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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, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	In Equity No. CV-125-ECR Subfile No. C-125-B RESPONSE OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO JOINT MOTION BY THE STATE OF NEVADA AND WRID CONCERNING CASE MANAGEMENT

The United States and the Walker River Paiute Tribe ("Tribe") have reviewed the Joint Motion Concerning Case Management filed by the Walker River Irrigation District ("WRID") and the State of Nevada, which includes a Proposed Order Concerning Case Management ("WRID/Nevada Proposed Order"). As discussed below, we agree generally with some of the suggestions contained therein. We do not believe, however, that the WRID/Nevada Proposed Order will result in a case management structure that will "secure the just, speedy, and inexpensive determination of [this] action."[1]/ Rather, it appears that the WRID/Nevada Proposed Order is drawn to complicate further the already complicated procedural hurdles the United States and Tribe must clear so that their claims may be heard.

1/ Fed. Rule of Civil Procedure 1.

First, the WRID/Nevada Proposed Order does not establish procedures that will lead to the efficient resolution of a definable set of threshold legal issues in this litigation. On the one hand, the WRID/Nevada Proposed Order recommends a limited set of threshold issues to be determined at the outset of the case, which includes issues of jurisdiction and groundwater, but does not include any kind of defenses that other parties may assert. On the other hand, the WRID/Nevada Proposed Order would also authorize virtually unlimited discovery against the United States and the Tribe without regard to the range of issues to be decided in the initial phase of the case. Neither of these elements of the WRID/Nevada Proposed Order will assist the Court and the parties in establishing a process for the identification and orderly resolution of the issues raised by the United States' and Tribe's claims. At this point, the Court and parties should determine which issues the Court will address initially and then determine the related procedural aspects of the litigation, such as the scope and timing of discovery. Dividing this litigation into phases at the outset, based on parties and issues, as the United States and Tribe have suggested, is a logical and efficient way to proceed. See e.g., Manual for Complex Litigation, Third, Federal Judicial Center, 1995, 21.211, 21.32.

Regarding the threshold issues, the United States and the Tribe have proposed that the initial phase of this litigation focus on certain legal issues related to this Court's jurisdiction, groundwater, and affirmative defenses the other parties may assert. We believe that this is logical, efficient, economic, and just. Focusing on threshold issues such as jurisdiction and related affirmative defenses is a logical first step, because it allows for the prompt resolution of these potentially or partially dispositive issues.[2] If WRID or the State or any other party has a procedural or other defense to going forward, then this is the logical time to identify the defense and address it. It is efficient to resolve threshold issues regarding the Tribal Claims because it allows the parties to focus their time and resources on a manageable set of issues, and eliminates the temptation for the parties to litigate every issue in the case at once, without a coherent structure for doing so. Resolution of the threshold issues regarding the Tribal Claims may also lead to more efficient resolution of similar issues regarding the other federal claims. Finally, it is just because the Tribe and the United States

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[2] The United States and the Tribe also assert that whatever statement of specific threshold issues the Court ultimately adopts, it should be by way of a more neutral phrasing of these issues than offered in the WRID/Nevada Proposed Order. See e.g. WRID/Nevada Proposed Order at Para. 11.A.

should have the opportunity to obtain legal redress for their claims in the most logical and efficient manner possible. This case originated in 1924 with certain claims made on behalf of the Tribe and the current effort to proceed with the counterclaims began in 1992 on behalf of and regarding the Tribal Claims. The Tribe should not have to remain on the sideline while other claims and issues are litigated before theirs and while the status quo as to water use, for which it and the United States wish to obtain legal redress, continues and likely worsens.

Regarding discovery, the United States and the Tribe have proposed that procedures as to the scope and timing of discovery should only be addressed once it is clear which issues are the present focus of the litigation. Thereafter, and in light of the determination of issues to be decided in the initial phase, the parties should be required to confer on a proposed Discovery Plan for submission to the Court. If necessary, this plan can be finalized with the assistance of the Court and the Magistrate Judge. The approach suggested by the United States and the Tribe is consistent with the guidance of the Manual for Complex Litigation:

> Discovery in complex litigation, characterized by multiple parties, difficult issues, voluminous evidence, and large numbers of witnesses, tends to proliferate and become excessively costly, time consuming, and burdensome. Early and ongoing judicial control is therefore imperative for effective management....
>
> Fundamental to control is that discovery be directed at the material issues in controversy. The general principle governing the scope of discovery stated in Rule 26(b)(1) permits discovery of matters "relevant to the subject matter ... [of] the action" if "[t]he information sought . . appears reasonably calculated to lead to the discovery of admissible evidence." But Rule 26(b)(2) directs the court to limit the frequency and extent of use of the discovery methods permitted by the rules, to prevent "unreasonably cumulative or duplicative" discovery and discovery for which "the burden or expense ... outweighs its likely benefit, taking into account the needs of the case. ... the importance of the issues at stake ... and the importance of the proposed discover in resolving the issues." Application of this underlying principle of proportionality means that even in complex litigation, conducting discovery does not call for leaving no stone unturned.
>
> Early identification and clarification of issues is therefore essential to meaningful and fair discovery control. It enables the court to assess the materiality and relevance of proposed discovery and provides the basis for formulating a fair and effective discovery plan....

Manual for Complex Litigation, Third at 21.4, 21.41 (citations omitted).

By contrast, the WRID/Nevada Proposed Order does not establish meaningful controls on discovery. Although it purports to stay discovery subject to "limited" exceptions, it would authorize open-ended discovery against the United States and the Tribe. This would have several undesirable consequences. It would interfere needlessly with the service efforts of the United States and the Tribe, as

it would subject them to virtually unlimited discovery (interrogatories and requests for document production) on any claim from any party to the case, even as they work to identify and serve the additional parties. It would threaten to proliferate the issues in dispute at just the moment that they have been limited to manageable proportions, without regard to the range of issues to be decided in the initial phase. It could result in significant waste of resources, as discovery may be conducted needlessly on matters that never arise because of the resolution of initial-phase issues. For all of the above reasons, it would delay the ultimate resolution of this case. And for the same reasons, such one-sided discovery is unfair, overburdensome, and costly for the United States and the Tribe. Moreover, this proposal bypasses any less onerous, more reasonable and mutually applicable alternatives, such as the initial disclosure requirements of the Federal Rule of Civil Procedure 26(a)(1) or the local rules of this Court.

Second, the WRID/Nevada Proposed Order is more time-consuming. In addition to the above concerns regarding the WRID/Nevada Proposed Order's approach to discovery, we are concerned that service efforts, which will be long and difficult under the best of circumstances, will be further delayed. For the past five years, the parties and the Court have observed the difficulties Mineral County has encountered in attempting to intervene in this action in the C-125 subfile. We believe the Mineral County experience demonstrates that it will be critical to have the assistance of the Court as the United States and the Tribe seek to identify and serve the additional parties for resolution of the Tribal and other federal claims. Thus, the United States and the Tribe would like to identify and clarify from the start, as they have proposed, the categories of parties to be included in this action. Related to this effort, they seek the assistance of the Court in obtaining from the parties all information in their custody and control that identifies these persons. It will be unnecessarily time-consuming for the United States and the Tribe to be left to identify these parties on their own, only to meet at some future date the kinds of objections filed regarding the Mineral County service effort. We do not want to see service and related procedural requirements disputed in a manner that prevents access to the Court for redress of the Tribal Claims.

Third, the WRID/Nevada Proposed Order will be more costly for most of the parties. As noted above, discovery and service-related efforts under the WRID/Nevada Proposed Order will be unnecessarily expensive. In addition, this proposal would require the joinder of even more persons from the outset of the case than as proposed by the United States and the Tribe, which will burden not just the

United States and the Tribe with additional litigation costs, but also burden these additionally joined persons with unnecessary costs associated with being a party. This applies, for example, to groundwater users in California. Perhaps WRID and the State of Nevada want these persons included in the case, but with a bifurcation of parties and issues as suggested by the United States and the Tribe, their presence would not be necessary at this phase of the litigation, and may well not be necessary at any point in the litigation.

Notwithstanding the above concerns, there are some proposals in the WRID/Nevada Proposed Order with which the United States and Tribes agree generally, although the specifics of these proposals and their context do not allow complete and unqualified agreement. First, the United States and Tribe agree that their service efforts should be combined with an effort to record a Notice of Lis Pendens with the appropriate recorder(s) of the applicable property. We wish to explore further how each applicable county or recorder wishes this process to be done and to discuss further with both the parties and the Court the timing of such an effort, applicable procedures, and agreed-upon form for such notice. We believe that this is an issue for which the specifics should be able to be worked out by the parties with the assistance of the Court and Magistrate Judge.

Second, in the memorandum in support of the WRID/Nevada Proposed Order, WRID and the State appear to imply that the Counter-claims may not be served until all parties are identified in the caption of the Complaint under Federal Rule of Civil Procedure 10(a). (Mem. at p. 6.) The United States and Tribe recognize that their Complaint will have to comply with Rule 10(a), but it may not be reasonable, practical, or even possible, to hold up service until all parties were identified with absolute certainty. Indeed, it is clear from the efforts of Mineral County to effect service that the ownership of water interests named in its Complaint have changed over time. This issue and the application of Federal Rule of Civil Procedures 10 and 15, in conjunction with the completion of service, should be worked out by the parties with the assistance of the Court and Magistrate Judge.

Third, the United States and the Tribe agree generally with the proposed additional procedures in paragraph 12 of the WRID/Nevada Proposed Order regarding the potential need to perpetuate testimony, but only to the extent that these procedures supplement and do not change or conflict with the Federal Rules of Civil Procedure. To the extent that these proposed procedures change or conflict with existing

rules, then the parties should discuss the rationale for such proposals and determine if they can come to an agreement on procedures if such an issue arises. This is an issue that at this point is speculative and can be addressed with the assistance of the Court or Magistrate Judge in the context of further discussions on the scope and implementation of discovery and as such issues arise initially.

Third, the United States and Tribe agree generally with the proposals that no defaults should be taken against any party and that the parties should not be required to file counterclaims or cross-claims against each other. We do not agree, however, that the parties served should be excused from filing answers in this matter. All parties to the counterclaims of the United States and the Tribe should be required to file answers, although we would agree to delay the filing of these answers until shortly after completion of service, but before initiation of any discovery and litigation of what we have proposed as threshold issues in the initial phase of this litigation. If the parties do not file answers, then the Court and other parties will not know what the parties identify as issues, affirmative defenses, and other positions. It would leave the litigation of initial issues extremely one-sided, unfair, and ad hoc, as well as frustrate the goal of establishing and implementing a process for the identification and orderly resolution of the issues raised by the United States' and Tribe's claims.

The United States and the Tribe note that a hearing is scheduled on March 14, 2000, before the Magistrate Judge for the parties to address service issues in the C-125-C subfile concerning the Mineral County intervention effort. We suggest that, time permitting, this may be an opportunity for the parties to hold preliminary discussions with the Magistrate Judge concerning the procedural matters outlined in both proposed Case Management Orders to see if the parties can resolve any of these issues with assistance, to ascertain how service issues may be coordinated with or should proceed in the wake of the Mineral County effort, and to discuss how the parties may avoid the problems and delays that have plainly impacted the Mineral County case. The simple fact that the parties have been unable to agree upon a Case Management Order in over eight months underscores the need for such judicial assistance at this stage of the litigation and continuing thereafter.

WHEREFORE, for these and such other reasons as may appear to the Court, the United States and the Tribe respectfully request that the Court adopt the Proposed Case Management Order previously submitted by the United States and the Tribe.

Dated: 2/~~20~~ 21/00

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2000, I placed a true and correct copy of the foregoing "RESPONSE OF THE UNITED STATES AND WALKER RIVER PAIUTE TRIBE TO JOINT MOTION BY THE STATE OF NEVADA AND WRID CONCERNING CASE MANAGEMENT," by first-class mail, postage prepaid, to the persons on the attached mailing list.

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