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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125 SUBFILE NO. C-125-B **WALKER RIVER IRRIGATION DISTRICT'S RESPONSE TO THE UNITED STATES OF AMERICA'S AND WALKER RIVER PAIUTE TRIBE'S BRIEF REGARDING WHEN ANSWERS NEED TO BE FILED IN THIS ACTION**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

I. INTRODUCTION.

In connection with the briefs on threshold issues, the United States and Walker River Tribe asserted that answers must be filed before threshold issues are finalized. *See, e.g.*, United States and Walker River Paiute Tribe Opening Brief, Doc. 1411, pp. 6-7; United States and Walker River Paiute Tribe Response Regarding Threshold Issues, Doc. 1442, p.16. The Walker River Irrigation District and other defendants contend that answers are not necessary to finalize and litigate threshold issues, and would serve no useful purpose at this time, except unnecessary cost and delay. *See, e.g.*, Walker River Irrigation District's Responsive Brief on Threshold Issues, Doc. 1443, pp 7-9; Walker River Irrigation District's Reply Brief on Threshold Issues, Doc. 1453, pp. 12-14.

Now the United States and Tribe assert that "it is premature to determine when answers should be filed in relation to the litigation of threshold issues under the CMO because the Court has not yet identified these issues." United States and Tribe Brief, Doc. 1487, p. 3. However, in order to ensure continued delay, unnecessary cost and expense, and that the issues initially addressed do nothing to avoid that unnecessary cost and expense, the United States and Tribe ask the Court to establish a deadline for filing answers or motions under Fed.R.Civ.P., Rule 12. *Id.* Further, they argue that any threshold issue which "cannot be handled as dispositive motions under Rule 12 should not be addressed until after answers are filed and the issues properly joined." [1] *Id.*, p. 4.

The only apparent bases for these positions, other than delay, is that to do otherwise is somehow inconsistent with the Federal Rules of Civil Procedure, exposes the United States and

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[1] The reference to "dispositive" Rule 12 motions is an oxymoron in the context of this case. Motions under Rule 12(b)(4), (5) and (6) are rarely dispositive, and are not likely to be so here. The District has recognized that what is a very narrow issue on subject matter jurisdiction, Fed.R.Civ.P. Rule 12(b)(1), should be addressed as a threshold issue. *See*, District Reply Brief, Doc. 1453, pp. 10-12.

Tribe to prejudice in their ability to prepare and conduct discovery, and creates an unreasonable risk that some defendants will not be bound by resolution of threshold issues. These contentions do not withstand scrutiny.

II. THE FEDERAL RULES OF CIVIL PROCEDURE ALLOW THE COURT TO PROVIDE FOR THE IDENTIFICATION OF, DISCOVERY ON AND LITIGATION OF THRESHOLD ISSUES HERE WITHOUT REQUIRING ANSWERS FROM ALL DEFENDANTS.

Except for the time periods listed in Rule 6(b)(2), this Court has the discretion to extend any time periods established by the Federal Rules of Civil Procedure. The exceptions set forth in Rule 6(b)(2) do not relate to the time for filing answers. As the District has argued, there are good reasons why the Court did not require an answer as an initial response to service of process, and why answers are not needed to identify, conduct discovery on, and litigate appropriate threshold issues. First, it recognized that, depending on the outcome of certain threshold issues, a formal responsive pleading from every defendant might never be necessary. Second, it understood that even if an answer were required and not filed, a default judgment could never be taken until the conclusion of the case, and then only if plaintiffs were successful. *See*, District's Reply, Doc. 1453, pp. 12-13. Third, the Court also knew that it was and is possible that after resolution of threshold issues, litigation of the Tribal Claims might involve adjudication of the relative priorities and relationships of some or all of the underground water rights and additional surface water rights in the Walker River Basin, which would then necessitate not only answers, but also counterclaims and crossclaims. Finally, the Court was aware that, at some point, answers might also be required as to the bifurcated Federal Claims. The Court was right then, and it will be right now in not requiring answers before appropriate threshold issues related to the Tribal Claims are addressed. To do otherwise results in nothing more than unnecessary cost, expense and delay. *See*, District's Reply Brief, Doc. 1453, p. 14.

Rule 26(d) of the Federal Rules of Civil Procedure also allows a court to authorize discovery to proceed at any time. The Court has done just that with the Case Management Order in allowing full and complete discovery on threshold issues. CMO, Doc. 108, p. 13. Identification of those issues through the process which began in June of 2008, and which has extended to November of 2008 (*see*, Doc. Nos. 1359-1362; Doc. Nos. 1411-1416; Doc. Nos. 1441-1443; Doc. Nos. 1452-1455), provides far more information to the United States and Tribe for purposes of preparing for and conducting discovery than answers will ever provide.

III. IT IS NOT NECESSARY TO INVITE MOTIONS WHICH ASSERT, OR ANSWERS WHICH RAISE DEFENSES, UNDER FED.R.CIV.P., RULE 12(b)(2), (4) OR (5) TO ENSURE THAT DEFENDANTS WILL BE BOUND BY RESOLUTION OF THRESHOLD ISSUES.

Given the attention which has been devoted here to the form of process, to its service, and to the filing of Notices of Appearance and Intent to Participate, it is difficult to imagine a viable motion or defense under Rule 12(b)(4) or (5). Moreover, any such defects in the form or service of process can be cured.

If, for some reason, there are a few defendants over whom there is no personal jurisdiction, it is highly likely that litigation of the threshold issues related to the Tribal Claims and the Tribal Claims themselves would still proceed.[2] The Court clearly has personal jurisdiction over most, if not all, of the defendants. Thus, this hypothetical issue will be framed by Fed.R.Civ.P., Rule 19(b), and in all probability, the action will proceed without the few defendants who are not subject to the Court's jurisdiction. That situation is not changed by requiring answers now.

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[2] For purposes of this discussion, it is assumed that the hypothetical personal jurisdiction question is one which cannot be overcome.

For all practical purposes, a person with a viable Rule 12(b)(4) or (5) motion will be bound by resolution of the threshold issues. Resolution of threshold issues will either result in complete or partial victory for the defendants, or will require the Court to proceed to whatever remains on the merits of the Tribal Claims. It is unlikely that a defendant with an available defense under Rule 12(b)(4) or (5), or even under Rule 12(b)(2), will want to relitigate a complete or partial victory for defendants.

It is equally unlikely that a defendant who successfully asserts a defense under Rule 12(b)(4) or (5) will not have to live with a complete or partial victory for plaintiffs on threshold issues. The decision will be the law of the case. *See, e.g.*, *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452-53 (9th Cir. 2000) ("[A] court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case."). In the context of this massive proceeding, the availability of a defense under Rule 12(b)(4) or (5) to a few defendants will not create an exception to application of the law of the case doctrine here. *See, Lummi*, 235 F.3d at 452-53 (The law of the case doctrine is applied unless: (1) the first decision was clearly erroneous; (2) an intervening change in law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result.). Moreover, if a viable exception to that doctrine applies, it will also apply to all defendants.

IV. CONCLUSION.

The Court should proceed to identify, allow discovery on, consider and decide threshold issues which have the real possibility to narrow the scope of this litigation before requiring

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answers from all defendants.

DATED this 17th day of February, 2009.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 17th day of February, 2009, I electronically served the foregoing *Walker River Irrigation District's Response to the United States of America's and Walker River Paiute Tribe's Brief Regarding When Answers Need to Be Filed in This Action* 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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