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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF NEVADA

11 UNITED STATES OF AMERICA,  
12 Plaintiff,

13 WALKER RIVER PAIUTE TRIBE,  
14 Plaintiff-Intervenor,

15 v.

17 WALKER RIVER IRRIGATION DISTRICT,  
a corporation, et al.,  
18 Defendants.  
19

) IN EQUITY NO. C-125-RCJ  
) SUBFILE NO. C-125-B  
) 3:73-CV-00127-RCJ-WGC  
)

) **WALKER RIVER IRRIGATION**  
) **DISTRICT'S OPPOSITION TO**  
) **MOTION OF THE UNITED STATES**  
) **OF AMERICA FOR**  
) **SUPPLEMENTAL CASE**  
) **MANAGEMENT ORDER**  
)

20 UNITED STATES OF AMERICA,  
21 WALKER RIVER PAIUTE TRIBE,  
22 Counterclaimants,

23 v.

24 WALKER RIVER IRRIGATION DISTRICT,  
25 et al.,  
26 Counterdefendants.  
27

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1 **I. INTRODUCTION.**

2 The United States asserts that its Motion for Supplemental Case Management Order  
3 (the “Motion”) “further implements the existing Case Management Order” and “outlines an  
4 efficient and expeditious procedural path to resolve the pending water rights claims of the  
5 Walker River Paiute Tribe (“Tribe”), as well as the remaining claims” in this matter.<sup>1</sup> Doc.  
6 1772 at 1-2. The Walker River Paiute Tribe has joined in the Motion. Doc. 1775.

7  
8 At the outset, it is important to understand that, if granted, the Motion would not  
9 “supplement” the existing Case Management Order (April 18, 2000; Doc. 108) (“CMO”), but  
10 rather would effectively replace it. While the Motion is styled as “Supplemental,” if allowed, it  
11 will supplant the existing CMO entered by Judge Reed on April 18, 2000. The Motion requests  
12 that “to the extent that the Court determines that any part of the CMO needs to be ‘changed,  
13 amended, or modified’ ...the Court do so,” and the accompanying Proposed Supplemental Case  
14 Management Order (“Proposed Supplemental CMO”), provides that “[t]his Supplemental CMO  
15 updates...the original CMO” and “to the extent [the Proposed Supplemental CMO] changes, or  
16 modifies, or adjusts the CMO...such changes are [determined] appropriate.” Doc. 1772 at p. 2,  
17 para. 2; Doc. 1772-1 at p. 1, para. 2.

18  
19 As explained below, the provisions of the existing CMO and the provisions of the  
20 Proposed Supplemental CMO are inconsistent and contrary, and so, if the Proposed  
21 Supplemental CMO is entered, it will effectively undo the existing CMO (with the minor  
22 exception of ratifying Judge Reed’s determination to bifurcate the Tribal claims from all other  
23 Federal claims and its recognition that the issue of subject matter jurisdiction needs to be  
24

25  
26  
27  
28 <sup>1</sup> The existing Case Management Order (Doc. 108) refers to the claims for the Walker River  
Indian Reservation as the “Tribal Claims” and the remaining claims as the “Federal Claims.”  
That terminology is used in this Opposition.

1 determined at an early stage of the proceedings). *Compare*, CMO, Doc. 108, *with*, Proposed  
2 Supplemental CMO, Doc. 1772-1.

3 Under the Proposed Supplemental CMO, Phase I would allow a period of time for all  
4 defendants to file motions contemplated by Rule 12(b) of the Federal Rules, and would require  
5 defendants to “coordinate their filings.” Doc. 1772-1 at para. 3.a. Such Rule 12(b) motions  
6 would be required to address all of the claims made by the United States and Tribe, not just the  
7 claims related to the Walker River Indian Reservation. *Id.* at para. 3. Phase I would also  
8 permit Rule 12 motions to strike defenses as a matter of law. Doc. 1772. After disposition of  
9 Rule 12 motions, the CMO’s existing bifurcation of the Tribal Claims from the Federal Claims  
10 would again be effective. Doc. 1772-1 at para. 3.

11  
12 Under the Proposed Supplemental CMO, Phase II would require answers to the Tribal  
13 Claims, as well as counterclaims and crossclaims as to the Tribal Claims. *Id.* at paras. 5; 6; 7.  
14 During Phase II, the Court and the parties would address discovery, dispositive or partially  
15 dispositive motions and the merits of the Tribal Claims and related counterclaims and  
16 crossclaims, apparently simultaneously. *Id.*

17  
18 The Proposed Supplemental CMO does little, if anything, to provide for any kind of  
19 actual “case management.” “Phase I” of the Proposed Supplemental CMO is merely a  
20 restatement of the provisions of Fed. R. Civ. P. 12(b), which, by its terms, provides only for the  
21 structuring of litigation “**generally.**” *Compare*, Fed. R. Civ. P. 12 (2012), *with*, Proposed  
22 Supplemental CMO, Doc. 1772-1, p.2, paras. 3-7. The Proposed Supplemental CMO ignores  
23 the fact that this proceeding includes several thousand defendants, over 2,000 of whom are  
24 unrepresented, and the case management and other burdens those facts place on the Court and  
25 the parties, many of whom are defendants, only because they may have a domestic well, and  
26 most recently because they may have an “unexercised dormant riparian water right.” *See* Doc.  
27 1741, p. 5; Doc. 1749, pp. 2-3.  
28

1 Far from “further implementing” the existing CMO, the Proposed Supplemental CMO  
2 provides for no special management of this litigation at all. It eliminates the CMO’s central  
3 purpose of early consideration and disposition of issues which might shorten or simplify this  
4 litigation. Rather than placing this litigation on an efficient and expeditious procedural path to  
5 resolution of the claims being made, it places it on a path which contemplates time consuming  
6 and needless motions which will not materially advance the resolution of this matter.  
7

8 The Proposed Supplemental CMO completely overlooks the reasons the Court issued  
9 the CMO in the first instance, particularly the reasons for extending the time for filing answers  
10 and for directing the Magistrate Judge to identify threshold issues to be decided by the District  
11 Judge through dispositive motions or evidentiary hearing. When those reasons are considered,  
12 it becomes clear that the Proposed Supplemental CMO neither implements the CMO, nor  
13 provides for the efficient and expeditious resolution of this litigation. Those reasons are  
14 revealed by a brief review of the events which led up to the CMO.  
15

16 **A. The Amended Claims**

17 The circumstances leading up to the CMO began in 1997 when the Tribe and the United  
18 States filed their amended pleadings in this matter. Docs. 58; 59. Until that time, the claims  
19 being made involved only surface water in the Walker River Basin. *See* Docs. 1; 3; 17, 18.  
20 Through their amended pleadings, the Tribe and the United States asserted claims to  
21 groundwater and claims against other groundwater users in the Walker River Basin, including  
22 the claim that “underground water and surface waters constitute a single source.” CMO, Doc.  
23 108 at 3, *Ins.* 24-25; *see also* Docs. 58; 59.  
24

25 **B. The May 11, 1999 Minute Order.**

26 After filing their amended claims, the Tribe and the United States filed a Joint Motion  
27 for Leave to Serve First Amended Counterclaims, to Join Groundwater Users, to Approve  
28 Forms for Notice and Waiver, and to Approve Procedure for Service of Pleadings Once Parties

1 Are Joined (the “Joint Motion”). Doc. 62. Various parties responded to the Joint Motion.  
2 Docs. 64-67. Thereafter, on May 11, 1999, the Court entered a Minute Order which provided  
3 for a scheduling conference to establish procedures for the expeditious and efficient  
4 management and resolution of this matter, and to hear argument and proposals on certain  
5 specific matters. Doc. 81.<sup>2</sup> It is clear from a reading of that Minute Order that the Court was  
6 concerned about the complexities and case management issues that were certain to arise with  
7 the joinder into the litigation of groundwater users from throughout the Walker River Basin. In  
8 part, the Court said:

10 Obviously, the introduction of the groundwater claims may be necessary to the  
11 counterclaims, but such will greatly increase the complexity of the litigation and  
12 could possibly make it simply impractical to proceed.

13 \* \* \*

14 Our goal here is to place the case on some sort of proper procedural track.

15 Certainly, all will agree that resolution of these questions will almost certainly  
16 have a far-reaching impact on this case as a whole, and not just with respect to  
17 this sub-file.

18 \* \* \*

19 In sum, we must establish procedures for consideration of these matters in an  
20 orderly fashion, so that the matter may proceed in as expeditious a manner as  
21 possible.

22 Doc. 81 at 3-4. The Court was also concerned with its jurisdiction over proposed groundwater  
23 defendants. *See* Doc. 81 at 3.

24 The Court was right in concluding that the introduction of groundwater users and issues  
25 into this matter, particularly with respect to the Tribal Claims, necessitated the implementation  
26  
27

---

28 <sup>2</sup> The May 11, 1999 Minute Order is attached to this Opposition as Exhibit A.

1 of special procedures for its management.<sup>3</sup> There are two separate and distinct aspects of the  
2 Tribal Claims which relate to groundwater and groundwater users which require such  
3 management.

4 The first relates to the claims made for a federal reserved right to groundwater for lands  
5 within the Walker River Indian Reservation. In that context, the hydrographic groundwater  
6 basin or basins, of which the Reservation is a part, are no different than, and must be  
7 considered in the same manner as, the Walker River was considered when a similar federal  
8 reserved claim was made to water from it. All of the claims to that underground water source,  
9 both inside and outside the boundaries of the Reservation, must be adjudicated *inter se* so that  
10 they can be administered based upon the priority system. Here, the relevant hydrographic  
11 groundwater basin from the State of Nevada's perspective is hydrographic Basin 110, which is  
12 divided into three sub-areas: Sub-Area (A), the Schurz Sub-Area; Sub-Area (B), the Lake Sub-  
13 Area; and Sub-Area (C), the Whiskey Flat Hawthorne Sub-Area. Thus, all underground water  
14 users in the relevant hydrographic basin were joined in the litigation, and it may be necessary to  
15 allow them to assert their claims to water from it.

16  
17  
18 The second and more pervasive aspect of the Tribal Claims with respect to groundwater  
19 concerns the issue of the hydrologic relationship between surface and groundwater throughout  
20 the Walker River Basin. The relief requested with respect to the Tribal Claims exemplifies the  
21 magnitude and enormity of this aspect of the groundwater issues. With respect to the Tribal  
22 Claims, the Tribe and the United States ask the Court:

23  
24 1. To recognize and declare and quiet title to:

25 A. The right of the Tribe to store water in Weber Reservoir for use  
26 on the Reservation, including the lands restored to the Reservation in 1936;

27  
28 <sup>3</sup> Even without the introduction of groundwater issues and users into the litigation, the original  
claims would probably have required some management beyond normal procedures. However,  
the management issues were magnified exponentially with the groundwater issues and users.

1           B.     The right of the Tribe to use water on the lands restored to the  
2     Reservation in 1936;

3           C.     The right of the Tribe to use groundwater underlying and  
4     adjacent to the Reservation on the lands of the Reservation, including the lands  
5     restored to the Reservation in 1936;

6           D.     The right of the Tribe to use groundwater underlying and  
7     adjacent to the lands restored to the Reservation in 1936 on the lands of the  
8     Reservation, including the lands restored to the Reservation in 1936.

9           2.     Declare that the defendants and counterdefendants have no right, title or  
10    other interest in or to the use of such water rights.

11          3.     Preliminarily and permanently enjoin the defendants and other  
12    counterdefendants from asserting any adverse rights, title or other interest in or  
13    to such water rights.

14    *See* Doc. 58, pp. 17-18; *see also* Doc. 59, p. 31.

15           In order to render a judgment providing the relief the Tribe and United States seek, the  
16    Court would have to require that all defendants assert any claims they may have to surface  
17    water established under state law after entry of the Walker River Decree, and to underground  
18    water. Moreover, as is recognized in the CMO, an essential element of the Tribal Claims and  
19    Federal Claims is the contention that “underground and surface waters [within the Walker  
20    River Basin] constitute a single source.” Doc. 108, p. 3. Thus, if the Court ultimately reaches  
21    the merits of that claim, in order to render a judgment which can administer all of the rights to  
22    that “single source,” the Court will have to determine the relative priority and relationships of  
23    all such rights, surface and groundwater, to each other. That determination can only be made if  
24    persons whose rights to that “single source” which have not been previously adjudicated are not  
25    only joined, but also are allowed and required to assert and prove those rights through  
26    appropriate counterclaims and crossclaims.

27           Although the Walker River Decree represents a comprehensive adjudication of the  
28    relative rights to use the surface waters of the Walker River and its tributaries in Nevada and  
29    California, there has never been a similar comprehensive adjudication of the relative rights to  
30    use underground water within the Walker River Basin in Nevada and California. There

1 certainly has never been an adjudication which determines the relative rights to use water from  
2 the alleged “single source” within the Basin.

3         The Court recognized that to simultaneously address all of the issues related to the  
4 merits of such an enormous adjudication proceeding “could possibly make it simply impractical  
5 to proceed.” Doc. 81 at 3. It also was aware that there were issues related to the claims being  
6 made which, if raised and decided early in the proceeding, might render some aspects of such  
7 an enormous undertaking entirely unnecessary. It gave the parties participating at the time a  
8 period of time to submit a stipulation on how to proceed. Doc. 83. The parties were not able to  
9 reach agreement, and stipulated to the submission of their respective proposals for case  
10 management by way of motion. Those motions and related briefing were submitted on or about  
11 January 21, 2000. Docs. 96 - 100. Responses to the motions submitted were filed on or about  
12 February 22, 2000. Docs. 101 - 104. Replies in support of the respective motions were  
13 submitted on or about March 7, 2000. Docs. 105-106. The CMO was entered as a result of  
14 those motions and related briefs.  
15  
16

17 **II. THE CASE MANAGEMENT ORDER IS INTENDED TO PROVIDE FOR THE**  
18 **EARLY RESOLUTION OF ISSUES WHICH MIGHT SHORTEN OR**  
19 **SIMPLIFY THIS LITIGATION.**

20 **A. The Case Management Order.**

21         In the CMO, the Court recognized that the case as a whole was simply too big and too  
22 complex to process on a reasonable basis without bifurcation and other management. Based  
23 upon service to date, the case involves several thousand defendants. Approximately 2,000 of  
24 those defendants are not represented by counsel. Although there has been no specific  
25 breakdown of defendants who are included solely because they are users of groundwater, it is  
26 likely that many of the defendants are in that category. The number of defendants and the  
27 problems associated with proceeding to simultaneously adjudicate the Tribal Claims and  
28 related counterclaims and crossclaims, require that the case must be managed in ways that may

1 reduce the burden on the Court and the parties.<sup>4</sup> That fundamental purpose of the CMO entered  
2 in April of 2000 is what the Proposed Supplemental CMO would undo.

3 The CMO bifurcates the Tribal Claims for the Walker River Indian Reservation from  
4 Federal Claims raised by the United States for other federal interests. Except as expressly  
5 provided in the CMO, all discovery and other proceedings in the action are stayed. CMO, Doc.  
6 108, p. 4, Ins. 20-24. The CMO required the Tribe and the United States to serve their  
7 amended pleadings and related service documents on, and thereby join, numerous individuals  
8 and entities who hold surface and underground water rights within the Walker River Basin. It  
9 grouped those individuals and entities into nine different categories. *Id.*, pp. 5-6. The CMO  
10 expressly provides that no answers or other pleading will be required except upon further order  
11 of the Magistrate Judge. It also provides that no default will be taken for failure to appear. *Id.*,  
12 p. 12.  
13

14  
15 The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase  
16 I will consist of the disposition by the District Judge of “threshold issues as identified and  
17 determined by the Magistrate Judge.” Phase II will “involve completion and determination of  
18 the merits of all matters relating to [the] Tribal Claims.” CMO, Doc. 108, p. 11. Additional  
19 phases of the proceedings will “encompass all remaining issues in the case.” *Id.*  
20

21 Although the United States professes to believe that no amendment to the CMO is  
22 needed by reason of its Proposed Supplemental CMO, the Proposed Supplemental CMO would  
23 require that Rule 12 motions be filed under its Phase I with respect to both the Tribal Claims  
24 and the Federal Claims. Doc. 1772 at 4; Doc. 1772-1 at n. 6. That is clearly in conflict with  
25 the CMO which stayed all proceedings with respect to the Federal Claims. *See* Doc. 108 at p.  
26

27  
28 <sup>4</sup> As noted above, after disposition of Rule 12 motions directed at the Tribal Claims and the  
Federal Claims, the Proposed Supplemental CMO would again recognize the bifurcation of the  
Tribal Claims from the Federal Claims.

1 4, Ins. 20-24; p. 11, ln. 11 - p. 12, ln. 13. Moreover, as is discussed further below, with the  
2 exception of threshold issues which address subject matter jurisdiction as to both the Tribal  
3 Claims and the Federal Claims, other Rule 12 motions will not further the efficient or  
4 expeditious resolution of this litigation.

5  
6 The identification of threshold issues is left to the Magistrate Judge, and the  
7 identification of those issues shall “not be finally resolved and settled by the Magistrate Judge  
8 until all appropriate parties are joined.” CMO, Doc. 108, p. 9. Included among the possible  
9 threshold issues to be considered for inclusion by the Magistrate Judge are issues related to the  
10 Court’s jurisdiction and equitable defenses to the Tribal Claims. *Id.*, pp. 9-11. The CMO  
11 contemplates that the Magistrate Judge will designate as threshold issues those issues the early  
12 resolution of which may shorten or simplify the litigation.

13  
14 The CMO also directs the procedures to be followed in connection with the disposition  
15 of designated threshold issues. First, it allows for discovery on those issues. Second, it allows  
16 for written discovery concerning the bases for the Tribal Claims. The CMO stays all other  
17 discovery. CMO, Doc. 108., p. 13. It provides for the disposition of the designated threshold  
18 issues by the District Judge through dispositive motion, evidentiary hearing, or both. *Id.*, p. 13,  
19 ln. 16-14, ln. 2. Contrary to the assertion of the United States, there is nothing in that process  
20 which contemplates a “series of advisory opinions.” *See* Doc. 1772 at 5.

21  
22 The Proposed Supplemental CMO would replace the CMO’s threshold issue phase of  
23 the litigation related to the Tribal Claims with a phase allowing only motions under Rule 12 of  
24 the Federal Rules. That approach does not in any way further the resolution of this matter  
25 expeditiously or efficiently. First, it ignores the thousands of defendants involved, and the fact  
26 that most are unrepresented. As the Manual for Complex Litigation notes, “motion practice can  
27 be a source of substantial cost and delay.” Manual for Complex Litigation (4th), § 11.32, p. 43  
28 (2004). Second, many of the defects which can be raised by Rule 12 motions can be cured.

1 *See, e.g.*, Fed. R. Civ. P. 12(b)(3); (4); (5); (6) and (7). Such a Rule 12 motion phase of this  
2 litigation will do nothing to shorten, simplify or defer costly and possibly unnecessary  
3 proceedings in this matter. It will do the precise opposite.

4 Through its threshold issue phase, the CMO manages the Tribal Claims in ways which  
5 have the potential to defer costly and possibly unnecessary proceedings in the interests of  
6 judicial economy and the convenience of the parties. The Court suggested that such issues  
7 include defenses which might bar some or all of the Tribal Claims. Depending on the  
8 determination of defense issues, the merits (Phase II) of the Tribal Claims may not proceed at  
9 all. Alternatively, some, but not all, or all of those claims might proceed on the merits.  
10 Additional issues included the extent to which the Court may or should become involved in  
11 issues related to underground water and its uses within the Walker River Basin. The potential  
12 outcomes there range from not at all, to in a limited way, to a separate adjudication of rights to  
13 underground water, and finally to an adjudication of surface and underground water as a single  
14 source of supply. Again, depending on how those issues are determined, the scope of the  
15 merits (Phase II) of the Tribal Claims may be broad or narrow. The Court's suggestions for  
16 threshold issues did not preclude consideration of other issues.

17 Through its provisions for Magistrate Judge identification and District Judge disposition  
18 of threshold issues, the CMO allows for the potential avoidance of possibly unnecessary and  
19 costly litigation. It does so in several ways. First, through issues related to its jurisdiction,  
20 particularly as to groundwater. Second, it does so through issues to be identified which may be  
21 dispositive or partially dispositive of some or all of the Tribal Claims. Rather than waiting  
22 until the end of a massive proceeding for the Court to decide that one or more of those  
23 defenses, including finality, is a valid defense to the merits of the Tribal Claims, the CMO  
24 allows for consideration of some defenses first. For example, threshold issues proposed by  
25 defendants, like claim and issue preclusion, have the potential to avoid such possibly  
26  
27  
28

1 unnecessary and certainly costly litigation just as they did in *Nevada v. United States*, 463 U.S.  
2 110, 129-145 (1983); *see also, United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10,  
3 12 (D. Nev. 1975). Those defenses have the potential to bar the claims for underground water  
4 and for surface water storage in Weber Reservoir for the Reservation as it existed when the  
5 Walker River Decree was entered.

6  
7 Similarly, the defendants have also identified two significant issues which have the  
8 potential to eliminate the claims for the lands added to the Reservation in the 1930s. Those  
9 issues relate to the purpose of reserving those added lands, and to the question of whether the  
10 United States may reserve water under the implied reservation of water doctrine from a water  
11 source (the Walker River), that is not within the lands being reserved.

12  
13 If the surface water portion of the Tribal Claims is fundamentally flawed, either because  
14 of an affirmative defense or because of the absence of an element essential to their merits, the  
15 need for a single source adjudication of surface and groundwater throughout the entire Walker  
16 River Basin becomes unnecessary. Hundreds, if not thousands, of the defendants, many of  
17 whom have nothing more than a domestic well, can be dismissed from the action and will not  
18 be required to participate further. The defendants have identified such issues to be designated  
19 as threshold issues on which the CMO allows discovery and provides for disposition, either  
20 through dispositive motion, or evidentiary hearing before the District Judge.

21  
22 Similarly, if the groundwater claims for the Reservation as it existed when the Walker  
23 River Decree was entered are barred on claim preclusion grounds, the need for an adjudication  
24 of groundwater rights in Hydrographic Basin 110 may also be obviated.

25 In 2000, the United States and Tribe said:

26 Regarding the threshold issues, the United States and the Tribe have proposed  
27 that the initial phase of this litigation focus on certain legal issues related to this  
28 Court's jurisdiction, groundwater, and affirmative defenses the other parties may  
assert. We believe that this is logical, efficient, economic, and just. Focusing  
on threshold issues such as jurisdiction and related affirmative defenses is a

1 logical first step, because it allows for the prompt resolution of these potentially  
2 or partially dispositive issues. If WRID or the State or any other party has a  
3 procedural or other defense to going forward, then this is the logical time to  
4 identify the defense and address it. It is efficient to resolve threshold issues  
5 regarding the Tribal Claims because it allows the parties to focus their time and  
6 resources on a manageable set of issues, and eliminates the temptation for the  
parties to litigate every issue in the case at once, without a coherent structure for  
doing so. Resolution of the threshold issues regarding the Tribal Claims may  
also lead to more efficient resolution of similar issues regarding the other federal  
claims.

7 Response of United States and Walker River Paiute Tribe to Joint Motion by the State of  
8 Nevada and WRID Concerning Case Management, Doc. 101 at 2, lns. 15-25. Now, in lieu of  
9 the CMO provisions which allow the parties and the Court to focus their time and resources on  
10 a manageable set of issues whose resolution may shorten or simplify this litigation sooner  
11 rather than later, the United States through the Proposed Supplemental CMO would require  
12 Rule 12 motions, followed by answers, counterclaims and crossclaims and answers to the  
13 counterclaims and crossclaims. Thereafter, discovery and the merits of the Tribal Claims and  
14 related counterclaims and crossclaims would proceed simultaneously. Doc. 1772-1 at 2-3.  
15 That approach is exactly what the CMO seeks to avoid, and what in 2000 the United States and  
16 Tribe said should be avoided.

17  
18  
19 **B. The Case Management Order Does Not Violate the Federal Rules of Civil  
20 Procedure.**

21 The United States contends that the CMO violates the Federal Rules of Civil Procedure  
22 in three ways. First, the United States questions the power of the Court to extend the time for  
23 filing answers. Doc. 1772, p. 3. Second, it doubts the authority of the Court to proceed with  
24 the litigation in phases. *Id.*, p. 4. Third, it is concerned about the discovery related to threshold  
25 issues. *Id.*, p. 5.

26 Fed. R. Civ. P. 83(b) allows a judge to “regulate practice in any manner consistent with  
27 federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules.”  
28 Under that Rule, a district judge supervises litigation and manages the docket. The judge may

1 authorize actions which the Federal Rules neither authorize, nor forbid. *See, Beaird v. Seagate*  
2 *Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). The CMO extends the time for filing  
3 answers to a time to be determined by the Magistrate Judge, authorizes the Magistrate Judge to  
4 identify issues which, if decided early, may shorten or simplify this litigation, allows discovery  
5 on such issues, and thereafter provides for their disposition by the District Judge through  
6 dispositive motion and/or separate trial. All of that is permitted by the Federal Rules, and, here,  
7 sound case management reasons support the Court's decision to include them in the CMO.  
8 Moreover, even if the CMO has authorized something not expressly provided for in the Federal  
9 Rules, Fed. R. Civ. P. 83(b) allows the court to manage litigation and its docket in those ways  
10 because they are not prohibited by the Federal Rules.  
11

12 **1. Fed. R. Civ. P. 56(b) Allows for the Filing of Dispositive Motions at**  
13 **Any Time or As Ordered by the Court.**

14 Fed. R. Civ. P. 56(b) allows for the filing of a dispositive (summary judgment) motion  
15 at any time or as ordered by the court. *See* Fed. R. Civ. P. 56(b). The CMO is an order by the  
16 Court which authorizes the filing of such motions after completion of discovery on the  
17 threshold issues designated by the Magistrate Judge. CMO, Doc. 108 at para. 16.  
18

19 Fed. R. Civ. P. 56(d) also allows the Court to authorize discovery related to such  
20 motions. Moreover, Fed. R. Civ. P. 26(d) allows the Court to control the timing of discovery.  
21 The CMO is an order of the Court which controls the timing of discovery and which directs the  
22 Magistrate Judge to control that discovery through an appropriate discovery plan. CMO, Doc.  
23 108 at para. 15.  
24

25 Clearly, the Federal Rules do not prohibit, and in fact authorize, the procedures  
26 provided for in the CMO for discovery on and dispositive motions related to threshold issues  
27 designated by the Magistrate Judge. As the Manual for Complex Litigation (4th) notes:  
28

1 “Summary judgment may eliminate the need for further proceedings, or at least reduce the  
2 scope of discovery or trial.” Manual for Complex Litigation (4th) § 1134, p. 46 (2004).

3 **2. Fed. R. Civ. P. 42(b) Allows for the Management of Claims and**  
4 **Issues As Provided in the CMO.**

5 The CMO also provides for the disposition of threshold issues designated by the  
6 Magistrate Judge by what is, in essence, a separate trial on such issues. CMO, Doc. 108 at 17.  
7 The Manual for Complex Litigation (4th) recognizes: “conducting a separate trial under Federal  
8 Rule of Civil Procedure 42(b) of issues that may render unnecessary or substantially alter the  
9 scope of further discovery or trial” is one of a “variety of actions [that] can help to identify,  
10 define, and resolve issues in complex litigation.” Manual for Complex Litigation (4th), §  
11 11.33, pp. 45-46 (2004). Further, “despite their benefits, summary judgment proceedings can  
12 be costly and time consuming. To avoid the filing of unproductive motions the court  
13 may...ascertain whether issues are appropriate for summary judgment. A separate trial of an  
14 issue bifurcated under Rule 42(b) may...be preferable.” *Id.* § 1134, pp. 46-47. The existing  
15 CMO authorizes the Magistrate Judge to not only identify threshold issues, but also to permit  
16 dispositive motions, or a separate trial on such issues. Doc. 108 at paras. 16-17; *see also*,  
17 *Miller v. New Jersey Transit Authority Rail Ops.*, 160 F.R.D. 37 (D. N.J. 1995) (allocating Rule  
18 42(b) power to magistrate judges serves goal of efficiency).

19  
20  
21 The existing CMO, that the United States seeks to undo, structures this complex  
22 litigation, involving thousands of parties, in a manner thoroughly consistent with Fed. R. Civ.  
23 P. 42(b), while the Proposed Supplemental CMO merely recites what the Federal Rules of Civil  
24 Procedure and applicable law already provide, without lending any meaningful structure to the  
25 litigation. *Compare*, CMO (Doc. 108), *with* Fed. R. Civ. P. 42, *and compare both with*  
26 *Proposed Supplemental CMO (Doc. 1772-1)*. The United States “does not believe any  
27 amendment to the existing CMO is necessary to issue the [Proposed] CMO,” but at the same  
28

1 time somehow also believes that the “CMO, which Judge Reed issued...outlines a phased  
2 approach to litigation that **simply does not correlate to the Federal Rules of Civil**  
3 **Procedure.**” Doc. 1772, p. 2, para. 1; p. 4, para. 2, *emphasis added*, [citing CMO, p. 11, para.  
4 12]. The United States further “believes” that “this misunderstanding has contributed to  
5 ongoing debates over ‘threshold’ issues, and “lead some parties to believe...that the CMO can  
6 legitimately...require litigation to proceed” in the manner provided for in the existing CMO.  
7 Doc. 1772, p. 4, para. 2.

9 Obviously, the CMO cannot both require no amendment and also be impermissible  
10 under the Federal Rules of Civil Procedure. The United States is simply incorrect in its  
11 assertion that the existing CMO’s contemplation of “phased” litigation is in any way improper,  
12 or inconsistent, or “simply does not correlate to” the Federal Rules of Civil Procedure. Further,  
13 the only “misunderstanding” concerning proceeding to the identification of potentially  
14 dispositive threshold issues, pursuant to the existing CMO, is that of the United States and  
15 Tribe. The “phased” approach to this litigation outlined in the existing CMO is perfectly  
16 permissible under the Federal Rules pursuant to Fed. R. Civ. P. 42(b), which provides that the  
17 Court “may order a separate trial of one or more separate issues,” “for convenience, to avoid  
18 prejudice, or to expedite or economize.” Fed. R. Civ. P. 42(b) (2012). Further, there are  
19 prominent examples of appropriate “phasing” of complex litigation by a trial court, which  
20 involved identification of, and separate trial upon, potentially dispositive “threshold issues.”  
21 *C.f., Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575 (9th Cir. 1995).

24 In *Exxon Co. v. Sofec, Inc.*, the Ninth Circuit affirmed the trial court’s bifurcation and  
25 limitation of “**Phase One**,” of the litigation that followed upon the Exxon Houston’s  
26 grounding, to a separate trial and determination upon the sole issue of causation, pursuant to  
27 Fed. R. Civ. P. 42(b). *Exxon Co.*, 54 F.3d at 575-576. The *Exxon* court reasoned that by  
28 making such bifurcation and thereby potentially avoiding the need to consider comparative

1 negligence, the trial court’s “phasing” of the litigation was expeditious and appropriate in light  
2 of the circumstances. *Id.*; *see also, e.g., United States v. Truckee-Carson Irrig. Dist.*, 71 F.R.D.  
3 10, 12-13 (D. Nev. 1975)<sup>5</sup> (separate trial on defenses of *res judicata* and collateral estoppel was  
4 the most convenient way to dispose of those defenses, without any need to also determine the  
5 merits of claims to water rights being asserted at the same time); *Japan Cash Machine Co., Ltd.*  
6 *v. MEI Inc.* (D. Nev. 2008), *unpublished decision citeable as procedural example*, (Court  
7 determined to bifurcate equitable defense issue for separate determination, pursuant to Fed. R.  
8 Civ. P. 42(b), “a decision that is clearly permissible under Federal Circuit precedent.”).

10 “Rule 42(b) of the Federal Rules of Civil Procedure confers broad discretion upon the  
11 district court to bifurcate a trial, thus deferring costly and possibly unnecessary proceedings  
12 pending resolution of potentially dispositive threshold issues.” *Zivkovic v. Southern California*  
13 *Edison, Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) [*Citing, Exxon Co.*, 54 F.3d at 575 (9th Cir.  
14 1995)]. In *Zivkovic*, the Ninth Circuit affirmed the trial court’s *sua sponte* determination to  
15 limit a trial to only two potentially dispositive issues. *Zivkovic*, 302 F.3d at 1088, *C.f.*,  
16 *Zizkovic*, at 1088 (“the trial court **explained** to the parties that the trial was limited...to...two  
17 designated issues,” whose resolution potentially “would have necessarily resolved the case.”  
18 [*emphasis added*]).

20 The United States provides no authority, nor argument that such “phasing” of litigation  
21 is in any way improper, beyond bare assertions of inefficiency and blanket allegation. It also  
22 provides no example of litigation, disapproving of such “phasing” of litigation. Instead, it  
23 merely, in substance, asserts that the Federal Rules have other provisions, which entitle it to an  
24 answer. Doc. 1772, p. 3, para. 3. As explained herein Fed. R. Civ. P. 42(b) allows for the  
25  
26  
27

28 <sup>5</sup> This water litigation involved over 17,000 defendants, and Judge Reed was counsel for the State of Nevada in connection with it.

1 litigation structure provided for in the CMO, and as explained below, Fed. R. Civ. P. 6 allows  
2 the Court to extend time for answers required by Fed. R. Civ. P. 12(a).

3 Further, as explained above and below, “proceeding with ‘threshold issues’ outside the  
4 context of a motion for specific relief,” is perfectly proper, is **not** “an inefficient use  
5 of...resources,” and certainly does not “seek from the court a series of advisory opinions.”  
6 (Doc. 1772, p. 4 para. 2, p. 5 para. 2). Rather, the litigation structure provided for in the  
7 existing CMO, including its provision for the identification of potentially dispositive threshold  
8 issues for dispositive or partially dispositive motions under Fed. R. Civ. P. 56 and/or separate  
9 trial and determination pursuant to Fed. R. Civ. P. 42(b), promotes efficiency specifically by  
10 allowing for the identification of those potentially dispositive “threshold issues,” because  
11 determinations upon those “threshold issues” may obviate the need to expend additional  
12 resources by all parties and the Court. Nor would such determinations amount to “advisory  
13 opinions” and the United States offers neither authority, nor explanation as to that assertion.  
14  
15

16 Thus, Judge Reed, “with the conclusion that the Tribal claims should be bifurcated in  
17 mind,” crafted the procedurally proper, existing CMO, “in order to provide for such  
18 bifurcation.” CMO, Doc. 108, p. 4, Ins. 4-7; para. 2. Consistently, as explained herein, the  
19 CMO directs the Magistrate Judge to identify certain potentially dispositive “threshold issues,”  
20 for determination in “Phase I” of this litigation, consistent with, and permissibly pursuant to,  
21 Fed. R. Civ. P. 42(b). *C.f.*, CMO, Doc. 108, pp. 9-11. The United States simply has no basis  
22 for its assertion that the phased approach to litigation outlined in the CMO “does not correlate  
23 to the Federal Rules of Civil Procedure.” Doc. 1772, p. 4 [*citing* CMO, Doc. 108, p. 11, para.  
24 12].  
25

26 **3. Fed. R. Civ. P. 6(b)(1) Allows the Court to Extend the Time for**  
27 **Filing Answers.**  
28

1 Fed. R. Civ. P. 6(b)(1) authorizes the Court to extend any of the time periods  
2 established by the Federal Rules, including the time for filing answers, which is what the Court  
3 has done through the CMO. The exceptions to that authority in Fed. R. Civ. P. 6(b)(2) do not  
4 relate to the time for filing answers. There are good reasons why the Court did not require an  
5 answer as an initial response to the service of process, and why answers, counterclaims and  
6 crossclaims are not needed, if at all, until after the identification and disposition of appropriate  
7 threshold issues. Delay and unnecessary cost will be the result if answers, counterclaims and  
8 crossclaims, and answers to counterclaims and crossclaims from several thousand defendants,  
9 most of whom are unrepresented, are required before that happens.

11 For good reason, the CMO left to the discretion of the Magistrate Judge the  
12 determination of when answers (and counterclaims and crossclaims) should be required. First,  
13 the CMO recognizes that depending on the outcome of certain threshold issues, a formal  
14 responsive pleading from every defendant might never be necessary. It also recognizes that  
15 even if answers were required and not filed, a default judgment can never be taken until the  
16 conclusion of the case, and then only if the United States and Tribe were successful. This is  
17 because rights to use water from a common source must be regulated *inter se*. A water right  
18 cannot be regulated against some, but not all, of the other water rights. Thus, the principles  
19 announced in *Frow v. De La Vega*, 82 U.S. 552, 553-554 (1872) apply. In cases where the  
20 identical nature of the claims, facts and legal issues relative to each defendant make it logically  
21 inconsistent to rule in favor of some defendants, but not others, a default judgment against  
22 some, but not all, of the defendants is barred as a matter of law. *Shanghai Automation Inst. Co.*  
23 *v. Kuei*, 194 F.Supp.2d 995, 1005-1009 (N. D. Cal. 2001); *see also, First T.D. & Investment*  
24 *Inc. v. Chang*, 253 F.3d 520, 532, 533 (9th Cir. 2001). In a situation as is presented here where  
25 the Tribe and the United States seek recognition of water rights from a common source, it is not  
26  
27  
28

1 only logically inconsistent, it is impossible as a practical matter to recognize such water rights  
2 against defendants who do not answer, while ruling in favor of those who do.

3 Finally and most importantly, the CMO recognizes it is possible, after resolution of  
4 appropriate threshold issues, that litigation of the Tribal Claims might involve adjudication of  
5 the relative priorities and relationships of some or all of the underground water rights and  
6 additional surface water rights in the Walker River Basin, which would then, but not before  
7 then, necessitate not only answers, but also counterclaims and crossclaims. The Court was  
8 right then, and it will be right now in not requiring answers (and counterclaims and  
9 crossclaims) before appropriate threshold issues related to the Tribal Claims are addressed.  
10

11 If, after appropriate threshold issues are decided, there must be an adjudication of rights  
12 to underground water and rights to surface water established under state law after the Decree  
13 was entered, the Court will not be able to grant effective injunctive relief without adjudicating  
14 the relative priority and relationship to some or all of the underground water rights and  
15 additional surface water rights in the Basin. At that point, depending on how broadly or  
16 narrowly the Court defines the source of supply, all claimants to that source of supply will need  
17 to file counterclaims against the Tribe and the United States and crossclaims against other  
18 defendants with respect to their claims to that source of supply. Requiring those now, before it  
19 is known whether such counterclaims and crossclaims are even necessary, results in nothing  
20 more than unnecessary cost, expense and delay. Moreover, that prospect makes it all the more  
21 important that the Magistrate Judge identify, and the District Judge consider and decide  
22 threshold issues which have the real possibility to narrow the scope of this litigation, and that  
23 the Proposed Supplemental CMO be rejected.  
24  
25

### 26 **III. CONCLUSION.**

27 The fundamental difference between the CMO and the Proposed Supplemental CMO is  
28 the nature of the issues to be considered during the threshold issue phase of the Tribal Claims.

1 The CMO intends that, in addition to subject matter jurisdiction, issues whose resolution might  
2 shorten or simplify this litigation be included. If it did not, its provisions for discovery and  
3 dispositive or partially dispositive motions to be decided by the District Judge and for an  
4 evidentiary hearing before the District Judge were and are meaningless. It further intended that  
5 answers and perhaps counterclaims and crossclaims not be required until those threshold issues  
6 were decided because in fact they may never be necessary.  
7

8 The Proposed Supplemental CMO provides for a threshold issue phase which is  
9 consistent with the CMO only with respect to issues related to subject matter jurisdiction. The  
10 only other issues which could be raised are those which will not in the end advance the  
11 resolution of this litigation. Thereafter, answers, counterclaims and crossclaims will be  
12 required from several thousand parties, most of whom are presently unrepresented, even though  
13 they may ultimately be unnecessary in whole or in part.  
14

15 The United States' Motion for Supplemental Case Management Order should be denied  
16 because, if granted, it will not supplement the existing CMO, it will, in every meaningful way  
17 replace the existing CMO's extensive and carefully considered provisions for real case  
18 management, with the Proposed Supplemental Case Management Order, which is bereft of any  
19 meaningful provision for managing this complex litigation. As explained above, this litigation  
20 can and should proceed in the manner provided for in the existing CMO.  
21

22 Dated: January 11, 2013.

23 WOODBURN AND WEDGE

24  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of Woodburn and Wedge and that on the 11th day of January, 2013, I electronically served the foregoing *Walker River Irrigation District's Opposition to Motion of the United States of America for Supplemental Case Management Order* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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