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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

UNITED STATES OF AMERICA Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff, Intervenor v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants. UNITED STATES OF AMERICA WALKER RIVER PAIUTE TRIBE Counterclaimants, vs.	Case No: 03:73:cv-127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **REPLY TO RESPONSES TO MOTION TO MODIFY CASE MANAGEMENT ORDER**

WALKER RIVER IRRIGATION DISTRICT, et al.,

Counterdefendants.

The moving parties filed the instant motion in good faith. Their only motive was to get this case off dead center and to suggest ways to move it along so the residents of the Walker River Basin could get some answers sooner rather than later. Some of the responding parties agreed with certain of the moving parties' suggestions. WRID filed a particularly well considered response. All apparently agree that the Court should entertain suggestions as to how this case should proceed at this point. Perhaps the best way would be for the Court to appoint a committee of parties to develop suggestions for the Court. The Court attempted to do so once with regard to service issues but the effort fell apart when the Tribe's counsel, who was appointed chair, substituted out of the case. Nothing has been done since then on that subject. The moving parties will respond hereinbelow to the responses filed by the various parties but would suggest that this Court appoint a committee to make suggestions to it at the next status conference.

AREAS OF AGREEMENT

Before addressing the objections voiced by the parties responding to the motion, Movants Haight and Reviglio believe it is important to identify the issues on which some level of agreement exists amongst the parties. There is almost unanimous agreement with regard to the proposal that the parties move forward with identification of the threshold issues. Mineral County has proposed that at the next scheduled status conference the Court could establish a

schedule for submission of proposals on the threshold issues and for deliberation of those proposal's relative merits.

The United States and the Tribe, jointly, (collectively referred to as "the US/Tribe") and Mineral County agree that the parties can move forward on identification of threshold issues. (Mineral County Response at 5, Tribe's Response at 2). Both Mineral County and the Tribe submit that the Court could order a briefing schedule for parties to identify and submit a list of proposed threshold issues to the court. (Mineral Count Response at 5, US/Tribe Response at 7).

Walker River Irrigation District ("WRID") also agrees that an effort should proceed to identify threshold issues but qualifies its agreement with the proposition that the Court should direct the United States and the Tribe to disclose the legal basis for their claims first. (WRID Response at 4). WRID reasonably suggests that disclosure of the legal bases for the United States' and Tribe's claims is probably necessary to allow the parties to identify threshold issues not already addressed in the CMO. *Id.* at 5. Given the concurrence of the parties regarding the issue of moving forward with identification of threshold issues, Movants Haight and Reviglio move this Court for an order instructing the parties to file proposals within 60 days. The government also appears to agree that the Court should appoint a committee of currently active counsel to develop a proposal for how to manage discovery and service issues. For that reason, Haight and Reviglio ask that the Court also order the creation of the committee with directions to develop suggestions by the next status conference.

Mineral County and the government otherwise oppose the instant motion to which opposition the moving parties respond as follows:

OPPOSITION OF MINERAL COUNTY

Apparently, Mineral County did not bother to read our motion before opposing it. We have no way of otherwise explaining why it has posed a series of arguments in its opposition that are so at variance with that for which we have moved. In addition, it has flagrantly and egregiously misrepresented to this Court what is actually occurring at this time with respect to out of court "negotiations".

Mineral County argues that granting the instant motion would result in "redundancy, delay, confusion and unnecessary additional burdens on the parties". The motion, on the other hand, has set forth a detailed suggestion for how all of that can be avoided. Indeed, those proposals take up the greatest part of the moving parties' argument. In the motion Reviglio and Haight suggest that with document discovery carried out by web posting, all documents could be produced just once rather than multiple times. Redundancy and "additional burdens", as the motion points out, can be avoided by prohibiting all parties from requesting any document that has been posted to the website and could impose sanctions on those that do. Redundancy and "additional burdens", as the motion points out, can be avoided by having responses to interrogatories posted to the website and sanctioning anyone who serves an interrogatory that is duplicative. Much of the point of the motion is to suggest a means for preventing redundancy and reducing the burden on the various parties. Contrary to Mineral County's assertion, it would be redundant to conduct discovery in any other way. Once everyone is served, everyone will have the right to propound discovery and that is when redundancy will explode and each party will be put to the task of preparing and propounding its own discovery, geometrically increasing the likelihood of redundancy and increasing the burden on everyone. It will explode, that is, unless something along the lines of the procedure we have suggested is

implemented. And if that procedure is going to be implemented, what difference does it make if it is implemented now or when service is complete? The result will be to order discovery and prevent duplication so there would be no excuse for not getting started.

As for delay, it is hard to fathom how actually getting the case moving in some way will somehow promote delay. To the contrary, allowing document discovery and getting the parties to state their respective legal positions will advance, rather than delay, the case and will get it moving in a way that means that once all parties are served, the case can move forward in earnest. The only way the case can be further delayed is by continuing to do nothing, as Mineral County suggests, until service is complete. And given the fact that after seven long years service shows no signs of being complete (unless, of course, this Court sets a date for completion, as we have suggested), who knows how much longer that would be? The fact is that if the parties are allowed to start doing things, those attempting to effect service might be incentivized to get it done a little more promptly. So much for Mineral County's protestations of delay.

Mineral County's assertion that there is an ongoing "process of meetings and negotiations" with respect to the issues presented by this case is false. The moving parties have checked with other parties and no major parties are participating in an ongoing "process of meetings and negotiations" on these issues. Apparently, unbeknownst to the moving parties and other major parties to this action, Senator Reid's office has engaged in some informal meetings with unknown people regarding unknown issues but has not included in those discussions thousands of stakeholders and major parties to this action. This informal effort falls far short of being a formal "process".

In addition, however these activities can be characterized, they have not been disclosed to the Court heretofore and hardly qualify as another track of this litigation that somehow disables Mineral County from actually doing some work to advance this case. And if service were completed tomorrow, how, then, would Mineral County avoid the litigation process? Would it ask for a stay so informal meetings between unknown parties on unknown issues could proceed without the participation of the major litigants herein? It seems unlikely that this Court would entertain such a further delay under those circumstances. The point is that whatever these meetings are, they are not an alternate track of this litigation that can, or should, be considered in determining whether or not it is appropriate for the parties to be allowed to move the case along.

And, in any event, how does activity on the part of the litigants herein have any impact on Mineral County which, to our knowledge, has not yet formally joined this litigation? At last look, Mineral County had applied for, but not yet been granted, intervenor status.

Moreover, if these informal meetings are intended to be comprehensive negotiations, as Mineral County suggests, it is odd that hundreds of stakeholders have not been invited. And, that being the case, it is unclear how we ever would have known of them and what relevance they might have to the instant case. This case will not be settled without the participation of all stakeholders and unless they are made a part of a negotiating process, these parties, and the hundreds (if not thousands) of stakeholders similarly situated, will resolve this case by fully litigating it rather than by settlement. The likelihood that these unknown meetings will resolve *any* of the issues before this Court, let alone "most if not all of them" is ridiculously slim absent the involvement of the many stakeholders who have neither been invited nor participated in them. It is a shame that Mineral County has chosen to so misrepresent to this Court Sen. Reid's

informal meetings as to suggest that they will "resolve most if not all of the issues presented in this case". For Mineral County, then, to warn this Court that it should be wary of modifying the CMO "in such a way as to subvert those parallel negotiations" is beyond misleading. How the Court can be expected to avoid subverting meetings of which it has not been made aware is left unexplained by Mineral County.

Moreover, it is hard to square Mineral County's opposition to most of the suggestions in the instant motion with its concession that the CMO contemplates some activity, such as setting a schedule for the completion of service and determination of threshold issues. Allowing document discovery would assist in determining and fleshing out the threshold issues, as would requiring that the parties disclose the legal theories they intend to assert in pursuing their cases herein. If, as Mineral County concedes, the CMO contemplates the identification of threshold issues, surely, it also contemplates the parties' having access to the instruments that will enable them to do so, such as document discovery. Surely, too, it contemplates having the parties be sufficiently forthcoming to disclose their legal theories. Clearly, lacking that, attempts to determine the threshold issues are simply shots in the dark. That is why document discovery should be allowed to proceed once a system is in place that will prevent duplication and redundancy.

It is clear from its opposition that Mineral County has little interest in moving its case along and, apparently, every intention of extenuating it. We have no objection to Mineral County's case languishing forever, if that is what it wants. But it is not fair to the actual parties to this litigation, C-125-B, to allow Mineral County's desire for lethargy to affect those in other cases who would like to get on with it and its position must not be encouraged. It bears pointing out, too, that it was Mineral County's withdrawal from the original mediation, among

others, that ended that mediation and the formal negotiated effort it represented. So, it is a little cloying to see Mineral County now resist efforts to get this case, to which it is not a party, on track.

OPPOSITION OF THE FEDERAL GOVERNMENT

The government's opposition herein is remarkable for several reasons. It begins by admitting that it made (at least two) motions similar to the instant one some years ago only to have the court deny them to avoid prejudice to unserved stakeholders. Presumably, the government had a good faith basis for its motions in accordance with Rule 11. So, one must question how it can be that it had a good faith basis for making those motions at the same time as it opposes this one. Perhaps the government's good faith can be gauged by the fact that when it sought the right to bring dispositive motions, virtually no stakeholders had been served and were parties to this action. Perhaps the Court's reluctance, at that time, then, to grant the Tribe and the government the right to make dispositive motions rested in the fact that almost no one had yet been joined in the case so there was not much by way of opposition. However that may be, we must presume that one cannot, in good faith, at once, advocate early dispositive motions when it is its idea and oppose it when it is another party's idea.

What a difference ten years makes. Now there are numerous parties and, certainly, some, such as the moving parties herein, who are prepared to vigorously pursue this litigation and offer defenses to the Tribal and government claims. That is why the instant motion should be granted even though the government's premature motions along the same lines were not.

The government refers to the current CMO as if it were a holy writ. It isn't. It is an order. What is more, it is an order that, by its own terms contemplates change to respond to changes in the facts "on the ground". This case has been pending for a decade. In spite of the

fact that the government's effort at service is excruciatingly slow, it appears that it may be coming to an end. To that end, this Court should set a date for completion of that service. The government counts every citizen in the nation every ten years. It should not take that long to identify and serve a tiny sliver of that population with process from this case.

Technology, too, has progressed during that time and it affords the court the ability, now, to, at once, allow activity that might, previously, have prejudiced unserved parties and, at the same time, protect all parties from any conceivable prejudice by reason of redundancy and, also at the same time, move the case forward. Perhaps some parties are content to let this case languish endlessly. Perhaps some do not mind that this case shows every sign of continuing until a date long after we all retire. But we believe our clients are ill-served by permitting that to happen. The people of the Walker River Basin need and deserve resolution. They need to know that they will have water available for population and economic expansion.

Since it is the most controversial part of the instant motion, perhaps we should, for the sake of this discussion, put off consideration of the propriety of dispositive motions and focus, instead, on those activities that can be undertaken without any conceivable prejudice to any party if done in accordance with the moving parties' suggestions.

Initial disclosures of legal theories should not be that difficult and should certainly not be disruptive. We must presume that the government and the Tribe had a legal basis for their complaints herein as required by Rule 11. What, then, is the big secret? Why is it so difficult for them to tell us what they are? It is not as if that disclosure requires a full on brief. It should be able to be done in a few sentences and the result would be that issues could begin to come into focus. Without that, all parties are left with the bare complaints and nothing else. As

pointed out by WRID in its response, the threshold issues cannot be narrowed, or even completely identified, until the Tribe and government finally tell us the basis for their claims.

To the government's argument that it is premature for parties to disclose legal theories until answers are filed, these defendants are fully prepared to immediately file answers, if that is all it would take to get the government to tell us all the basis for its suit. Again, if the disclosures are posted to a website accessible to all actual and potential parties, early disclosure would prejudice no one. Certainly not the government and Tribe which already know their own theories. And certainly not unserved parties, who would have immediate access to that information once served. Presumably, the theories would not change with the addition of additional parties. So, where is the prejudice?

On the issue of document discovery, as observed in the motion itself and in this Reply hereinabove, providing for the posting of document requests, responses to document requests and the documents themselves on a dedicated website, together with the preparation and posting of indices thereof, will not only not result in redundancy and burden but will affirmative prevent them. Certainly, if a process like the one proposed in the instant motion is not in place by the completion of service, the ensuing chaos of competing discovery requests served by all who will have an absolute right to serve them, will geometrically increase the potential of redundancy and burden. And if the system proposed by the moving parties herein (or something very much like it) will be implemented eventually, what difference does it make if it is implemented now or when service is complete?

That is why this Court should grant the instant motion at least to the extent of: (1) setting a date for the completion of service (2) starting the process of identifying Threshold Issues; (3), requiring the government and the Tribe to disclose their legal theories; and (4)

allowing all parties document discovery once a system is in place that will ensure that duplication will not occur.

The moving parties also suggest, again, that the Court immediately appoint a committee of currently active counsel to devise a method through which discovery and service may be accomplished that will protect the rights of all litigants, present and future, and to develop a system that will ensure that duplication will not occur. This is the one area in which the moving parties and the government appear to have some agreement and something the Court attempted to do more than a year ago. After Alice Walker left the case, the effort collapsed and nothing further, to our knowledge, was ever done in this regard.

People are moving into the affected area every day. Population is increasing without anyone's being able to know, for certain, that the population gain is going to be supportable with sufficient water. As long as this case is pending, no one can make legitimate long term plans because no one can be certain that there will be water available to them for growth. This case has been pending for a decade without even the completion of service. It is time to get it moving in a productive way.

Dated: May 23, 2007

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