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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-RCJ Subproceedings: C-125-B 3:73-CV-00127-RCJ-WGC **THE UNITED STATES OF AMERICA'S MOTION FOR A SUPPLEMENTAL CASE MANAGEMENT ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

The United States of America ("United States") moves this Court to issue a Supplemental Case Management Order ("Supplemental CMO") in Subproceeding C-125-B, as proposed in Attachment A. The proposed Supplemental CMO further implements the existing *Case Management Order* (Apr. 18, 2000; Doc. B-108) ("CMO") and outlines an efficient and expeditious procedural path to resolve the pending water rights claims of the Walker River

Paiute Tribe ("Tribe"), as well as the remaining claims in Subproceeding C-125-B. Although the United States does not believe any amendment to the CMO is necessary to issue the Supplemental CMO, to the extent the Court determines that any part of the CMO needs to be "changed, modified or adjusted," the United States requests that the Court do so. CMO at pg. 14, ¶ 19. The paragraphs below are provided in support of this Motion.

I. ARGUMENT

The Court should enter the proposed Supplemental Case Management Order to resolve the claims in Subproceeding C-125-B in a manner that is orderly, efficient, timely, and fair, as well as consistent with the Federal Rules of Civil Procedure.

For more than a decade and as directed by the Court, the United States has worked diligently to complete service on certain water users and claimants in Nevada and California. *See* CMO at pgs. 4-8, ¶¶ 3-9. Service is nearing completion and the Court has begun to work on case management for the litigation of the claims of the United States and the Tribe. *See First Amended Counterclaim of the United States of America* (July 31, 1997; Doc. B-59) ("U.S. Counterclaim") and *First Amended Counterclaim of the Walker River Paiute Tribe* (Doc. B-58). By following the procedures outlined in the Supplemental CMO, this Court can address and resolve these water rights claims efficiently, expeditiously, and fairly.

Litigation of this subproceeding under the CMO must be consistent with the Federal Rules of Civil Procedure, which as a fundamental matter govern these proceedings. While federal district courts have authority to prescribe rules (local rules) for the conduct of their own business, "[s]uch rules **shall** be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(a) (emphasis added). Congress prescribed the Federal Rules of Civil Procedure under 28 U.S.C. § 2072. Although the Federal Rules of Civil Procedure provide discretion and flexibility in case management, district

courts have no authority to proceed in a manner that is inconsistent with the Rules. *See also* Rule 83(b), Fed. R. Civ. P. ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §[] 2072 . . . and the district's local rules."). The procedures outlined in the Supplemental CMO are consistent with the Federal Rules of Civil Procedure.

In 2000, the Court ordered that the claims of the United States and the Tribe concerning water rights for the Walker River Paiute Reservation (collectively the "Tribal Claims") would be "bifurcated" from the other claims of the United States. CMO at pg. 2 & pg. 4, ¶ 1. The Court also described that after service was complete, the Magistrate Judge would have discretion to identify the procedures and schedule by which to address the Tribal Claims and the remaining Federal Claims[1] asserted by the United States. *Id.* at pg. 8, ¶ 10.

Upon completion of service, the United States and the Tribe are entitled to answers to their complaints. *See* Rule 12(a), Fed. R. Civ. P. Not only will answers identify which defendants object to the Tribal Claims and the Federal Claims and the grounds and defenses they assert, but answers will also begin to identify, frame, and narrow the issues that the Court must address in these proceedings. The Federal Rules of Civil Procedure alter the requirement to file an answer only if the defendant decides to file a motion as authorized by Rule 12. *See id.* at Rule 12(b). If so, that defendant is not required to file an answer until the Court either denies the motion or determines to postpone disposition of the motion until trial. *Id.* at Rule 12(a)(4). Typically, and relevant to this case, these motions would likely challenge the Court's jurisdiction to address the merits of the complaints or assert that a proper claim for relief has not been

[1] The remaining claims address other tribes (the Bridgeport Paiute Indian Colony and the Yerington Paiute Indian Reservation), a series of Indian allotments, and several federal agencies (U. S. Army, U.S. Forest Service, U.S. Marine Corps, U.S. Bureau of Land Management) (collectively "Federal Claims"). *See* U.S. Counterclaim Fourth through Eleventh Claims for Relief.

articulated. *See id.* at Rule 12(b)(1), (2), and (6). To the extent that defendants wish to pursue such motions, they should be given an opportunity to do so.

The CMO, which Judge Reed issued over a decade ago, outlines a "phased" approach to litigation that simply does not correlate to the Federal Rules of Civil Procedure. *See* CMO at pg. 11, ¶12. This appears to have led some parties to believe, incorrectly, that the CMO can legitimately require litigation to proceed in a manner that is inconsistent with the Federal Rules of Civil Procedure. The United States believes this misunderstanding has contributed to ongoing debates over "threshold issues," the scope of discovery that may be conducted for threshold issues, and what other additional motions might be filed once service is complete. Fortunately, the United States believes that the CMO's phased approach can easily be brought into alignment with the Federal Rules of Civil Procedure.

To the extent that the Court wishes to embrace a "phased" approach, the United States proposes that Phase I, as referenced in the CMO, be reserved for Rule 12 motions that address challenges of law to *all claims* in Subproceeding C-125-B. Such motions are filed before answers and do not involve discovery; therefore, they are easily distinguishable from issues that go to the merits of a claim. Moreover, the Court could more efficiently address challenges of law that are common to the Tribal Claims and the Federal Claims. Under this approach, for example, the Court could review all challenges to subject matter jurisdiction in Phase I, resolving at the outset a matter that some parties have long-regarded as a "threshold issue" but that the United States considers conclusively established.

The United States' Supplemental CMO embraces and implements the CMO's bifurcation of the Tribal Claims and Federal Claims in Phase II. Thus, answers to the Tribal Claims would be filed in Phase II, while answers to the Federal Claims would continue to be

stayed. *See* CMO at pg. 4 ¶ 2. As outlined in the CMO, Phase II would address the merits of the Tribal Claims, including motions that require discovery or development of a factual predicate.[2] Once answers are filed regarding the Tribal Claims, the parties would be able to engage in discovery on those claims, in compliance with the Federal Rules of Civil Procedure. In this manner, all remaining motions, and ultimately the merits of the Tribal Claims, will be addressed in an orderly and efficient manner.

Proceeding with "threshold issues" outside the context of a motion for specific relief (i.e. a motion to dismiss) fundamentally seeks from the court a series of advisory opinions and is an inefficient use of time and resources for the Court and the parties. Further, such a process is piecemeal, confusing, and unnecessarily burdensome as parties will insist on broad discovery associated with the threshold issues that they identify.[3] The Federal Rules of Civil Procedure do not contemplate such an approach. Indeed, to the extent any party wants to raise a Rule 12 motion, it can do so at the appropriate time, whether or not the Court and the parties have designated a particular issue as a "threshold." Pursuant to the Federal Rules of Civil Procedure (specifically Rule 12) and the Supplemental CMO, as explained above, any party may raise an issue it identifies as a "threshold issue." Whether the issue ought to be raised in Phase I or Phase II depends on whether it requires discovery or is otherwise appropriate to file under Rule 12 before answering the Claims.

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[2] All motions filed in response to any Answers (*e.g.*, motions to strike certain defenses as a matter of law) that address the Tribal Claims or common issues of law in C-125-B would be addressed in the beginning of Phase II. Answers and all such motions that address the Federal Claims would be stayed.

[3] By following the Federal Rules of Civil Procedure, any necessary discovery associated with those threshold issues identified by defendants would be efficiently secured at the same time discovery on the merits of and objections to the Tribal Claims was being pursued.

II. CONCLUSION

For these and such other reasons that may appear to the Court, the United States respectfully requests that the Court enter the attached Supplemental Case Management Order.

Dated: December 11, 2012

Respectfully submitted,

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