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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-ECR Subproceeding: C-125-B THE UNITED STATES OF AMERICA'S AND WALKER RIVER PAIUTE TRIBE'S BRIEF REGARDING WHEN ANSWERS NEED TO BE FILED IN THIS ACTION

At the status conference of the Court on December 3, 2008, the Court asked the United States ("United States") and the Walker River Paiute Tribe ("Tribe") to set forth their position as to when answers should be filed in the above action. This pleading responds to this request.

Litigation of this case under the *Case Management Order*, (Apr. 18, 2000) ("CMO") (Doc. 108), must be consistent with the Federal Rules of Civil Procedure. District courts have authority to prescribe rules (local rules) for the conduct of their own business, but "[s]uch rules shall be

consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a). The Federal Rules of Civil Procedure are prescribed under 28 U.S.C. § 2072. Although these rules provide discretion and flexibility, district courts have no authority to proceed in a manner inconsistent with the Federal Rules of Civil Procedure. *See also* Rule 83(b), Fed. R. Civ. P. ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 . . . and the district's local rules.).

The Federal Rules of Civil Procedure provide for the filing of answers or other prescribed pleadings that frame the issues to be litigated. Rule 7, Fed. R. Civ. P. The Rules require answers to be served within 20 or 60 days of service, depending on whether the defendant was served or waived service. Rule 12(a), Fed. R. Civ. P.[1] This requirement is altered only if a defendant decides to file a dispositive motion pursuant to Rule 12. If so, that defendant is not required to file an answer until the court denies the motion or determines to postpone disposition of the motion until trial. Rule 12(a)(4), Fed. R. Civ. P. 12. To the extent a matter is susceptible of being handled as a dispositive motion under Rule 12, answers are not required until 10 days after a motion is denied or postponed by the Court until trial. Rule 12(a)(4)(A), Fed. R. Civ. P. To the extent, however, a matter cannot be handled as a dispositive motion under Rule 12, answers are required.

The Court must reconcile the CMO with the Federal Rules of Civil Procedure. *See, e.g.*, CMO ¶ 10 at 8-9, (requiring the Magistrate Judge to address case management upon completion of service) and ¶19 at 14 (authorizing the Magistrate Judge to change, modify and adjust the CMO). The CMO does not address when answers need to be filed or how answers are to be submitted in

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[1]The Court's authority to extend this deadline is authorized by Fed. R. Civ. P. 6 for good cause or excusable neglect.

light of the Court's bifurcation of the Tribal and other claims and its division of litigation into phases. Instead, it simply says that no answers or other pleadings will be required except upon further order of the Magistrate Judge. CMO ¶12 at 13. In light of the large number of defendants and extensive efforts required to complete service, this provision makes sense as a matter of case management during the service period. There is, however, no reason to assume that the absence of a deadline to file answers means they do not need to be filed at all or can be filed in violation of the Rules.

It is premature to determine when answers should be filed in relation to the litigation of threshold issues under the CMO because the Court has not yet identified these issues. Identifying an issue as a threshold issue under the CMO does not automatically classify it as a Rule 12 issue. To the extent threshold issues are appropriately addressed as Rule 12 dispositive motions, answers are not prerequisites. Threshold issues that cannot be handled as dispositive motions under Rule 12 should not be addressed until after answers are filed and the issues are properly joined.

The Court should set a deadline after the completion of service for all defendants to answer or file any Rule 12 motions and to state whether they wish to participate in the determination of threshold issues under the CMO.[2] Issues raised under Rule 12(b)(2)-(5) are, by their very nature, threshold issues. Such motions address lack of personal jurisdiction, venue, insufficient process and insufficient service or process, which are issues the United States and the Tribe have already identified as issues that must be resolved initially. The Court should require defendants to file any such motions within that time frame or waive them. This process should also govern motions under

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[2] The Court can delay requiring answers as to the issues that have been bifurcated and held for later phases.

Rule 12(b)(1) for lack of subject matter jurisdiction. Although a Rule 12(b)(1) motion can be filed at any time, the Court has flagged jurisdictional issues as potential threshold issues, CMO ¶ 11 at 9-10, and the Supreme Court has directed that a federal court generally may not rule on the merits of a case prior to determining whether it has subject matter jurisdiction over the claims and personal jurisdiction over the parties. *See Steel Co. v. Citizens for Better Environment,* 523 U.S. 83 (1998). During the last status conference, one defense attorney indicated his intention to file several motions pursuant to Rule 12(b)(6). This process should also address the filing of motions under Rule 12(b)(6) and (7). Once these motions have been filed, they should be reviewed for incorporation into the threshold issues under the CMO. Furthermore, this process should ensure that all defendants are bound by any resolution of these issues.

To the extent that discovery is authorized and attempted by any party in connection with any threshold issue under the CMO or the "contentions of the U.S./Tribe with respect to the basis for the Tribal Claims," CMO ¶15 at 13, discovery must follow answers. The Federal Rules do not provide for discovery prior to the receipt of answers, because the issues are not framed and joined. Moreover, the concept of discovery presupposes that the plaintiff knows what defendants admit or deny and allege as defenses, which the plaintiff cannot know without seeing the defendants' answers. If discovery is allowed before the United Stated and the Tribe receive answers, they will be prejudiced in their ability to prepare and conduct discovery and the parties will needlessly expend resources.

CONCLUSION

The issue of when answers should be filed in this case underscores the need to reconcile the Case Management Order with the Federal Rules of Civil Procedure. This particular issue cannot be

resolved until the Court identifies the threshold issues under the CMO, sets forth a schedule for filing Rule 12 motions, and determines how to address all issues raised under Rule 12 as part of its case management responsibilities. There is no basis for litigating issues that require discovery or are not proper Rule 12 motions until after answer have been filed. Finally, it is essential that these case management steps be handled in a manner that binds all defendants.

Dated: January 16, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009, I served or caused to have served a true and correct copy of the foregoing by electronic mail or first-class mail, postage prepaid, addressed to the following persons:

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