

1 SIMEON M. HERSKOVITS, *pro hac vice*  
New Mexico State Bar No.1686  
2 ADVOCATES FOR COMMUNITY AND ENVIRONMENT  
3 P.O. Box 1075  
El Prado, NM 87529  
4 Phone: (575) 758-7202  
5 Fax: (575) 758-7203  
E-mail: [simeon@communityandenvironment.net](mailto: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](mailto: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, )  
19 )  
20 WALKER RIVER PAIUTE TRIBE, )  
 )  
21 Plaintiff-Intervenor, )  
22 vs. )  
23 WALKER RIVER IRRIGATION DISTRICT, )  
a corporation, et al., )  
24 )  
25 Defendants. )

3:73-CV-0127-ECR-RAM

In Equity No. C-125  
Subfile C-125-B

**MINERAL COUNTY  
PRELIMINARY THRESHOLD  
ISSUES REPLY BRIEF**

1 **ARGUMENT**

2 In their opening and response briefs, Defendants offer a number of characterizations of  
3 what constitutes a proper threshold issue, ranging from those that could be dispositive of the  
4 Tribal Claims, to those that will avoid costly litigation, to those that involve minimal factual  
5 development. However, across the board, Defendants' lists of threshold issues are slanted  
6 toward issues that would involve extensive factual development and would require the Court to  
7 decide the merits of the Tribal Claims as threshold issues. The inclusion of such factually  
8 involved ultimate merits questions is inconsistent with Defendants' own characterizations of  
9 what constitutes a threshold issue.  
10

11  
12 Issues that are fundamental to the merits of the Tribal Claims are clearly not candidates  
13 for threshold issue status. The Case Management Order ("CMO") does not contemplate a  
14 decision on the merits of the Tribal Claims during Phase I of the litigation. Rather, the merits of  
15 the Tribal Claims are left to Phase II of the litigation. *See* CMO at 11, ¶12(b). Although, as the  
16 Walker River Irrigation District ("WRID") correctly notes, the CMO provides for full discovery  
17 as to threshold issues, it also expressly limits discovery on the merits during Phase I of the  
18 litigation. *See* CMO at 13, ¶ 15 ("Discovery shall also be permitted during that same time period  
19 concerning the basis for the Tribal Claims; such discovery shall be limited to propounding of  
20 interrogatories and requests for production of documents relating to the contentions of the  
21 U.S./Tribe with respect to the basis for the Tribal Claims."). Thus, the CMO does not appear to  
22 contemplate deciding merits related issues during Phase I. Indeed, such an approach would  
23 deprive Plaintiffs of the ability to fully develop their case.  
24  
25

26 Notwithstanding WRID's assertion to the contrary, *see* WRID Responsive Brief on  
27 Threshold Issues at 3, Mineral County recognizes that this Court may consider certain claims or  
28  
Mineral County Preliminary Threshold Issues Reply Brief  
Page 2 of 9

1 issues while holding others in abeyance. In fact, the Court has chosen to do just that in the CMO  
2 by holding issues relating to the merits in abeyance until threshold issues have been disposed of.  
3 If the Court wishes to further organize consideration of issues relating to the merits, it could  
4 certainly do that during Phase II of the litigation. However, the CMO makes it clear that the  
5 Court has chosen to hold consideration of the merits in abeyance until Phase II of the litigation.  
6

7 WRID suggests the CMO does not require that answers be filed before threshold issues  
8 are decided, while at the same time arguing that certain fact intensive issues that go directly to  
9 the merits of Plaintiffs' claims ought to be designated as threshold issues. WRID Responsive  
10 Brief on Threshold Issues at 7-8. These positions are inconsistent with one another. If, as WRID  
11 suggests, answers need not be filed during Phase I of the litigation, then designating fact  
12 intensive issues related to the merits as threshold issues would deprive both defendants and  
13 plaintiffs of the ability to fully develop their cases. Given that inconsistency, it would not be  
14 appropriate to treat issues that go to the merits of the Tribal Claims as threshold issues. Thus,  
15 designating issues that go to the merits of the Tribal Claims as threshold issues would deprive the  
16 plaintiffs of the opportunity for the broad discovery provisions of the Federal Rules of Civil  
17 Procedure, *see* Fed. R. Civ. Pro. 26, would be inconsistent with the answer provision of the rules  
18 of civil procedure, *see* Fed. R. Civ. P. 7(a), 8, 12, and would be contrary to the phased litigation  
19 approach contemplated by the CMO.  
20  
21  
22

23 Contrary to WRID's assertion that Mineral County's approach "ignores the content of the  
24 CMO," WRID Responsive Brief on Threshold Issues at 2, Mineral County's approach is  
25 consistent with the CMO's content and evident purpose of designating threshold issues to  
26 simplify this complex litigation and organize the case in such a way as to address simpler, more  
27 easily decided issues that require minimal resources before deciding issues that require  
28

1 significant expenditure of resources and time. However, Defendants’ overly broad designation  
2 of threshold issues undermines this very goal. Designation of threshold issues that require  
3 extensive discovery and are fundamental to the merits of the Tribal Claims would not serve to  
4 streamline litigation, but likely would result in duplication of discovery efforts and could well  
5 result in unnecessary discovery. Additionally, as noted above, addressing the ultimate merits of  
6 the Tribal Claims at this preliminary phase of the litigation would be inconsistent with the  
7 CMO’s phased approach and would increase the potential for inefficient litigation of the merits  
8 in a premature and piecemeal fashion. Rather, designation of threshold issues that do not involve  
9 such extensive discovery but which could be dispositive of the case would be the most efficient  
10 approach and would be in line with the language of the CMO.  
11  
12

13           While WRID seems to suggest that addressing legal issues before factually intensive  
14 issues would “establish a process to litigate issues of law disconnected from the content of the  
15 claims being asserted by the Plaintiffs,” WRID Responsive Brief on Threshold Issues at 5,  
16 Mineral County has not suggested such an approach. Rather, Mineral County suggests  
17 addressing the simpler, less factually intensive issues first, before moving to the merits of the  
18 case. WRID’s approach, on the other hand, seems to advocate trying the core of the Tribe’s case  
19 at the threshold issue phase of the litigation. While consideration of the factual content and  
20 context of even these issues is clearly necessary, a well-reasoned decision on threshold issues  
21 does not require that the merits of the case be moved to the threshold issue phase of the  
22 litigation. Indeed, such an approach would undermine the phased litigation approach adopted by  
23 the CMO.  
24  
25

26           Tellingly, designating issues that involve the merits of the Tribal Claims as threshold  
27 issues, the Defendants focus exclusive on those facets of the ultimate merits that put the burden  
28

1 of making defensive factual showings on the Plaintiffs, whether the Decree Court has jurisdiction  
2 to adjudicate new and additional claims for reserved water rights, while deferring consideration  
3 of those facets of the ultimate merits that would require the Defendants to make such a showing,  
4 such as an examination of the relationship between groundwater and surface water. This  
5 approach seems simply unfair and prejudicial to the plaintiffs. As such, Mineral County  
6 respectfully requests that the Court decline the Defendants' invitation to selectively address  
7 ultimate merits issues that favor them at this preliminary stage of the litigation while deferring  
8 any consideration of ultimate merits issues that disfavor them.  
9  
10

### 11 **CONCLUSION**

12 For the reasons set forth above, Mineral County respectfully requests that, the Court first  
13 address genuine, undisputed threshold issues that involve little factual development and do not  
14 go to the merits of the Tribal Claims, such as those concerning the scope of the Court's  
15 jurisdiction, the proper choice of applicable law, and service. After those threshold issues have  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 been addressed, the Court could more efficiently provide for discovery and motion practice  
2 concerning the other more factually intensive and merits-oriented issues identified in the CMO  
3 as properly decided in Phase II of this litigation.

4 Dated: November 3, 2008

Respectfully submitted,

5  
6 SIMEON M. HERSKOVITS, *pro hac vice*  
7 New Mexico State Bar No.1686  
8 ADVOCATES FOR COMMUNITY AND  
9 ENVIRONMENT  
10 P.O. Box 1075  
11 El Prado, NM 87529  
12 Phone: (575) 758-7202  
13 Fax: (575) 758-7203  
14 E-mail: [simeon@communityandenvironment.net](mailto:simeon@communityandenvironment.net)

15 By /s/ Simeon M. Herskovits  
16 SIMEON M. HERSKOVITS

17 Dated: November 3, 2008

Respectfully submitted,

18  
19 CHERI K. EMM-SMITH  
20 Nevada State Bar No. 3055  
21 MINERAL COUNTY DISTRICT ATTORNEY  
22 P.O. Box 1210  
23 Hawthorne, NV 89415  
24 Phone: (775) 945-3636  
25 Fax: (775) 945-0700  
26 E-mail: [districtattorney@mineralcountynv.org](mailto:districtattorney@mineralcountynv.org)

27 By /s/ Cheri Emm Smith  
28 CHERI EMM SMITH

Attorneys for MINERAL COUNTY, NEVADA

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of November, 2008, I electronically filed the foregoing Mineral County Preliminary Threshold Issues Reply 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](mailto:madams@ag.nv.gov) [pyoung@ag.nv.gov](mailto:pyoung@ag.nv.gov)

Gregory W. Addington  
[greg.addington@usdoj.gov](mailto:greg.addington@usdoj.gov) [judy.farmer@usdoj.gov](mailto:judy.farmer@usdoj.gov) [joanie.silvershield@usdog.gov](mailto:joanie.silvershield@usdog.gov)

George N. Benesch  
[gbenesch@sbcglobal.net](mailto:gbenesch@sbcglobal.net)

Gordon H. DePaoli  
[gdepaoli@woodburnandwedge.com](mailto:gdepaoli@woodburnandwedge.com)

Cheri Emm-Smith  
[districtattorney@mineralcountynv.org](mailto:districtattorney@mineralcountynv.org)

Dale E. Ferguson  
[dferguson@woodburnandwedge.com](mailto:dferguson@woodburnandwedge.com)

John W. Howard  
[john@jwhowardattorneys.com](mailto:john@jwhowardattorneys.com) [elisam@whowardattorneys.com](mailto:elisam@whowardattorneys.com)

Erin K. L. Mahaney  
[emahaney@waterboards.ca.gov](mailto:emahaney@waterboards.ca.gov)

David L. Negri  
[David.negri@usdoj.gov](mailto:David.negri@usdoj.gov)

Michael Neville  
[michael.neville@doj.ca.gov](mailto:michael.neville@doj.ca.gov) [cory.marcelino@doj.ca.gov](mailto:cory.marcelino@doj.ca.gov)

Karen A. Peterson  
[kpeterson@allisonmackenzie.com](mailto:kpeterson@allisonmackenzie.com) [egarrison@allisonmackenzie.com](mailto:egarrison@allisonmackenzie.com)

Marshall Rudolph  
[mrudolph@mono.ca.gov](mailto:mrudolph@mono.ca.gov)

Mineral County Preliminary Threshold Issues Reply Brief  
Page 7 of 9

1 Susan L. Schneider  
2 [susan.schneider@usdoj.gov](mailto:susan.schneider@usdoj.gov)

3 William Schaeffer  
4 [Lander\\_lawyer@yahoo.com](mailto:Lander_lawyer@yahoo.com)

5 Laura A. Schroeder  
6 [counsel@water-law.com](mailto:counsel@water-law.com)

7 Stacey Simon  
8 [ssimon@mono.ca.gov](mailto:ssimon@mono.ca.gov)

9 Brian Stockton  
10 [bstockton@ag.nv.gov](mailto:bstockton@ag.nv.gov)

11 Wes Williams  
12 [wwilliams@standordalumni.org](mailto: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 Preliminary Threshold Issues Reply Brief on the following non-  
15 CM/ECF participants by U.S Mail, postage prepaid, this 3rd day of November, 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, 3<sup>rd</sup> 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/ Noel Simmons  
23 NOEL SIMMONS  
24  
25  
26  
27  
28