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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 REPLY 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") replies to the responsive briefs of the United States and the Walker River Paiute Tribe (collectively, the "Plaintiffs") and of Mineral County. Plaintiffs contend that the District, in relying on the provisions of and case law interpreting F.R.C.P. Rule 42(b), disregards the provisions of the Case Management Order ("CMO") Doc. 108). See, Plaintiffs' Response (Doc. 1442) at pgs. 13-14. Mineral County recognizes the relevance of Rule 42(b) and applicable case law, but contends the issues which the District and other Defendants suggest be bifurcated are "too factually and legally intertwined" with the merits of the Tribal Claims to be separated. See, Mineral County's Response (Doc. 1441) at pgs. 4-5. As is discussed below, the CMO, which has its roots in bifurcation under Rule 42(b), contemplates exactly what the District has proposed, and the issues which the District and other Defendants contend should be separated are appropriate for separation.

Plaintiffs and Mineral County also argue that subject matter and personal jurisdiction are threshold issues. See, Plaintiffs' Response (Doc. 1442) at pgs. 17-18; Mineral County's Responsive Brief (Doc. 1441) at pg. 3. The District recognizes that the Court must be satisfied that it has subject matter jurisdiction with respect to the Tribal Claims and threshold issues related to those Claims. However, as is discussed below, the Court need not now decide its subject matter jurisdiction over issues or claims which, after decision on appropriate threshold issues, may disappear. Issues of personal jurisdiction, if any, are for defendants to raise, and as far as the District is aware, no such issues have been raised.

Plaintiffs also argue that the Court must require answers from all defendants before it can finalize the threshold issues. The CMO does not require answers before the threshold issues are established, or before those issues are decided. See, District's Responsive Brief

(Doc. 1443) at pgs. 8-9. As is established below, requiring answers at this time serves no purpose except unnecessary delay and expense.

In a number of different ways, Plaintiffs and Mineral County assert that any issue which involves the need for factual development, whether it relates to a defense or to an essential element of a Tribal Claim, is disqualified from threshold issue status. As the District established in its Responsive Brief (Doc. 1443), the procedure established by the CMO for resolving threshold issues contemplates full and complete discovery, dispositive motions, and to the extent that an issue is not resolved by dispositive motion, resolution by separate trial. All of this is pursuant to, and not in subversion of, the Federal Rules of Civil Procedure. See, District's Responsive Brief (Doc. 1443) at pgs. 3-5.

Consistent with their position that facts are off limits, Plaintiffs and Mineral County also propose that certain legal issues be considered in a complete factual vacuum. Factual circumstances which give rise to legal issues relevant here should be part of the consideration of those legal issues, and as is discussed below, in some cases, the applicability of a defense cannot be decided without facts. Moreover, the consideration of abstract legal issues will do little, if anything, to avoid costly and possibly unnecessary proceedings in this case.

Plaintiffs and Mineral County argue that issues which involve essential elements of the merits of a Tribal Claim cannot be considered because of the need for factual development, and also because the CMO does not identify such issues for threshold status. Admittedly, the CMO does not mention as threshold issues questions which may relate to a defect in an essential element of the Plaintiffs' claims. However, that does not mean that such an issue cannot be considered as a threshold issue. As is discussed below, there are good reasons to consider for threshold status one of the essential elements of the claim for reserved water for the Added Lands sooner rather than later.

II. THE THRESHOLD ISSUES PROPOSED BY PLAINTIFFS AND MINERAL COUNTY DO NOTHING TO FURTHER MANAGE THE TRIBAL CLAIMS WHICH MIGHT DEFER COSTLY AND POSSIBLY UNNECESSARY PROCEEDINGS CONCERNING THOSE CLAIMS.

One cannot read the CMO and reasonably take the position that it does not allow for threshold issues which require discovery, dispositive motions and perhaps a separate trial. See, District's Responsive Brief (Doc. 1443) at pgs. 3-5. In order for the Court to decide if it is appropriate to further manage the Tribal Claims by identifying and organizing threshold issues in a manner that has the potential to avoid costly and possibly unnecessary proceedings, it should consider the magnitude of the Tribal Claims without such management. The threshold issues proposed by Plaintiffs and Mineral County will not avoid costly and perhaps unnecessary proceedings. See, Plaintiffs' Response (Doc. 1442) at pgs. 24-26; 29-32.

Without further management through appropriate threshold issues, Phase II of the Tribal Claims will involve an enormous proceeding, much of which ultimately may be entirely unnecessary. As Plaintiffs state in their Response, in their case-in-chief they would seek water rights for: (1) Weber Reservoir for use on the entire Reservation; (2) lands transferred to the Reservation after April 14, 1936; and (3) underground water for the entire Reservation. Their claims under the federal implied reservation of water doctrine will require evidence on the fact, date, and purpose of reservation, and on the quantity of water needed to fulfill that purpose. See e.g., *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

There may be disagreement over the date of reservation issue, if Plaintiffs argue the lands transferred after April 14, 1936 were "restored" to the Reservation, and thus the "restoration" relates back to 1859. It is already apparent that there will be major disagreement on the purpose of reservation issue. Compare, Plaintiffs' Response (Doc. 1442) at pgs. 26-29 with District Opening Brief (Doc. 1416) at pg. 13. Plaintiffs will present their facts on the purpose issue.

There will be a major disagreement on quantification. Quantification may be approached from several directions. One would be based upon the so-called "practically irrigable acreage" or "PIA" standard. See, *Arizona v. California*, 373 U.S. 546, 600-01 (1963) ("*Arizona I*"). Under this standard, one must show that land can support the growth of crops, and that the crops can be grown economically. Under this standard, Defendants will argue that Plaintiffs must show not only arability, but also engineering and economic feasibility, as well as sensitivity to the impact on state and private appropriators, and also that future irrigation projects are likely and required to meet tribal needs. See e.g., Mergen and Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. of Colo. L.Rev. 683, 706-707 (1997); O'Hair, *The Federal Reserved Rights Doctrine and Practically Irrigable Acreage: Past, Present and Future*, 10 BYU J.Pub.L. 263, 289-291 (1996); see also, *In Re Rights to Use of Water in Bighorn River*, 753 P.2d 76, 100-03 (Wyo. 1988) ("*Bighorn I*").

However, here, because the lands in question may not be arable, or even if arable, not feasibly irrigated, Plaintiffs may take a different approach to quantification. Plaintiffs may base their quantification case on the decision of the Arizona Supreme Court in *In Re Gen. Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) ("*Gila III*") and the factors suggested in *In Re Gen. Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 80-81 (Ariz. 2001) ("*Gila V*"). Those factors include: (1) the Tribe's history; (2) the land's geography, topography and natural resources; (3) the Tribe's economic base; (4) past water use on the Reservation; (5) proposed projects, including whether they are practical, feasible and suitable; and (6) the Tribe's present and projected population.

Plaintiffs will also assert that the implied reservation doctrine applies to underground water and also to conservation storage in a reservoir built nearly 100 years after the Reservation was established. They will rely on *In Re Gen. Adjudication of All Rights to Use Water in the*

Gila River System and Source, 989 P.2d 739 (Ariz. 1999) ("*Gila III*"), in arguing that the implied reservation doctrine applies to underground water.

The relief requested with respect to the Tribal Claims also bears on the magnitude and enormity of those claims. With respect to the Tribal Claims, Plaintiffs ask the Court:

1. To recognize and declare and quiet title to:

   A. The right of the Tribe to store water in Weber Reservoir for use on the Reservation including the lands restored to the Reservation in 1936;

   B. The right of the Tribe to use water on the lands restored to the Reservation in 1936;

   C. The right of the Tribe to use groundwater underlying and adjacent to the Reservation on the lands of the Reservation including the lands restored to the Reservation in 1936;

   D. The right of the Tribe to use groundwater underlying and adjacent to the lands restored to the Reservation in 1936 on the lands of the reservation including the lands restored to the Reservation in 1936.

2. Declare that the defendants and counterdefendants have no right, title or other interest in or to the use of such water rights.

3. Preliminary and permanently enjoin the defendants and counterdefendants from asserting any adverse rights, title or other interest in or to such water rights.

See, Tribe's First Amended Counterclaim, pgs. 17-18; United States' First Amended Counterclaim, pgs. 31-33.

In order to arrive at and render a judgment which can administer all of the rights Plaintiffs seek, the Court may have to require all Defendants to assert any claims they may have to surface water established under State law after entry of the Decree and to underground water. Moreover, as the Court recognized in the CMO, an essential element of the Tribal Claims and Federal Claims is the contention that "underground and surface waters [within the Walker River basin] constitute a single source." CMO pg. 3. Thus, if the Court ultimately

reaches the merits of that claim in order to arrive at a judgment which can administer all of the rights to that "single source," the Court will have to determine the relative priority and relationship of all such rights, surface and groundwater, to each other. That determination can only be made if persons whose rights to that "single source" which have not been previously adjudicated are not only joined, but also are allowed and required to assert and prove those rights through appropriate counterclaims and crossclaims.

Although the Walker River Decree represents a comprehensive adjudication of the relative rights to use the surface waters of the Walker River and its tributaries in Nevada and California, there has never been a similar comprehensive adjudication of the relative rights to use underground water within the Walker River Basin in Nevada and California. There certainly has never been an adjudication which determines the relative rights to use water from the alleged "single source" within the Basin.

The Defendants in their case-in-chief will have to address all of the same issues addressed by Plaintiffs. As noted, there may be a major contest on the date of reservation, and there will be a major contest on the purpose of reservation and on all aspects of the quantification issue. In addition, the Defendants will provide facts to support their finality defenses, their equitable defenses and any other defense which involves a need for facts.

In addition, the Defendants, including the owners of domestic wells, will have to assert through appropriate counterclaims and crossclaims, and with required proof, their rights to underground water and to surface water rights appropriated under State law after the Decree was entered. There will no doubt be major issues concerning whether and how all such rights relate to the Tribal Claims, as well as to each other.

Leaving aside the issue of subject matter jurisdiction and the question of if and when answers should be required, each of which is addressed separately below, it is important to compare the potential for avoidance of possibly unnecessary and costly litigation under

Plaintiffs' and Mineral County's proposed threshold issues to that same potential under Defendants' proposed threshold issues.

Plaintiffs and Mineral County suggest that the Court include as initial threshold issues whether federal law governs underground water pumping on the Reservation, and if it does, what remedies are available to protect Tribal pumping. Plaintiffs' Response (Doc. 1442) at pgs. 21-22. They also suggest that the availability of equitable defenses, like laches, be addressed only as a matter of law. Id. at pgs. 22-23.

These abstract legal issues have no potential to avoid possibly unnecessary litigation. In fact, they create it. It makes no sense to consider what law governs pumping of groundwater on the Reservation or available remedies without getting to the merits of whether the Tribe actually has a right to underground water under the implied reservation of water doctrine. In addition, eliminating or verifying the availability of a defense as a matter of law does nothing to narrow the proceedings on the Tribal Claims. Moreover, the availability of a defense, like laches, will turn on the relevant facts. See e.g., *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005). Those facts may well include evidence that a Tribe has successfully asserted claims against, and been compensated by, the United States for damages related to the claims asserted here. See, District's Opening Brief (Doc. 1416) at pg. 12; see also, Circle Bar N Opening Brief (Doc. 1415) at pgs. 8-11; Nevada Opening Brief (Doc. 1413) at pg. 6; Landolt Opening Brief (Doc. 1414) at pg. 3.

At the end of that massive proceeding, the Court may decide that, on the merits, one or more of the defenses, including finality, is a "knock-out punch" to the merits of the Tribal Claims. In that instance, the efforts and costs of Plaintiffs, Defendants and the Court on all of the other issues is simply wasted.

On the other hand, threshold issues proposed by Defendants, like claim and issue preclusion, do have the potential to avoid such possibly unnecessary and certainly costly litigation, just as they did in *Nevada v. United States*, 463 U.S. 110, 129-145 (1983). See, District's Opening Brief (Doc. 1416) at pgs. 11-12; see also, Circle Bar N Opening Brief (Doc. 1415) at pgs. 5-6; Nevada Opening Brief (Doc. 1413) at pg. 5. Those defenses have the potential to "knock-out" the claims for underground water and for conservation storage in Weber Reservoir for the Reservation as it existed when the Decree was entered. They have similar potential for the claim for conservation storage for the Added Lands. The assertion that the CMO does not identify finality issues as threshold issues (Plaintiffs' Response (Doc. 1442) at pg. 24) is wrong. The CMO states, "in general, threshold issues, among others shall address jurisdiction, claim, (sic) preclusion, applicable law, equitable and other defenses which may be raised by any party." CMO at pg. 9, lns. 17-19.

Similarly, the Defendants have also identified two significant issues which have "knock-out punch" potential on the claims for the Added Lands. Those are as follows:

> Whether the United States may reserve water, under the federal implied reservation of water doctrine, from a water source that is not within the lands being reserved.
>
> Whether any water, surface or underground, was impliedly reserved when lands were added to the Reservation in light of the following: (1) the language and history of the Act of Congress that authorized the addition of those lands; (2) the fact that prior to their addition to the Reservation, those lands were designated as public domain and opened to entry under the Desert Lands Act; and (3) the fact that the lands were added for grazing purposes.

District's Opening Brief (Doc. 1416) at pgs. 11-12; see also, Circle Bar N Opening Brief (Doc. 1415) at pgs. 7-8; Nevada Opening Brief (Doc. 1413) at pg. 5.

Plaintiffs, although acknowledging that these are issues, would disqualify them because they are fact intensive and because they involve the "purpose" for reserving the Added Lands. Sooner or later, the parties and the Court will need to get to the factual bases for the essential

elements of the Tribal Claims. It is consistent with the CMO to do that **now** on these issues. These issues have the potential to either eliminate the claims for the Added Lands, or to require a quantification related to water for livestock. With either result, the need to require hundreds, if not thousands, of persons with nothing more than a domestic well to hire attorneys and engineers may completely disappear.

The CMO is grounded on the bifurcation principles of F.R.C.P. Rule 42(b) and applicable case law. The process it established for resolving threshold issues, full discovery, dispositive motions and, if necessary, separate trial, make it clear that those same principles should be used to identify the threshold issues. Plaintiffs and Mineral County have ignored those principles.

III. THE ONLY ISSUE OF SUBJECT MATTER JURISDICTION WHICH NEEDS TO BE ADDRESSED NOW IS WHETHER THIS COURT IS ACTING IN A PROCEEDING COMPLETELY SEPARATE FROM ITS ADMINISTRATION OF THE WALKER RIVER DECREE.

Plaintiffs assert that "having insisted that the United States and Tribe serve several thousand persons and entities" and having allowed such service "over the last eight years," the Defendants are now contending that Plaintiffs "must start all over again in a new action before the same court." Plaintiffs' Response (Doc. 1442) at 20; 2. It is the Constitution of the United States and Supreme Court decisions interpreting and applying it that require notice and an opportunity to defend here, not the insistence of Defendants. The magnitude of service stems from the breadth of the claims which the United States and the Tribe **chose** to assert. The time that it has taken for such service results from the **decision** of the United States on the resources to be devoted to the effort. However, if there is any doubt after the District's Responsive Brief, the District does not contend that resolution of this issue may require the United States and the Tribe to start over. See, District's Responsive Brief (Doc. 1443) at pg. 7, lns. 7-10; pg. 12, lns. 12-16.

The issues related to subject matter jurisdiction are best considered in light of the allegations of subject matter jurisdiction in the First Amended Counterclaims. The First Amended Counterclaims allege six bases for subject matter jurisdiction. Three of the jurisdictional bases afford grounds for jurisdiction over new actions. Those bases are: 28 U.S.C. § 1331, arising under the Constitution, laws or treaties of the United States; 28 U.S.C. § 1362, brought by an Indian Tribe arising under the Constitution, laws or treaties of the United States; and 28 U.S.C. § 1345, proceedings brought by the United States. The remaining three allegations of subject matter jurisdiction are based upon jurisdiction which allegedly results from the existence of the final judgment in the C-125 case, the Walker River Decree. Those bases are the continuing jurisdiction of the Court over the Walker River and its tributaries; 28 U.S.C. § 1367, supplemental jurisdiction; and 28 U.S.C. §1651, the All Writs Act, authorizing the Court to issue all writs necessary, where appropriate, in aid of its jurisdiction. See, Tribe's Amended Counterclaim, at 14; United States' Amended Counterclaim, at 10-11.

There is no issue over whether the United States District Court for the District of Nevada, acting in a new action, has subject matter jurisdiction under 28 U.S.C. §1331, 28 U.S.C. § 1362, and 28 U.S.C. § 1345, to consider whether there is an implied reserved right to store water in a reservoir for use on Walker River Indian Reservation, and whether there is an implied reserved water right for the Reservation's Added Lands. Subject to the applicability of principles of abstention, that same federal court acting in a new action may have subject matter jurisdiction under those same provisions to determine the Tribal Claims to, and the relative rights of, all other claimants to underground water in some sort of comprehensive adjudication of the rights to underground water. What is at issue here is whether this Court has such subject matter jurisdiction to do any of those things by reason of its continuing jurisdiction to administer the water rights recognized by the Walker River Decree, by reason of supplemental jurisdiction, or by reason of the All Writs Act.

Thus, the only subject matter jurisdiction issue which needs to be addressed at this time is whether this proceeding should be considered a new action, completely separate from the continuing administration of the Walker River Decree, and with subject matter jurisdiction based upon 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 28 U.S.C. § 1345. As the District noted in its Opening Brief (Doc. 1416) at pgs. 13-14, and in its Responsive Brief (Doc. 1443) at pgs. 9-10, the surface water/underground water relationship issue need not be considered at this time because if the Tribe has no rights to additional water beyond those presently recognized in the Decree, there is simply no interference issue to adjudicate, and no reason to undertake a comprehensive adjudication of the relative rights of claimants to underground water.

IV. REQUIRING ANSWERS AT THIS TIME WOULD SERVE NO PURPOSE, EXCEPT UNNECESSARY COST AND DELAY.

Delay and unnecessary cost are the only reasons to require answers from several thousand defendants before proceeding to finally determine the threshold issues and to litigate those issues in accordance with the CMO. Ironically, Plaintiffs, who complain about the number of threshold issues suggested by Defendants, insist on answers from several thousand defendants, ostensibly for painstaking review, to ensure that no threshold issue is missed.

Consistent with their entire approach to identifying threshold issues, Plaintiffs ignore the language and intent of the CMO in contending that answers from all defendants must be filed as a "prerequisite to threshold issues." Plaintiffs' Response (Doc. 1442) at pgs. 14; 15-16. If that is what the CMO intends, the question of why the CMO did not require answers as an initial response to process begs for an answer.

The CMO has a separate section entitled "Responses to Process." CMO at 12. The CMO requires a notice of appearance and intent to participate as the response to process. It provides that answers are not required except upon further order of the Magistrate Judge, and that no default will be taken for failure to appear. CMO at pg. 12, lns. 22-25. These provisions

are based upon the Court's recognition that a formal responsive pleading for every defendant might never be necessary.

The Tribal Claims involve an effort to assert additional claims to surface water against rights to surface water which have already been recognized and adjudicated in the Walker River Decree. In those circumstances, the Court recognized that there was no need for answers from every defendant at the outset because even if an answer was required and not filed, a default judgment could never be taken until the conclusion of the case, and then only if the Plaintiffs were successful. This is because rights to use water from the Walker River must be regulated *inter se*; a water right cannot be regulated against some, but not all, of the other water rights. Thus, the principles announced in *Frow v. De La Vega*, 82 U.S. 552, 553-554 (1872) apply. In cases where the identical nature of the claims, facts and legal issues relative to each defendant make it logically inconsistent to rule in favor of some defendants, but not others, a default judgment against some, but not all, of the defendants is barred as a matter of law. *Shanghai Automation Inst. Co. v. Kuei*, 194 F.Supp.2d 995, 1005-009 (N.D. Cal. 2001); see also, *First T.D. & Investment, Inc. v. Chang*, 253 F.3d 520, 532-33 (9th Cir. 2001). In a situation as is presented here where Plaintiffs seek recognition of water rights from a common supply, it is not only logically inconsistent, it is impossible as a practical matter to recognize such water rights against defendants who do not answer, while ruling in favor of those who do.

A notice of appearance and intent to participate (pro se) was all that was needed until resolution of the threshold issues either narrowed or didn't narrow the magnitude of the Tribal Claims. For example, if principles of finality bar the Tribal Claims related to the Reservation as it existed when the Decree was entered and/or the purpose of reservation element of the Tribal Claims for the Added Lands results in no, or minimal, needs for water, another response from all defendants may never be required.

However, if, after threshold issues are decided, there must be an adjudication of rights to underground water and rights to surface water established under State law after the Decree was entered, the Court will not be able to grant effective injunctive relief without adjudicating the relative priority and relationship to some or all the underground water rights and additional surface water rights in the Basin. At that point, depending on how broadly or narrowly the Court defines the source of supply, all claimants to that source of supply will need to file "counterclaims" against the Plaintiffs and "crossclaims" against other defendants with respect to their claims to that supply. To require an additional response in the form of answers now, before it is known whether such counterclaims and crossclaims are necessary, results in nothing more than unnecessary cost, expense and delay. Moreover, this prospect makes it all the more important that the Court identify, consider and decide threshold issues which have the real possibility to narrow the scope of this litigation.

DATED this 3rd day of November, 2008.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 3rd day of November, 2008, I electronically served the foregoing *Walker River Irrigation District's Reply 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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