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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. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	In Equity No. C-125-ECR Subfile No. C-125-B REPLY TO RESPONSE TO OPENING BRIEF ON APPEAL OF DENIAL OF MOTION TO DISQUALIFY COUNSEL, GORDON DePAOLI

REPLY TO RESPONSE TO OPENING BRIEF ON APPEAL OF DENIAL OF MOTION TO DISQUALIFY COUNSEL, GORDON DePAOLI

Appellants fully briefed their position in their Opening Brief herein. The instant Reply will, therefore, be limited to responding to some of the points made in the Response.

THERE IS A DIRECT CONFLICT BETWEEN THE PARTICIPANTS IN THE MEDIATION AND THOSE WHO HAVE BEEN DENIED A PLACE AT THAT TABLE.

WRID asserts, repeatedly, that the water rights of the individual stakeholders have been adjudicated and will not be readjudicated in the instant action. In order to fully understand why this assertion is false, one must analyze what is at issue herein. The Tribe is requesting that this Court recognize the vesting of its rights at a time earlier than it has heretofore. It is asking, further, that this Court recognize a higher priority right to direct flow water than the 1936 Decree currently recognizes and increase the amount of such water that will be available to the Tribe under the decree.

There is a finite amount of water to be allocated in Northern Nevada and it is allocated according to vesting date and other factors. The Tribe is asking to be put at the head of the line which means that the rights it seeks, if granted and the decree modified accordingly, would result in less water available to those behind it in priority. While the relationship of those behind it would not change, the amount of water they would receive would. The truth of WRID's statement, then, is that the relationships as between the stakeholders other than the Tribe will not be readjudicated in this action. (Although there is no guarantee of that once the proceeding gets going and the Decree is reopened for modification.) The falsity of WRID's statement is in the implication that this action will not affect the water rights of the individual stakeholders.

It is also not true, as WRID asserts at page 9 of its brief, at neither the federal government nor the Tribe are seeking to readjudicate the rights of the individual stakeholders. In seeking a larger percentage of the pie, they are certainly seeking to readjudicate what the individual stakeholders will receive by way of direct flow water. While it may not change the relationship of those behind the Tribe's rights, it certainly will change their relationship to the Tribe and the federal government.

Where the conflict comes in is that virtually all of WRID's allocation is storage water as opposed to direct flow water. Its incentive to protect the priority rights of the individual stakeholders is significantly less than it is for the holders of those rights and it could easily concede points in mediation that individual stakeholders would not. The individual stakeholders would never know this, of course, since their attorney, Mr. DePaoli, who represents WRID in the mediation cannot tell them. WRID's statement in Response notwithstanding, this is a real and direct conflict.

WRID MUST WITHHOLD VIRTUALLY ALL INFORMATION EXCHANGED DURING THE MEDIATION PROCESS.

WRID misrepresents the extent to which the individual stakeholders are to be denied information growing out of the mediation process. At page 14, line 14 of its Response, it asserts that under paragraph 8.3.4 of the *Mediation Process Agreement*, WRID it has the ability to communicate all sorts of things to its constituents. But what it can communicate is strictly limited. Let's start with observing that if 8.3.4 were as broad as WRID is attempting to suggest, there would be nothing confidential that cannot disclosed. But that is clearly untrue. If it were true, why would the mediating parties be struggling so mightily to maintain the confidentiality clause? Simply stated, 8.3.4 is just not that broad. It allows WRID to reveal three things and

three things only: (1) when the next meeting is; (2) what proposals are being considered; and (3) what work assignments have been handed out to the participants. That's not much information. And it certainly is not nearly as broad as WRID would have this court believe.

The point is that the strict limitation of the information that can be disclosed to the non-mediating parties creates a conflict between those who are privy to the information exchanged during that process and those who are not and Mr. DePaoli represents both.

IT IS NOT JUST TO ASSERT THAT THE LANDOLTS CAN GIVE NO CONCRETE EXAMPLES OF IMPORTANT CONFIDENTIAL MATERIAL WHEN THEY HAVE BEEN DENIED ACCESS TO ALL MATERIAL FLOWING FROM THE MEDIATION.

In what must count as among the most cynical claims made by WRID in it opposition, it asserts that the Landolts have not given one concrete example of important information they are being denied by reason of the confidentiality of the mediation process. Of course they cannot. The information is not available to them. That's a little like telling someone he can drive your car anywhere but refusing to give him the keys. It is the very not knowing that creates the conflict. It is not enough for Mr. DePaoli to assure his individual clients that no information has been exchanged that they need to know. How can they give a knowing and intelligent waiver of a conflict if they are not even allowed to know what they are waiving?

THE FACT THAT MATERIALS GENERATED IN THE MEDIATION CANNOT BE USED IN THE LITIGATION IS IRRELEVANT.

WRID claims that if no one can use the information generated at mediation at trial because it is not admissible, then everyone is on an equal footing. Everyone is equally disadvantaged. But that is not so. Just because information is not admissible does not mean that it is not of interest and would not be helpful to a litigant. Many things in litigation are

confidential. Attorney work product, for example. But would anyone seriously deny that knowing an opposing lawyer's work product, even though inadmissible, would be helpful to the other side? Would anyone seriously deny that that knowledge would represent a tremendous advantage to the opposing party? Of course not. The notion is absurd on its face. The reason attorney work product is protected from discovery is just because it would give the opposing party a tremendous and unfair advantage over his adversary.

And that is why the mere fact that the confidential information generated by the mediation process is inadmissible at trial does not, in any way, vitiate the tremendous advantage it gives those having it over those who do not. And how would an opposing party know to object to it when it is introduced anyway? How could he tell if it arose from the mediation or was just the result of good lawyering? He wouldn't. And that is why the fact of its inadmissibility is completely irrelevant.

This is important because while Mr. DePaoli will learn that information wearing his WRID hat at the mediation, he will be able to use that information in behalf of his individual clients in the litigation while, at the same time, denying it to the other individual stakeholders. The disadvantage to the Landolts would be tremendous and deeply unfair.

THE CONFLICT IS DIRECT.

In its response, WRID writes that "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest." That is a correct statement and one this Court should consider carefully. The fact is that Mr. DePaoli cannot carry out the appropriate course of action of disclosing anything that would be important to his individual clients in this litigation

because of his responsibility to WRID to keep that information secret. That is the conflict and that is why Mr. DePaoli should be disqualified in this case.

Dated: June 21, 2006

/s/ John W. Howard

John W. Howard
Attorney for Landolts

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2006, I electronically filed the foregoing *Reply to Response to Opening Brief on Appeal of Denial of Motion to Disqualify Counsel, Gordon DePaoli* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their e-mail addresses:

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