

1 CATHERINE CORTEZ MASTO
Attorney General
2 MARTA A. ADAMS
Chief Deputy Attorney General
3 Nevada State Bar #1564
Office of the Attorney General
4 100 North Carson Street
Carson City, Nevada 89701-4717
5 Telephone: (775) 684-1237
Facsimile: (775) 684-1108
6 *Attorneys for State of Nevada*
Department of Wildlife

7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 WALKER RIVER PAIUTE TRIBE,
13 Plaintiff-Intervenor,
14 v.
15 WALKER RIVER IRRIGATION DISTRICT,
16 a corporation, et al.,
17 Defendants.
18 MINERAL COUNTY,
19 Proposed-Plaintiff-Intervenor,
20 v.
21 WALKER RIVER IRRIGATION DISTRICT,
22 a corporation, et al.,
23 Proposed 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**

24 The Nevada Department of Wildlife (NDOW), through its counsel Catherine Cortez
25 Masto, Nevada Attorney General, and Chief Deputy Attorney General, Marta Adams, submits
26 the following preliminary list of Threshold Issues requested by the Court during its August 2,
27 2012 status conference. On June 24, 2008, NDOW, in conjunction with Joseph and Beverly
28 Landolt, Circle Bar N Ranch, LLC, et al., and the Walker River Irrigation District, filed

1 Proposed Threshold Issues in this case. (See, Document 1361). On September 5, 2008,
2 NDOW also filed an Opening Brief on Threshold Issues. (See, Document 1413). For
3 purposes of this filing, NDOW suggests that appropriate threshold issues (1) logically belong
4 at the initial phase of the litigation following service; (2) are either purely legal issues or ones
5 which require minimal factual development, and (3) resolution of which would facilitate this
6 Court's management of the case.

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

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

12 The CMO carefully lays out categories of water rights' holders and users subject to
13 service. In addition and relevant for purposes of determining appropriate threshold issues, the
14 CMO directs the Magistrate Judge to address threshold issues directed toward resolution of
15 the Tribal claims. In fact, the Tribal claims are to be addressed in Phase 1 following service of
16 process. CMO at 8. Only when service of process has been completed on designated
17 categories of water right holders and water users, the Magistrate Judge is directed to
18 "consider and make a preliminary determination of the threshold issues to be addressed at the
19 outset of the litigation on the U.S./Tribe counterclaims." CMO at 9.

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

25 With respect to the Tribal claims, the Walker River Paiute Tribe (Tribe) and the United
26 States seek approximately 13,000 acre feet of water as a storage right in Weber Reservoir
27 with a priority date of April 15, 1936. In addition, the Tribe and the United States seek a
28 federal reserved water right for approximately 167,460 acres of land added to the Reservation

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

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

6 **1. To what extent should this Court exercise its jurisdiction to determine the**
7 **Tribe's claims to additional surface water?**

8 The United States and the Tribe filed their claims in this Court as part of the initial
9 action resulting in the Walker River Decree. *United States v. Walker River Irr. Dist., et al.*,
10 11 F.Supp. 158 (D. Nev. 1935); *United States v. Walker River Irr. Dist., et al.*, 104 F.2d 334
11 (9th Cir. 1939). Recognizing this Court's continuing jurisdiction to administer provisions of the
12 Walker River Decree, it is nevertheless important as a threshold matter for the Court to
13 determine whether the Tribe's claims to additional Walker River water should be considered at
14 all.

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

17 Before reaching the Tribe's and the United States' claims to a reserved right in
18 groundwater under and adjacent to the Reservation, the Court must, of necessity, determine
19 whether the Tribe's 1859 direct flow rights awarded in the Decree are the full extent of the
20 water rights to which the Tribe is entitled to carry out the purposes of the Reservation.
21 Although not considered in the original action, this Court's determination of its jurisdiction to
22 consider the Tribe's claims to groundwater has serious implications both for the management
23 of the litigation and the State of Nevada's administration of Nevada's groundwater resources.

24 **3. What is the underlying purpose of the Reservation with respect to the lands**
25 **added to it in 1936?**

26 While the purpose of the reservation of the decreed lands on the Reservation was to
27 enable irrigation for agriculture, the lands added in 1936 to the Reservation were intended for

28 ///

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

3 **4. May the Tribe's and the United States' claims for a reserved water right for**
4 **storage in Weber Reservoir be established under *Winters v. United States*, 207 U.S. 564**
5 **(1908) or under another theory of federal common law?**

6 If the United States and the Tribe are relying on a reserved water right theory other
7 than that emanating from the *Winters* doctrine, that theory should be identified as a threshold
8 matter.

9 **5. Whether the doctrines of res judicata or issue preclusion bar the United**
10 **States' and the Walker River Paiute Tribe's claims for additional water?**

11 The Walker River Decree emanated from a suit in equity brought by the United States,
12 as plaintiff, against 253 upstream users and appropriators of the waters of the Walker River to
13 secure for the benefit of the Walker River Indian Paiute Tribe water for the irrigation of crops
14 on 2100 acres of irrigable land on the Walker River Reservation in the amount of 26.25
15 second feet of water for an annual 180 days irrigation period and the flow reasonably
16 necessary for domestic and stock watering purposes and for power purposes during the non-
17 irrigating season with a priority of November 29, 1859. *United States v. Walker River Irr. Dist.*,
18 *et al.*, 11 F.Supp. 158 (D. Nev. 1935); *United States v. Walker River Irr. Dist., et al.*, 104 F.2d
19 334 (9th Cir. 1939). To the extent water rights were established and became part of the
20 Walker River Decree, do the doctrines of *res judicata* and *issue preclusion* bar consideration
21 by this Court of the present Tribal claims? *See, Nevada v. United States*, 463 U.S. 110, 103
22 S.Ct. 2906 (1983).

23 **6. To what extent are the affirmative defenses of laches and estoppel relevant to**
24 **this case?**

25 Many of the facts giving rise to claims of the United States on behalf of the Tribe and
26 the Tribe itself have been operative since at least 1936. The 50 plus years intervening

27 ///

28 ///

1 between these facts and the counterclaims asserted may give rise to the equitable defenses
2 of laches and estoppel. These affirmative defenses should be addressed as a threshold
3 matter.

4 Submitted this 20th day of August, 2012.

5 CATHERINE CORTEZ MASTO
6 Attorney General

7 By: 

8 MARTA A. ADAMS
9 Chief Deputy Attorney General
10 Nevada State Bar No. 1564
11 Office of the Attorney General
12 100 North Carson Street
13 Carson City, NV 89701-4717
14 (775) 684-1237
15 *Attorneys for State of Nevada*
16 *Department of Wildlife*

17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

1
2 I declare that I am an employee of the State of Nevada, Office of the Attorney General
3 and on this 20th day of August 2012, I electronically filed the foregoing **NEVADA**
4 **DEPARTMENT OF WILDLIFE'S PROPOSED THRESHOLD ISSUES** with the Clerk of the
5 U.S. District Court using the CM/ECF system, which will send notification of such filing to the
6 email addresses that are registered for this case; and I further certify that I served a copy of
7 the foregoing on the following non-CM/ECF participants by U.S. Mail, postage prepaid, this
8 20th day of August, 2012:
9

10 Athena Brown, Superintendent
11 Western Nevada Agency
12 Bureau of Indian Affairs
311 E Washington St
Carson City NV 89701-4065

13 Robert L Auer
14 Lyon County District Attorney
31 S Main St
Yerington NV 89447

15 Michael Axline
16 Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97405

17 George N. Bloise
18 34 Artist View Lane
Smith, NV 89450-9715

19 Courtney Brown
20 pro hac vice
21 P.O. Box 1507
Taos, NM 87571

22 Robert L. Hunter
23 Western Nevada Agency
311 East Washington Street
Carson City, NV 78701-4065

24 Leo Drozdoff, Director
25 State of Nevada
26 Conservation and Natural Resources
901 S. Stewart St., Suite 1003
Carson City, NV 89701

27 ///

28 ///

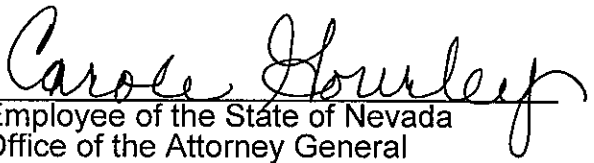
- 1 William J. Shaw
Brooke & Shaw, Ltd.
- 2 1590 Fourth Street
P.O. Box 2860
- 3 Minden, NV 89423

- 4 Garry Stone
Water Master
- 5 290 South Arlington Ave
Reno, NV 89501

- 6 Arthur B. Walsh
- 7 Los Angeles City Attorney's Office
P.O. Box 51-111
- 8 111 North Hope Street, Suite 340
Los Angeles, CA 90051-0100

- 9 George M. Keele
- 10 1692 County Road – Suite A
Minden, NV 89423

- 11 Nevada State Engineer
- 12 Division of Water Resources
901 S. Stewart Street – Suite 202
- 13 Carson City, NV 89701


Employee of the State of Nevada
Office of the Attorney General