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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

UNITED STATES OF AMERICA Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff, Intervenor v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants. UNITED STATES OF AMERICA WALKER RIVER PAIUTE TRIBE Counterclaimants,	3:73-cv-00127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B LANDOLTS' OPENING BRIEF REGARDING PROPOSED PRELIMINARY THRESHOLD ISSUES

INTRODUCTION

This Court entered a Case Management Order in the instant case in which it recognized that the case's size and complexity of makes it impossible to process it in the ordinary manner. It attempted, through that order, to slice the case into more easily managed pieces. In doing so, it suggested that a list of Threshold Issues be developed, decisions on which would materially reduce or dispose of the case.

In deciding what issues are "threshold", the Court should go back to the basic question of what it was trying to accomplish in ordering the parties to develop a list of such issues for the Court's decision. It is obvious that the full trial of all issues related to the disputes embodied in a case that affects thousands of people, will take, perhaps, years of discovery and months, maybe even years of trial. The sheer organization of a trial would be a daunting task. Clearly the Court's idea was that if there were issues it could decide without a lot of litigation activity that might either resolve the matter in its entirety or substantially reduce the issues, it should do so in the early stages. The theory is that the Court, as well as the parties, should be spared the needless expenditure of time, treasure and resources by deciding those issues that might dispose of the claims at the earliest possible time.

To that end, we offer the following definition of "Threshold Issue": A threshold issue is one the decision of which will either dispose of a claim or greatly narrow the issues related to it. If the Court can, through the application of law and without substantial factual dispute make decisions that will end the case, it should do so at the earliest possible time.

THRESHOLD ISSUES SHOULD BE THOSE THAT CAN BE DECIDED AT THE EARLY STAGES AS A MATTER OF LAW

The basic questions to be answered by the Court are those related to its jurisdiction, standing and the legal sufficiency of the claims. Those questions can all be answered as a matter of law. But equally important are those issues the factual basis for which is not in serious question and the answers to which can dispose of the case. They can be answered by the Court on motion and generally on stipulated facts or those of which the Court can take judicial notice.

What will be saved by proceeding in this manner is discovery and substantial factual development; activities that take up the lion's share of time and resources in litigation. Those, combined with the inevitable discovery disputes and the development of the means through which discovery and responses thereto are to be transmitted to all parties will take up tremendous time. That can be vitiated by the deciding of all dispositive issues that can be decided without substantial fact development.

Other parties to this litigation will be filing more voluminous briefs related to these issues and the Landolts join, endorse and incorporate all of the arguments included in the briefs filed by Walker River Irrigation District and Circle Bar N Ranch. For that reason, and to spare the Court unnecessary work in reviewing a brief which would simply repeat what has already been submitted by others, the instant brief will be quite short. However, certain positions bear emphasis.

THE DEFENSE OF LACHES IS A THRESHOLD ISSUE

We should start by pointing out that the instant case is, by its own designation, one in equity. Equitable defenses, therefore, are particularly appropriate in it. The Case

Management Order specifically contemplates that equitable defenses be considered as Threshold Issues. (Case Management Order, pps. 9-11).

The main inquiries in a laches defense are the extent of the passage of time and detrimental reliance. *City of Sherrill, New York v. Oneida Indian Nation of New York* 544 U.S. 197, 217; 125 S.Ct. 1478, 1491 ("The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.") In the instant matter, with respect to the Tribe's claims for additional water to support land added to the reservation in 1936, the facts underlying a laches defense are not in serious dispute. The land was added in 1936. The area outside the reservation was subject thereafter to substantial settlement by non-Native Americans; much of it at the official urging of the United States. The population of non-Native Americans in the area (determined by the official census) geometrically increased between 1936 and 1992. The Tribe asserted no claim for additional water for the land added in 1936 for nearly sixty years.

This issue can, and should, be decided by briefing and motion without any discovery and on facts upon which this Court may take judicial notice. And, having decided it in favor of those positing it, the Court could dispose of one claim for relief. This clearly makes laches a threshold issue not only with respect to claims for water for the land added to the reservation in 1936 but, also, to Tribe claims for additional water (from whatever source) for the reservation as it existed at the time of the 1936 Decree in this Court.

THE VIABILITY OF ALL TRIBE CLAIMS FOR WATER FOR THE LAND ADDED IN 1936 IS DEPENDENT UPON THE PURPOSE FOR WHICH THE LAND WAS RESERVED.

The legislation that provided for the transfer of previously public domain land to the reservation in 1936 was specific not only in the purpose for which Congress intended to reserve the land but, in addition, in preserving all existing rights of any parties affected by the transfer. The Court may take judicial notice of the purpose for which the land was reserved by Congress. It may decide, as a matter of law, whether land reserved for such purposes carries with it an implied reserve right to water. If the decides this issue in favor of the proponents of the defense, all Tribal claims for water for the land added in 1936 must fall. This issue, again, could be completely decided on motion without substantial additional litigation activity and must, thus, be considered a Threshold Issue.

WHETHER THE COURT HAS JURISDICTION TO HEAR TRIBAL CLAIMS FOR ADDITIONAL WATER FOR THE RESERVATION AS IT EXISTED AT THE TIME OF THE 1936 DECREE IS A THRESHOLD ISSUE

In light of the very language of the 1936 Decree, it is apparent that this Court gave finality to the adjudication of the water rights affecting the reservation as it existed at the time the Decree was issued. The Court made very clear that its decision was to be the final word on the subject and prohibited further claims outside the Decree itself. Whether the Court has jurisdiction to entertain claims in violation of its own Decree is a Threshold Issue.

Likewise, water claimants other than the United States and the Tribe have detrimentally relied on the Decree as preserving their water rights and have expended 60

years of labor, resources and money in developing lives and businesses in reliance on the Court's Decree. Whether, in light of this and the language of the Decree, the Tribe and especially the United States are estopped from asserting claims for additional water for land covered by the Decree is a Threshold Issue.

CONCLUSION

Our inclusion of specific Threshold Issues in this brief is not intended nor should it be seen as indicating any thought that other proposed Threshold Issues posited by Circle Bar N Ranch and the Walker River Irrigation District are any less important. As we indicated at the outset, we join in the briefs of those entities and the arguments contained in them.

If the Court's purpose in identifying and disposing of Threshold Issues in the early stage of the litigation is to short circuit extended litigation activities or to narrow the range of disputes, it should, through this process "de-complicate" the issues, paring them down to those basic ones which may dispose of all or part of the case without substantial discovery and as a matter of law. It is anticipated that the Tribe and the United States will attempt to cast issues as substantially more complicated than they are in an effort to avoid their decision. But the truth is that the issues proposed as "threshold" by the Landolts, Walker River Irrigation District and Circle Bar N Ranch are profoundly simple and could dispose of this entire action. They should, therefore, be designated as "threshold" by this Court and a briefing schedule ordered that will provide for their prompt resolution.

Dated: September 5, 2008

/s/ John W. Howard
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2008, I electronically filed the foregoing LANDOLTS' OPENING BRIEF REGARDING PROPOSED PRELIMINARY THRESHOLD ISSUES 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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