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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	3:73-CV-0127-ECR-RAM
)	
WALKER RIVER PAIUTE TRIBE,)	In Equity No. C-125
)	Subfile C-125-B
Plaintiff-Intervenor,)	
vs.)	
)	MINERAL COUNTY
WALKER RIVER IRRIGATION DISTRICT,)	PRELIMINARY THRESHOLD
a corporation, et al.,)	ISSUES RESPONSE BRIEF
)	
Defendants.)	

ARGUMENT

I. The Court Should Address Limited Jurisdictional, Choice Of Law, And
Procedural Issues As Threshold Issues Before Addressing Issues That Require
Factual Development And Overlap With The Ultimate Merits

As noted in Mineral County's Opening Brief, designating and addressing an issue as a threshold issue is appropriate only when the issue is one that properly is decided at the outset of litigation in order, like other pretrial tools, to "aid the efficient presentation of a case in order to maximize the chances of a fair and just result." Hon. Milton Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475, 477 (1975). Generally, then, a threshold issue should be an issue of pure law or one that requires only minimal factual development through discovery or other means, not one that requires significant factual development and discovery or one that involves consideration of the ultimate merits of a claim. While the complexity of this case necessitates that efficiency be a primary concern, it must be balanced with the goals of thoroughness, fairness and reaching a sound result.

In their opening briefs on threshold issues, a number of the upstream defendants have advocated an approach to the identification and resolution of issues in this case as threshold issues that appears to be at once inappropriately expansive and unfairly slanted. For example, the Walker River Irrigation District ("WRID") suggests that the Court not only designate as threshold issues, but also bifurcate for separate trial, a number of issues that go to the heart of the ultimate merits of the Tribal Claims, as defined in the CMO. In advocating for their treatment as threshold issues, WRID and other upstream defendants attempt to minimize the extent to which addressing these issues would require discovery and development of factual matters that overlap

1 with the ultimate fact issues underlying the Tribal Claims. At the same time, these upstream
2 defendants either sidestep or argue against the CMO's suggested designation of hydrologic,
3 choice of law, and jurisdictional issues concerning surface and groundwater in the Walker River
4 basin as threshold issues, despite the fact that these issues, too, could prove to be dispositive and
5 merely implicate other facets of ultimate fact development that could prove to be less favorable
6 to the defendants' interests.

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8 In effect, these upstream defendants are urging the Court to treat as threshold issues those
9 facets of the ultimate merits of the Tribal Claims that put the plaintiffs in the position of having
10 to make defensive factual showings, while deferring consideration of those facets of the ultimate
11 merits of the Tribal Claims that would require themselves to make such a showing. This seems
12 simply unfair and prejudicial to the plaintiffs. Accordingly, the Court should decline these
13 upstream defendants' invitation to selectively address those ultimate merits issues that favor
14 them at this still preliminary stage of the litigation while deferring any consideration of those
15 ultimate merits issues that might work to their disadvantage. Rather, Mineral County
16 respectfully suggests that the Court first address genuine, undisputed threshold issues, such as
17 those concerning the scope of the Court's jurisdiction, the proper choice of applicable law, and
18 service. After those issues have been addressed, the Court could more efficiently provide for
19 discovery and motion practice concerning all of the other more factual and merits-oriented issues
20 that have been identified in the CMO and the parties' threshold issues briefing.

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24 II. Additional Bifurcation Is Not Called For In This Case

25 The Court already has addressed the question of bifurcation in this case, and in the CMO
26 the Court bifurcated the Tribal Claims from the remaining federal agency claims. CMO at 1-3.
27 In its Opening Brief WRID alludes to the bifurcation criteria considered under Federal Rule of
28 Mineral County Preliminary Threshold Issues Response Brief
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1 Civil Procedure 42(b) in advocating for certain issues to be treated as threshold issues, despite
2 the fact that they require factual development and address the ultimate merits of this case.
3 WRID further asserts that those issues should be bifurcated from the consideration of other
4 issues that require factual development and consideration of the case's merits. Mineral County
5 agrees that, in making its determination as to threshold issues, it is appropriate for the Court to
6 consider the types of factors considered by trial courts under Rule 42(b), which include
7 "avoiding prejudice, separability of the issues, convenience, judicial economy, and reducing risk
8 of confusion," *see Bates v. UPS*, 204 F.R.D. 440 (N.D. Cal. 2001) (citations omitted), and
9 "complexity of issues, factual proof, risk of jury confusion, difference between the separated
10 issues, the chance that separation will lead to economy in discovery and, the possibility that the
11 first trial may be dispositive of the case." *Calmar, Inc. v. Emson Research, Inc.*, 850 F. Supp.
12 861, 866 (C.D. Cal. 1994) (citations omitted).

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15 However, Mineral County believes that the phased approach to the identification and
16 resolution of threshold issues within the bifurcated Tribal Claims portion of this case, as outlined
17 in the CMO, is sufficient for case management purposes, and that no further bifurcation is
18 warranted. "The piecemeal trial of separate issues in a single suit is not to be the usual course. It
19 should be resorted to only in the exercise of informed discretion when the court believes that
20 separation will achieve the purposes of the rule." *Hangerter v. Provident Life & Acc. Ins. Co.*,
21 236 F. Supp. 2d 1069, 1095 (N.D. Cal. 2002) (citing 9 Wright and Miller, Federal Practice and
22 Procedure: Civil 2d, § 2388 (1995)), *affirmed in part, reversed in part on other grounds*,
23 *Hangerter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004). Where questions of
24 fact overlap issues proposed for bifurcation, courts often have held that bifurcation is
25 inappropriate. *See 9A Wright and Miller, Federal Practice and Procedure: Civil 3d*, § 2338
26
27
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(2008). As explained above, the issues that WRID asserts should be bifurcated are too factually and legally intertwined with the rest of the Tribal Claims' ultimate merits to be properly separated from the rest of the merits-oriented issues in terms of discovery and judicial resolution. Therefore, the Court should not bifurcate any of the putative threshold issues that have been identified from the rest of the issues involved in the Tribal Claims.

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CONCLUSION

For the reasons set forth above and in Mineral County's Preliminary Threshold Issues Opening Brief, Mineral County respectfully suggests that at this stage of the case, the Court designate only the limited list of predominantly legal issues proposed by Mineral County as proper preliminary threshold issues in its Opening Brief.

Dated: October 10, 2008

Respectfully submitted,

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Dated: October 10, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2008, I electronically filed the foregoing Mineral County Preliminary Threshold Issues Response 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:

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and I further certify that I served or caused to have served a true and correct copy of the foregoing Mineral County Preliminary Threshold Issues Response Brief on the following non-CM/ECF participants by U.S Mail, postage prepaid, this 10th day of October 2008:

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