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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 RESPONSIVE BRIEF ON THRESHOLD ISSUES**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

I. INTRODUCTION.

The Walker River Irrigation District (the "District") responds to the Opening Briefs of the United States and the Walker River Paiute Tribe (collectively the "Plaintiffs") and of

Mineral County. The Plaintiffs and Mineral County disregard Case Management Order ("CMO"), Doc. No. 108. They do not consider the nature of the issues the CMO intends be identified as threshold issues. They attempt to label other CMO directives as "preliminary" threshold issues. The CMO clearly contemplates threshold issues that differ from, and go far beyond those suggested by their briefs.

The fundamental difference between the threshold issues proposed by the Plaintiffs and Mineral County on one hand, and the District and other defendants on the other hand, relates to what constitutes a threshold issue, and correspondingly, what the Court intended to achieve by establishing the threshold issue process in the first instance. The Plaintiffs and Mineral County contend that only case management issues and purely legal issues (primarily issues that are raised under Rule 12 of the Federal Rules of Civil Procedure) are proper threshold issues. It is this narrow view that causes them to add the word "preliminary" as a modifier to "threshold" and to make allegations about litigation shortcuts which avoid the requirements of the Federal Rules of Civil Procedure and due process. The CMO clearly does not direct that the Magistrate Judge establish "preliminary" threshold issues; rather the CMO states that the Magistrate Judge shall "consider and make a *preliminary determination* of the threshold issues to be addressed at the outset of the litigation." (Compare, Brief of the United States of America and the Walker River Paiute Tribe, and, Brief of Mineral County, with CMO at p. 9, lns. 6-8 [emphasis added]).

The approach of Plaintiffs and Mineral County to the threshold issue question is entirely divorced from the content of the claims which Plaintiffs assert. It ignores the content of the CMO, and includes no analysis of whether any determination of the "preliminary" threshold issues proposed will in any way defer costly and possibly unnecessary proceedings in the interests of the Court and the parties.

Their approach ignores the Court's broad authority to consider certain claims or issues while holding others in abeyance. When the content of the CMO, and the authority and intent of the Court to further manage the Tribal Claims through the threshold issues in ways that might defer costly and possibly unnecessary proceedings, are brought to bear on the threshold issue question, it becomes clear that Plaintiffs' and Mineral County's approach is simply inappropriate and inconsistent with the purpose and intent of the CMO and with Rule 42(b) of the Federal Rules of Civil Procedure.

This Case as a whole may be excessively large and complex but bifurcation allows the Court to avoid costly and possibly unnecessary proceedings by processing claims and issues in a manner that serves to expedite the litigation. The threshold issues proposed by the District and the other defendants clearly have that potential. Plaintiffs and Mineral County make no attempt to justify their threshold issues based upon those goals.

II. THE CASE MANAGEMENT ORDER MAKES IT CLEAR THAT PHASE I OF THE TRIBAL CLAIMS, DETERMINATION OF THRESHOLD ISSUES, ALLOWS FOR FULL AND COMPLETE DISCOVERY, DISPOSITIVE MOTIONS AND IF NECESSARY A SEPARATE TRIAL ON SOME OR ALL OF THOSE ISSUES.

In the CMO, the Court stated that "without bifurcation of some sort, the case may simply be too big and too complex to process on a reasonable basis." (CMO at p. 2, lns. 10-11.) Therefore, the Court bifurcated the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). (CMO at p. 4, lns. 9-19.)

The Court then went further. The CMO directs that proceedings in this case take place in phases. (CMO at p. 11, lns.10-12.) Phase I of the proceedings is to consist of the threshold issues as identified and determined by the Magistrate Judge. (CMO at p. 11, lns. 14-16.) Phase II of the proceedings will involve completion and determination on the merits of all matters relating to the Tribal Claims. (CMO at p. 11, lns. 17-19.) Additional phases of the proceedings

shall encompass all remaining issues in the case, but the court anticipates that such phases will not be scheduled until the threshold issues have been decided on the merits. (CMO at p. 11-12, lns. 25-26, 3-6.)

Once the threshold issues are identified and determined by the Magistrate Judge, the Court established clear procedures for resolving those issues during Phase I of the proceedings. First, it provided that "discovery shall be allowed to all parties on the threshold issues." (CMO at p. 13, lns. 4-6.) The Court authorized and contemplated full and complete discovery under the Federal Rules of Civil Procedure. The Court instructed the Magistrate Judge to establish the period for discovery and such other terms, conditions, modifications and extensions as the Magistrate Judge determined appropriate. (See, CMO at p. 13, lns. 11-14.) The CMO thus allows for full discovery on the threshold issues for all parties following a final determination of such issues. (CMO at p. 13, lns. 3-6.)

On completion of discovery, the Court authorized "motions which may be dispositive or partially dispositive of any threshold issue." (CMO at p. 13, lns. 16-18.) The Magistrate Judge is to set the time period and schedules for such dispositive or partially dispositive motions. However, such motions are to be decided by the Judge. (CMO at p. 13, lns. 19-22.) The CMO thus provides for the filing of dispositive motions following completion of discovery on the threshold issues. (CMO at p. 13, lns. 16-20.)

Finally, the CMO expressly provides that if "the threshold issues are not resolved by motions, an evidentiary hearing shall be held before the undersigned Judge at such time and according to such conditions (including, as appropriate, the filing of joint pre-hearing orders as shall be determined by the Magistrate Judge)." (CMO at p. 13, ln. 23 - p. 14, ln. 2.) The CMO thereby provides for fact-finding through separate trial on any of the threshold issues not resolved by dispositive motions. (CMO at p. 13, lns. 23-25.) Thus, the CMO does not disqualify issues which require full discovery and fact finding from being a "threshold issue."

It does just the opposite by providing for complete and full compliance with the Federal Rules of Civil Procedure, complete and full discovery, and complete and full fact finding on threshold issues, including, if necessary, a separate trial.[1]

There is simply no question that the threshold issue process set forth in the CMO was intended to further manage this complex litigation in ways which might defer costly and possibly unnecessary proceedings in the interests of judicial economy and the convenience of the parties. The Court clearly did not intend to establish a complicated process for dealing with nothing more than run-of-the-mill motions under Rule 12 of the Federal Rules of Civil Procedure. It also did not intend to establish a process to litigate issues of law disconnected from the content of the claims being asserted by the Plaintiffs.

Each of the "preliminary" threshold issues proposed by Plaintiffs and Mineral County is considered below based upon the above considerations. As the Court compares the threshold issues proposed by Plaintiffs and Mineral County to those proposed by the District and other defendants, the most relevant question is: Does a determination of the issue have the potential to avoid costly and potentially unnecessary proceedings on the central Tribal Claims, i.e., a water right for Weber Reservoir for use on the Reservation as it existed at the time the Decree was entered, and for the Added Lands and a water right for the Added Lands?

III. THE "PRELIMINARY" THRESHOLD ISSUES PROPOSED BY THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE, AND MINERAL COUNTY ARE INCONSISTENT WITH THE THRESHOLD ISSUES AS CONTEMPLATED BY THE CASE MANAGEMENT ORDER.

A. Issues Related to Service Are Not Proper Threshold Issues as Contemplated by the Case Management Order.

The District agrees that the CMO provides for joinder of certain persons and entities holding categories of water rights, and that those parties be joined before the threshold issue list

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[1] Mineral County's assertion that the Court limits discovery on threshold issues (Mineral County Brief at p. 6, lns. 5-6) is simply wrong.

is made final. The District also acknowledges that the CMO recognizes that the Plaintiffs may move for publication of summons consistent with Rule 4 of the Federal Rules of Civil Procedure. However, although the Court may need to conclude that service is sufficiently complete for purposes of finalizing the list of threshold issues, that determination is not, and was never intended to be, a "threshold" issue.

If Plaintiffs believe that publication is appropriate or necessary as provided in the CMO, they should file a motion to that effect. However, resolution of that motion is not a threshold issue, nor would any determination of whether publication is adequate or complete be a threshold issue.

Plaintiffs also suggest consideration of the need to expand the categories of water right holders to be joined as a threshold issue. (Brief of the United States of America and Walker River Paiute Tribe, at p. 5.) They specifically refer to users of underground water, particularly domestic users. (Brief of United States of America and Walker River Paiute Tribe, at p. 5.) First, no one has proposed that that category be expanded. Second, the CMO establishes criteria for determining whether or not the category should be expanded. It requires a showing that a new water right for the Tribe could affect the rights of other categories of domestic users. (CMO at p. 3, lns. 14-20.) No such showing has been made. Moreover, even if an attempt is made to expand the parties to be joined, that too will not be a threshold issue under the CMO.

B. The United States and the Walker River Paiute Tribe Mischaracterize Threshold Issues Related to Jurisdiction as Case Management Issues and Mistake Other Scheduling and Case Management Issues for Threshold Issues.

1. The United States and Walker River Tribe Characterize a Threshold Jurisdictional Issue as a Case Management Issue and Misstate The Threshold Jurisdictional Issue in Doing So.

Plaintiffs phrase the jurisdictional issue as "whether Case No. C-125-B is the proper case for the Federal and Tribal claims or whether these claims must be filed in a new and separate action" and identify the issue as a case management rather than a jurisdictional issue.

(Brief of United States of America and Walker River Paiute Tribe, at p. 6.) The essence of this issue is whether a court in an action which has gone to final judgment has jurisdiction after entry of that final judgment to adjudicate new claims for additional water, or whether such claims must be the subject of a new and separate action. This is a jurisdictional threshold issue as identified by the CMO.

This is not a new issue raised for the first time now. It is an issue which was before the Court in the briefing related to the CMO. It is not an issue which, if decided adversely to Plaintiffs, would require starting over. Rather, it is an issue which requires a determination as to whether this proceeding should be considered a new action completely separate from the continuing administration of the Walker River Decree which takes place in Case No. C-125.

2. Deadlines for Amendments to Claims and Answers Are Scheduling and Case Management Issues; They Are Not Threshold Issues as Contemplated by the Case Management Order.

Plaintiffs include the CMO's directive regarding scheduling and case management into the threshold issue process. They assert that issues related to scheduling and case management as identified in the CMO at page 8, ¶10, are proper threshold issues. (Brief of the United States and Walker River Paiute Tribe, at p. 6-7.) This assertion also ignores the plain language and content of the CMO.

The section of the CMO dealing with scheduling and management merely allows the parties to recommend "procedures for scheduling and for the efficient management of the litigation" to the Magistrate Judge. (CMO at p. 8, lns. 20-23.) This section of the CMO precedes the section of the CMO dealing with the determination of threshold issues by the Magistrate Judge and directing the parties to identify potential threshold issues. (CMO at p. 9, lns. 3-19.)

Recommending procedures for scheduling and efficient management of the litigation is simply not the same as identifying potential threshold issues. Scheduling and management of the litigation clearly refers to just that, scheduling and management: housekeeping matters

related to the times and dates for proceedings, "special procedures for service of pleadings," and "other mechanisms to reduce the burdens on the parties and the court." Scheduling and management *procedures* are not threshold *issues*, and attempting to identify such procedures as issues does not confer threshold status.

Plaintiffs suggest that some time be allowed both for receiving and assessing answers, and for potentially amending claims and answers. (Brief of the United States of America and Walker River Paiute Tribe, at p. 6.) Plaintiffs first filed these claims over sixteen years ago. They sought permission to amend the claims eleven years ago, and received that permission nearly nine years ago. The suggestion that at this point additional time should be allowed for purposes of amending claims is simply a subterfuge for delay.

Moreover, the CMO does not require answers from all counterdefendants prior to identifying, processing and deciding threshold issues. Plaintiffs take the position that the threshold issues cannot even be identified unless and until every counterdefendant has filed an answer in these proceedings. That assertion simply ignores the content of the CMO. It expressly provides that no answers or other pleading will be required except upon further order of the Magistrate Judge. It also provides that no default will be taken for a failure to appear. (CMO at p. 12, lns. 22-25.) In terms of finalizing the threshold issues, the Court simply directed that they be finally resolved and settled after all appropriate parties are joined. (CMO at p. 9, lns. 10-13.) There are no reasons, except delay and unnecessary cost, to require answers from all counterdefendants before proceeding to finally determine threshold issues and to litigate those issues in accordance with the CMO.

The Court has required persons joined to file a Notice of Appearance and Intent to Participate. In many cases, defendants are represented by attorneys, and some of those attorneys have joined in the position of the defendants on threshold issues. Once the Court has made a preliminary determination of threshold issues, that preliminary determination can be

served on all persons who have filed a Notice of Appearance and Intent to Participate, with a time frame for making the list final. When it wrote the CMO, the Court was well aware that there were parties presently appearing in the case who would likely raise most, if not all, of the potential threshold issues, i.e., Nevada and the Walker River Irrigation District, and that groups of individual defendants would also participate. Answers are not necessary to finalize and litigate the threshold issues, and are only suggested for purposes of delay.

C. The Initial Jurisdictional Threshold Issue Is Whether the Decree Court Has Jurisdiction to Adjudicate New and Additional Claims for Reserved Water Rights; Consideration of All Other Issues Involving the Surface Water/Underground Water Relationship Should Await Resolution of Other Threshold Issues As Suggested by the District and Other Defendants.

The initial jurisdictional threshold issue is whether the Decree Court has jurisdiction to adjudicate these new and additional claims by Plaintiffs for reserved water rights for the Walker River Indian Reservation. All of the other jurisdictional issues suggested by Plaintiffs and Mineral County involve the surface water/underground water relationship issues. They are issues which should not be considered until other threshold issues have been determined in a way which requires that they be considered.

As the District noted in its opening brief (Doc. 1416, at p. 13-14), the prior determination of other threshold issues suggested by the District and other defendants will help to define the extent to which the surface water/underground water relationship issues are actually, rather than hypothetically, involved in the case. If the Tribe has no rights to surface water beyond those presently recognized in the Walker River Decree, it will not be necessary to consider: (i) what jurisdiction the Court has over groundwater used pursuant to state law; (ii) whether the Court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law; (iii) whether holders of surface rights under federal law have more protection from the use of groundwater than holders of

surface rights established under state law; or (iv) whether issues of interference need be decided as part of an adjudication of federal surface water rights.

Plaintiffs do not contend that at the present time the Tribe is being deprived of water under the 1859 water right recognized in the Decree because of underground pumping by those who have permits to pump underground water under Nevada law or by domestic users of underground water. There is simply no good reason to have the Court consider in the abstract these issues which may be, and likely are, partially, if not wholly, hypothetical issues.

Plaintiffs, and California to a certain extent, propose an issue concerning the Court's jurisdiction to determine rights to water "in the system not covered by the Decree." (Brief of the United States of America and Walker River Tribe, at p. 7.) If, by that issue, Plaintiffs suggest that entry of the Walker River Decree renders the process for appropriating water under Nevada and California law meaningless, that issue is not raised in any of their pleadings and, therefore, is not a threshold issue.

D. Issues Related to Applicable Law.

The District recognizes that an issue in this case is whether a claim to a right for underground water may be made under the implied reservation of water rights doctrine which was established in *Winters v. United States*, 207 U.S. 564 (1908), or under any other theory of federal common law. However, as the District noted in its opening brief, that issue should be considered in conjunction with the broader issues of claim and issue preclusion, and laches and estoppel. The other issues related to applicable law proposed by Plaintiffs and Mineral County are all issues which, at this point, are purely hypothetical and which, depending on the outcome of appropriate threshold issues proposed by the District and other defendants, may never need to be considered at all. They all relate to issues concerning the surface/underground water relationship.

E. Contrary to the Contentions of the United States and Walker River Paiute

Tribe Issues Relating To Finality and Claim Preclusion Are Proper Threshold Issues.

Plaintiffs suggest that defenses based on claim and issue preclusion cannot receive threshold status because they require discovery and possibly expert testimony. As noted at the outset, the fact that discovery is required, and that experts may be needed in a trial, is no bar to identification of an issue as a threshold issue. Indeed, the CMO expressly recognized claim preclusion as a threshold issue. (CMO at p. 9, lns. 17-19.)

The CMO directs that threshold issues shall address among other issues equitable and other defenses. (CMO at p. 9, lns. 17-19.) The questions of what evidentiary matters are relevant or material in the proof or disproof of those defenses must naturally be taken up at the separate trial on the defenses. *United States v. Truckee-Carson Irrigation District*, 71 F.R.D. 10, 13 (D.Nev. 1975). The scope of a separate trial on the defenses of res judicata or collateral estoppel for example must include development of facts sufficient to make a determination on the defenses. This is because each element of res judicata and/or collateral estoppel must be affirmatively proved and the defendants carry the initial burden. *Id.*[2]

Plaintiffs overstate the amount of discovery and testimony needed for the Court to properly address the finality issues. The validity or merits of a cause of action need not be known if the question is whether the cause of action is barred by the principles of res judicata or a party is collaterally estopped from asserting matters in proof of its validity. *Truckee-Carson*, 71 F.R.D. at 13. While it is true that in order to consider the applicability of the principles of res judicata or collateral estoppel the nature of a cause of action must be known, such nature can be determined from the complaint and through discovery so that a sufficient record is made to determine if the principles apply. *Id.* Therefore issues of finality and claim

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[2] Thus, Mineral County's suggestion that the threshold issues proposed by defendants will unfairly burden the Plaintiffs, (Brief of Mineral County at p. 6, lns. 19-26) is nonsense.

preclusion are proper threshold issues because a record sufficient to make a determination upon them can be developed from the discovery and fact-finding provided for in the CMO.

F. Threshold Issues Related to Equitable Defenses Are Proper Threshold Issues.

The District and other defendants have set forth appropriate equitable defenses for threshold issues. As noted previously, there is no requirement for answers, and clearly no reason to delay identification of threshold issues for answers. As noted above the CMO directs that threshold issues address equitable defenses and a record sufficient to determine if such equitable defenses apply can easily be made within the directives of the CMO.

IV. CONCLUSION.

The District believes that the jurisdictional issue concerning whether the Decree Court has jurisdiction to adjudicate these claims can be quickly and easily resolved, either by stipulation that Case C-125-B, for all purposes, shall be treated as a new and entirely separate proceeding wholly and completely independent from the action which led to the final judgment which is the Walker River Decree, or by consideration as a threshold issue. With respect to the remaining threshold issues identified by the District and other defendants, the Court should follow the clear requirements of the CMO. A time period should be established for discovery. At the conclusion of discovery, a time period should be established for filing wholly or partially dispositive motions. Issues not resolved by dispositive motion should then become the subject of a pretrial order, and a trial should be held on those issues. After such a trial is complete, the

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Court should consider and decide what, if anything, should be certified for appeal under 28 U.S.C. § 1292(b).

DATED this 10th day of October, 2008.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 10th day of October, 2008, I electronically served the foregoing *Walker River Irrigation District's Responsive Brief on 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 email addresses:

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