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. C-125-ECR Subproceeding: C-125-B JOINT RESPONSE TO MOTION TO DISQUALIFY COUNSEL, GORDON DEPAOLI

The United States of America, State of Nevada, State of California, Walker River Paiute Tribe, Mono County, California, Lyon County, Nevada, Mineral County, Nevada, and Walker Lake Working Group hereby respond to the *Motion to Disqualify Counsel, Gordon De Paoli*, Case No. C-125-B (Nov. 28, 2005) ("Motion to Disqualify"), filed by Defendants Joseph and Beverly Landolt.

The undersigned parties file this response solely to address the mischaracterizations in the Landolt's Motion to Disqualify regarding the nature of the settlement talks in this matter, the goal of any settlement effort, and the process by which any proposed settlement would be brought to the Court for approval. Accordingly, this Response does not address the allegation that Mr. DePaoli and members of his law firm may have a conflict of interest in this matter.

The Landolts claim that the participants in the mediation efforts are "prohibited from

discussing its processes, discussions or results with any other person or entity." Motion to Disqualify at 3. Among other things, the Landolts claim that Mr. DePaoli: "cannot represent WRID in a secret negotiation, the fruits, methods and discussions of which he cannot disclose to other clients who have vital interest in the outcome of those discussions;" "cannot disclose to his stakeholder clients what progress is being made and what solutions have been proposed;" "may not disclose to them sufficient information from which they may discern whether or not their interests are being protected in those discussions;" and "cannot even tell them enough to allow them to determine what their best interests are." *Id.*, 6, 8. These claims misrepresent both the terms of the Mediation Process Agreement and the process by which the Court would evaluate any proposed settlement reached by the Mediating Parties.

As the Landolts recognize, the *Order Governing Mediation Process*, Case Nos. C-125-B and C-125-C (May 27, 2003), expressly incorporates Paragraph 8 of the *Mediation Process Agreement* (Jan. 14, 2003).[1] Paragraph 8 addresses the issue of confidentiality and the need to inform various parties outside the mediation about the Mediation Process. "The purpose of Paragraph 8 and its subparts is to ensure that the Mediation Process remains confidential, while providing a method for informing decision makers, governing bodies and boards, and, where appropriate, constituents, elected officials and the public regarding the Mediation Process." Mediation Process Agreement at ¶ 8.1 (Purpose). While Paragraph 8.2 of the Mediation Process Agreement sets out the "General Rule" regarding confidentiality of the Mediation Process,

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[1]The *Mediation Process Agreement* is attached to the *Joint Motion for Entry of Order Governing Mediation Process*, Case Nos. C-125-B and C-125-C (May 9, 2003). While agreements governing mediation are generally kept confidential, the Mediating Parties decided to make their agreement publicly available.

Paragraph 8.3. specifies certain exceptions to this general rule. Of particular importance are: Paragraph 8.3.3., which addresses "Disclosures to Decision-Makers and Governing Bodies;" Paragraph 8.8.4., which addresses "Disclosures to Constituents;" Paragraph 8.3.5, which addresses "Communications with Elected Officials;" and Paragraph 8.3.6., which addresses "All Other Disclosures." *Id.*, ¶ 8. These exceptions to the general rule regarding confidentiality identify when and how information can be communicated outside the mediation, including information that otherwise might be confidential. Indeed, the specific language of the Mediation Process Agreement rebuts the Landolt's claims. Paragraph 8.3.4. ("Disclosures to Constituents") states:

> The provisions of Paragraph 8.2 notwithstanding, **a Party may communicate with its constituents on the following subjects: solutions being considered or not considered,** including proposals for the allocation of water between Nevada and California; work assignments; and the date or dates of the next negotiating session.

Id. (emphasis added).[2] This subparagraph further explains how such communications may occur.

The Landolts incorrectly make the larger assumption that the results, if any, of the Mediation Process will adversely affect all others who are not sitting at the settlement table. No settlement of this matter can be proposed and implemented in a vacuum. Indeed, the Mediating Parties recognized in the Mediation Process Agreement that their efforts to settle were not the only steps necessary to achieve and implement settlement of any of the issues in the mediation:

> **Product of Mediation**. The intended product of the mediation is an agreement in the form of a written statement, signed by all Parties after ratification by the organizations they represent, that would be used in developing appropriate papers seeking to conclude

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[2]The Landolts hold water rights within the Walker River Irrigation District ("WRID") under a trust. Consequently, they are constituents of WRID.

> the relevant portions of the C-125 case and its subproceedings, congressional legislation, other appropriate papers and/or other actions to implement the agreements reached, possibly including one or more separate agreements when signed by appropriate authorities. The drafting of specific implementation vehicles, in turn, might be an extension of this process. The Parties recognize that completing an agreement of the type contemplated and then implementing that agreement requires substantial time and resources, and agree that the time line provided here for mediation only applies to the initial steps in this process.

Mediation Process Agreement, ¶ 6. Moreover, the Mediating Parties recognized that:

> In addition to any appropriate filing in Court, the Parties contemplate that an agreement successfully ending these negotiations may be made contingent upon the enactment of federal, state, tribal, county or municipal legislation, ordinances, resolutions or regulations. The Parties acknowledge that such legislative or regulatory processes are outside the scope of the District Court litigation and may be beyond the control of any of the Parties. The terms and conditions of any such contingency will be part of the Parties' negotiations before the Mediator.

Id., ¶ 7.4.

Any proposed settlement must come before the Court for entry following notice and an opportunity to be heard by all potentially affected parties to the litigation.[3] The Court has clearly recognized this and, in October 2004, explained this sequence of approving a proposed settlement to the Landolt's counsel:

MR. HOWARD: . . . . The problem, as I see it, is that there are two problems. The request by itself to stay the court proceeding, at the same time as the Landolts are being denied access or participation in the mediation proceeding, ends up by itself being a denial of equal protection, and a denial of due process where there's, apparently, something going on that is potentially affecting their rights in which they have no means of participating.

THE COURT: But they're going to have a means to participate. The process provides

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[3]This is one reason why the efforts to complete service in Case Nos. C-125-B and C-125-C were not stayed during the mediation process. *See Order Governing Mediation Process* ¶ 2.c.. Service must be completed before any settlement can be completed or litigation continues. *See Id.*; *Case Management Order*, Case No. C-125-B (April 19, 2000).

> that if the settlement negotiations are successful and at least a tentative agreement is reached, that all the parties in this matter are going to have an input at that point to say yeah or nay, we approve, we disapprove, and here's why, and it will get decided at that time.

Transcript of Status Conference Before the Hon. Robert A. McQuaid, Jr. (Oct. 1, 2004) at 11-12 (attached as Exhibit A). The Court repeated this explanation in March 2005:

> THE COURT: . . . . I think that what will occur is if – and it's a big if – but if these parties that are participating in this mediation are successful and come forth with a plan, some sort of a framework to resolve this case, this court is going to allow adequate time for every party who may have, may be affected in any manner with this resolution, to study whatever is put on the table, to object, adequately object in writing and in hearings, before any final proposal is done. And I think that that process satisfies any due process arguments that are put forward.

Transcript of Status Conference Before the Hon. Robert A. McQuaid, Jr. (Mar. 8, 2005) at 38-39 (attached as Exhibit B).

Consequently, it is the position of the undersigned parties that the Motion to Disqualify mischaracterizes the nature of the settlement talks, the goal of any settlement effort, and the process by which any proposed settlement would be brought to the Court for approval, and that

the Court should disregard these representations.

Respectfully submitted,

Dated this 26th day of January, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2006, I electronically filed the forgoing **JOINT RESPONSE TO MOTION TO DISQUALIFY COUNSEL, GORDON DEPAOLI** with the Clerk of the Court using the CM/ECF system which will send notice of the filing to all parties registered in the CM/ECF system for this matter and by sending a copy by first-class mail, postage pre-paid, addressed to the following:

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