

Wes Williams Jr.
 Nevada Bar No. 06864
 3119 Pasture Rd.
 P.O. Box 100
 Schurz, Nevada 89427
 775/773-2838
wwilliams@stanfordalumni.org

Attorney for the Walker River Paiute Tribe

Gregory A. Brower, U.S. Attorney
 Greg Addington, Asst. U.S. Attorney

Ronald J. Tenpas, Asst. Attorney General
 Susan L. Schneider, Trial Attorney
 U.S. Department of Justice
 Environment and Natural Resources Div.
 1961 Stout Street, 8th floor
 Denver, Colorado 80294
 303/844-1348
susan.schneider@usdoj.gov

Attorneys for the United States of America

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
WALKER RIVER PAIUTE TRIBE,)	IN EQUITY NO. C-125-ECR
)	Subproceeding: C-125-B
Plaintiff-Intervenor,)	
)	
vs.)	THE UNITED STATES OF AMERICA'S
)	AND WALKER RIVER PAIUTE
WALKER RIVER IRRIGATION DISTRICT,)	TRIBE'S BRIEF REGARDING WHEN
a corporation, et al.,)	ANSWERS NEED TO BE FILED IN
)	THIS ACTION
Defendants.)	
_____)	

At the status conference of the Court on December 3, 2008, the Court asked the United States (“United States”) and the Walker River Paiute Tribe (“Tribe”) to set forth their position as to when answers should be filed in the above action. This pleading responds to this request.

Litigation of this case under the *Case Management Order*, (Apr. 18, 2000) (“CMO”) (Doc. 108), must be consistent with the Federal Rules of Civil Procedure. District courts have authority to prescribe rules (local rules) for the conduct of their own business, but “[s]uch rules shall be

consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.” 28 U.S.C. § 2071(a). The Federal Rules of Civil Procedure are prescribed under 28 U.S.C. § 2072. Although these rules provide discretion and flexibility, district courts have no authority to proceed in a manner inconsistent with the Federal Rules of Civil Procedure. *See also* Rule 83(b), Fed. R. Civ. P. (“A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 . . . and the district’s local rules.”).

The Federal Rules of Civil Procedure provide for the filing of answers or other prescribed pleadings that frame the issues to be litigated. Rule 7, Fed. R. Civ. P. The Rules require answers to be served within 20 or 60 days of service, depending on whether the defendant was served or waived service. Rule 12(a), Fed. R. Civ. P.^{1/} This requirement is altered only if a defendant decides to file a dispositive motion pursuant to Rule 12. If so, that defendant is not required to file an answer until the court denies the motion or determines to postpone disposition of the motion until trial. Rule 12(a)(4), Fed. R. Civ. P. 12. To the extent a matter is susceptible of being handled as a dispositive motion under Rule 12, answers are not required until 10 days after a motion is denied or postponed by the Court until trial. Rule 12(a)(4)(A), Fed. R. Civ. P. To the extent, however, a matter cannot be handled as a dispositive motion under Rule 12, answers are required.

The Court must reconcile the CMO with the Federal Rules of Civil Procedure. *See, e.g.*, CMO ¶ 10 at 8-9, (requiring the Magistrate Judge to address case management upon completion of service) and ¶19 at 14 (authorizing the Magistrate Judge to change, modify and adjust the CMO). The CMO does not address when answers need to be filed or how answers are to be submitted in

^{1/}The Court’s authority to extend this deadline is authorized by Fed. R. Civ. P. 6 for good cause or excusable neglect.

light of the Court's bifurcation of the Tribal and other claims and its division of litigation into phases. Instead, it simply says that no answers or other pleadings will be required except upon further order of the Magistrate Judge. CMO ¶12 at 13. In light of the large number of defendants and extensive efforts required to complete service, this provision makes sense as a matter of case management during the service period. There is, however, no reason to assume that the absence of a deadline to file answers means they do not need to be filed at all or can be filed in violation of the Rules.

It is premature to determine when answers should be filed in relation to the litigation of threshold issues under the CMO because the Court has not yet identified these issues. Identifying an issue as a threshold issue under the CMO does not automatically classify it as a Rule 12 issue. To the extent threshold issues are appropriately addressed as Rule 12 dispositive motions, answers are not prerequisites. Threshold issues that cannot be handled as dispositive motions under Rule 12 should not be addressed until after answers are filed and the issues are properly joined.

The Court should set a deadline after the completion of service for all defendants to answer or file any Rule 12 motions and to state whether they wish to participate in the determination of threshold issues under the CMO.² Issues raised under Rule 12(b)(2)-(5) are, by their very nature, threshold issues. Such motions address lack of personal jurisdiction, venue, insufficient process and insufficient service or process, which are issues the United States and the Tribe have already identified as issues that must be resolved initially. The Court should require defendants to file any such motions within that time frame or waive them. This process should also govern motions under

²The Court can delay requiring answers as to the issues that have been bifurcated and held for later phases.

Rule 12(b)(1) for lack of subject matter jurisdiction. Although a Rule 12(b)(1) motion can be filed at any time, the Court has flagged jurisdictional issues as potential threshold issues, CMO ¶ 11 at 9-10, and the Supreme Court has directed that a federal court generally may not rule on the merits of a case prior to determining whether it has subject matter jurisdiction over the claims and personal jurisdiction over the parties. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998). During the last status conference, one defense attorney indicated his intention to file several motions pursuant to Rule 12(b)(6). This process should also address the filing of motions under Rule 12(b)(6) and (7). Once these motions have been filed, they should be reviewed for incorporation into the threshold issues under the CMO. Furthermore, this process should ensure that all defendants are bound by any resolution of these issues.

To the extent that discovery is authorized and attempted by any party in connection with any threshold issue under the CMO or the “contentions of the U.S./Tribe with respect to the basis for the Tribal Claims,” CMO ¶15 at 13, discovery must follow answers. The Federal Rules do not provide for discovery prior to the receipt of answers, because the issues are not framed and joined. Moreover, the concept of discovery presupposes that the plaintiff knows what defendants admit or deny and allege as defenses, which the plaintiff cannot know without seeing the defendants’ answers. If discovery is allowed before the United States and the Tribe receive answers, they will be prejudiced in their ability to prepare and conduct discovery and the parties will needlessly expend resources.

CONCLUSION

The issue of when answers should be filed in this case underscores the need to reconcile the Case Management Order with the Federal Rules of Civil Procedure. This particular issue cannot be

resolved until the Court identifies the threshold issues under the CMO, sets forth a schedule for filing Rule 12 motions, and determines how to address all issues raised under Rule 12 as part of its case management responsibilities. There is no basis for litigating issues that require discovery or are not proper Rule 12 motions until after answer have been filed. Finally, it is essential that these case management steps be handled in a manner that binds all defendants.

Dated: January 16, 2009

Respectfully submitted,

Wes Williams Jr.
Nevada Bar No. 06864
3119 Pasture Rd.
P.O. Box 100
Schurz, Nevada 89427
775/773-2838
wwilliams@stanfordalumni.org

By: /s/ Wes Williams Jr.
Wes Williams Jr.

Attorney for the Walker River Paiute Tribe

Dated: January 16, 2009

Respectfully submitted,

Greg Addington, Assistant United States Attorney
Susan L. Schneider, Trial Attorney
U.S. Department of Justice
Environmental and Natural Resources Div.
1961 Stout Street, 8th floor
Denver, Colorado 80294
303/844-1348

susan.schneider@usdoj.gov

By: /s/ Susan L. Schneider
Susan L. Schneider

Attorneys for the United States of America

Of Counsel:

CHRISTOPHER WATSON
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, NW
Mailstop 6513-MIB
Washington, D.C. 20240

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009, I served or caused to have served a true and correct copy of the foregoing by electronic mail or first-class mail, postage prepaid, addressed to the following persons:

Marta Adams
Deputy Attorney General
State of Nevada
100 N. Carson Street
Carson City, NV 89701-4717

Nathan Goedde
Staff Counsel
Calif. Dept. of Fish and Game
1416 Ninth Street, Ste. 1335
Sacramento, CA 95814

Greg Addington
Asst. U. S. Attorney
100 W. Liberty St., Suite 600
Reno, NV 89509

Simeon M. Herskovits
Advocates for Community & Environment
P.O. Box 1075
El Prado, NM 87529

George N. Benesch
190 W. Huffaker Lane, Ste. 408
Reno, Nevada 89511

John Kramer
Department of Water Resources
1416 Ninth Street
Sacramento, CA 94814

Karen Peterson
Allison, MacKenzie, Pavlakis, Wright &
Fagan, Ltd.
402 North Division Street, P.O. Box 646
Carson City, Nevada 89702

Michael Neville, Deputy Atty. General
DOJ, Off. of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Gordon H. DePaoli
Dale E. Ferguson, Esq.
Woodburn and Wedge
6100 Neil Road, Suite 500
Reno, NV 89511

Erin K. L. Mahaney
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814

Cheri Emm-Smith
Mineral County District Attorney
P.O. Box 1210
Hawthorne, NV 89415

Wes Williams Jr.
Law Offices of Wes Williams Jr.
P.O. Box 100
Schurz, NV 89427

David L. Negri
United States Department of Justice
Env. and Natural Resources Division
161 E. Mallard Dr., Suite A
Boise, ID 83706

Todd Plimpton
Belanger & Plimpton
1135 Central Avenue
P. O. Box 59
Lovelock, NV 89419

Bryan L. Stockton, Deputy Atty General
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

William E. Schaeffer
P.O. Box 936
Battle Mountain, NV 89820

Marshall S. Rudolph, County Counsel
Stacey Simon, Deputy County Counsel
Mono County
P.O. Box 2415
Mammoth Lakes, CA 93546-2415

Laura A. Schroeder
Schroeder Law Offices, P.C.
1915 N.E. 39th Ave.
P.O. Box 12527
Portland, Oregon 97212-0527

* * * *

Stephen B. Rye
District Attorney
Lyon County
31 S. Main St.
Yerington, NV 89447

Wesley G. Beverlin
Malissa Hathaway McKeith
Lewis, Brisbois, Bisgaard & Smith LCP
221 N. Figueroa St., Suite 1200
Los Angeles, CA 90012

Jim Shaw
Chief Dep. Water Commissioner
U. S. Board of Water Commissioners
Post Office Box 853
Yerington, NV 89447

Michael D. Hoy
Bible Hoy & Trachok
201 West Liberty Street, Third Floor
Reno, NV 89511

Ken Spooner
Walker River Irrigation District
P. O. Box 820
Yerington, NV 89447

Timothy A. Lukas
P. O. Box 3237
Reno, NV 89505

* * * * *

John W. Howard
625 Broadway, Suite 1206
San Diego, CA 92101

/s/Yvonne M. Marsh
Yvonne M. Marsh, Paralegal Specialist