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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEVADA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>WALKER RIVER PAIUTE TRIBE,<br><br>Plaintiff-Intervenor,<br><br>vs.<br><br>WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,<br><br>Defendants. | IN EQUITY NO. C-125-ECR<br>Subproceeding: C-125-B<br><br>THE UNITED STATES OF AMERICA'S AND WALKER RIVER PAIUTE TRIBE'S REPLY REGARDING PROPOSED PRELIMINARY THRESHOLD ISSUES |

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") reply to the Response Briefs filed 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] Response Briefs were filed by WRID and Nevada ("Defendants"); Circle Bar N joins

[1] *Walker River Irrigation District's Responsive Brief on Threshold Issues* (Oct. 10, 2008) (Doc. 1443) ("WRID"); *Nevada Department of Wildlife's Response Brief on Threshold Issues* (Oct. 10, 2008) (Doc. 1439) ("Nevada"); *Joinder by Circle Bar N Ranch, L.L.C. et al. In Walker River Irrigation District's Response to Opening Briefs on Threshold Issues*, Oct. 10, 2008 (Doc. 1444); *Mineral County Preliminary Threshold Issues Response Brief* (Oct. 10, 2008) (Doc. 1441) ("Mineral County").

WRID. Joseph and Beverly Landolt and the State of California did not respond. The United States and the Tribe concur in Mineral County's filing.

**Introduction**

The Case Management Order sets out an orderly path to proceed with this case. In our opening brief, the United States and Tribe set out a general approach to threshold issues based on the CMO, regarding such issues as jurisdiction, finality, equitable defenses and related case management. In our response, the United States and Tribe address the basis for this approach and the case's historical and procedural context, while explaining how Defendants' proposed threshold issues are inconsistent with the CMO and the Federal Rules of Civil Procedure, avoid essential jurisdictional issues, and seek to address the merits of the Tribal Claims and other fact-intensive issues as threshold issues. In this reply, the United States and Tribe explain that Defendants' proposals are flawed in additional respects in that they contradict the CMO and other orders of this Court, as well as arguments many of these Defendants made previously – and successfully – in this very case.

Having benefitted from these earlier arguments, Defendants now argue the reverse. Defendants' inconsistent positions disregard the orderly administration of justice and the dignity of this proceeding because: 1. Their current positions are clearly inconsistent with prior positions; 2. They were successful in persuading the Court to accept their earlier positions; and 3. They would "derive an unfair advantage or impose an unfair detriment on the opposing party." *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (discussing judicial estoppel).

**1. The Case Management Order Sets Forth an Orderly, Expeditious and Fair Process.**

This Court has always managed C-125-B, along with sub-proceedings C-125, C-125-A and C-125-C, as part of "one action," for which "[a]ll . . . issues and claims also constitute a

single law suit." *Minutes of Court*, 1 (Jan. 3, 1995) (Doc. 46).[2] Almost ten years ago, the Court determined to place C-125-B "on some sort of proper procedural track"– "[W]e must establish procedures for consideration of these matters in an orderly fashion, so that the matter may proceed in as expeditious a manner as possible." *Minutes of the Court*, 3-4 (May 11, 1999) (Doc. 81). The CMO reflects the Court's view of an "orderly" and "expeditious" process, including the requirement that all parties be joined and served before litigation commences. CMO at 5-6, ¶3.

With the CMO, the Court placed this case on a "proper procedural track," *Minutes* at 3 (May 11, 1999) (Doc. 81), beginning with the requirement that the United States and the Tribe join and serve nine categories of persons and entities claiming water rights in the Walker River Basin. CMO at 4-8, ¶¶3-4. Thereafter, the Court accepted Defendants' arguments and consistently rejected efforts to expedite or truncate this service process prior to initiating Phase I threshold issues. The Court refused to require WRID and the U.S. Board of Water Commissioners to identify current decreed water right holders to aid service and Decree administration, *Order* at 10, June 11, 2001 (Case No. C-125, Doc. 522), or to certify classes for decreed water rights holders and domestic water rights holders. *Order*, Apr. 29, 2002 (Doc. 179). The Court and Defendants have acknowledged that this process would be long and arduous. CMO at 5-6, ¶3.[3] Defendants now complain that the case is taking too long – and they blame the

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[2]*See also e.g., Order* (Oct. 30, 1992) ("This Subfile C-125-B is part of [a] larger case concerning rights to the water in the Walker River.").

[3]For example, in Case C-125-C, the Court noted that "[w]e are sympathetic to the struggles of the United States and the Tribe to serve parties for C-125-B," and that:

> Altering water rights on a river system divided more than sixty years ago is no easy task. There will be considerable time and expense in pursuing an action. . . . Procedural rules of service of process are well established, and are not waived simply because of the complexity of the case or the time and expense involved in making service.

(continued...)

United States and the Tribe. *E.g.*, WRID at 8.

The CMO's notions of "orderly" and "expeditious" process extend beyond service. Nowhere does the Court assert that "expeditious" means dispensing with the Federal Rules of Civil Procedure or that "orderly" means litigating the merits of the Tribal Claims as threshold issues. Nowhere does the Court assert, as Defendants repeatedly contend, that the threshold issue process was "intended [solely] to further manage this complex litigation in ways which might defer costly and possibly unnecessary proceedings in the interests of judicial economy and the convenience of the parties." WRID at 5. *See also id.* at 2. The problem with WRID's approach is that avoidance of "costly and unnecessary proceedings" is the "most relevant question" to determine threshold issues. WRID at 3-5. Avoiding costly and unnecessary proceedings is not the only goal in case management. The real goal is to set a course to navigate this complex case in the most efficient manner possible while allowing the claims raised to be addressed fully and fairly. Efficiency is gained by determining basic questions such as jurisdiction, questions of law, and the legal applicability of certain defenses.

"Costly and unnecessary" is in the eye of the beholder. Defendants do not want the United States and Tribe to obtain additional water.[4] While it may be convenient and in their interests to

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[3](...continued)
*Order*, 6, 8 n.2 (Case No. C-125, June 11, 2001) (Doc. 522); *WRID and Nevada's Points and Authorities in Support of Motion Concerning Case Management*, 5, 6 (Jan. 21, 2000) ("*WRID's & Nevada's Case Management Proposals*, Jan. 2000") ( Doc. 97) ("[A]ny case management order must recognize that identifying all surface and groundwater claimants within the Walker River watershed is no easy task." "[I]t is likely that a substantial period of time will be needed to complete service of process.").

[4]Defendants are not mollified by the Court's observation that "[i]n light of the fact that the additional water rights claimed by the U.S. and the Tribe will in all likelihood be small in relation to the total amount of water appropriated from the Walker River, it is unreasonable to assume that these additional water rights will be the figurative straw that breaks the camel's back." *Order*, 11 (July 8, 1994).

end this proceeding as soon as possible, their proposed path would prejudice the United States and Tribe at the expense of a just resolution of the case. *See* Fed. R. Civ. P. 1.

**2. Threshold Issues Should Not Determine the Merits of the Tribal Claims.**

One fundamental issue before the Court is whether threshold issues should address the merits of the Tribal Claims. Nevada and WRID maintain that the "express direction" of the CMO is that "the threshold issues are intended to address the Tribal claims themselves" and "should include those issues which go to the merits of the tribal claims." Nevada at 2-3. WRID makes the same argument, also referring to "content of the claims," which is a euphemism for "merits of the claims." *E.g.*, WRID at 5. Defendants' proposal to address the merits of the Tribal Claims as threshold issues is completely inconsistent with the approach in prior Court orders.

The CMO 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 (emphasis added). Additional phases follow, as necessary. *Id.* Defendants' latest proposal contradicts the CMO, would confuse and further complicate this proceeding, and contradicts positions Defendants took previously, and successfully, and resulting Court orders.

Defendants' efforts to merge Phase I and Phase II is problematic. They would initiate full-scale discovery and litigation of the Tribal Claims and certain defenses as threshold issues.[5] One consideration in identifying threshold issues is the amount and type of discovery required. Although the CMO contemplates discovery on threshold issues, unlimited or extensive discovery

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[5]No answers have been filed, so Defendants may assert different defenses.

is inconsistent with the concept of threshold – or preliminary – issues. Moreover, if an issue and related discovery are so intertwined with the merits of a claim, it should not be a threshold issue. This is consistent with the Court's proper exercise of discretion with Rule 12(i) (formerly Rule 12(d)) motions to hear and decide certain defenses before trial:

> In exercising this discretion, the district court must balance the need to test the sufficiency of the defense or objection and the right of a party to have his defense or objection decided promptly and thereby possibly avoid costly and protracted litigation against such factors as the expense and delay the hearing may cause, the difficulty or likelihood of arriving at a meaningful result of the question presented by the motion at the hearing, and the possibility that the issue to be decided on the hearing is so interwoven with the merits of the case, which . . . can occur in various contexts, that a postponement until trial is desirable.

Wright & Miller, 5C FPP §1373. It is neither efficient nor practical to conduct discovery on issues that have to be examined again in discovery on the merits of a claim. Nor is it likely that a meaningful result will emerge by litigating factually intense defenses prior to full consideration of the merits. As discussed below, WRID would excuse most defendants from answering. If Defendants address the merits of the Tribal Claims in Phase I and do not prevail, these issues must be redone, particularly if not all Defendants are bound by the initial litigation.

There is no basis for Defendants' reading of the CMO.[6] Nowhere does it evince a desire to omit Phase II by disposing of the merits of the Tribal Claims in whole or in part more quickly through Phase I. None of the threshold issues identified in the CMO remotely approaches the merits of the Tribal Claims as WRID and others now propose. CMO at 9-11, ¶11. The CMO simply reflects the types of threshold issues anticipated: jurisdiction, claim preclusion, applicable

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[6]The fact that the CMO states that the Magistrate Judge will likely not schedule additional phases until "the threshold issues have been decided on the merits," does not mean that Phase I threshold issues address the Phase II merits of the Tribal Claims. WRID at 4. It only means that those issues identified as threshold issues have been decided on their merits.

law; equitable and other defenses.[7]

Defendants' assertion that the CMO authorizes full discovery into the Tribal Claims in Phase I is wrong. Although the CMO allows discovery to all parties on threshold issues, it allows only limited discovery into the "contentions of the U.S./Tribe with respect to the basis for the Tribal Claims." CMO at 13, ¶15. Indeed, both WRID and Nevada suggested this provision when the Court determined what to include in the CMO.[8]

This Court's descriptions of the CMO and the relationship between Phase I and Phase II issues do not support Defendants' current views either. In denying the motion to certify defendant classes, the Court observed:

> In our case management order we also established various phases for the case. We required that at the outset of the litigation concerning the United State[s] and the Tribe's counterclaims, the magistrate judge would determine a list of threshold issues. These issues would include, among others, jurisdiction, claim preclusion, applicable law, and any defenses which may apply. We designated these threshold issues as "Phase I." The remainder of the case would involve the determination of the merits of all matters relating to the claims of the United States and the Tribe. These we refer to as the "Phase II" issues.

*Order*, 2-3 (Apr. 29, 2002). The Court further explained that "Phase I threshold issues present questions of law that will apply to all parties," *id.* at 9, "involve questions of applicable law, jurisdiction and defenses to the claims of the United States and the Tribe, not issues of injunctive and declaratory relief," *id.* at 15, and "involve determinations of what law to apply to the interaction of groundwater and surface water." *Id.* at 16. *See also id.* at 18-19 (referencing the

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[7]In 1994, the Court acknowledged that "the doctrine of federally reserved water rights does not include any equitable principle calling for a balancing of the competing (non-federal) rights." *Order*, 9 (July 8, 1994) (Doc. 30). The United States and the Tribe contend that such defenses are not available as a matter of law. The legal applicability of equitable defenses should be a threshold issue, with the merits of any remaining defenses litigated in a later phase.

[8]*WRID's & Nevada's Case Management Proposals*, Jan. 2000 at 10 (Doc. 97).

"determination of the substantive claims of Phase II.). According to the Court, Phase I addresses **preliminary** issues:

> We are also persuaded that the class action is not the superior method by the fact that the determination of the preliminary issues would not be the end of our inquiry, but rather the start of a long process. . . . These preliminary issues are just that, preliminary. We anticipate that the majority of this litigation will be spent determining the water rights, if any, of the United States and the Tribe.

*Id.* at 21-22 (citation omitted).

The Magistrate Judge's underlying Report and Recommendation is similar. Under the caption "Phase I versus Phase II Adjudication," the Magistrate Judge explains that "it is important to note the distinction to be drawn between Phase I and Phase II adjudication of this matters as described in the Case Management Order." *Report and Recommendation of U.S. Magistrate Judge*, 3 (Sept. 13, 2001) (Doc. 164) (citations omitted). *Id.* at 3. Thereafter, the Magistrate Judge lists the eight specific issues that the CMO directs him to consider in Phase I and then addresses Phase II, ultimately distinguishing between Phase I and Phase II for purposes of a potential class certification:

> Determination of Phase II issues would be based upon the merits of the Plaintiffs' claims as identified in the Tribe's First Amended Counterclaim, in which the Tribe asks the Court:
>
> 1. To recognize and declare and quiet title:
> A. The right of the Tribe to store water in Weber Reservoir for use on the Reservation including the lands restored to the Reservation in 1936;
> B. The right of the Tribe to use water on the lands restored to the Reservation in 1936;
> C. The right of the Tribe to use groundwater underlying and adjacent to the Reservation on the lands of the Reservation including the land restored to the Reservation in 1936;
> D. The right of the Tribe to use groundwater underlying and adjacent to the lands restored to the Reservation in 1936 on the lands of the Reservation including the lands restored to the Reservation in 1936.
> 2. Declare that the defendants and counterdefendants have no right, title or other interest in or to the use of such water rights.
> 3. Preliminary and permanently enjoin the defendants and counterdefendants from asserting any adverse rights, title or other interest in or to such water rights.

*Id.* at 4-5.

Following issuance of the CMO, Defendants also stressed the distinction between Phase I and Phase II when they opposed certification of two defendant classes:

> It's important to understand what Judge Reed meant in the Case Management Order when he described Phase Two. He described Phase Two as, and I quote, "involving completion and determination of the merits of all matters relating to the Tribal Claims," And then went on to say it could include some other things.
>
> It – it seems, now that we are proposing to divide Phase Two of the litigation into parts one and two. Part one being a declaration of – on the merits of the Tribal Claims. And part two, then, being getting to how relief would be handled.
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> However, I think it is inappropriate to alter what Judge Reed said Phase Two of this litigation will be. I think Phase Two, necessarily, has to include granting effective relief. And as I will explain later, in my judgment the merits of the – the mere declaration of the merits of the Tribal Claims, necessarily, involves their affect on the other water rights claimants. And that those two things are not severable, but must be considered together.

Statements of WRID Counsel.[9] Consequently, neither the CMO nor the Court's descriptions of it support Defendants' proposal to address the merits of the Tribal Claims as threshold issues.

**3. Threshold Groundwater Issues Should Not be Deferred.**

Defendants now contend that issues relating to groundwater and the surface water/groundwater connection are hypothetical and should not be considered until some determination that the Tribe has "rights to surface water beyond those presently recognized." WRID at 9. WRID asserts that "Plaintiffs do not contend that at the present time the Tribe is being deprived of water under the 1859 water right recognized in the Decree because of underground pumping by those who have permits to pump underground water under Nevada law

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[9] *Transcript of Status Conference; Arguments Regarding the Class Certification Motion; and Arguments Regarding the Identification Methods Before the Hon. Robert A. McQuaid, Jr.* U.S. Magistrate Judge at 20-21 (Aug. 27, 2001). An excerpt of this transcript is attached as Exhibit A. *See also, e.g., Walker River Irrigation District's Points and Authorities in Opposition to Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* 4-5 (June 18, 2001) (discussing the two initial phases and the possible threshold issues identified in the CMO for the Magistrate's consideration) (Doc. 151).

or by domestic users of underground water," so that the Court should not "consider in the abstract these issues which may be, and likely are, partially, if not wholly, hypothetical issues." WRID at 10. This misses the point of the groundwater claims and why the Court designated certain groundwater claimants to be joined and served.

In 2000, in connection with their case management proposals, WRID and Nevada insisted that groundwater issues had to be addressed at the outset of the case:

> **Decisions on the legal and factual issues related to whether some or all of the groundwater users in the Walker River Basin are or are not properly joined as parties will determine the scope and course of this litigation. Those issues should be decided at the very outset of the litigation.** Moreover, in a case of this magnitude, which may involve years, if not, decades, of litigation it is also possible, if not probable, that orders which determine the scope and course of the litigation should be the subject of immediate appellate review.

*WRID's & Nevada's Case Management Proposals,* Jan. 2000 at 4 (emphasis added).[10] Moreover, WRID and Nevada proposed that the Court identify some issues for consideration as threshold issues in the Case Management Order, and identified the

> issues which the District suggests be included along with their status in somewhat similar litigation pending in Arizona. These issues, once decided, will determine the scope and course of this litigation. . . . .
>
> **One issue is the scope of the Court's jurisdiction in post judgment proceedings. That issue includes not only the Court's jurisdiction to adjudicate claims to groundwater, but also claims to additional surface water.** This is not an issue in the Arizona litigation.
>
> Three related issues involve the claim that groundwater use affects the availability

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[10] WRID and Nevada also oppose joinder of groundwater users because they contend "that under Nevada and California law surface and groundwater within the Walker River Basin do not form a single *res* and that the Court does not have jurisdiction over these claims." *E.g., Walker River Irrigation District's Points and Authorities in Support of Motion for Scheduling and Planning Conference and in Response to United States' and Walker River Paiute Tribe's Joint Motion for Leave to Serve First Amended Counterclaims, to Join Groundwater Users, to Approve Forms for Notice and Waiver and to Approve Procedure for Service for Pleadings Once Parties are Joined,* 12 (Nov. 9, 1998).

> of surface water. The first issue is **whether, regardless of the extent of hydrologic connection between surface and groundwater, the Court is required to accept the distinction drawn between surface water rights and groundwater rights by California and Nevada law.** In *In re General Adjudication of All Rights to Use Water in the Gila River Systems and Source*, . . . 857 P.2d 1236 (1993), the Arizona Supreme Court held that it must accept the distinction drawn between surface and groundwater under Arizona law even if that distinction was not consistent with hydrology.
>
> The second and related issue is **whether holders of surface water rights established under federal law are entitled to protection from use of groundwater beyond the protection provided to holders of surface water rights established under state law.** The Arizona Supreme Court so held in *In re General Adjudication of All Rights to Use Water in the Gila River Systems and Source*, 989 P.2d 739 (Ariz. 1999).
>
> If the Court has jurisdiction to protect surface water rights established under federal law from interference from junior groundwater right holders, the final issue in this trilogy is **whether issues of interference must be decided as a part of the adjudication of surface water claims under federal law** . . . .

*Id.* at 8-9 (emphasis added).

The Court included three of Defendants' issues in the CMO, almost verbatim, *see* CMO, 10-11, ¶11.f, g, & h, and the first issue is reflected to some extent in CMO ¶11.a. *See also Joint Motion Concerning Case Management* at 5, ¶11 (Jan. 21, 2000) (Nevada & WRID). Thus, having successfully argued that all groundwater users must be served before addressing threshold issues and to include the above issues in the CMO, WRID now argues that resolution of these issues should be deferred until a newer set of "threshold" issues is addressed.[11]

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[11]Nevada also insisted on joining all groundwater users:

> [I]t has become apparent that to the extent the Tribe's and the United State's claims can affect the groundwater users in both California and Nevada, those users should be joined from the outset to have the opportunity to participate in decisions relative to the litigation and to have access to appellate forums should certain decisions be appealed before final disposition of the entire case. Moreover, it is crucial that all affected parties be joined to enable the Court to effectuate any ultimate decisions relative to the parties' water rights.

*State of Nevada's Response to the Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order*, 2 (Feb. 18, 2000).

Based on Defendants' earlier successful arguments that several thousand groundwater users should be identified, joined and served, there are now several thousand such persons and entities who would like to see their issues addressed. The bulk of the United States' service efforts and related expenses has focused on these groundwater users. Many of these people do not understand why they are being served, particularly those joined solely based on their domestic wells. Apart from earlier Defendants' insistence that groundwater issues should be addressed at the outset, it will be helpful for groundwater users to have these issues addressed sooner rather than later. If these issues are delayed, significant numbers of ownership transfers will further complicate matters for groundwater claimants, as well as the Court, the United States and the other parties. Moreover, if, as Defendants contend, groundwater raises jurisdictional legal issues, *see* n.10, they should be addressed initially. Indeed, the CMO includes the groundwater issues that Defendants once insisted should be addressed promptly. If the Court has jurisdiction over groundwater, then, as discussed several years ago, the existence and extent of any surface/groundwater connection can be ascertained as a threshold issue through discovery and a hearing. Thereafter, users of groundwater determined not be to connected to surface water could be dismissed.

**4. Jurisdiction Issues Are Threshold Matters.**

WRID brushes aside the broad requirement that the Court determine its jurisdiction to address each of the Tribal Claims as threshold issues. Previously, Defendants argued that the following jurisdictional issue is an essential threshold issue for inclusion in the CMO:

> One issue is the scope of the Court's jurisdiction in post judgment proceedings. That issue includes not only the Court's jurisdiction to adjudicate claims to groundwater, but also claims to additional surface water.

*WRID's & Nevada's Case Management Proposals,* Jan. 2000 at 8. In the CMO, the Court stated the following issue:

> 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?

CMO at 9-10, ¶11.a. WRID now describes this issue 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?

*Walker River Irrigation District's Opening Brief on Threshold Issues*, 10 (Sept. 5, 2008) (Doc. 1416).[12] These are not identical issues.

WRID backtracks from its earlier statements to the United States and Tribe that bringing its claims in a new and separate action would require re-serving all parties. Without citing any authority, WRID now asserts that this:

> is not an issue which, if decided adversely to Plaintiffs, would require starting over. Rather, it is an issue which requires a determination as to whether this proceeding should be considered a new action completely separate from the continuing administration of the Walker River Decree which takes place in Case No. C-125.

WRID at 7. WRID believes the remedy for this "jurisdictional issue"

> can be quickly and easily resolved, either by stipulation that Case C-125-B, for all purposes, shall be treated as a new and entirely separate proceeding wholly and completely independent from the action which led to the final judgment which is the Walker River Decree, or by consideration as a threshold issue.

*Id.* at 12. Parties cannot confer subject matter jurisdiction on a Court. *E.g., U.S. v. Griffin,* 303 U.S. 226, 229 (1938); *Town of Elgin v. Marshall*, 106 U.S. 578 (1883). Parties cannot stipulate around a potential jurisdictional issue, even if the stipulation could include all defendants.

**5. Threshold Issues and Case Management Are Linked.**

Defendants criticize the United States and the Tribe for addressing case management as

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[12] Most of the other Defendants asserted a similar issue in their opening briefs.

part of threshold issues.[13] These issues, however, are inextricably linked.

**A. All Defendants Must Answer the First Amended Counterclaims.**

WRID contends that "the CMO does not require answers from all counterdefendants prior to identifying, processing and deciding threshold issues" and that there "are no reasons, except delay and unnecessary cost, to require answers from all counterdefendants before proceeding to finally determine threshold issues and to litigate those issues in accordance with the CMO." WRID at 8, 12. This position distorts the CMO, is contrary to the Federal Rules of Civil Procedure, and contradicts earlier positions that Defendants took, successfully, before the Court.[14]

Nowhere does the CMO state that defendants need not answer. It merely says that no answers or other pleadings will be required except upon further order. CMO at 12, ¶13. This makes sense as a matter of case management because service has taken a period of years as a matter of necessity. If the Court did not delay answers or other pleadings until a future coordinated deadline, Defendants would have had varying deadlines to answer under Rule 12 and may have filed other preliminary pleadings while service efforts were ongoing.

The United States and the Tribe are entitled to receive answers. The Rules require defendants to file answers that respond to specific claims and to identify their defenses, including

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[13] Defendants point to the United States' and Tribe's use of "Preliminary Threshold Issues," as contrary to the CMO and having some broader and inappropriate meaning. WRID at 2. The CMO requires the Magistrate Judge to make a "preliminary determination of threshold issues," that "will not be finally resolved and settled . . . until all appropriate parties are joined." CMO at 9, ¶11. Consequently, the Court's current review and determination of proposed threshold issues is just that – preliminary – until service is complete.

[14] WRID appears to reference "all appropriate parties," CMO at 9, line 12-13, as meaning that the Magistrate Judge can determine the final list of threshold issues without involvement of all the parties that WRID and others insisted be joined and personally served. WRID at 8. The CMO, at 5, ¶3, makes clear that "all appropriate parties" (also meaning all necessary parties), means all persons and entities identified in ¶3 who are to be joined and served. *See also Order*, 5-7 (Oct. 27, 1992 (Doc. 15) (applying Rule 19).

affirmative defenses, or face the consequences of failing to answer. *See* Fed. R. Civ. P. 7(a); 8, 12. The purpose of an answer is to formulate issues by means of denials and defenses addressed to the allegations constituting the claims for relief. Wright & Miller, 5B FPP §1345.[15] This is clearly relevant to identifying threshold issues. The Court should consider these issues when it finalizes threshold issues. The United States and Tribe have a right to an orderly process to receive and review the universe of issues raised in answers so they can determine which defenses and other matters raised should be addressed in motions to dismiss or other threshold issues.[16] If defendants are excused from answering, the case preparation of the United States and the Tribe is prejudiced. In addition, if defendants are relieved from answering and have no opportunity to participate in the threshold issues, they may not be bound by the determinations of these issues or may raise these or other defenses later, causing some issues to be re-litigated and other potentially

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[15]These same principles are reflected in Paragraph 10 of the recent case management order in the Zuni adjudication in New Mexico, which includes approximately 1,500 parties:

> **Answers.** Pleadings responding to the United States' Subproceeding Complaint and to the Navajo Nation's Supplemental Subproceeding Complaint are necessary to frame issues for purposes of disclosures and discovery, and to provide information essential to the Court's further management of the case, including which parties are prepared to bear the burdens of participation in the adjudication of which issues. Accordingly, on or before February 1, 2011, all parties opposing any of the claims stated by the United States or the Navajo Nation shall file Answers consistent with Fed. R. Civ. P. 8, <u>except that</u>, given the proceeding's character as a subproceeding, no such Answer shall contain a counterclaim or cross-claim. Any claim that could be stated in a counterclaim or cross-claim should be properly stated in the main case. . . . A party's failure to file a timely Answer shall be grounds for dismissal of the party from Subproceeding 2.

*Zuni River Basin Adjudication, Preliminary Procedural and Scheduling Order for Subproceeding 2: The Adjudication of Navajo Indian Water Rights Claims*, 4-5 (May 21, 2008) (Doc. 1767) (attached as Exhibit B).

[16]Pursuant to Rule 12, every defense may be asserted by the responsive pleading and even those defenses that are permitted to be interposed by pre-answer motion may be raised by answer, unless they have been waived by failure to include them in a previously made motion.

important threshold issues to be left for later in the proceeding. This is inefficient and potentially duplicative, and is not cost-effective.

The Court and Defendants have voiced these same concerns. WRID and Nevada have long insisted that all defendants must be joined and allowed to participate, including during the resolution of threshold issues, because fundamental fairness requires that those who may be affected by decisions be allowed to participate, and because judicial economy requires that significant issues be decided in a manner that binds all affected parties. For example, in connection with proposing the CMO, WRID asserted on behalf of itself, Nevada and California that:

> The identification of all threshold issues and equitable defenses cannot occur until after all necessary parties have been joined. **Those necessary parties must participate in decisions involving the identification of threshold issues and equitable defenses. Proceeding without them in this process is futile.** It can only result in subsequent challenges by necessary parties based on the fact that decisions were made, without their participation, that impact and possibly impair their interests. It can only result in current parties having to revisit issues. Under these circumstances, deciding case management issues based on the premature identification of threshold issues and defenses cannot be "logical, efficient, economic and just."
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> **[T]he final clarification of threshold issues should not occur until after all necessary parties are joined in the litigation. All necessary parties may then participate in the identification of threshold issues and defenses and the related extent and scope of discovery.**

*Walker River Irrigation District's Reply Points and Authorities in Support of Joint Motion Concerning Case Management*, 1, 3, 4 (Mar. 7, 2000) (Doc.106) (underlining in the original and bold-emphasis added).[17]

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[17] Nevada has been equally insistent:

> [T]here is clearly no guarantee for those unserved water users that they will not be unfairly prejudiced because they could not participate at the outset of the litigation, particularly as early decisions could affect both the procedural and substantive posture of

(continued...)

Defendants' arguments are reflected in the CMO's service requirements, as well as other rulings of the Court. For example, based on Defendants' arguments, the Court refused to truncate service based on concern for the rights of each potential defendant and required service on all applicable water claimants to protect their ability to protect their water rights – because the new claims "could affect the rights and priority standing of other rights holders, . . . they must be joined and served in order for the action to proceed fairly." *Order*, at 6-7 (Oct. 30, 1992) (Doc. 15). In addition, when the Court refused to certify two defendant classes, it determined that common issues would not predominate over individual issues, even for Phase I threshold issues, because each defendant's positions would be based on the nature of its specific water rights. *Order*, Apr. 29, 2002 at 16-17. The Court also rejected designating Nevada as a class representative for persons with only domestic rights because Nevada did not have claims and defenses that would be typical of other water rights holders. *Id.* at 11.

Defendants have both rights and responsibilities. If they are excused from answering, the United States and the Tribe are prejudiced. Requiring all defendants to answer and offering them the opportunity to participate benefits all parties and serves the Court's interests in judicial economy. If all defendants are joined, but neither answer nor participate in the proceeding, the reason they were served is not honored. If defendants do not answer or have no meaningful opportunity to participate, they may not be bound by principles of finality in this or future

---

[17](...continued)

> the litigation.
>
> - - - -
>
> [B]asic fairness requires that groundwater users are entitled to service of process and an opportunity to protect their interests.

*State of Nevada's Response to the Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order*, 3 (Feb. 18, 2000) (Doc. 104) *See also, e.g., Walker River Irrigation District's and State of Nevada's Joint Motion Concerning Case Management, [Proposed] Order Concerning Case Management,*, 5 (Jan. 21, 2000 )(Doc.96).

litigation. If defendants are shielded from answering, they do not have a meaningful opportunity to protect their interests and may not be bound by the proceeding.

**B. It is Premature to Consider Separate Trials Pursuant to Fed. R. Civ. P. 42(b).**

WRID, which opposed even the bifurcation of the Tribal Claims, now seeks further bifurcation of the Tribal Claims not contemplated by the CMO to spin a combination of defenses and merits of the Tribal Claim into a separate trial. The CMO does not provide for merging Phase I and Phase II issues nor does it allow separate trials of designated issues pursuant to Fed. R. Civ. P. 42(b).

Fed. R. Civ. P. 42(b) allows the Court, in its discretion, to grant a separate trial of any of issue to promote effective adjudication of the litigation. The Court also has discretion to deny separate trials; bifurcation remains the exception rather than the rule. The burden of establishing that separate trials will advance the interests in Rule 42(b) rests with the moving party. A separate trial will be denied if the burdens of a separate trial will outweigh their benefits. Wright & Miller, 9A FPP §2389. In making this decision, the Court must weigh a variety of factors,

> such as whether one trial or separate trials best will serve the convenience of the parties and the court, avoid prejudice, and minimize expense and delay. The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation.

Wright & Miller, 9A FPP §2388. Although a separate trial may be ordered on threshold issues, such as jurisdiction or venue, "these matters may not be separated if they are related closely to the merits of the action." Wright & Miller, 9A FPP §2389 (emphasis added). In addition, bifurcation is inappropriate if it prejudices the non-moving party. *E.g., Reading Industries Inc. v. Kennecott Copper Corp.*, 61 F.R.D. 662, 664 (S.D.N.Y. 1974).

**CONCLUSION:** For the reasons set forth in their pleadings on this issue, the United States and the Tribe respectfully request that the Court adopt their approach to threshold issues.

Dated: November 3, 2008

Respectfully submitted,

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Dated: November 3, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 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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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>PLAINTIFF,<br><br>WALKER RIVER PAIUTE TRIBE,<br><br>PLAINTIFF-INTERVENOR,<br><br>VS.<br><br>WALKER RIVER IRRIGATION DISTRICT, *ET AL.*,<br><br>DEFENDANTS. | IN EQUITY NO. C-125-ECR<br>SUBFILE NO. C-125-B<br><br>AUGUST 27, 2001<br>9:30 A.M. |
| UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE,<br><br>COUNTERCLAIMANTS,<br><br>VS.<br><br>WALKER RIVER IRRIGATION DISTRICT, *ET AL.*,<br><br>COUNTERDEFENDANTS. | |

TRANSCRIPT OF STATUS CONFERENCE; ARGUMENTS REGARDING THE CLASS CERTIFICATION MOTION; AND ARGUMENTS REGARDING THE IDENTIFICATION METHODS BEFORE THE HONORABLE ROBERT A. MCQUAID, JR. UNITED STATES MAGISTRATE JUDGE

TAPE NOS. 01-099 & 01-100

TRANSCRIPTION: LETTER PERFECT
P.O. BOX 70626
RENO, NV 89570
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PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING, TRANSCRIPT PRODUCED BY LETTER PERFECT.



***ORIGINAL***



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| ALSO APPEARING: | GEORGE N. BENESCH, ESQ.<br>1025 RIDGEVIEW DRIVE, SUITE 400<br>RENO, NV 89509 |



EXHIBIT A

THE CLERK: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IS NOW IN SESSION. THE HONORABLE ROBERT A. MCQUAID, JR., PRESIDING.

THE COURT: BE SEATED, PLEASE.

THE CLERK: THIS IS THE DATE AND TIME SET FOR A STATUS CONFERENCE AND ARGUMENTS REGARDING CLASS CERTIFICATION MOTION AND IDENTIFICATION METHODS IN CASE NUMBER C-125-B-ECR (RAM), UNITED STATES OF AMERICA AND OTHERS VERSUS WALKER RIVER IRRIGATION DISTRICT.

PRESENT IN THE COURTROOM ARE ALICE WALKER, SCOTT MCELROY, SUSAN SCHNEIDER, TREVA HEARNE, GORDON DEPAOLI, SUELLEN FULSTONE, MARTA ADAMS, GEORGE BENESCH, LINDA BOWMAN. AND PRESENT BY PHONE IS MICHAEL NEVILLE.

THE COURT: GOOD MORNING. CAN YOU HEAR OKAY, MR. NEVILLE?

MR. NEVILLE: YES, YOUR HONOR.

THE COURT: THE WAVES AREN'T -- THE WAVES AREN'T TOO LOUD THERE?

FIRST LET'S HEAR THE ARGUMENTS ON THE MOTION FOR CLASS CERTIFICATION.

MS. WALKER, YOU GOING TO DO THAT?

MS. WALKER: THANK YOU, YOUR HONOR. IS THAT OKAY FOR THE PHONE, MIKE?

MR. NEVILLE: YES, THANK YOU.

MS. WALKER: GREAT.





YOUR HONOR, UNDER THE CASE MANAGEMENT ORDER, PARAGRAPH 10, WE HAVE BEEN DIRECTED TO CONSIDER TOOLS FOR EFFICIENT CASE MANAGEMENT THAT WILL REDUCE BURDENS ON THE PARTIES AND THE COURT. WE HAVE PROPOSED A CERTIFICATION OF TWO DEFENDANT CLASSES CONSISTENT WITH THE COURT'S DIRECTION UNDER THE CASE MANAGEMENT ORDER. WE SEEK CERTIFICATION OF THE FIRST CLASS, WHICH WOULD CONSIST OF THOSE BELONGING TO CATEGORY THREE A, IDENTIFIED IN THE CASE MANAGEMENT ORDER AS SUCCESSORS IN INTEREST TO THE DECREE. AND WE HAVE SUGGESTED TO DEFINE THAT CLASS AS THOSE SUCCESSORS IN INTEREST, OR THOSE WHO CLAIM A SUCCESSORS IN INTEREST, WHO HAVE NOT -- WHO ARE NOT PARTICIPATING INDIVIDUAL -- INDIVIDUALLY, PARDON ME, IN THESE PROCEEDINGS.

WE ALSO SEEK CERTIFICATION OF A PARTIAL CATEGORY, THREE C DEFENDANT CLASS, AGAIN CONSISTING OF THOSE INDIVIDUALS AND ENTITIES CLAIMING A RIGHT TO USE GROUNDWATER FOR DOMESTIC PURPOSES IN THE SPECIFIED SUB-BASINS, 107, 108, 110-A, AND 110-B, WHO ARE NOT PARTICIPATING INDIVIDUALLY IN THESE PROCEEDINGS.

ONLY THE DISTRICT AND NEVADA HAVE FILED OPPOSITIONS TO OUR MOTION. AND NEVADA PRIMARILY OBJECTS TO ITS DESIGNATION AS CLASS REPRESENTATIVE. NO OTHER PARTY IN THESE PROCEEDINGS HAS OBJECTED TO OUR MOTION.

I'VE ESTABLISHED IN OUR BRIEFS THE TWO CLASSES WHO RECEIVED IDENTIFI (SIC) -- OR, EXCUSE ME, CERTIFICATION,

1 MR. DEPAOLI?
2 MR. DEPAOLI: YOUR HONOR, GORDON DEPAOLI, ON BEHALF
3 OF THE WALKER RIVER IRRIGATION DISTRICT.
4 THE -- THE LANDSCAPE HAS, AT LEAST IN MY
5 INTERPRETATION, HAS SHIFTED SOMEWHAT FROM THE ORIGINAL MOTION
6 TO THE JOINT REPLY. WE ARE NOW PROPOSING TO EXCLUDE FROM THE
7 TWO PROPOSED CLASSES ANYONE WHO IS PARTICIPATING IN THE
8 PROCEEDINGS.
9 AND, SECONDLY, AT LEAST IN MY MIND, I HAVE SOME
10 QUESTIONS AS TO WHETHER WE HAVE SHIFTED SOME FROM WHAT THE
11 ORIGINAL MOTION INTENDED. THE ORIGINAL MOTION WAS DIRECTED TO
12 CERTIFICATION TO ADDRESS THE THRESHOLD ISSUES RELATIVE TO THE
13 TRIBAL CLAIMS AND FOR PURPOSES OF ADDRESSING THE DECLARATORY
14 RELIEF THAT THE TRIBE AND THE UNITED STATES SEEK IN PHASE TWO
15 OF THE PROCEEDINGS. IN THE ORIGINAL MOTION, THE TRIBE AND THE
16 UNITED STATES ALSO SAID THAT CLASS CERTIFICATION BEYOND PHASES
17 ONE AND TWO MIGHT BE APPROPRIATE.
18 IT'S IMPORTANT TO UNDERSTAND WHAT JUDGE REED MEANT IN
19 THE CASE MANAGEMENT ORDER WHEN HE DESCRIBED PHASE TWO. HE
20 DESCRIBED PHASE TWO AS, AND I QUOTE, "INVOLVING COMPLETION AND
21 DETERMINATION ON THE MERITS OF ALL MATTERS RELATING TO THE
22 TRIBAL CLAIMS." AND THEN WENT ON TO SAY IT COULD INCLUDE SOME
23 OTHER THINGS.
24 IT -- IT SEEMS, NOW, THAT WE ARE PROPOSING TO DIVIDE
25 PHASE TWO OF THE LITIGATION INTO PARTS ONE AND TWO. PART ONE





1 BEING A DECLARATION OF -- ON THE MERITS OF THE TRIBAL CLAIMS.
2 AND PART TWO, THEN, BEING GETTING TO HOW RELIEF WOULD BE
3 HANDLED. AND I THINK IT'S VERY CLEAR THAT IN ORDER TO GRANT
4 EFFECTIVE RELIEF, EVERYONE AGREES THAT THE INDIVIDUAL WATER
5 RIGHTS CLAIMANTS WILL HAVE TO BE NAMED AND JOINED. AND I -- I
6 DO NOT AGREE THAT THEY WILL NOT ALSO HAVE TO BE SERVED UNDER
7 RULE 4.
8 BUT I THINK WHETHER YOU VIEW THE ISSUES AS -- AS I
9 INTERPRET IT, THE ORIGINAL MOTION, OR AS I INTERPRET THE
10 NARROWING BY THE JOINT REPLY, THE TRIBE AND THE UNITED STATES
11 HAVE NOT MET THEIR BURDEN UNDER RULE 23.
12 HOWEVER, I THINK IT IS INAPPROPRIATE TO ALTER WHAT
13 JUDGE REED SAID PHASE TWO OF THIS LITIGATION WILL BE. I THINK
14 PHASE TWO, NECESSARILY, HAS TO INCLUDE GRANTING EFFECTIVE
15 RELIEF. AND AS I WILL EXPLAIN LATER, IN MY JUDGMENT THE
16 MERITS OF THE -- THE MERE DECLARATION OF THE MERITS OF THE
17 TRIBAL CLAIMS, NECESSARILY, INVOLVES THEIR AFFECT ON THE OTHER
18 WATER RIGHTS CLAIMANTS. AND THAT THOSE TWO THINGS ARE NOT
19 SEVERABLE, BUT MUST BE CONSIDERED TOGETHER.
20 THE TRIBE AND THE UNITED STATES HAVE NOT SHOWING
21 (SIC) -- SHOWN THAT JOINDER OF ALL OF THE DEFENDANTS IS NOT
22 PRACTICAL. THE QUESTION OF WHAT CONSTITUTES IMPRACTICABILITY
23 DEPENDS ON THE FACTS OF EACH CASE. THERE'S NO ARBITRARY RULE
24 AS TO NUMBERS. THE BASIC QUESTION IS PRACTICABILITY OF
25 JOINDER. THE JOINDER IS PRACTICABLE WHERE MEMBERS OF THE

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CLASS CAN BE IDENTIFIED AND ARE FROM THE SAME GEOGRAPHIC AREA.

IN REPLY, THE UNITED STATES AND THE TRIBE DO NOT DIRECTLY ADDRESS THIS REQUIREMENT AT ALL. THEY REFER TO ALLEGED DIFFICULTY IN IDENTIFYING DEFENDANTS, AND THE TIME WHICH HAS ELAPSED FROM THE FILING OF THE CLAIMS. IN -- IN FACT, THERE HAS NOT BEEN A SERIOUS EFFORT TO IDENTIFY DEFENDANTS BEFORE THE CORE (SIC) -- BEFORE THE CASE MANAGEMENT ORDER WAS -- WAS ENTERED.

AND IT SEEMS TO ME THE UNITED STATES AND THE TRIBE CAN'T, ON THE ONE HAND, CLAIM THAT JOINDER IS IMPRACTICABLE BECAUSE IT'S DIFFICULT TO IDENTIFY AND SERVE THE DEFENDANTS, AND AT THE SAME TIME PROPOSE THAT THERE BE NOTICE TO ALL CLASS MEMBERS SENT BY MAIL.

IN ADDITION, IT SEEMS TO ME THAT THEY CAN'T CLAIM THAT JOINDER IS IMPRACTICABLE AND AT THE SAME TIME ARGUE THAT DEFENDANTS CAN OPT OUT OF THE CLASS AND PARTICIPATE INDIVIDUALLY IN LITIGATION ON THEIR OWN.

IN BOTH OF THOSE CASES, THE TRIBE AND THE UNITED STATES WILL HAVE TO IDENTIFY THE DEFENDANTS AND AT LEAST MAIL A NOTICE TO THEM. A PROCESS NOT UNLIKE WHAT IS GOING TO OCCUR WITH JOINDER AND MAILING OF REQUESTS FOR WAIVER OF SERVICE OF SUMMONS.

AND, AS I WILL EXPLAIN IN A LITTLE DETAIL LATER, IF SOMEONE CHOOSES TO BE EXCLUDED FROM THE CLASS AND -- AND THE CLASS IS CERTIFIED UNDER RULE 23(B)(3), THOSE PEOPLE UNDER





JUDGE REED'S ORDER AND THE WAY THIS CASE IS INTENDED TO PROCEED WILL HAVE TO BE SERVED WITH PROCESS AND JOINED BECAUSE WE CAN'T HAVE A BUNCH OF PEOPLE BEING EXCLUDED -- OR DECIDING TO BE EXCLUDED AND THEN NOT BOUND BY ANY JUDGMENT THAT IS FINALLY ENTERED.

AS -- IN FACT, THE UNITED STATES AND THE TRIBE HAVE ACCESS TO THE REQUIRED INFORMATION TO IDENTIFY THE PARTIES. THE PARTIES ARE NOT GEOGRAPHICALLY DISPERSED.

AND IN -- IN THE REPLY, THE -- THE CHANGE IN OWNERSHIP QUESTION IS REFERENCED AS A REASON FOR JOINDER BEING IMPRACTICAL AND ALSO AS A REASON FOR THE CLASS ACTION BEING SUPERIOR HERE. AND THE -- THE REPLY SUGGESTS THAT WHAT HAS BEEN DONE ON DEALING WITH CHANGES IN OWNERSHIPS IS -- IS SOME VOLUNTARY TRACKING OF CHANGES IN OWNERSHIPS BY THE UNITED STATES. AND IT'S -- CERTAINLY, THAT'S NOT HOW I INTERPRET WHAT THE COURT HAS DONE HERE. IT SEEMS TO ME THAT THE COURT HAS ADOPTED AN ORDER THAT WILL GO OUT TO ALL OF THE DEFENDANTS REQUIRING THEM TO GIVE NOTICE OF CHANGES IN OWNERSHIP, TO BOTH THE COURT AND THE UNITED STATES. AND THE PURPOSE OF THAT IS NOT MERELY FOR VOLUNTARILY TRACK -- VOLUNTARY TRACKING, BUT IS TO, AT APPROPRIATE POINTS IN TIME, BRING IN, IF THAT'S NECESSARY, IF THEY'RE NOT ALREADY PARTICIPATING, THE PEOPLE WHO HAVE COME INTO OWNERSHIP OF -- OF THESE WATER RIGHTS.

AS A PRACTICAL MATTER, IF -- IF THE UNITED STATES AND THE TRIBE ARE EVENTUALLY SUCCESSFUL, THE PEOPLE ARE GOING TO

1 HAVE TO BE JOINED. AND, IN FACT, BECAUSE OF THE OVERLAP IN
2 THE CATEGORIES, A LOT OF THEM ARE GOING TO BE JOINED IN ANY
3 EVENT. ON --
4 THE COURT: IF YOU EXCLUDE THE -- IF YOU EXCLUDE THE
5 DECLARATORY RELIEF, ISN'T THIS -- ISN'T THIS CLASS
6 CERTIFICATION A MORE EFFICIENT WAY TO DISPOSE OF THE THRESHOLD
7 ISSUES?
8 MR. DEPAOLI: WELL, IT -- IT MAY BE MORE EFFICIENT,
9 BUT IT -- IN -- IN MY JUDGMENT, IT PRESENTS SOME OF THE SAME
10 PROBO (SIC) -- PROB (SIC) -- PROBLEMS WITH RESPECT TO
11 TYPICALITY AND ADEQUACY OF REPRESENTATION AS WILL THE -- AS
12 WILL THE DECLARATORY ISSUES.
13 AND -- AND THAT'S WHERE I WAS -- WHERE I WAS HEADED
14 NEXT ON THIS TYPICALITY AND ADEQUACY OF REPRESENTATION ISSUE.
15 THE UNITED STATES AND THE TRIBE DO NOT REALLY DISPUTE THE FACT
16 THAT A PARTY'S POSITION ON THE ISSUES IN THIS CASE IS GOING TO
17 BE SHAPED BY THEIR WATER RIGHTS, BY THE WATER RIGHTS PACKAGE
18 THAT THEY HELD -- HOLD AND NOT SOLELY ON WHETHER THEY HAVE A
19 DECREE RIGHT OR A DOMESTIC WELL.
20 THEY, INSTEAD, BASICALLY, SAY THAT -- THAT THAT WON'T
21 MATTER UNTIL WE GET TO PART TWO OF -- OF PHASE TWO OF THE
22 TRIBE'S CLAIMS. BUT I THINK IT -- THE -- THE WATER RIGHTS
23 PACKAGE THAT INDIVIDUALS HAVE DOES -- DOES MATTER ON THE
24 THRESHOLD ISSUES. AND, CERTAINLY, ANY DEFENSE THAT IS A
25 COMPLETE BAR TO THE TRIBAL CLAIMS IS PROBABLY GOING TO BE





1 LOOKED AT IDENTICALLY BY PRETTY MUCH EVERYBODY IN THE CLASS.
2 BUT I THINK THAT'S WHERE THINGS MAY START -- HAVE THE
3 POTENTIAL TO CHANGE.
4 IF YOU LOOK AT THE OTHER PROPOSED THRESHOLD ISSUES
5 AND THAT'S -- AND NOW WE'RE PROPOSING TO DELETE A THRESHOLD
6 ISSUE, AND, OF COURSE, THE THRESHOLD ISSUES ARE NOT SET IN
7 CONCRETE, THE CASE MANAGEMENT ORDER MAKES THAT CLEAR. BUT
8 MOST OF THOSE RELATE TO THIS SOLE SOURCE THEORY AND RELATE TO
9 HOW AND IF AND UNDER WHAT CIRCUMSTANCES THE COURT IS GONNA GET
10 INVOLVED IN REGULATING THE USE OF GROUNDWATER WITHIN THE
11 WATERSHED.
12 AND I THINK THAT THE POSITION OF PEOPLE IN THESE
13 CLASSES ON THOSE KINDS OF ISSUES IS GONNA DEPEND ON WHAT THEIR
14 WATER RIGHT ASSORTMENT IS. AND IT'S GONNA DEPEND ON WHETHER
15 THEY HAVE GROUNDWATER TO SUPPLEMENT THEIR IRRIGATION SUPPLIES
16 OR NOT. IT'S GONNA DEPEND ON THEIR PRIORITY DATE OF THEIR
17 SURFACE SUPPLIES. IT'S GONNA DEPEND ON WHETHER THEIR (SIC)
18 HAVE ONLY NEW LAND WATER RIGHTS FROM THE DISTRICT OR -- OR
19 SOME SUPPLEMENTAL DECREE -- OR SOME DECREE WATER RIGHTS.
20 AND -- AND IN -- IN MY JUDGMENT, THERE IS POTENTIAL
21 FOR CONFLICT AND -- AND ON -- AND THE -- HOW PEOPLE APPROACH
22 THOSE ISSUES MAY NOT NECESSARILY BE TYPICAL. AND THE DISTRICT
23 AND NEVADA CANNOT ADEQUATELY REPRESENT THE MEMBERS ON THOSE
24 PROPOSED ISSUES.
25 THE COURT: WELL, I GUESS I'M -- IN LOOKING AT THE

STAGE YET. I THINK WHAT YOU HAVE DONE IS -- THUS FAR AND THE EFFORTS YOU HAVE MADE ARE REASONABLE.

AND IT MAY VERY WELL BE THAT WHEN YOU PUT A LIST TOGETHER, THAT WILL BE THE LIST. THERE MIGHT NOT BE ANY MORE WORK NEED TO BE DONE. BUT I DON'T WANT TO FORECLOSE THAT BY SAYING WHAT I'M SAYING HERE TODAY.

IS THERE ANYTHING ELSE THAT WE NEED TO DEAL WITH TODAY IN THIS MATTER?

MR. NEVILLE?

MR. NEVILLE: NO, YOUR HONOR, I DON'T HAVE ANYTHING. THANK YOU.

THE COURT: OKAY. THANK YOU VERY MUCH, THEN. WE'RE ADJOURNED.

(PROCEEDINGS CONCLUDED AT 10:55 A.M.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Janyce Rossall, Owner — Date: 10/19/01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

| | | |
|---|---|---|
| UNITED STATES OF AMERICA<br>and<br>ZUNI INDIAN TRIBE<br>Plaintiffs,<br><br>-v-<br><br>STATE OF NEW MEXICO, *ex rel.* State ENGINEER, *et al.*<br>Defendants | ) | **01cv00072-BB**<br><br>ZUNI RIVER BASIN ADJUDICATION<br><br><br><br>Subproceeding 2<br>**Navajo Indian Claims** |

**PRELIMINARY PROCEDURAL AND SCHEDULING ORDER FOR SUBPROCEEDING 2: THE ADJUDICATION OF NAVAJO INDIAN WATER RIGHTS CLAIMS**

The Special Master enters this Order pursuant to Fed. R. Civ. P. 16(b), and hereby amends and supercedes in part the April 5, 2004, *Procedural and Scheduling Order for Federal and Indian Water Rights Claims* (Doc. No. 323) ("April 5, 2004 Order") with respect to the adjudication of all water rights claims for surface and groundwater use made in this civil action on behalf of the Navajo Nation and its members. This matter came before the Special Master upon the United States' March 31, 2008, *Motion To Amend Procedural And Scheduling Order For Indian Water Rights Claims* (Doc. No. 1681). Having considered the comments and suggestions of all interested counsel and *pro se* parties, and being fully advised in the premises, it is hereby ordered that the following will govern the course of Subproceeding 2:

1. **Subproceeding Complaint**. On or before April 2, 2010, the United States shall file in Case No. 01cv00072 a Subproceeding Complaint setting forth a detailed statement of all claims of rights to use water in the Zuni River stream system that the United States asserts on behalf of the Navajo Nation or its members, including allottees.

EXHIBIT B

2. **Establishment of Member Case.** Following the filing of the United States' Subproceeding Complaint, the Clerk will establish a member case civil action number for Subproceeding 2 and cross-file the United States' Subproceeding Complaint as the initial document in the member case. All subsequent pleadings concerning Subproceeding 2 shall be filed in the member case.

3. ***Inter se* Proceedings/Binding Effect.** Subproceeding 2 will be conducted as an expedited *inter se* proceeding: All water rights claimants in the Zuni River stream system will receive notice and have the opportunity to object to claims filed in Subproceeding 2, and to participate in the presentation to the Court of evidence and legal arguments concerning such claims. The adjudication of the Navajo Indian claims will proceed to a partial final decree which shall be binding on all water rights claimants, known and unknown, in the Zuni River stream system, regardless of whether they choose to participate as parties in Subproceeding 2, and will therefore affect these other claimants' rights to challenge the Navajo Indian Claims. However, Subproceeding 2 does not involve the adjudication of the water rights of other parties, including those of subfile defendants, of the Zuni Indian Tribe and its members, or of the United States in its proprietary capacity or in its capacity as trustee for the benefit of the Zuni Indian Tribe or Zuni Indian Tribe members.

4. **Supplemental Subproceeding Complaint.** Not later than June 1, 2010, the Navajo Nation shall file in Subproceeding 2 a pleading styled a "Supplemental Subproceeding Complaint" containing any objections the Nation may have to the United States' Subproceeding Complaint and any additional claims the Nation may have to appropriative or reserved rights to surface water or groundwater within the Zuni River stream system.

5. **Responsive Pleadings and Discovery Stayed.** No party shall serve or file an answer or other pleading responding to the United States' Subproceeding Complaint or to the Navajo Nation's Supplemental Subproceeding Complaint, or serve discovery concerning the Navajo Indian Claims, until after the scheduling and planning conference set by Paragraph 9 of this Order.

6. **Service of Notice of Expedited *Inter Se* Proceeding and Form Notice of Intent to Participate.** On or before **September 2, 2010**, the United States shall serve a *Notice of Expedited Inter Se Subproceeding*, substantially in the form attached hereto, including the form *Notice of Intent to Participate in Subproceeding 2*, on all water rights claimants in the Zuni River stream system. Service on known claimants shall be by mail addressed to the claimants or to their counsel of record. Service on unknown claimants shall be by publication of the *Notice of Expedited Inter Se Proceeding* and form *Notice of Intent to Participate in Subproceeding 2* for four consecutive weeks in a newspaper of regional circulation, the last date of publication to be on or before September 2, 2010.

7. **Notice of Intent to Participate.**

a. Unrepresented, or *pro se*, parties. Any party desiring to participate in the adjudication of the Navajo Indian Claims in Subproceeding 2 shall file a form *Notice of Intent to Participate in Subproceeding 2* with the Court for receipt on or before **October 4, 2010. Only parties who claim water rights within the Zuni river stream system in New Mexico will be permitted to participate in Subproceeding 2.** Filing a *Notice of Intent to Participate in Subproceeding 2* constitutes a voluntary appearance by the party, and affirmative submission to the jurisdiction of this Court with respect to all matters in the lead case, No. 01cv00072-BB, as well as those involved in the member case established for Subproceeding 2. Any party that fails to file a timely *Notice of Intent to Participate in Subproceeding 2* may not later object to any of the claims raised in

Subproceeding 2, unless pursuant to an order of the Court granting a motion to intervene in Subproceeding 2 consistent with Fed. R. Civ. P. 24.

b. Parties represented by counsel. Parties represented by counsel shall complete and sign, but not file, a *Notice of Intent to Participate in Subproceeding 2.* That pleading shall be filed by Counsel pursuant to the provisions in Paragraph 8, below.

8. **Entries of Appearance.** On or before **October 4, 2010**, each attorney representing one or more parties in Subproceeding 2, other than the United States, the Navajo Nation, or the State shall, pursuant to D.N.M.LR-Civ.83.4 and the CM/ECF Administrative Procedures Manual, file an entry of appearance in Subproceeding 2, provide the name and mailing address of each client represented, and attach to the entry of appearance the corresponding *Notice of Intent to Participate in Subproceeding 2* for each client. The Notice(s) shall be completed and signed by the client(s). The entry of appearance shall be filed regardless of whether counsel has entered an appearance in the lead case, and will relate specifically to Subproceeding 2.

9. **Planning and Scheduling Conference.** The Special Master will hold a planning and scheduling conference on **Thursday, November 4, 2010**, at a time and place to be announced. **Attendance at the planning and scheduling conference is mandatory: Any party not appearing at the planning and scheduling conference in person or by counsel will thereafter be precluded from participating in Subproceeding 2, notwithstanding the filing of a timely *Notice of Intent to Participate in Subproceeding 2.***

10. **Answers.** Pleadings responding to the United States' Subproceeding Complaint and to the Navajo Nation's Supplemental Subproceeding Complaint are necessary to frame issues for purposes of disclosures and discovery, and to provide information essential to the Court's further management of the case, including which parties are prepared to bear the burdens of participation

in the adjudication of which issues. Accordingly, on or before February 1, 2011, all parties opposing any of the claims stated by the United States or the Navajo Nation shall file Answers consistent with Fed.R.Civ.P. 8, except that, given the proceeding's character as a subproceeding, no such Answer shall contain a counterclaim or cross-claim. Any claim that could be stated in a counterclaim or cross-claim should be properly stated in the main case, No. 01cv00072. Counterclaims or cross-claims asserted in Subproceeding 2 in violation of this Order shall be deemed stricken without further order of the Court. A party's failure to file a timely Answer shall be grounds for dismissal of the party from Subproceeding 2.

11. **Further Schedule.** For planning purposes, and subject to reconsideration at the November 4, 2010 planning and scheduling conference, the following shall govern the subsequent course of Subproceeding 2:

11.1. **Sequence of Claims.** As a matter of case management, and for purposes of enabling the parties to coordinate the resource demands of Subproceeding 2 with parallel activity in Subproceeding 1, the Special Master determines that discovery and trial activity in Subproceeding 2 should begin with that necessary to resolve any claims asserted by the United States or the Navajo Nation for uses of water for domestic, commercial, municipal, or industrial ("DCMI") purposes.

11.2. **DCMI Discovery Completion Date.** All discovery concerning DCMI claims in Subproceeding 2 shall be commenced in time to be completed by February 26, 2013. Motions relating to discovery (including, but not limited to, motions to compel and motions for protective order) shall be filed with the Court and served on opposing parties by April 26, 2013. This deadline shall not be construed to extend the twenty-day time limit in D.N.M.LR-Civ. 26.6.

11.3. **Expert Witness Disclosure.** With respect to DCMI claims, the parties anticipate calling expert witnesses in the fields of hydrology, hydrographic survey, demography, economics and other fields involving knowledge of domestic, commercial, municipal and industrial uses of water. Reports under Rule 26(a)(2) from experts retained to testify concerning the DCMI claims shall be due:

From the United States by July 6, 2011;

From the Navajo Nation by November 2, 2011;

From the State by July 6, 2012;

From all other parties by October 5, 2012.

11.4. **Pre-trial Motions.** Pretrial motions, other than discovery motions, shall be filed with the Court and served on opposing parties by April 30, 2013, or thirty (30) days after relevant documents are provided pursuant to a motion to compel, whichever is later. Any pretrial motions, other than discovery motions, filed after this date shall be considered untimely in the discretion of the Court.

11.5. **Witness and Exhibit Lists.** Final lists of witnesses and exhibits under Rule 26(a)(3) shall be due from all parties on June 4, 2013. Parties shall have 15 days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

11.6. **Date of Trial.** The case should be ready for trial of all matters concerning DCMI claims by July 8, 2013.

11.7. **Other Claims.** The schedule of proceedings to adjudicate any claims asserted in Subproceeding 2 by the United States or the Navajo Nation for uses of water other than DCMI uses shall be established at a scheduling conference to be set following the conclusion of the trial of DCMI claims.

IT IS SO ORDERED.

Vickie L. Gabin

SPECIAL MASTER VICKIE L. GABIN