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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 OPENING BRIEF REGARDING PROPOSED PRELIMINARY THRESHOLD ISSUES

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") submit the following regarding their proposed list of preliminary threshold issues, which were submitted in *The United States of America's and Walker River Paiute Tribe's Proposed List of Preliminary Threshold Issues* (June 24, 2008) (Doc. 1360) ("Preliminary Threshold Issues List"), to be addressed at the outset of this litigation, pursuant to the *Case Management Order* (Apr. 19, 2000) ("CMO"), and this Court's direction, *Minutes of the Court* (Aug. 20, 2007, Feb. 1, 2008, Apr. 15, 2008, and July 25, 2008). In the Preliminary Threshold Issues List, the United States and Tribe

explained their approach to identifying threshold issues. The following opening brief reiterates and expands upon this earlier filing.

The CMO requires the Magistrate Judge 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, ¶11 ("Threshold Issues Relative to Tribal Claims").

> The list of threshold issues regarding said claims will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined. Nevertheless, the parties are directed to identify all potential threshold issues promptly and to submit them to the Magistrate Judge for consideration, as he shall direct, so that action may proceed as promptly as possible upon conclusion of service of process. In general, threshold issues, among others, shall address jurisdiction, claim [ ] preclusion, applicable law, equitable and other defenses which may be raised by any party.

Id. The CMO also directs the Magistrate Judge to consider eight specific issues listed therein. CMO at 9-11, ¶11.

I. The General Approach to Identifying Preliminary Threshold Issues.

As a general matter, a threshold issue may assist the Court and the parties by refining and possibly limiting the issues before the Court. Nevertheless, an issue should not be designated a threshold issue as a means to litigate by short-cut and avoid the requirements of the Federal Rules of Civil Procedure. Consequently, some issues are not suitable as threshold issues because their consideration must allow for full discovery and fact-finding. As the State of California has stated: "In general, . . . threshold issues [are] those issues that will aid in determining the scope of litigation without requiring extensive discovery and are subject to interlocutory appeal." *California State Agencies' Suggested Threshold Issue* (June 24, 2008).

Due process demands that all parties have an opportunity to make their cases on the merits and that opportunity should not be subject to a litigation short-cut. Indeed, the two methods by which

claims and defenses may be addressed, short of a full trial, are by a motion to dismiss pursuant to Fed. R. Civ. P. 12 or a motion for complete or partial summary judgment pursuant to Fed. R. Civ. P. 56. The former requires that all facts asserted by the non-moving party be taken as true, and the latter requires that there be no genuine issue as to material facts. Such efforts must be based on an adequate record, not just allegations, which highlights the need for answers from all counter-defendants and discovery from all parties.

We are concerned that the counter-defendants have proposed so many substantive threshold issues that the point of identifying such issues is lost in an effort to find a short-cut to defeat the Tribal Claims, as well as the other tribal and federal claims, and avoid the requirements of the Federal Rules of Civil Procedure. Indeed, the Walker River Irrigation District, Nevada Department of Wildlife, and several individuals have jointly proposed thirteen general issues, with multiple sub-parts, for a total of 28 threshold issues. *Proposed Threshold Issues Submitted by Nevada Department of Wildlife, Joseph and Beverly Landolt, Circle Bar N Ranch, LLC, et al., and Walker River Irrigation District* (June 24, 2008) ("Joint Issues Filing"). The Preliminary Threshold Issues List proposed by the United States and Tribe focuses first on procedural threshold issues not included in the Joint Issues Filing that we believe must be addressed before the Court addresses appropriate substantive issues.

As a basic matter, the United States and Tribe contend that whether an issue is appropriate for consideration as a "threshold issue" depends in large part on the set of facts that must be determined before the Court can appropriately consider and rule on the issue. While some issues may appear, at a superficial level, to fit within the general categories of threshold issues contemplated by the Court, the extent of facts needed to develop them, often including expert testimony, will make them unfit

candidates as threshold issues.

In addition, the sequencing of threshold issues is essential to consider. For example, some issues may be appropriate prior to the receipt of any answers and others may not be appropriate until jurisdiction is clarified as a prerequisite. Moreover, the United States is concerned that certain threshold issues may have a substantive impact on the other tribal and federal claims in this case. As the Court noted in the CMO:

> Any such bifurcation may involve some duplication of work in relation to subsequent phases of the case. There does not seem to be any way to entirely avoid duplication, but we should endeavor to do so to the extent that we can. Another major concern is whether persons litigating in later phases of the case may find themselves prejudiced by being bound by decisions and adjudications in earlier phases where they did not participate. This, too, we should endeavor to avoid.

CMO at 2. This potential is not necessarily a reason to avoid designating an issue as a threshold issue, but these impacts must be considered.

II. Proposed Threshold Issues

A. Threshold Issues related to Service:

The Court has required that the United States and Tribe complete service pursuant to Fed. R. Civ. P. 4 on all members of nine categories of water rights holders described in the CMO. CMO at ¶ 3. Because of the large number of persons and entities within these categories, service on the counter-defendants has been extremely expensive and extremely time-consuming. The CMO directs that service must be complete before the "list of threshold issues. [is] . . . finally resolved and settled. . . so that action may proceed as promptly as possible upon conclusion of service of process." CMO at 9, ¶ 11. Consequently, the United States and Tribe believe that service-related issues should be resolved as initial threshold issues.

1. Whether service is complete.

This issue would include any challenges to the manner and extent of service; case caption; parties and entities identified and served; and parties and entities dismissed. *See e.g.,* CMO at 8, ¶ 9. Fed. R. Civ. P. 12 (b) directs that certain challenges that might fit within this general issue must be filed before answers are filed.

2. Whether publication should occur.

The Federal Rules and the CMO contemplate publication under certain circumstances. Fed. R. Civ. P. 4; CMO at 6, ¶ 5. This issue would include whether and how publication of summons should occur.

3. Whether publication is complete.

This issue would include whether publication is adequate under applicable law.

4. Whether any other categories of persons and entities should be served.

The CMO contemplates that the Magistrate Judge may determine to expand the category of domestic users or other groundwater pumpers. CMO at 3-4. This issue would include whether any additional service should be required; the circumstances of such service; and impact, if any, on the ongoing litigation. If the Magistrate Judge determines to expand service, then time will be needed to complete these additional service requirements.

B. Threshold Issues related to Case Management:

Although the Court and parties are already attempting to address certain case management issues, the CMO also contemplates that the Court address a number of case management issues "[f]ollowing completion of service of process on the said counterclaims." CMO at 8, ¶ 10. The identification and resolution of these matters will be essential for the overall management of the case.

1. Whether C-125-B is the proper case for the Federal and Tribal claims or whether these claims must be filed in a new and separate action.

The parties participating in the Joint Issues Filing rephrase one potential issue set forth at ¶ 11.a of the CMO[1], as "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?" Joint Issues Filing at 2. While the United States and Tribe are surprised that this issue would be raised after the Court designated Case No. C-125-B in 1992, *e.g., Minutes*, Case No. C-125-A (May 18, 1992); *Order*, Case No. C-125-B (Oct. 30, 1992), and after all the years of effort and expense dedicated to service, we agree that if any party wishes to raise this or a similar issue, it should be considered sooner, rather than later.

We suggest, however, that this issue is properly phrased as "whether Case No. C-125-B is the proper case for the Federal and Tribal claims or whether these claims must be filed in a new and separate action," and have identified it as a case management issue, rather than a jurisdictional issue. As stated above, the United States is also concerned that resolution of this issue may impact the other tribal and federal claims in this case.[2]

2. Resolution of any Case Management issue identified generally at p. 8, ¶ 10 of the CMO.

This issue includes addressing and scheduling deadlines for such typical preliminary filings as amendments to claims and answers. A significant period of time will be needed, for example, to

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[1]The United States and Tribe do not agree that the Joint Issues Filing accurately captures the Court's issue as stated in the CMO.

[2]The resolution of this issue may also impact the claims in Case No. C-125-C.

receive and assess the answers from the large number of counter-defendants, and to determine, among other things, whether defenses and other issues raised therein should be addressed as additional threshold issues.

C. Threshold Issues related to Jurisdiction:

The United States and the Tribe believe that jurisdictional issues should be resolved before addressing the merits of any claim or defenses thereto. Such issues include:

1. Whether this court has jurisdiction to adjudicate the said Tribal Claims. If so, to what extent should the court exercise its jurisdiction in these matters? In this connection, what is the scope of this court's subject matter jurisdiction to adjudicate the Tribal Claims to groundwater, as well as to additional surface waters?

This issue is set forth at p. 9-10, ¶ 11.a of the CMO.

2. Whether the court has jurisdiction to enforce tribal rights against claims to groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the Tribe's rights under federal law to use water from the Walker River system? If so, should the court exercise that jurisdiction?

This issue is based on the issue set forth at p. 10, ¶ 11.d of the CMO.

3. If the only jurisdiction of this court with respect to groundwater issues is to protect surface water rights established under federal law from interference by junior groundwater users, must the issues of interference be decided as a part of the adjudication of federal surface water claims?

This issue is set forth at p. 11, ¶ 11.h of the CMO.

4. To the extent there is water in the system that is not covered by the Decree, does the Court have jurisdiction to determine rights in that water, among the parties to the Decree and among other users.

5. Any other challenges to jurisdiction.

Depending on the specific issue raised, the United States is also concerned that resolution of any such issues may impact the other tribal and federal claims in this case.

D. Threshold Issues related to Applicable Law:

These issues can be addressed in conjunction with the assessment of jurisdiction and establish the framework for evaluating the claims and defenses.

1. Does federal law govern the pumping of groundwater on the Walker River Paiute Indian Reservation by the Tribe or the United States on its behalf?

This issue is based on the issue set forth at p. 10, ¶ 11.b of the CMO.

2. If the Tribe has the right to pump groundwater under federal law, what remedies are available to protect such Tribal rights?

This issue is based on the issue set forth at p. 10, ¶ 11.c of the CMO.

3. Whether, regardless of the physical extent of hydrologic connection between surface and groundwater, legal distinctions found in California and Nevada law can operate to limit relief that is otherwise available to protect tribal rights under federal law?

This issue is based on the issue set forth at p. 10, ¶ 11.f of the CMO.

4. Does federal law provide protections from groundwater interference to holders of surface water rights established under federal law that are greater than the protection provided to holders of surface water rights established under state law?

This issue is based on the issue set forth at p. 11, ¶ 11.g of the CMO.

E. Threshold Issues related to Finality or Claim Preclusion:

The United States and the Tribe agree with the counterdefendants that issues of finality or claim preclusion will be a relevant consideration for the Court. They do not agree, however, that these issues may be addressed adequately as to the impact, if any, of the 1936 Decree without completion of extensive discovery and possibly expert testimony. Nevertheless, the United States and the Tribe identify here a related issue raised by counterdefendants, which resolution the parties appear to agree will require further investigation and possibly a limited amount of discovery:

Whether the commencement and resolution of claims against the United States before the Indian Claims Commission, as continued before the Court of Claims, waives, bars or precludes litigation of the Walker River Tribal Claims against non-federal parties?

F. Threshold Issues related to Equitable Defenses:

The CMO contemplates that "equitable defenses" may be addressed to some extent as Threshold Issues and requires that "[w]ithin such time as shall be fixed by the Magistrate Judge the parties now or hereafter appearing in the case shall file for consideration by the Magistrate Judge a statement as to any defenses or issues they intend to assert." CMO at 10, ¶11.e. Thus, each party wishing to assert such defenses must both file the above statement and assert these defenses in its answer. Although this earlier statement will assist both the parties and the Court in ascertaining the nature of issues to be addressed, because a party may change its mind, its answer may not mirror its earlier filed statement. Consequently, the United States and Tribe assert that the Court's initial consideration of these issues may be altered by the content of the answers, once they are filed.

As a general matter, the ability to assert a defense in this case as a matter of law may be an appropriate consideration as a threshold issue, although application of any defense to a case should not be addressed in the abstract. The application of any defense to the case may ultimately require more discovery and consideration than to be classified automatically as a threshold issue.

Dated: September 5, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2008, 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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