands added to the Reservation in 1936. The 1992 counterclaims also requested additional water uses over and above the reserved rights awarded to the United States for the benefit of the Walker River Indian Reservation in the Decree. The United States filed a counterclaim the same year asserting identical claims for water use to benefit the Walker River Indian Reservation. While the Tribes' and United States' pleadings were procedurally, improperly denominated counterclaims, this Court, by Order dated October 27, 1992, determined that the counterclaims would be treated as if filed as cross-claims.

In 1997, the Tribe filed a "First Amended Counter Claim," adding claims for ground water use for the Reservation. The United States similarly filed a First Amended Claim, which advanced claims for surface and ground water for use at the Walker River Reservation, the Yerington Reservation, the Bridgeport Paiute Indian Colony, several individual allotments, as well as surface water and groundwater claims for other federal enclaves within the Walker River Basin.

2. Procedural Posture

Service of process proceeded and on November 4, 2013, a status hearing was held before the District Court to establish a briefing schedule regarding certain threshold jurisdictional issues. By order, the Court instituted a briefing schedule requiring Motions to Dismiss to be

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filed by the Respondents regarding limited, specific issues on questions relating to Jurisdiction. These motions to raise threshold jurisdictional challenges were contemplated under the Case Management Order (C-125-B Document #108). The Court ordered that the jurisdictional challenges focus on the Tribes' and the United States' Amended Counterclaims (C-125-B Document #58 and #59), as well as Mineral County's Amended Complaint in Intervention (C-125-C Document #20).

The Court narrowed the scope of the topics it preferred to be covered in the first Motions to be filed by Respondents. This Memorandum is in response to the Court's order following the July 25, 2013, status hearing.

Subsequently, the parties followed the Court's briefing schedule and proceeded to file certain motions to dismiss in accordance with the Court's direction. Such motions were then opposed, with replies filed in return. On October 17, 2014, the Court issued an order addressing the several motions filed in both this sub-proceeding as well as the C-125-C sub-proceeding. As to the present matter, the Court denied the parties motions to dismiss, without prejudice, subject to re-filing upon issuance and service of the Superseding Order Regarding Service. (C-125-B Document #2099).

On December 30, 2014, the Court entered an Order setting forth a Stipulated Schedule for Motions to Dismiss to be re-filed. (C-125-B Document #2150). The present motion is being filed in compliance with such Order, and in anticipation of oral argument set to be heard before the Court on May 4, 2015.

Circle Bar N Ranch, LLC, et al. hereby joins and adopts all argument made by the Walker River Irrigation District in its Motion, and any argument made herein is meant to supplement that made by the Walker River Irrigation District, and should not be construed as an opposition to such.

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3. Decree Court Lacks Jurisdiction to Adjudicate New Claims for Additional Water Rights Under C-125

This Court lacks jurisdiction to adjudicate new claims for additional surface and/or underground water rights, because final judgment was entered. A new and separate action must form the basis for the claims made by the Tribe, United States and Mineral County.

The United States and Tribe improperly filed their claims in Case No. C-125. No authority exists for reopening the Decree in order to enlarge the United States' decreed rights or to provide additional rights to the Tribe (or any other party) because 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 itself, as explained below.

Case C-125 adjudicated the implied federally reserved rights for the Walker River Paiute Tribe as of June 14, 1936. *Decree, United States of America v. Walker River Irrigation District, et al.,* as *Amended Order for Entry of Amended Final Decree to Conform to Wirt of Mandate* (D Nev. Apr. 24, 1940). The Decree provides for the Court's continuing jurisdiction as it relates to regulation of the water uses adjudicated. The Decree's jurisdictional statement provides:

> The court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user…

Walker River Decree at Paragraph XIV.

While it is possible for this Court to modify or change the duty of existing adjudicated water uses established under the Decree, no authority exists for reopening the Decree to adjudicate new water use claims to the United States, Tribe, or any other party, as the Court entered a final order which did not retain jurisdiction allowing for any further claims' adjudication.

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In order to fully understand the limited nature of the retained, regulatory jurisdiction, we must look to decree language in other cases. In *Arizona v. California*, 460 U.S. 605, 607 (1983), the Court reviewed a decree which was issued in 1964, in which the United States acquired water rights for multiple Indian reservations. The United States petitioned the Court to increase the tribes' water rights under the 1964 decree. The Court first looked at its jurisdiction to grant such additional rights, and in doing so looked to the language of the decree, which provided:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or <u>any supplementary decree</u>, that may at any time be deemed proper in relation to the subject matter in controversy.

Id. at 617-618 (emphasis added). Under the "supplementary" language, the Court found jurisdiction to allow the additional, or "supplemental", rights to be granted.

In the present case, no such "supplemental" jurisdiction was retained by the Court within the final order of the Decree. If the Court had intended to retain the right to supplement the Decree by allowing additional claims to surface and/or ground water rights to be added, it would have expressly provided for this jurisdiction. Instead, this Decree provides only for regulatory, continuing jurisdiction in its final order.

4. Decree Court and United States District Court Jurisdiction is Limited to Claims Based on Federal Law

The United States District Court for the District of Nevada holds jurisdiction over adjudicated claims brought by the United States and Tribe for water rights of use which are based on federal law. This jurisdiction is based on the United States' ability to reserve water for federally reserved lands.

The power of the United States Government to reserve waters for federally reserved lands and exempt them from subsequent appropriation is "beyond debate." *United States v. Walker River Irrigation District*, 104 F.2d 334, 336 (9th Cir. 1939). The scope and extent to which

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reserved rights may be claimed is derived and delimited by *Winters v. United States*, 207 U.S. 564 (1908), and its progeny.

The United States Supreme Court's holding in *Winters* established the federal government's right to impliedly reserve water rights for federal reservations, even when the treaty, executive order, or legislation that created the reservation was silent as to the reservation of those rights. Since its inception in 1908, the *Winters* doctrine has expanded to apply to other types of federal reservations. For example in 1976, the Court in *Cappaert v. United States*, 436 U.S. 128 (1976), succinctly explained the Supreme Court's position on implied reserved water rights:

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

Id. at 137 (citations omitted).

When determining the extent of these unique court-created federal reserved water rights of use, the Court must examine the purpose for which the reservation was created:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Id. at 140 (citations omitted).

A determination of the purpose of the reservation is critical as "water may be reserved under the Winters Doctrine only for the primary purposes of the federal reservation." *United*

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States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1984), *cert. denied*, 967 U.S. 1252 (1984). Water rights are not implied where they are merely "valuable for a secondary use of the reservation." *Id.* at 1409 (quoting *United States v. New Mexico*, 438 U.S. 696, 702 (1978)). Where water on a federal reservation is not explicitly reserved, but is required for a secondary use, the Supreme Court has inferred that "Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator" under state law. *New Mexico*, 438 U.S. at 701.

Further, the primary purpose of the reservation also is used to adjudicate and define the extent of the reserved rights, as the "implied-reservation-of water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141:

> While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." Each time this Court has applied the "implied reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated . . .This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water.

New Mexico, 438 U.S. at 700 (citations omitted).

The need to tailor the award of implied right to the "minimum need" of the reservation also arises from the recognition that in the case of fully appropriated rivers, federally reserved rights will frequently require a "gallon-for-gallon" reduction in the amount of water available for state and private appropriators. *Id.* at 705. It is not uncommon for private appropriators to have relied on these waters for their livelihood and expended considerable sums of money for the

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construction of dams, ditches, and reservoirs long before the existence or extent of the federal claims are recognized through an adjudication process. See *Winters*, 207 U.S. at 569-70.

The purpose and extent of the entire water right for the Walker River Paiute Reservation as it existed in 1935 was previously determined by final order and decreed. *United States v. Walker River Irr. District*, 104 F.2d 334 (1939). With regard to the 1936 Congressional legislative addition of lands to the Reservation, the stated purpose for the withdrawal of those lands was to provide the Tribe with additional lands for dry land stock grazing. S. R. 1750, 74th Cong., 2d Sess. 6-39 (1936). If this Court elects to proceed in this case, despite lacking subject matter jurisdiction, the extent of any claims to water rights of use associated with 1936 lands must be limited to those necessary "for dry land stock grazing."

5. Decree Court and United States District Court Lack Jurisdiction Over Ground Water Located Outside Reservation Boundaries

The Amended Counterclaim of the United States and that of the Tribe ask this Court to recognize additional rights to groundwater not only underlying the reserved land, but to adjacent lands as well. First of all, under the reserved rights doctrine, there is no basis upon which the claims for water rights of use outside the exterior boundaries of the Walker River Paiute Reservation may be made. The federal court, particularly the Decree court, holds no subject matter jurisdiction over ground water claims or uses outside the Reservation.

Even if the United States and Tribes were only seeking to invoke the continuing, regulatory jurisdiction under the Decree to claim interference with adjudicated, surface water uses, there could be no jurisdiction in this Court without a specific allegation as to present interference with a federal surface or ground water right as a result of pumping of state ground water rights of use outside the boundaries of the federal reservation. Even with a specific allegation, the State of Nevada, which holds the power to regulate the groundwater uses, would be in a better position to enjoin an interfering ground water use, than the federal decree court that only holds the power, under its continuing regulatory jurisdiction, to assert its authority over the

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adjudicated surface water uses. If the ultimate remedy the United States and the Tribe seeks is to shut off ground water uses, it is not this decree Court whose jurisdiction the United States and Tribe should seek to invoke. This Court's continuing regulatory jurisdiction does not spread so far.

When the federal government withdraws lands from the public domain for a federal purpose, water rights are impliedly reserved to support the purpose of the withdrawal. The Property Clause, Art. IV, § 3 of the United States Constitution, provides the federal government with the authority for the regulation of federal lands and non-navigable waters within the federal reservation. See, *Cappaert*, 436 U. S. at 138. Conversely, on lands outside the reservation, state law governs:

> [P]roperty ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.'

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (U.S. 1977), quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944).

Further, the Desert Land Act of 1877, which specifically addressed water rights on public lands, provided that such water rights were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). In interpreting the Desert Land Act, the Supreme Court stressed that the waters of lakes, rivers and other sources of water supply upon the public lands that were not navigable were severed and "reserved for the use of the public under the laws of the states and territories." *Id.*, at 162.

To obtain water rights of use on non-federally reserved lands, the United States and the Tribe are required to obtain water rights through the application and permitting in compliance with the State of Nevada water code or claim pre-code vested rights for groundwater use

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consistent with state law. The federal court cannot grant such groundwater rights of use, and its ability to exercise jurisdiction over such rights is extremely limited.

A federal court's jurisdictional authority to issue determinations with regard to non-federally reserved groundwater rights is limited to cases involving: (1) federal rights in basin adjudications of water systems in which hydrological connections between groundwater and surface water are recognized (see e.g., *In re General Adjudication of All Rights to Use Water & Water Rights*, 531 F. Supp. 449 (D.S.D. 1982)); (2) cases in which the federal water rights have been impacted adversely by state agency determinations; and (3) appeal is made to the federal decree court or injunctive relief is sought with regard to an undefined federal reserved right. See, e.g., *United States v. Orr Water Ditch Co.*, 391 F.3d 1077 (2004), *Cappaert*, 426 U.S. at 135. Jurisdiction in these cases arises under 28 U.S.C. § 1331, §1362, 1367, and §1345.

In this case, we have no new action for an adjudication. Neither the United States nor the Tribe has claimed the necessity for a comprehensive adjudication of all rights to groundwater in the Water River Basin. Nor have either alleged in a new action that the existing reserved rights or claimed implied reserved rights have been or will be injured as a result of groundwater use outside the original federal reservation. Without these allegations, brought in a new action, this Court lacks jurisdiction to address nonfederal ground water claims.

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6. Conclusion

For the above reasons, the Court should dismiss the Walker River Paiute Tribe and United States' Amended Counterclaims, and require them to be brought in a new action; dismiss all claims not based on federal law; and dismiss those related to ground water outside the boundary of the reservation.

DATED this 9th day of February, 2015.

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CERTIFICATE OF SERVICE

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: ***POINTS AND AUTHORITIES OF CIRCLE BAR N RANCH, LLC, ET AL. IN SUPPORT OF ITS JOINDER TO WALKER RIVER IRRIGATION DISTRICT'S MOTION TO DISMISS CLAIMS OF UNITED STATES BASED UPON STATE LAW PURSUANT TO FED. R. CIV. P. 12(b)(1), AND SUPPLEMENTAL ARGUMENT*** 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 addressed to the following persons:

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