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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 RESPONSE REGARDING PROPOSED PRELIMINARY THRESHOLD ISSUES

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") respond to the Opening Briefs filed by various counter-defendants ("Defendants") regarding proposed preliminary Threshold Issues to be addressed at the outset of this litigation pursuant to the *Case Management Order* (Apr. 18, 2000) ("CMO") (Doc. 108).[1] The United States and the Tribe believe that

[1] *Nevada Department of Wildlife's Opening Brief on Threshold Issues* (Sept. 5, 2008) (Doc. 1413) ("Nevada"); *Walker River Irrigation District's Opening Brief on Threshold Issues* (Sept. 5, 2008) (Doc. 1416) ("WRID"); *Opening Brief Identifying Threshold Issues* (Sept. 5, 2008)

(continued...)

the sole threshold issue offered by California can be addressed as a threshold service-related issue and concur in Mineral County's filing. Consequently, our references to "Defendants" address the Landolts, Circle Bar N, Nevada and WRID, who jointly proposed 28 threshold issues[2], but have filed separate briefs that offer varying and often contradictory approaches to certain of these issues.

I. Introduction

Having insisted that the United States conduct careful personal service on several thousand persons and entities, Defendants now complain that this case is taking too long and want a short-cut to end it. *E.g.*, WRID at 9; Landolts at 2, 6. Defendants' approaches to defining and organizing threshold issues generally seek an early knock-out punch of the Tribe's claims by identifying new and different procedural hurdles to keep all of the federal claims at bay and by attempting to reach the merits of such claims prior to any orderly development of the case.

The first "short-cut" Defendants promote would require the United States and Tribe to file their claims in a new case and begin service efforts all over again. This is quite the opposite of trying to streamline litigation and conserve resources, particularly given the approximately eight years and over $1.3 million devoted to service at the direction of the Court and the insistence of the Defendants. Failing this, Defendants second short-cut addresses the merits of the claims as threshold issues, on the

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[1](...continued)
(Doc. 1415) ("Circle Bar N"); *Landoldts' Opening Brief Regarding Proposed Preliminary Threshold Issues* (Sept. 5, 2008) (Doc. 1414) ("Landolts"); *Mineral County Preliminary Threshold Issues Opening Brief* (Sept. 5, 2008) (Doc. 1412) ("Mineral County"); *California State Agencies' Opening Brief on Threshold Issues* (Sept. 5, 2008) (Doc. 930, filed in Case No. C-125) ("California"). Several other parties have joined in the filings by the Landolts, Circle Bar N, Nevada and WRID.

[2]*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) (Doc. 1361) ("Defendants' Proposed Threshold Issues").

apparent ground that doing so would obviate the need to litigate the merits later. Defendants skip over essential threshold issues of subject matter and personal jurisdiction and seek advisory opinions on the merits of the Tribal Claims. Defendants erect elaborate multi-tiered frameworks for this task, effectively establishing threshold issues for their proposed threshold issues and mini-trials for proposed threshold issues that also incorporate the merits of the Tribal Claims.

Defendants' attempts to litigate the merits of the Tribal Claims as threshold issues is squarely contradicted by the Court's CMO, which directs that these proceedings:

> shall be conducted in multiple phases as follows:
>
> (a) **Phase I** of the proceeding shall consist of the threshold issues as identified and determined by the Magistrate Judge.
>
> (b) **Phase II** will involve completion and determination on the merits of all matters relating to the said Tribal Claims.

CMO at 11, ¶12. The common strategy in Defendants' filings move Phase II's completion and determination of the merits of the Tribal Claims into Phase I threshold issues. Defendants' attempts to rush this case to conclusion violate the CMO and brush aside the orderly and fair management of litigation under the Federal Rules of Civil Procedure, subverting the requirement that these rules be construed and administered to promote, not just the speedy and inexpensive end of cases, but their just resolution as well. *See* Fed. R. Civ. P. 1.

The United States and the Tribe seek water rights for: 1. Weber Reservoir; 2. lands restored and/or transferred to the Walker River Paiute Reservation after April 14, 1936; and 3. groundwater associated with the entire reservation. These claims are based on the doctrine of federally reserved water rights first established in *Winters v. United States*, 207 U.S. 564 (1908). When the Federal Government withdraws land from the public domain for a federal purpose, by implication it reserves

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unappropriated water to accomplish the purposes of the reservation. *E.g., Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981).

The four essential elements the United States and Tribe must ultimately establish are: 1. the extent and nature of the federal withdrawal and reservation of land underlying the claims; 2. the purpose(s) of the withdrawal or reservation; 3. the amount and source of unappropriated water available at the time of the withdrawal or reservation; and 4. the amount and source of water needed to accomplish the purpose(s) of the reservation. These elements must be approached from the perspective that the federal reservations of water at issue address the ultimate purposes of the Walker River Paiute Reservation as a permanent homeland for its members.

> [I]t seems clear to us that each of the Indian reservations in question was created as a "permanent home and abiding place" for the Indian people, as explained in *Winters*, 207 U.S. at 565, 28 S. Ct. at 208. This conclusion comports with the belief that "the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 47 (9th Cir. 1981). Such a construction is necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency.

In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 35 P.3d 68, 76 (Ariz. 2001) (citations omitted). These are the ultimate issues to be decided and clearly represent "the merits of all matters relating to the . . . Tribal Claims." CMO at 11, ¶12. Although the CMO anticipates that these matters will be addressed in Phase II, not Phase I, each Defendant proposes to address one or more of these elements as a Phase I threshold issue. We submit that any issue designed to litigate the merits of the United States' and the Tribe's reserved federal water rights claims prematurely is inappropriate and prejudicial as a threshold issue.

Not only do Defendants wish to litigate the merits of the Tribal Claims early, they assert that the Court can decide these fact-intensive issues based on minimal or truncated factual development. The ability to use discovery in Phase I threshold issues should be limited and not open the floodgates to

litigation-level discovery. Indeed, a threshold issue should help determine the scope of litigation with the aid of little or no discovery and be subject to interlocutory appeal. *See California State Agencies' Suggested Threshold Issue* (June 24, 2008) (Doc. 1359). *See also* Mineral County at 5. Equally important is that issues requiring significant discovery not receive short shrift.

One fundamental problem with many of the Defendants' proposed threshold issues is that they are fact-intensive and require significant discovery, including expert testimony. A second fundamental problem with many of the Defendants' proposed threshold issues is that they assume legal standards this Court has yet to address.

II. History of the Proceedings Before this Court.

Before addressing the Defendants' proposals, it is important to provide the historical and procedural context underlying Case No. C-125 and its sub-proceedings. Put into context, it is clear that many of Defendants' proposals are unworkable, prejudicial, or both.

A. Litigation in Case No. C-125 and the Walker River Decree.

The United States filed this equity proceeding in 1924 to quiet title to a water right claim for the Walker River Reservation and requested the Court to determine the relative rights of parties in Nevada and California to water from this river system. On April 14, 1936, following trial, the Court entered a judicial Decree that included a direct flow right of 26.25 cfs to the United States for the irrigation of 2,100 acres on the Walker River Indian Reservation. *United States v. Walker River Irr. Dist.*, 11 F. Supp. 158 (D. Nev. 1935). The decision was reversed, in part, because the Court did not recognize this right as a federally reserved water right. *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939). On April 24, 1940, the Court amended the Decree to address the 9th Circuit's ruling and incorporate a stipulation among the parties that:

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> This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries **as of the 14th day of April, 1936**, ...

Decree at ¶XII, p. 72 (amended language in bold).

Following entry of the Decree, the Court retained jurisdiction "for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . ." Decree at XIV, p. 72-73. Over the years it has exercised ongoing authority over and supervision of these proceedings, including approving rules to implement the Decree, addressing requests to amend the Decree, and appointing Water Masters and members of the U.S. Board of Water Commissioners.

B. Case No. C-125 and its sub-proceedings.

This proceeding is one of three sub-proceedings in Case No. C-125. In 1991, in Case No. C-125-A, WRID petitioned the Court for injunctive and declaratory relief after California issued administrative orders to protect instream and minimum pool objectives for Topaz and Bridgewater reservoirs. WRID sought relief in the federal court, arguing that the California agency was acting inconsistently with the Decree and interfering with the federal court's retained jurisdiction. This matter was ultimately settled.

On March 17, 1992, the Tribe filed a cross-claim in Case No. C-125 against WRID and other defendants, as well as a counterclaim seeking a water right for lands restored to the reservation subsequent to the Decree and a right to store water in the Weber reservoir. The Court separated these issues into Case No. C-125-B. *Order* (C-125-A, May 18, 1992) (Doc. 34). The United States also sought leave to file a counterclaim for the same additional water rights for the Tribe. WRID moved to dismiss the counterclaims, to require joinder of all claimants to water in the Walker River basin, and to require service of process on all such claimants or, service of notice of substitution on successors to the

parties to the Decree. Nevada intervened, opposing the counterclaims. On October 27, 1992, the Court denied the motions to dismiss, required joinder of "all claimants to the water of the Walker River and its tributaries," and ordered the Tribe and the United States to serve those persons pursuant to Rule 4, Fed. R. Civ. P. *Order* (C-125-B, Oct. 27, 1992) (Doc. 15) at 6. On July 31, 1997, the United States and the Tribe sought leave to file amended counterclaims to include a new claim to use groundwater under and adjacent to the reservation and the United States included new claims for additional tribal and other federal interests in the basin. The United States and the Tribe asserted that the surface and groundwater systems of the Walker River Basin are so interconnected that taking water from one affects the amount available to the other. The Court granted leave to file the amended counterclaims.

Finally, in proceedings filed in October 1994, and denominated Case No. C-125-C, *Minutes of Court* (C-125-B, Jan. 3, 1995) (Doc. 46), Mineral County seeks to intervene to address the decline of water in Walker Lake. Mineral County has also been directed to identify and serve its intervention motion upon the current Decreed water users, which efforts are ongoing.

C. The Court's Case Management Order in C-125-B.

On April 18, 2000, after extensive briefing, the Court issued its CMO, in which it acknowledged the potential complexity of trying the claims and bifurcated the Tribal Claims from the other federal claims, because the remaining federal claims "appear[] to require development of a distinctly different factual scenario, as well as specific legal basis." CMO at 2. No answers or other pleadings are required except upon further order of the Magistrate Judge. CMO at 12, ¶13. All discovery, except as expressly stated in the CMO, is stayed. *Id.*

1. Service of Process and the Case Management Order:

The Court required the United States and Tribe to effect personal service pursuant to Fed. R.

Civ. P. 4, upon nine categories of persons and entities. CMO at 5-6, ¶3. After reviewing the parties' submissions, the Court determined who should be served based on its review of all claims in this sub-proceeding. *See* CMO at 1 - 4. Consequently, the service requirements address all federal claims, not just the Tribal Claims. Over the last 8 years, the Court, including the Clerk's Office, and the United States have invested significant resources and attention to these ongoing service efforts. Following the Court's approval of its service package, the United States has mailed over 3,000 service packages, personally served almost 1,500 persons and entities, and obtained the review and approval of its efforts by the Court and Defendants through thirteen Service Reports and three proofs of service. In response to the Defendants' concerns, the United States is working to complete service by the end of 2008.[3]

The CMO authorizes the Magistrate Judge to "consider and decide all issues which may arise pertaining to service of process," CMO at 7, ¶6, including establishing a schedule for completion of service, determining whether the categories to be served should be adjusted, modified or expanded, determining whether and when publication is appropriate, and determining whether specific service efforts are adequate and whether service efforts as a whole are adequate and complete. CMO at 6-8.

2. Threshold Issues and the Case Management Order.

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 said 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

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[3]This does not include such issues as challenges to service, possible publication, and any determination whether service is complete.

> 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. Discovery shall be allowed to all parties on threshold issues. *Id.* at 13. The CMO also directs the Magistrate Judge to consider the eight specific issues listed below, which the parties and the Court identified in determining the CMO. *Id.* at 9-11, ¶11.

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?

2. Does federal law govern the pumping of groundwater on the Walker Lake Paiute Indian Reservation by the Tribe or the U.S. on its behalf?

3. If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law, subject to different protections than those provided by State law?

4. Whether the court has jurisdiction over groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute 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?

5. Whether equitable defenses bar some or all of the said Tribal Claims. Within 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.

6. Whether, regardless of the extent of hydrologic connection between surface and groundwater, this court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law.

7. Are the holders of surface water rights established under federal law entitled to protection from the use of groundwater beyond the protection provided to holders of surface water rights established under state law.

8. 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.

CMO at p. 9-11, ¶11. Interestingly, Defendants no longer consider most of these to be threshold issues.

III. Defendants' Approaches to Threshold Issues

Although Defendants propose a variety of ways to define and organize threshold issues, their filings share several commonalities. Each Defendant proposes threshold issues that address: 1. jurisdiction; 2. finality, issue and claim preclusion; 3. equitable defenses; and 4. determining one or more aspects of the merits of the Tribal Claims (and other federal claims) as Phase I threshold issues.

A. The Landolts:

The Landolts assert that threshold issues are simply a way to dispose of the Tribal Claims: "A threshold issue is one the decision of which will either dispose of a claim or greatly narrow the issues related to it." Landolts at 2. Although they endorse the complicated and tiered approaches proposed by WRID and Circle Bar N, they maintain that threshold issues are "profoundly simple and could dispose of this entire action." *Id.* at 6. In the Landolts' view, the Court should "short circuit extended litigation activities" and dispose of the claims at the earliest possible time, because "those issues the factual basis for which is not in serious question and the answers to which can dispose of the case" are as important as jurisdiction, standing and the legal sufficiency of the claims. *Id.* at 3, 6.

Consequently, the Landolts assert that factual issues can be addressed by stipulation or judicial notice. "What will be saved by proceeding in this manner is discovery and substantial factual development; activities that take up the lion's share of time and resources in litigation." *Id.* at 3. One issue the Landolts believe is not in need of discovery and substantial factual development is the *purpose* of the lands added to the Reservation in 1936. The purpose of these lands – indeed, the purpose of the entire Walker River Paiute Reservation – is clearly one of the central issues in the case. Thus, it is clear the Landolts seek to use threshold issues to dispose of the merits of the Tribal Claims and as a means to avoid the requirements of the Federal Rules of Civil Procedure, including discovery and the standards

for reviewing dispositive motions set forth in Rules 12 and 56.

B. Nevada:

Nevada asserts that 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) if resolved, are either partially or wholly dispositive of key issues raised in this litigation." Nevada at 2.[4] Nevertheless, it proposes many fact-intensive issues as threshold issues.

In addition to claiming that the Tribal and federal claims should be brought in another case, discussed further below, Nevada identifies a second jurisdictional issue - whether the Court has jurisdiction over the groundwater claims - as requiring the Court to determine whether the 1936 Decree is all the water needed to carry out the purpose of the reservation. We agree that the issue of jurisdiction over groundwater is a threshold issue. We do not agree that a determination of this issue requires the Court to determine legal and factual issues concerning the finality of the 1936 Decree, legal and factual issues about the purposes of the reservation, and legal and factual issues about the amount of water needed to carry out those purposes. Each of these determinations is a separate fact-intensive issue. Indeed, Nevada reverses the determination of the merits of the Tribal Claims by attempting to have the amount of water needed for the reservation determined as a threshold and preemptive issue.

Nevada then shifts to another fact-intensive issue that requires legal determinations – the purpose of the lands added to the Reservation subsequent to the 1936 Decree. Nevada, as with all of the

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[4]Nevada claims that the groundwater is subject to a fully developed independent permit system administered by Nevada, and repeatedly, inaccurately, and unfairly paints the Tribe as the reason Walker Lake is declining, placing the fate of the Lake and fish at the Tribe's feet. Nevada at 3-4. A fundamental and critical element of the Lake's distress is the State's implementation of a parallel appropriation system for groundwater when surface water and groundwater are connected resources.

Defendants, attempts to divide the Reservation into subparts and treat the added lands as if they were a suburban subdivision annexed to a town, and then identify a separate purpose for this subdivision. We disagree fundamentally with this approach on both legal and factual grounds. The purpose(s) of the Walker River Paiute Reservation, including the lands added beginning in 1936, is a fundamental element of the merits of the Tribal Claims that requires both discovery and factual development and a determination of governing substantive law; as such, it is not a threshold issue. Finally, Nevada proposes as threshold issues, without explanation, the legal basis for the claim to water for Weber Reservoir, the res judicata effect of the 1936 Decree and any payments to the Tribe before the Indian Claims Commission on the Tribal Claims, and the possibility that affirmative defenses of laches and estoppel may be relevant.

C. Circle Bar N:

Circle Bar N offers a three tiered approach to almost 25 "threshold" issues, which it admits "may entail some redundancy." Circle Bar N at 3. It defines a threshold issue as one "that should be decided in the early stages of litigation as it will limit the scope of litigation, eliminating issues or counterclaims that are not sustainable under the Winters Doctrine." *Id.* at 1-2. Of course, the sustainability of the United States' and Tribe's federal reserved water rights claims is at the heart of the merits of this case. Under this definition, the merits of the case become threshold issues. This simply moves litigation of the merits case, which requires discovery, into the threshold issues, contrary to the CMO.

Circle Bar N explains that if the United States impliedly reserves waters for a federal reservation pursuant to the Winters Doctrine, the Court must examine the purpose for the creation of the reservation when determining the scope of that right. *Id.* at 1-3. We do not necessarily dispute this statement. But Circle Bar N and the other Defendants would determine the purpose(s) of the Walker River Indian

Reservation as a threshold matter by dividing the reservation into parts and identifying different purposes for each part, and then approach other threshold issues based on this determination. The fundamental problem with this approach is that it transforms a key issue concerning the merits of the Tribal Claims that is fact-intensive and requires a legal foundation into a threshold issue and presupposes the applicable law and facts.

Circle Bar N's first tier of threshold issues includes nine issues: the jurisdictional/case management issue that all Defendants raise; four issues that combine claim and issue preclusion with multiple legal and factual issues regarding the merits of the Tribal Claims; and four claimed legal issues based on certain claims of disputed fact. In its second tier of threshold issues, Circle Bar N identifies three potential equitable defenses and at least seven sub-issues, all of which present legal and factual issues that require discovery. Circle Bar N relegates five of the issues the CMO identifies as potential threshold issues to its third tier, adding one additional issue regarding the potential jurisdiction of Nevada over groundwater on the Reservation. In contrast to the Landolts, Circle Bar N acknowledges that many of these issues require legal research and discovery.

D. WRID:

WRID suggests that threshold issues deal with the issues that it considers easier and potentially dispositive and analogizes its approach to using Fed. R. Civ. P. 42(b) to bifurcate separate trials on issues or claims. This approach disregards the CMO's division between Phase I threshold issues and Phase II merits issues. Instead, WRID selects four issues – the affirmative defenses of finality/res judicata, laches and estoppel, and the purpose of one portion of the Walker River Indian Reservation, and would move these issues into full discovery, dispositive motions and possible trial apart from any

other issue in the case. This is a radically different approach to managing this case than contemplated in the CMO.

IV. Defendants' Proposed "Threshold Issues" are Inconsistent with the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure guide the management of litigation in civil cases before the federal courts, including cases that are complex because of size or issues presented. Certain procedural steps must be met at the outset either as threshold issues or prerequisites to threshold issues. Defendants have not addressed these requirements. Furthermore, the Rules direct how dispositive motions are addressed, whether or not they are raised as threshold issues.

A. Procedural and Substantive Requirements:

1. <u>Service and Personal Jurisdiction:</u> The Court has required that the United States and Tribe complete service pursuant to Rule 4 on all members of the nine categories of water rights holders described in the CMO. CMO at p. 5-6, ¶3. The CMO directs that service must be <u>complete</u> 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. Thus, service is a prerequisite to any other threshold issues. Because personal jurisdiction is a vital threshold issue, as discussed below, the determination whether service is complete should address personal jurisdiction, as well as challenges to the manner and extent of service, case caption, publication, parties and entities identified and served, and parties and entities dismissed.[5] In addition, because the CMO contemplates that the Magistrate Judge may expand the category of domestic users or other groundwater pumpers to be served, CMO at 3-4, this issue should be resolved promptly to allow for completion of any additional

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[5]Certainly, if there is no personal jurisdiction over any Defendant, it will conserve that Defendant's resources.

service. California asks whether unnamed senior water right holders in California with dormant or unexercised water rights are subject to compulsory joinder. California at 2. This appears to be a service-related issue that should be included in Court's assessment of whether service is complete.

So far, Defendants do not address these issues, but, as a practical matter, they may be time-consuming. Because the CMO states that threshold issues are not to be finalized until service is complete, the Court will have to reconsider the issues raised in the instant pleadings sometime after it determines whether service, including any publication, is complete.

2. Answers: The Rules also require Defendants to file Answers that respond to the specific claims and to identify their defenses, including affirmative defenses, or face the consequences of failing to answer. Fed. R. Civ. P. 7(a); 12(a). Each Defendant shall state in short and plain terms its defenses to each claim asserted, admit or deny the allegations asserted, and affirmatively state any affirmative defenses, including certain enumerated defenses. Fed. R. Civ. P. 8; Fed. R. Civ. P. 12(b). At this point, Defendants have not answered and are not required to do so until ordered by the Court. The CMO 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. Although some Defendants have identified equitable and other defenses, they may change their minds and their Answers may not mirror these earlier statements.[6] Furthermore, there have been neither early identifications of defenses nor Answers from several thousand other Defendants. The contents of all Answers will need to be reviewed and considered. Indeed, once all Answers have been filed, the United States may identify defenses it

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[6]For example, in their joint filing of proposed threshold issues, Defendants assert equitable reliance and waste as potential defenses and do not address these issues in their briefs. Defendants' Proposed Threshold Issues at 4.

believes should be struck at an early opportunity.

So far, Defendants do not address these issues, but, as a practical matter, they may be time-consuming. Moreover, because it will be necessary to review all Answers and the Answers may raise defenses and other issues that may impact threshold issues, the Court will have to consider the Answers filed and reconsider the issues raised in the instant pleadings when it finalizes threshold issues.

B. <u>Dispositive Motions and Threshold Issues:</u>

Efforts to put issues of law or fact before the Court through threshold issues cannot ignore the requirements of the Federal Rules of Civil Procedure, including the need to determine the governing substantive law or to develop relevant facts. Defendants appear to believe that certain issues can be resolved by the Court either without facts or based on a limited set of facts that they or the Court can identify. While it is always helpful if parties can agree on stipulated facts for purposes of dispositive motions, Defendants' descriptions of issues they believe are capable of easy resolution ignore the need to develop and identify relevant facts and assume that the United States and the Tribe must agree to the limited set of facts they espouse.

The Federal Rules provide two methods by which claims and defenses may be addressed short of a full trial – a motion to dismiss pursuant to Fed. R. Civ. P. 12 and a motion for complete or partial summary judgment pursuant to Fed. R. Civ. P. 56. The standards to review such motions are well established. When a Court reviews a motion to dismiss, it must take as true all facts asserted by the non-moving party. When a Court reviews a motion for summary judgment, it must determine that there are no genuine issues of material fact and that the movant is entitled to summary judgment as a matter of

law. Discovery is typically necessary prior to moving for summary judgment.[7]

The Rules also provide for discovery in litigation on any non-privileged matter relevant to any claim or defense, through such means as interrogatories, requests for admission, document production, and depositions of lay and expert witnesses. *See* Fed. R. Civ. P. 26 - 37. While the CMO contemplates limited discovery on threshold issues, CMO at 13, ¶15, this should not be construed as an invitation to convert threshold proceedings into full litigation of the case.

V. Defendants avoid resolution of jurisdictional issues.

Defendants ask the Court to determine the merits of the Tribal Claims before resolving its jurisdiction to do so. While in the past, some courts have "assumed" jurisdiction to address merits questions they perceived readily resolved in the favor of parties that might also contest jurisdiction, that approach is discredited. Consequently, threshold issues must address jurisdictional issues at the outset.

A. Subject matter and personal jurisdiction are threshold issues.

In *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998), the Supreme Court 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.

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[7] Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is "material" if it might affect the outcome of a suit, as determined by the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if sufficient evidence exists such that a reasonable fact finder could find for the non-moving party. *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076, 1079 (9th Cir.2004) (citing *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir.2001)). Further, this Court views all evidence in the light most favorable to the non-moving party. *Id.*

Marijuana Policy Project Case v. Miller, --- F. Supp. 2d ----, 2008 WL 4378481 (D. Nev., 2008).

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 7 Wall. 506, 514, . . . (1868). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones, supra,* at 453, . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, . . . (1884).

Steel Co. at 94-95. The Court rejected the "doctrine of hypothetical jurisdiction," under which a court "assumes" jurisdiction to address the merits when "(1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 84. *See, e.g., United States v. Troescher,* 99 F.3d 933, 934, n.1 (1996).

> Hypothetical jurisdiction produces nothing more than a hypothetical judgment-which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362, . . . (1911); *Hayburn's Case*, 2 Dall. 409 (1792).

Id. at 101. There is no mandatory sequencing of jurisdictional issues, *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584 (1999).

Moreover, the Court should determine its jurisdiction to enforce its judgments.

> [I]t becomes the duty of the court to determine [jurisdiction] before examining the merits. Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.

Riggs v. Johnson County, 73 U.S. 166, 187 (1867). It has been over 10 years since the United States and Tribes filed their amended claims. The United States and the Tribe contend that this Court has jurisdiction to hear cases brought by the United States involving competing claims to water rights. *United States v. Nevada and California*, 412 U.S. 534, 538 (1973). A federal court should be able to determine the merits of claims brought before it and then move into enforcement without having to stop

and determine if it has any right to enforce its judgments. If the Court believes it has no way to enforce its judgments, the parties should know this now before they devote more time and resources to litigation.

As a result, the Court should address subject matter and personal jurisdiction as initial threshold issues before proceeding with any other threshold or other issues. As noted above, personal jurisdiction is appropriately handled as a threshold service issue. Subject matter jurisdiction should address:

> 1. Whether the Court has jurisdiction to adjudicate each of the Tribal Claims, specifically whether the Court has jurisdiction to adjudicate claims to groundwater and claims to surface water.
>
> 2. Whether the Court has jurisdiction to enforce tribal rights against claims to groundwater used under State law outside the Tribe's Reservation if such use interferes with the Tribe's rights under federal law to use water from the Walker River system.
>
> 3. To the extent there is water in the Walker River 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.
>
> 4. Any other jurisdictional challenges or issues of absention.

Some of these issues may impact the other federal claims.

B. Defendants' proposed jurisdictional issue addresses case management, not the jurisdiction of the federal court to hear the Tribal and other federal Claims.

Defendants raise the following as their sole threshold jurisdictional issue:

> 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?

WRID at 10. *See also* Landolts at 5; Circle Bar N at 4; and Nevada at 4-5[8]. This issue, as phrased by the Defendants, does not focus on the authority of the federal court to hear the tribal and other federal

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[8]Nevada also identifies as a jurisdictional issue whether the Court has jurisdiction over groundwater. Nevada at 4-5.

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Claims, but on the vehicle in which these claims are brought before it. Moreover, Defendants' approach to this issue would inject the merits of the Tribal Claims and questions regarding the extent of finality of the 1936 Decree into a review of the Court's jurisdiction.

The Defendants, having insisted that the United States and Tribe serve several thousand persons and entities pursuant to Fed. R. Civ. P. 4, and having reviewed and approved both the service materials used and periodic reports made by the United States in conducting service over the last eight years, now contend that the United States and Tribe must start all over again in a new action before the same court. During the parties' discussions about threshold issues, Defendants made clear that the "logical extension" of this issue would require the United States and the Tribe to re-file their claims in the same federal district court under a new case number and re-serve all of the several thousand defendants pursuant to Fed. R. Civ. P. 4. Without commenting further here on the eight years and over $1.3 million dollars spent so far on service at the direction of the Court and the insistence of the Defendants or the strain that a second service effort would place on the several thousand persons and entities served in Case No. C-125-B, the United States and the Tribe believe this is really an issue of case management, rather than jurisdiction. We suggest rephrasing the issue as follows:

> Whether the fact that the Tribal and other federal claims were brought in Case No. C-125, a proceeding in equity, and separated by the Court into sub-proceeding Case No. C-125-B, constitutes a procedural error. If so, does this error deprive the District Court of jurisdiction and require that these claims be brought again in a new and separate action and be re-served on all defendants or does it constitute harmless error.

While we disagree with the issue raised, we agree that it should be addressed as a threshold issue as we state it, following the Court's determination of its subject matter and personal jurisdiction. This issue, however phrased, impacts all of the other federal claims, as well as the claims set forth in Case No. C-125-C.

VI. Significant Issues of Law and Fact Remain Unresolved.

The parties disagree over both the legal standards to determine the Tribal Claims and the legal standards to quantify these claims. Defendants frame many of their proposed threshold issues in terms of legal standards that the United States and Tribe contend are inapplicable. Defendants also offer as settled fact numerous assertions that the United States and Tribe dispute or contend require further discovery. Many of Defendants' assumptions as to law and fact go to essential issues related to the merits of the Tribal Claims that the Court must examine.

The Court should determine the correct legal standards before proceeding into the merits of the Tribal Claims so the parties and the Court will know what issues are relevant to discovery, testimony, evidence, and cross-examination. Otherwise, an enormous investment of time and resources may be made in discovery, discovery disputes, motions, hearings and at trial on potentially irrelevant issues and omit consideration of relevant issues. Issues of fact that are disputed and require extensive discovery are not appropriate components of threshold issues.

A. Legal Issues for Resolution as Threshold Issues:

The United States and the Tribe agree that certain issues of law potentially subject to interlocutory appeal can be decided as threshold issues.[9] Other issues suggested by Defendants are inappropriate for threshold issues.

1. Applicable Law for Groundwater Claims and Available Remedies:

1. Whether federal law governs groundwater pumping on the Reservation by the United States or the Tribe.

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[9]While the United States agrees that these issues can be decided as threshold issues, we make no concessions as to the merits of the legal issues that Defendants propose to raise or whether they are proper for interlocutory appeal.

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

Litigants should understand both the applicable law to determine claims to groundwater as well as the remedies available to the Court to protect any such rights, before the Court determines the merits of the Tribal Claims. This will help frame both litigation and settlement approaches for the parties. The first issue appears to us to be another way of asking whether groundwater can be claimed under the federal reserved rights doctrine, which Circle Bar N and WRID propose as threshold issues. Circle Bar N at 6; WRID at 11. WRID would prefer to push the second issue to a later phase, but we contend that the applicable law as to rights and remedies should be identified as threshold issues and available for interlocutory appeal, along with any other jurisdictional issue.

2. The Desert Lands Act:

Defendants Circle Bar N, WRID, and the Landolts claim that the Desert Lands Act severed water from public domain lands to preclude claims for federally reserved rights for land that had been opened to entry. Circle Bar N at 7-8; WRID at 13; Landolts at 3 (incorporating the other Defendants' briefs). The United States and the Tribe agree this is an issue of law that can be addressed as a threshold issue. Some limited facts may be necessary or helpful regarding the ownership history of the various lands added to the Reservation after April 14, 1936.

3. Equitable Defenses:

The availability of certain equitable affirmative defenses as a matter of law in the context of a federal reserved rights case could be determined as a threshold issue. Defendants appear to agree with this proposition. The parties disagree about whether the merits of any such affirmative defense are appropriate threshold issues; this issue is discussed below.

4. Indian Claims Commission Proceedings:

Defendants raise as a potential affirmative defense whether claims filed by the Tribe against the United States before the Indian Claims Commission ("ICC") have a preclusive impact on the Tribal Claims. Claims before the ICC concern claims against the United States by a Tribe, not claims against non-federal parties. This issue may involve limited factual investigation (Defendants admit they have not investigated this issue), but is likely resolved as a matter of law.

B. Proposed Legal Issues That are Fact-Intensive.

Defendants suggest numerous threshold issues that are fact-intensive. Issues of fact that are disputed and require extensive discovery are not appropriate threshold issues.

> 1. Whether a claim to a right for conservation storage of water in Weber Reservoir may be made under the implied reservation of water rights doctrine , . . . , or any other theory of common law. (*See* WRID at 11.)

This proposed issue essentially asks whether the Winters Doctrine applies to Weber Reservoir, which is one of the Tribal Claims. It does not present an issue of law alone but applies the specific facts and circumstances of the Tribal Claim for this reservoir. Defendants also identify (here and elsewhere) that this issue should address the availability of "any other theory of common law," but do so without explanation as to what specific theories they are considering. Any issue of law should identify the theories clearly. The circumstances regarding Weber Reservoir are fact-intensive and require significant discovery, including expert testimony from an historian. This issue could be restated as a legal issue, as follows: Whether a federally reserved right can be claimed for stored water within an Indian reservation.

> 2. Whether the United States may reserve water, under the federal implied reservation of water doctrine, from a water source that is not within the lands being reserved. (WRID at 11; Circle Bar N at 3.)

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This proposed issue does not constitute a legal issue that can be addressed without raising a broad range of legal and factual issues, such as the purpose(s) of the reservation, the purpose(s) of any additions to the Reservation, the meaning of the 1940 stipulation and amendment to the 1936 Decree, and the hydrology of the Walker River Basin. Even WRID acknowledges that this may include a factual component and needs to be considered in conjunction with considering the purpose of the reservation. WRID at 11. As a basic matter, this proposed issue is more properly addressed in the consideration of the merits of the Tribal Claims.

VII. Defendants inject the merits of the Tribal Claims into potential issues of finality.

The United States and Tribe agree that determining the final or preclusive effect of the 1936 Decree as to the Tribal Claims is a relevant issue, but do not agree with the manner in which Defendants would address it. Although Defendants contend that finality should be elevated to threshold issue status in Phase I, the CMO does not specifically identify it as such. As a basic matter, finality is not a jurisdictional issue. Rather, it is an affirmative defense that presents issues of law and is fact-intensive. We agree that at some point after the Court determines its subject matter and personal jurisdiction to determine the Tribal Claims, it should determine the extent to which the Tribal Claims are impacted, if at all, by the 1936 Decree, but we do not agree that this is a threshold issue.

Standing alone, the determination of the extent to which the 1936 Decree is final requires mutual discovery, factual development and expert testimony from an historian about the circumstances and context of the earlier litigation as a whole, as well as the 1936 Decree and its 1940 amendment by the parties and the Court. Even so, several Defendants compound the potential complexity of this issue by changing the merits of the Tribal Claims and the merits of Defendants' various equitable defenses, into elements of this affirmative defense, and then propose to move the litigation of these combined issues

into the Phase I set of threshold issues. The issue to be determined regarding the finality of the 1936 Decree is whether the United States and Tribe should have brought any of the Tribal Claims earlier, not whether the Tribal Claims are meritorious or whether equitable defenses bar them. Each of these issues presents issues of law and requires substantial discovery and factual development regarding the relevant facts. Moreover, this approach is prejudicial to the United States and the Tribe because it allows Defendants to assume trial of the merits of the Tribal Claims in the context of trying their defenses.

Each Defendant uses the issue of finality to address other issues, including the merits of the Tribal Claims. The Landolts blend finality with their claim that the Court does not have jurisdiction to hear the Tribal Claims. Landolts at 5. Nevada maintains that when the Court determines whether it has jurisdiction over groundwater, it must address the legal and factual issues related to the finality of the 1936 Decree. Nevada at 4-5. The Court's jurisdiction is separate from and predicate to deciding whether certain claims should have been brought earlier. Circle Bar N combines finality with the merits of the Tribal Claims in three of its own "Tier 1" threshold issues. Circle Bar N at 5-7. First, it asserts that finality, as a matter of law, bars the Tribal Claims as of April 14, 1936. This issue requires a factual basis and is not purely an issue of law. Second, it asserts that finality bars the Tribal Claims related to Weber Reservoir for lands within the Reservation when the 1936 Decree was entered, and that as part of this determination, the United States must establish its entitlement as a matter of law and fact for a storage claim for Weber under the Winters doctrine. This, however, presents multiple merits issues, each of which is fact intensive and not part of finality. Third, Circle Bar N makes a similar assertion as to the groundwater claims, again attempting to require the United States and Tribe to establish their

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entitlement to groundwater as a matter of law and fact as part of the finality determination.[10] Circle Bar N would further complicate the issue of finality, which is itself fact-intensive by adding in other issues that are also fact intensive and present numerous issues of law. WRID views finality as an affirmative defense and proposes a bifurcated trial of this issue pursuant to Fed. R. Civ. P. 42(b), but also would address the merits of the Tribal Claims as part of this proceeding. WRID at 9, 11, 12. WRID purports to separate these issues into separate trial proceedings in Phase I, but divides finality into five sub-issues that would litigate the merits of all three Tribal Claims as well. WRID at 12. This view recognizes the legal and factual components of the issue and clearly moves it out of the running to be a threshold issue. Since the only issue before the Court is a consideration of proposed preliminary threshold issues, the manner in which finality should be handled as a matter of case management, particularly if any party seeks a separate trial track for that issue, should be addressed another day.

VIII. The purposes of the Walker River Indian Reservation is an essential element of the merits of the Tribal Claims.

One key element to the merits of the Tribal Claims is to determine the purpose(s) of the reservation. Defendants frame many of their proposed threshold issues in terms of what they contend is the purpose of the Walker River Reservation, which they base on <u>their</u> view of both the applicable legal standard and relevant facts regarding the Walker River Paiute Tribe. Defendants assume both law and facts in these proposed threshold issues; the United States and the Tribe disagree with these assumptions. None of the proposed issues framed in this manner can constitute threshold issues because

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[10] Here, Circle Bar N contradicts Nevada. Nevada maintains the groundwater and surface water are appropriately administered as separate entities, Nevada at 3, while Circle Bar N maintains that is improper to treat a claim for groundwater as a distinct entity from a claim for surface water. Circle Bar N at 6.

there is no agreement on the applicable legal standard and the facts are disputed and require extensive discovery.[11]

Defendants generally use the term "reservation" in a constricted way to mean a limited amount of land directed by the federal government at a specific occasion for a federal purpose, as opposed to referring to an entire Indian reservation. With this approach, a "reservation" is the limited specific act by the United States of removing a limited amount of land for a federal purpose. Thus, instead of looking at the Walker River Indian Reservation as a whole, Defendants subdivide the Reservation into the various pieces of land added to the Reservation over time and look at the purpose of each addition, instead of the purpose of the entire Walker River Indian Reservation. As a result, Defendants would determine the purpose of the lands added to the Reservation pursuant to legislation in 1936 as if this land was a subdivision separate from the rest of the Indian reservation, with its own separate purpose. In addition, Defendants point to a limited amount of information that they interpret and conclude are the

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[11] E.g.,

- Landolts at 5 (addressing purpose in connection with the lands added to the Reservation and related legislation);
- Nevada at 4-5 (proposing the Court determine whether the direct flow right awarded in the original Decree fulfills the purpose of the reservation before determining whether the Court has jurisdiction over the groundwater claims); 5 (proposing the Court determine the purpose of the reservation with respect to lands "added to the Reservation in 1936" is dryland stock grazing);
- Circle Bar N at 5 (asserting that the 1936 Decree provided all water needed for the Walker River Paiute Reservation); 6 (raising purpose of the Indian Reservation as a bar to the Tribal groundwater claims); 7 (raising purpose of the Indian Reservation to support a finding of res judicata); 7 (addressing purpose of the added lands); 7 (raising purpose of the reservation to determine the scope of water that may be claimed for the added lands); 10 (raising purpose of the reservation of the added lands in connection with laches); 11 (raising purpose of the reservation of the added lands in connection with estoppel).
- WRID at 13 (raising purpose of the lands added in 1936 and after); 13 (raising whether any of the Tribal Claims have merit because of the purpose of the added lands).

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facts that demonstrate the purpose of this limited reservation. *E.g.,* WRID at 13; Circle Bar N at 3; Nevada at 5.

Defendants point to *United States v. New Mexico*, 438 U.S. 696 (1978), which addresses the determination whether a non-Indian federal reservation has implied water rights, rather than whether an Indian reservation has implied water rights. *E.g.,* WRID at 13. In *United States v. New Mexico*, the Supreme Court articulated a distinction between the "specific purposes" of national forests and secondary uses of the forests, implying that the *Winters* Doctrine only applies to the former. *New Mexico*, 438 U.S. at 700, 702, 707-709. For secondary uses, "there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *Id.* at 702. The Court has never addressed whether the "primary-secondary" distinction applies to Indian reservations. Every lower federal and state court addressing this issue, however, has construed the purposes of Indian reservations broadly based on the Indian canons of construction, regardless of how the court has ruled on the technical applicability of the primary-secondary distinction.

Contrary to Defendants' described threshold issues, the "purpose of the reservation" presents unresolved questions of both law and fact that this Court must determine as part of the merits of the Tribal Claims. Instead of looking at the Walker River Paiute Reservation as consisting of separate subdivisions, the Court must look at it as a "'permanent home and abiding place' for the Indian people." *Gila River*, 35 P.3d at 76, quoting *Winters*, 207 U.S. at 565. "The purpose of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *United States v. Adair,* 723 F.2d 1394, 1409 n.13 (9th Cir. 1983) (citation omitted). Determining the purposes of the reservation, and the water necessary to accomplish it, is a fact-intensive inquiry that

must be made on a reservation-by-reservation basis. *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 748 (Ariz. 1999).

Moreover, Defendants' interpretations of the 1936 Act authorizing additional land for the Reservation are insufficient to determine its purpose:

> In determining legislative intent it is necessary to consider the legislation in its historical context and not as if it was passed today . . . . [A] study of the purpose of any legislation involving the Indians would be incomplete and inaccurate without a consideration of the then prevailing policy on the subject. It is apparent that such policy does not follow an unwavering line, and may not appear in a very obvious way.

Ute Indian Tribe v. Utah, 716 F.2d 1298, 1303 (10th Cir. 1983). Indeed, Circle Bar N acknowledges that a determination limited to the purpose of the lands added after the 1936 Decree would have to consider "the legislation creating the Reservation, the circumstances surrounding the Reservation's creation, and the history of the Indians for whom it was reserved." Circle Bar N at 7, citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (1981) (addressing the "purposes" of an Indian reservation).

The United States and the Tribe contend that the examination into the purposes of the reservation must be even broader. Whether a court examines the purposes of an Indian reservation as a permanent home for its Indian citizens or whether it considers the objectives behind the creation of a particular reservation, the inquiry must result in the recognition of that quantity of water required to make the reservation a permanent and livable home, both now and in the future. *Arizona v. California*, 373 U.S. at 599. This critical issue is fact-intensive and requires extensive discovery, including expert testimony from a historian. As such, <u>any</u> issue purporting to address or incorporate the purposes of the reservation cannot be included in the threshold issues.

IX. The Merits of Equitable Defenses are Not Threshold Issues.

The CMO directs the Court to consider as a potential threshold issue whether equitable defenses

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bar some or all of the Tribal Claims. CMO at 10, ¶ 11.e.[12] Initially, the United States and the Tribe favored some review of equitable defenses in this phase, but we do not believe that the substantive consideration of any of these defenses is appropriate as a threshold issue.[13] Instead, we believe a proper threshold issue regarding equitable defenses, such as laches and estoppel, is whether such defenses are available as a matter of law against a federal reserved water right.

To date, no court has approved such equitable defenses in the litigation of a federally reserved water right. This is not surprising, given that the basic principles of such a right – that it is afforded a date-of-reservation priority, that it arises from land ownership rather than water use, that it cannot be lost through non-use – would seem to be sufficient to defeat any laches or estoppel claims. We would rephrase the issue as follows:

> If a federal reserved water right exists, are equitable defenses, such as laches and estoppel, precluded from being raised against such a right?

If the answer to this question is "Yes," this issue will be wholly dispositive of Defendants' various equitable defense claims, and the parties should not be required to expend the time and resources associated with conducting discovery and litigating the Defendants' threshold issues on laches and estoppel. Thus, these issues of law should be resolved as a threshold issue.

Assuming that one or more equitable defenses are available to Defendants as a matter of law, the burden of establishing each affirmative defenses rests with Defendants. The range of equitable defenses

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[12]This same provision also requires the Magistrate Judge to require all parties to identify the "defenses or issues" they intend to assert. *Id.*

[13]Circle Bar N accuses the United States and Tribe of backtracking from its earlier statements regarding the scope of issues under the CMO. It is clear from the threshold issues filings that all parties have reconsidered their earlier positions.

that Defendants may choose to raise in their Answers[14], assuming the Court determines they are appropriate for further consideration, present significant factual issues that require disclosures by the Defendants and will entail considerable discovery, including depositions and expert testimony from historians. The relevant facts are not as limited or simple as some Defendants think they should be.[15] For example, there were efforts over many years to negotiate the status of Weber Reservoir that involved the United States, California and Nevada, among others, that must be fully understood, particularly in connection with the affirmative defense of laches. If Defendants believe that the Tribal Claims can be rejected on the basis of equitable defenses, either before or after the Tribal Claims are considered on their merits, the United States and the Tribe believe that all relevant facts must be identified and fully developed.

Defendants assert that they should be allowed to establish one or more equitable defenses and have the Court reject the Tribal Claims before the Court considers the merits of the Tribal Claims.[16] The vehicles for them to do so would involve either a motion to dismiss, motion for summary judgment or trial on the merits of each defense. It is questionable whether a motion to dismiss would be

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[14]Defendants currently identify laches and estoppel as their potential affirmative equitable defenses. WRID at 12-13; Landolts at 3-4; Nevada at 6.; Circle Bar N at 8-11. Circle Bar N also raises waiver. Circle Bar N at 11. Previously, for example, Nevada has raised waste, *Nevada Department of Wildlife's Preliminary Legal Theories* (Dec. 17, 2007) (Doc. 1227) at 2, and the Landolts have raised waste, unclean hands, detrimental reliance, *Preliminary Legal Theories* (Dec. 28, 2007) (Doc. 1288) at 2-3.

[15]*See, e.g.,* Landolts at 4 (". . . the facts underlying a laches defense are not in serious dispute. . . . This issue can, and should, be decided by briefing and motion without any discovery and on facts upon which this Court may take judicial notice."). In contrast, Circle Bar N acknowledges the need to conduct discovery regarding equitable defenses. Circle Bar N at 9-10.

[16]*See, e.g.*, Landolts at 4 ("And, having decided [laches] in favor of those positing it, the Court could dispose of one claim for relief. This clearly makes laches a threshold issue [for one or more of the Tribal Claims].")

appropriate because these defenses require a factual basis. Because a detailed factual basis is necessary to determine the validity of these affirmative defenses, they are clearly not appropriately litigated as threshold issues.

X. Conclusion:

Defendants propose a series of threshold issues that would litigate the merits of the United States' and the Tribe's reserved federal water rights claims prematurely. The bulk of their proposed threshold issues assume legal issues that this Court has yet to address and address issues that are fact-intensive and require significant discovery, including expert testimony. Defendants' attempts to rush this case to conclusion violate the CMO and brush aside the orderly and fair management of litigation under the Federal Rules of Civil Procedue in a manner that is inappropriate and prejudicial.

Dated: October 10, 2008

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CERTIFICATE OF SERVICE

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