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14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA
16 RENO, NEVADA

17 UNITED STATES OF AMERICA) Case No: 03:73:cv-127-ECR-RAM
18 Plaintiff,) In Equity No. C-125-ECR
19) Subfile No. C-125-B
20)
21 WALKER RIVER PAIUTE TRIBE,)
22)
23 Plaintiff, Intervenor) JOSEPH AND BEVERLY
24) LANDOLT'S RESPONSE TO THE
25 v.) UNITED STATES OF AMERICA'S
26) AND WALKER RIVER PAIUTE
27 WALKER RIVER IRRIGATION) TRIBE'S BRIEF REGARDING WHEN
28 DISTRICT, a corporation, et al.,) ANSWERS NEED TO BE FILED IN
29) THIS ACTION
30)
31 Defendants.)
32)
33 UNITED STATES OF AMERICA)
34 WALKER RIVER PAIUTE TRIBE)
35)
36 Counterclaimants,)
37)
38 vs.)
39)
40 WALKER RIVER IRRIGATION)
41 DISTRICT, et al.,)
42)
43 Counterdefendants.)
44)
45)

1 At the last CMC in the instant case, the government took the position that Threshold
2 Issues should be defined as including only those which require no discovery and that no issue
3 should be considered as “threshold” if it is an affirmative defense. The government suggested
4 that until all parties are required to answer, no dispositive issues should be decided and it argued
5 that doing otherwise would somehow violate the Rules of Civil Procedure. This Court asked that
6 the government submit a brief explaining why that would be true.
7

8 The government’s brief in response to the order fails to indicate how the FRCP are
9 violated by this Court’s entertaining issues that might dispose of the case at an early hour. The
10 Court has been very clear in its understanding of the enormity of this case and the need to break
11 it into manageable pieces for reasonable disposition. That understanding was reflected in the
12 care with which it fashioned the Case Management Order. In that Order, the Court made it clear
13 that issues that could dispose of the case at an early date should be defined and determined so the
14 court and the parties could be spared the unnecessary time and expense of full case development
15 only to have it decided on issues that could have been disposed of through early motions. It was a
16 very sound approach to a case that, without it, would likely last far longer than the careers of any
17 of the lawyers or judges currently involved in it.
18

19 The Case Management Order listed an abundance of issues it considered “threshold”.
20 Judge Reed’s order included many of the issues the government now wants to exclude as
21 “threshold” on the theory that they cannot be so considered since to determine them would
22 require, first, the filing of an answer. If the government had such reservations at the time the
23 Case Management Order was issued, it should have raised them at that time and should not be
24 heard to raise them at this late date. It did not do so. Be that as it may, it has provided this Court
25 with no authority for its position. Indeed, it has provided no authority for the proposition that a
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1 dispositive motion may not be heard until an answer has been filed. If there was a burden to be
2 carried, therefore, the government has not carried it.

3 Judge Reed's Order should not be second guessed at this late date and that order included
4 as "threshold" a large number of issues, including all manner of defenses, that cannot be decided
5 by 12(b) motions. The government, for its part, has not provided this Court with one citation of
6 law that supports its claim that no issue may be determined to be "threshold", much less decided,
7 if it could be the subject of an answer or require any level, however modest, of discovery.
8 Indeed, it has provided this Court with not one citation of law that prohibits the Court from
9 deciding issues – even those that would dispose of the entire case – unless an answer is filed by
10 all parties. In fact, the court has the power, sua sponte, to dismiss on any number of grounds
11 virtually none of which require an answer's having been filed prior to the dismissal. Rule 4.
12

13
14 FRCP 56, governing summary judgment, does not require the filing of an answer before
15 the court may hear a motion for summary judgment. Indeed, it specifically provides that the
16 plaintiff has the right to file such a motion after the expiration of 20 days from the
17 commencement of the action. Rule 56(b), the section governing motions for summary judgment
18 brought by defendants, similarly contains no requirement that an answer be filed before the filing
19 of the motion and specifically says that a defendant may move "at any time". So, it is hard to
20 understand why it is the government argues herein that this Court would somehow violate the
21 FRCP if it were to hear dispositive motions in the absence of answers filed by all defendants.
22

23
24 It is worth recalling, at this point, where we are at this time in the processing of this case.
25 We are not at the point of filing briefs to assist in the determination of whether or not one side or
26 the other is right in its position with regard to the substance of the Threshold Issues. We are at
27 the moment of deciding what those Threshold Issues are and the government, as has been its
28

1 consistent wont, has extenuated the process by raising an issue that is peripheral to the question
2 of what issues are “threshold” and one which should have no bearing on the identification of
3 those issues. Its argument is that many of the issues proposed by the defendants as “threshold”
4 should not be considered threshold because they might require some modest discovery and
5 deciding their merits would violate the FRCP absent the requirement of, first, the filing of
6 answers. But, as noted, they have offered no authority for this proposition.
7

8 Since the Landolts first appeared in this case, we have been astonished at the lengths to
9 which the government will go to slow it down. We have repeatedly tried to push this case off
10 dead center and the government has vigorously opposed our every effort. In late 2007 when we
11 made our motion to start scheduling the activities contemplated in the Case Management Order,
12 the only one to oppose us was the government.
13

14 The government’s position on the filing of answers before the hearing of dispositive
15 motions is of a piece with its resistance to moving the case along. The filing of answers with the
16 required follow up will extenuate this case for months, if not years.
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18 The Case Management Order clearly contemplated early decision on a variety of issues
19 with an eye toward resolving this case at the earliest feasible time. That is why Judge Reed
20 specifically included defenses in his Order as potential Threshold Issues. Now, remarkably, the
21 government argues that it would be premature to look at defenses, in spite of Judge Reed’s clear
22 words, and to hear dispositive motions on those defenses before answers are filed. The
23 procedure Judge Reed laid out is fully consistent with the FRCP and the government, in its
24 filing, has not demonstrated any manner in which it is not.
25

26 It is worth noting that the government’s position has changed a bit since the hearing at
27 which this Court required that it explain its position that no issue may be considered “threshold”
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1 and decided absent an answer. Now it appears to concede that a number of the issues the
2 designation as “threshold” of which it opposed, can be heard without an answer’s first being
3 filed. Among the issues it now seems to concede can be decided by this Court without the filing
4 of an answer are those subject to FRCP 12(b)(6) motions. Among those are motions to dismiss
5 for failure to state a claim and among the matters that can be taken up in this way are motions
6 based on the statute of limitations and, probably, laches. *Jablon v. Dean Witter & Co.* (9th Cir.
7 1980) 614 F.2d 677, 682.
8

9 The government’s concession in this regard is, perhaps, because Rule 12 itself provides
10 that a motion asserting any of the listed defenses *was required to be made before* the filing of
11 answer or the defenses are waived.
12

13 In addition, the court has discretion to extend time periods and to determine motions in
14 its own order. Nothing in the FRCP prevents a court from doing what this one has and that is to
15 recognize the immensity of the case and the scope of potential issues involved with disposing of
16 it and fashioning a means of doing so in manageable increments that afford all parties substantial
17 justice.
18

19 If the government’s claims are barred, it is absurd to suggest that dismissing them on that
20 basis is somehow a denial of its day in court. It is ridiculous to argue that, somehow, the parties
21 should go ahead and litigate the merits of their claims anyway and then see if they are barred by
22 a statute of limitations or laches or claim preclusion. It does not matter if their claims are
23 sustainable on the merits if they are otherwise barred. That is like suggesting that personal
24 injury claims should all be tried before deciding whether or not the statute has run on them. The
25 reason we have statutes of limitation is so stale claims will not have to be decided on the merits.
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1 It is just the sort of waste of party and judicial resources that the staged proceedings the Court
2 ordered in its Case Management Order was carefully designed to avoid.

3 Contrary to the government's claim, deciding a case early on the basis of a defense like
4 laches or statute of limitations or claim preclusion is not a denial of due process and has never
5 been held to be so.

6 The stated purpose of the FRCP is "to provide a just, *speedy*, and *inexpensive*
7 determination of every action" Rule 1 (emphasis supplied). The Case Management Order does
8 just that in the spirit of the Rules and the government's consistent position would simply thwart
9 it.
10

11 It is not necessary, under the FRCP, for answers to be filed before the Court decides what
12 are and what are not Threshold Issues. It is not necessary, under the FRCP, for answers to be
13 filed prior to deciding the merits of the Threshold Issues. In this case, it is the only reasonable
14 means of proceeding.
15

16 We also join in the arguments contained in the brief filed by the Walker River Irrigation
17 District on this date.
18

19 This Court should proceed with a prompt determination of which issues constitute the
20 Threshold Issues, as provided by the Case Management Order, and need not be limited by
21 artificial arguments that accepting as "threshold" issues that may be the subject of dispositive
22 motions somehow violates the FRCP if answers are not first filed.
23

24 We urge the Court to do so.

25 Date: February 17, 2009

/s/ John W. Howard

26 _____
27 John W. Howard
28 Pro Hac Vice Counsel for
Joseph & Beverly Landolt

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2009, I electronically filed the foregoing JOSEPH AND BEVERLY LANDOLT'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 e-mail addresses:

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