Attachment Regarding Threshold Issues: Agenda Item 1.b.i

The parties do not agree on any proposed Threshold Issues, except they agree that jurisdictional challenges are appropriate. The parties also agree that this Court should address whether and when answers are to be filed. The parties' competing lists of issues are set forth below. The California state agencies and Mono County take no position at this time on the threshold issue questions posed.

1. The Walker River Irrigation District ("WRID" or "District"), Nevada Department of Wildlife ("NDOW"), Lyon County, and Circle Bar N, et al., propose the following threshold issues and related information and contend that they are fully consistent with the Federal Rules of Civil Procedure and the Case Management Order and, in particular, paragraphs 11, 12, 15, 16 and 17 thereof:

Proposed Threshold Issue	Issue Category	Is Discovery Required?
(1) 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?	Jurisdiction	No
(2) Whether the Final Decree and/or the doctrines of claim (res judicata) and/or issue preclusion (collateral estoppel) bar any claim for a right to store water in Weber Reservoir and for a right to water from an underground source for lands that were within the Walker River Indian Reservation at the time the Walker River Decree was entered?	Equitable and Legal Defense	Yes
(3) 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?	Legal Defense	Yes
(4) Whether any water, surface or underground, was impliedly reserved when lands were added to the Reservation in 1936 and thereafter?	Legal Defense	Yes

2. The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe ") ("Plaintiffs") do not have Threshold Issues to present to the Court, because they believe no threshold impediments exist to asserting their water rights claims in this matter. Instead, Plaintiffs tried to rephrase some of Defendants' current and past proposed issues and identify some of the legal issues that will come before the Court and to organize them consistent with the Federal Rules of Civil Procedure. Plaintiffs identified issues that focus on questions of law (*e.g.*, jurisdiction and choice of law), even though they disagree that there are, as described by Defendants, for example, any valid challenges to be made to this Court's jurisdiction.

Plaintiffs' claims are filed and service of process is almost complete. Thereafter, pursuant to the Federal Rules of Civil Procedure and any schedule set by this Court, Defendants must move for relief under Rule 12 or answer the complaints. Once Answers are filed, the parties may wish to move to address additional issues. All such issues should be raised in motions filed in compliance with the Federal Rules of Civil Procedure and the Court's Scheduling Orders. Once service is complete, the Case Management Order directs the Magistrate Judge to issue a further case management order to control litigation (including threshold issues). The United States and the Tribe will seek to have such an order issued, consistent with the Federal Rules of Civil Procedure.[1]

Proposed Threshold Issue	**Issue Category**	**Is this a Rule 12 issue that can be addressed before Answers are filed?**	**Can this issue be addressed before filing Answers?**	**Is Discovery Required?**	**Is this a Rule 56 issue that cannot be addressed without discovery?**
1. Whether the Court has jurisdiction to adjudicate each of the claims in Subproceeding C-125-B.	Jurisdiction	Yes, unless any disputed issues of fact are raised. Any motion that raises disputed issues of fact must be deferred until after Answers are filed.	Yes,	No	Probably not – unless an issue of material fact is identified.
2 Whether it was error to bring the Tribal and other federal claims in Case No. C-125. If so, must these claims be re-filed in a new and separate action and re-served	Jurisdiction Res judicata Collateral estoppel[2]	Yes, unless any disputed issues of fact are raised. Any motion that raises disputed issues of fact must be deferred until after Answers are filed.	Yes.	No	Probably not – unless an issue of material fact is identified.

[1] WRID and others object to portions of these two paragraphs as constituting argument.
[2] Res judicata/collateral estoppel are affirmative defenses, but under certain circumstances can be raised under Rule 12.

Proposed Threshold Issue	**Issue Category**	**Is this a Rule 12 issue that can be addressed before Answers are filed?**	**Can this issue be addressed before filing Answers?**	**Is Discovery Required?**	**Is this a Rule 56 issue that cannot be addressed without discovery?**
on all defendants?					
3. If the Court has jurisdiction to adjudicate any or all of the claims in C-125-B, should the Court exercise its jurisdiction?	Jurisdiction	Yes, unless any disputed issues of fact are raised. Any motion that raises disputed issues of fact must be deferred until after Answers are filed.	Yes.	No	Probably not – unless an issue of material fact is identified.
4. What is the applicable law that governs use of groundwater on the Walker River Paiute Indian Reservation and all other tribal claims by the Tribe/allottee or the United States on their behalf?	Question of Law	Yes, unless any disputed issues of fact are raised. Any motion that raises disputed issues of fact must be deferred until after Answers are filed.	Yes	No	Probably not – unless an issue of material fact is identified.
5. Whether certain equitable and affirmative defenses, as identified by Defendants in their Answers, may be asserted in this proceeding.	Equitable defenses Affirmative defenses	Because these threshold questions concern whether such defenses may apply as a matter of law, they may be addressed pursuant to Rule 12, but such motions cannot be filed until Answers are filed.	No	No – to the extent that the question is whether the defense may apply as a matter of law. If equitable defenses apply, they would be subject to discovery.	No/Yes

3. Mineral County believes that only the following two issues are appropriately classified as threshold issues at this point in the litigation:

1. Jurisdiction:

Whether the Decree Court has, and if so the extent of its, jurisdiction over ground water rights and claims both on and off the Walker River Paiute Indian Reservation?

2. Choice of Law:

What law governs the determination whether groundwater rights exist, and if so the quantification and administration of such rights, both on and off the Walker River Paiute Indian Reservation.