

1 SIMEON M. HERSKOVITS, *pro hac vice*
New Mexico State Bar No.1686
2 ADVOCATES FOR COMMUNITY AND ENVIRONMENT
3 129-C Kit Carson Road
Taos, NM 87571
4 Phone: (575) 758-7202
5 Fax: (575) 758-7203
E-mail: simeon@communityandenvironment.net

6 CHERI K. EMM-SMITH
7 Nevada State Bar No. 3055
8 MINERAL COUNTY DISTRICT ATTORNEY
P.O. Box 1210
9 Hawthorne, NV 89415
10 Phone: (775) 945-3636
11 Fax: (775) 945-0700
E-mail: districtattorney@mineralcountynv.org

12 Attorneys for MINERAL COUNTY, NEVADA

13
14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA

16 * * *

17 UNITED STATES OF AMERICA,)	
)	
18 Plaintiff,)	3:73-CV-0127-ECR-RAM
)	
19 WALKER RIVER PAIUTE TRIBE,)	In Equity No. C-125
)	Subfile C-125-B
20 Plaintiff-Intervenor,)	
)	
21 vs.)	
)	MINERAL COUNTY
22 WALKER RIVER IRRIGATION DISTRICT,)	PRELIMINARY THRESHOLD ISSUES
23 a corporation, et al.,)	OPENING BRIEF
)	
24 Defendants.)	
25)	

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES	3
INTRODUCTION.....	4
ARGUMENT	4
I. <u>What Properly Constitutes a Preliminary Threshold Issue</u>	4
II. <u>Proper Preliminary Threshold Issues</u>	7
A. <u>Service</u>	7
B. <u>Jurisdiction</u>	8
C. <u>Applicable Law</u>	8
CONCLUSION	9

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. Pro. 1 5, 6
Fed. R. Civ. Pro. 12 5, 6, 8
Fed. R. Civ. Pro. 26 6
Fed. R. Civ. Pro. 56 6

JUDGE REED ORDERS

Case Management Order (April 19, 2000) 4, 5, 6, 7

MAGISTRATE JUDGE MCQUAID ORDERS

Minutes of the Court (August 20, 2007) 4
Minutes of the Court (February 1, 2008) 4
Minutes of the Court (April 15, 2008) 4
Minutes of the Court (July 25, 2008) 4

OTHER AUTHORITY

Honorable Milton Pollack, *Pretrial Procedures More Effectively Handled*,
65 F.R.D. 475 (1975) 5, 6-7

INTRODUCTION

1
2 Judge Reed's April 19, 2000 Case Management Order ("CMO") directs the Magistrate
3 Judge to "consider and make a preliminary determination of the threshold issues to be addressed
4 at the outset of the litigation on the U.S./Tribe counterclaims." CMO at 9, ¶11. The CMO and
5 subsequent Minute Orders of the Court (August 20, 2007, February 1, 2008, and April 15, 2008)
6 directed the parties to the C-125-B litigation ("Parties") to attempt to reach agreement on a
7 proposed list of the preliminary threshold issues to be considered pursuant to the CMO. Pursuant
8 to these orders, the Parties exchanged lists of issues on March 10, 2008, and met to reach
9 agreement on April 15 and May 28, 2008. However, the parties were unable to come to
10 agreement with regard to which proposed issues are properly viewed as threshold issues in this
11 case. In light of their failure to agree to one shared list, the Parties agreed to submit separate lists
12 to the Court and to request the Court to set a schedule for the Parties to brief their respective
13 positions on what properly constitute threshold issues to be addressed by the Court prior to a
14 determination of the merits in this litigation. Mineral County, The United States and The Walker
15 River Paiute Tribe, California State Agencies, and The Walker River Irrigation District, joined
16 by other Defendants, (collectively "WRID"), submitted such lists to the Court on June 24, 2008.
17 A status conference was held before Magistrate Judge McQuaid on July 25, 2008. The July 25,
18 2008 Minutes of the Court set a schedule for the parties to submit briefs on threshold issues with
19 a due date of September 5, 2008 for opening briefs.

ARGUMENT

I. What Properly Constitutes a Preliminary Threshold Issue

25
26 By its nature, a preliminary threshold issue would appear to be one that properly is
27 decided at the outset of litigation in order, like other pretrial tools, to "aid the efficient
28

1 presentation of a case in order to maximize the chances of a fair and just result.” *Cf.* Hon. Milton
2 Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475, 477 (1975). Because this
3 litigation presents some complex issues, efficiency is both desirable and necessary. For example,
4 Judge Reed’s 2000 CMO identifies jurisdiction, claim preclusion, applicable law, and equitable
5 and other defenses as potential preliminary threshold issues to be addressed by the Court. CMO
6 at 9, ¶11. It appears, therefore, that a preliminary threshold issue generally is an issue of pure
7 law or one that requires no more than minimal factual development through discovery or other
8 means, such as the type of issues addressed in a responsive pleading under Federal Rule of Civil
9 Procedure 12, *see* Fed. R. Civ. Pro. 12(b)(1-6), not one that requires significant factual
10 development and discovery or one that involves consideration of the ultimate merits of a case.
11 These issues are properly characterized as “threshold” issues because they appropriately may be
12 decided at the outset of litigation without subverting the fundamental policy objectives of the
13 Federal Rules of Civil Procedure to promote the thorough, efficient development and resolution
14 of legal and factual issues in a case in an evenhanded manner and logical sequence. *See* Fed. R.
15 Civ. Pro. 1.
16
17
18

19 WRID included in its June 24, 2008 Proposed Threshold Issues filing a number of
20 proposed threshold issues that go to the heart of the case and address its ultimate merits, such as
21 making a determination on *Winters* water rights. This expansive approach to the scope of issues
22 to be considered at this preliminary stage of the case would seem to go far beyond the scope
23 contemplated by the CMO and far beyond those that appropriately ought to be considered at the
24 outset of this case. WRID’s request that the Court, in effect, decide this case on the merits at this
25 preliminary stage should be rejected as an attempt to circumvent the fair, balanced development
26
27
28

1 of the case intended by the Federal Rules of Civil Procedure, and thereby to unfairly burden the
2 Plaintiffs.

3 The Federal Rules of Civil Procedure provide for extensive discovery on any
4 nonprivileged matter relevant to any claim or defense. *See* Fed. R. Civ. Pro. 26. In contrast, the
5 CMO contemplates only limited discovery concerning threshold issues. CMO at 13, ¶ 15. Thus,
6 designating ultimate issues as preliminary threshold issues would subvert the Federal Rules of
7 Civil Procedure's goal of reaching a just determination in every action and proceeding. *See* Fed.
8 R. Civ. Pro. 1. Where issues such as those raised by WRID in its June 24, 2008 filing cannot be
9 disposed of by a Rule 12(b) motion, general discovery should be allowed to run its course in the
10 ordinary order of case development, at which point any party may raise such issues through a
11 proper Rule 56 motion for summary judgment. At this preliminary stage of litigation, it is
12 unlikely that issues relating to the ultimate merits of the case will involve undisputed issues of
13 material fact for which a Rule 56 summary judgment motion could be filed. Because summary
14 judgment as to these issues appears to be premature at this time, these issues should not be
15 designated as preliminary threshold issues to be decided at the outset of litigation.

16 Further, the designation of preliminary threshold issues that require the production of
17 extensive factual evidence by the Plaintiffs concerning certain ultimate issues in the case while
18 deferring consideration of other ultimate issues that would require comparable efforts by the
19 Defendants appears likely to unfairly burden the Plaintiffs and advantage the Defendants.
20 Indeed, such an approach would tend to work an injustice by denying Plaintiffs a fair opportunity
21 to develop their case in contravention of the basic policy underpinnings of the Federal Rules of
22 Civil Procedure. Pretrial procedures should not work to streamline "at the expense of a just and
23 fair opportunity to develop and present the case to the Court, but to achieve an efficient
24
25
26
27
28

1 administration consistent with the demands of the public on the Courts.” Pollack, *Pretrial*
2 *Procedures*, 65 F.R.D. at 477.

3
4 Finally, an expansive list of preliminary threshold issues, many of which go to the
5 ultimate factual merits of the case, would serve to complicate and confuse, rather than
6 streamline, the development and presentation of the litigation. The point of identifying
7 preliminary threshold issues is to order the presentation of issues in a logical fashion and to
8 promote an efficient, just resolution of the litigation. Including issues that involve a decision on
9 the merits of the case in the list of preliminary threshold issues undercuts this purpose and
10 undermines the likelihood of thorough consideration of all necessary issues. Rather, the Court
11 should adopt a more limited, straightforward set of essentially legal issues that will aid the Court
12 in simplifying the litigation while preserving the Plaintiffs’ ability to thoroughly develop and
13 fairly present their case.

14
15 II. Proper Preliminary Threshold Issues

16
17 In accord with the approach described above, Mineral County respectfully submits the
18 following list of preliminary threshold issues that should properly be considered by the Court at
19 the outset of litigation, all of which would require only minimal factual development and would
20 assist the Court in the efficient management of this case:

21
22 A. Service

23 Because the CMO requires that service be completed before decisions are reached on
24 threshold issues, service issues should logically be considered threshold issues and should be
25 ruled on before other issues in the case. Mineral County proposes the following preliminary
26 threshold issues relating to service:
27
28

- 1 1. How will the determination be made whether and when service in the C-125-B case is
- 2 complete?
- 3 2. Is publication appropriate for any remaining potential defendants in the C-125-B
- 4 case?
- 5 3. Is service complete in the C-125-B case?
- 6

7 B. Jurisdiction

8 Issues of jurisdiction may be addressed in motions under Rule 12 of the Federal Rules of
9 Civil Procedure. Therefore, as stated above, these issues may appropriately be designated as
10 threshold issues. Mineral County proposes the following preliminary threshold issues relating to
11 jurisdiction:
12

- 13 1. Does the Decree Court have jurisdiction to adjudicate the Tribal Claims to both
- 14 ground and surface water?
- 15 2. Does the Decree Court have jurisdiction over groundwater in this case?
- 16 3. Does the Decree Court have jurisdiction over groundwater used pursuant to state law
- 17 outside the exterior boundaries of the Walker River Paiute Indian Reservation?
- 18

19 C. Applicable Law

20 The determination of the law that governs this litigation is one that likely will involve no
21 factual development and will assist the Court in the efficient management of litigation by helping
22 to narrow issues and organize the presentation of the case. Mineral County proposes the
23 following preliminary threshold issues relating to applicable law:
24

- 25 1. What law governs the pumping of groundwater on and off the Walker River
- 26 Paiute Indian Reservation by the Walker River Paiute Tribe (“Tribe”) or by the
- 27
- 28

1 United States on the Tribe's behalf, and how should the Court resolve any
2 conflicts in applicable law?

- 3 2. Is the Decree Court required to accept the distinction drawn between surface
4 water and groundwater rights provided by California and Nevada law?
5

6 CONCLUSION

7 For the reasons set forth above, Mineral County respectfully suggests that the Court
8 designate only this limited list of predominantly legal issues as preliminary threshold issues at
9 this stage of this case.

10 Dated: September 5, 2008

11 Respectfully submitted,

12 SIMEON M. HERSKOVITS, *pro hac vice*
13 New Mexico State Bar No.16860
14 ADVOCATES FOR COMMUNITY AND
15 ENVIRONMENT
16 129-C Kit Carson Road
17 Taos, NM 87571
18 Phone: (575) 758-7202
19 Fax: (575) 758-7203
20 E-mail: simeon@communityandenvironment.net

21 By /s/ Simeon M. Herskovits
22 SIMEON M. HERSKOVITS

23 CHERI K. EMM-SMITH
24 Nevada State Bar No. 3055
25 MINERAL COUNTY DISTRICT ATTORNEY
26 P.O. Box 1210
27 Hawthorne, NV 89415
28 Phone: (775) 945-3636
Fax: (775) 945-0700
E-mail: districtattorney@mineralcountynv.org

Dated: September 5, 2008

By /s/ Cheri Emm Smith
CHERI EMM SMITH

Attorneys for MINERAL COUNTY, NEVADA

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September 2008, I electronically filed the foregoing Mineral County Threshold Issues Brief 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:

Marta A. Adams
madams@ag.nv.gov pyoung@ag.nv.gov

Gregory W. Addington
greg.addington@usdoj.gov judy.farmer@usdoj.gov joanie.silvershield@usdog.gov

George N. Benesch
gbenesch@sbcglobal.net

Gordon H. DePaoli
gdepaoli@woodburnandwedge.com

Cheri Emm-Smith
districtattorney@mineralcountynv.org

Dale E. Ferguson
dferguson@woodburnandwedge.com

John W. Howard
john@jwhowardattorneys.com elisam@whowardattorneys.com

Erin K. L. Mahaney
emahaney@waterboards.ca.gov

David L. Negri
David.negri@usdoj.gov

Michael Neville
michael.neville@doj.ca.gov cory.marcelino@doj.ca.gov

Karen A. Peterson
kpeterson@allisonmackenzie.com egarrison@allisonmackenzie.com

Marshall Rudolph
mrudolph@mono.ca.gov

1 Susan L. Schneider
2 susan.schneider@usdoj.gov

3 William Schaeffer
4 Lander_lawyer@yahoo.com

5 Laura A. Schroeder
6 counsel@water-law.com

7 Stacey Simon
8 ssimon@mono.ca.gov

9 Brian Stockton
10 bstockton@ag.nv.gov

11 Wes Williams
12 wwilliams@standordalumni.org

13 and I further certify that I served or caused to have served a true and correct copy of the
14 foregoing Mineral County Threshold Issues Brief on the following non-CM/ECF participants by
15 U.S Mail, postage prepaid, this 5th day of September 2008:

16 Ken Spooner
17 Walker River Irrigation District
18 P.O. Box 820
19 Yerington, NV 89447

Tracy Taylor
State Engineer – Division of Water Resources
State of Nevada
901 S. Stewart Street
Carson City, NV 89701

20 John Kramer
21 Department of Water Resources
22 1416 Ninth Street, Room 1118
23 Sacramento, CA 94814

Jim Shaw
Chief Dep. Water Commissioner
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

24 Robert L. Hunter, Superintendent
25 Western Nevada Agency
26 Bureau of Indian Affairs
27 311 E. Washington Street
28 Carson City, NV 89701-4065

Jeff Parker, Deputy Atty General
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

1 Allen Biaggi
2 Dept. of Conservation & Natural Resources
3 State of Nevada
4 901 S. Stewart Street
5 Carson City, NV 89701

Michael F. Mackedon
P.O. Box 1203
179 South LaVerne Street
Fallon, NV 89407

6 Nathan Goedde
7 Staff Counsel
8 California Dept. of Fish & Game
9 1416 Ninth Street, Suite 1335
10 Sacramento, CA 95814

Kelly R. Chase
1700 County Road, Suite A
P.O. Box 2800
Minden, NV 89423

11 Gary Stone
12 290 South Arlington Avenue, 3rd Floor
13 Reno, NV 89501

Wesley G. Beverlin
Malissa Hathaway McKeith
Lewis, Brisbois, Bisgaard & Smith LCP
221 N. Figueroa St., Suite 1200
Los Angeles, CA 90012

14 Michael D. Hoy
15 Bible Hoy & Trachok
16 201 West Liberty Street, Third Floor
17 Reno, NV 89511

Timothy A. Lukas
P.O. Box 3237
Reno, NV 89505

18 Robert Auer
19 District Attorney for Lyon County
20 31 South Main Street
21 Yerington, NV 89447

Todd A. Plimpton
Belanger & Plimpton
1135 Central Avenue
P.O. Box 59
Lovelock, NV 89419

22 /s/ Iris Thornton
23 IRIS THORNTON
24
25
26
27
28