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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,	Case No: 03:73:cv-127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **MOTION TO MODIFY CASE MANAGEMENT ORDER**

vs.

WALKER RIVER IRRIGATION DISTRICT, et al.,

Counterdefendants.

Cross defendants David Haight, making his first appearance in this case, and Tom Reviglio hereby move for an order modifying the Court's existing Case Management Order entered April 19, 2000.

BACKGROUND

This Court, based on conditions at the time, including pending legislation, entered a final decree establishing the rights to the waters of the Walker River in 1936. *United States v. Walker River Irrigation District*, 1 F. Supp. 158 (D. Nev. 1935). On appeal, certain of the District Court's determinations were reversed and the decree was amended in 1940 to conform to the Court of Appeals' mandate *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). In 1991, the Walker River Irrigation District ("WRID") filed a complaint against the California Water Control Board, alleging that the Board lacked authority to issue orders that were in conflict with the Decree. (See Order filed October 27, 1992.)(Docket # 15).

In 1992, the Walker River Paiute Tribe ("Tribe") filed an answer and counterclaim, requesting recognition of a right to store water in Weber Reservoir for use on the Reservation and for a federal reserved water right for lands included in the Reservation in 1936. The counterclaims sought additional water over the direct flow rights awarded to the United States for the benefit of the Tribe in the Decree as amended in April 1940. The United States of

America ("Government") was awarded the right to use the natural flow of the waters of the Walker River and its tributaries in the amount of 26.25 cubic feet per second with a priority date of November 29, 1859. The Government filed a counterclaim the same year asserting identical claims for water to benefit the Walker River Indian Reservation. While the Tribe's and Government's pleadings were improperly denominated counterclaims, the court by Order dated October 27, 1992, determined that the counterclaims would be treated as if they were filed as cross-claims.

In 1997, the Tribe filed a "First Amended Counter Claim" of the Walker River Paiute Tribe adding claims for ground water for the Reservation. The Government also filed a First Amended Claim, which advanced claims for surface and ground water for the Walker River Indian Reservation, the Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual allotments, as well as surface water and groundwater claims for other federal enclaves within the Walker River Basin. The Government and the Tribe were directed by the Court, pursuant to FRCP 4, to serve their counterclaims on all claimants to the waters of the Walker River and its tributaries. Service has yet to be completed.

On April 19, 2000, this Court entered an order addressing the management of this case, ("Case Management Order" or "Order") which recognized the complexity of the issues presented and the enormity of the impact its decision would have on thousands of people and millions of acres of land. It addressed those problems by ordering that the case be bifurcated, so that the claims of the Tribe contained in its First Amended Counterclaim and the first three claims of the Amended First Amended Counterclaims of the United States (First, Second, and Third Claims for Relief) ("Tribal Claims") would be addressed first. It also ordered a phased approach to the litigation that would allow the court to fully process the claims in an orderly manner.

As a part of the order, action was stayed on most aspects of the case until service of all necessary parties was complete. The Court did, however, contemplate that some activity would proceed during the service process so that litigation could proceed expeditiously when service was complete. In addition, the Magistrate Judge issued a stay during the pendency of the mediation process that effectively stayed any action not already stayed by the court's Case Management Order. The Magistrate Judge's stay pending mediation has now been dissolved because the formal mediation has ended.

Since entry of the Case Management Order, some seven years, now, the Government has attempted to complete service of all necessary parties and although attempts were made by various parties to advance some substantive issues during that time, those attempts failed either because they were deemed a violation of the Court's stay of litigation while service was pending or because the mediation between some of the parties made insufficient progress to narrow the issues and advance the case.

The Court, in its Order, identified some "Threshold Issues" that it believed would require resolution after completion of service, but before reaching the merits of the claims. The Court also ordered the parties to begin identifying all Threshold Issues and to submit their proposals to the Magistrate Judge for tentative approval as matters ultimately to be addressed. Because of the prolonged mediation process and with the understandably slow pace of service, some of those acts originally contemplated by the Court as being immediately undertaken, have fallen by the wayside. With service approaching completion, however, we would urge this Court to revisit the Case Management Order, and we suggest that it modify same to streamline the process. The hope is that if the Court agrees, the case might admit of early resolution.

What Can Be Accomplished.

We take the court's stay to be prompted by two considerations: (1) concern for prejudice to later joined parties who will not have the benefit of exposure to substantive activities, and, (2) concern for unnecessary activity on the part of current litigants, such as discovery responses, that may have to be repeated if later joined parties submit, as they will have a right to, discovery requests that are duplicative of earlier such requests. These considerations notwithstanding, there are several areas in which the parties can make progress while service is pending without prejudice either to later joined parties or to current parties. We suggest that an order can be fashioned in such a way as to mitigate any potential prejudice to any party, existing or potential.

When the Case Management Order was entered in 2000, use of the internet to assist in the organization and processing of litigation was in its infancy. Now that it is in wide use, however, it can and should be used to mitigate potential prejudice to litigants by making available to them virtually everything they might need to adequately participate in the instant litigation. In addition, it has already been observed by Magistrate Judge McQuaid that, at some point, the sheer number of parties will make it impossible to serve all parties with litigation related documents and sporadic efforts have been made to address that eventuality. It has been suggested, for example, that a repository of documents be created that can be accessed by litigants without internet access or computer skills. This, too, should be addressed in the modification of the Order.

The Federal Rules of Civil Procedure require that civil litigants make initial disclosures. FRCP 26(a) The policy underpinning this relatively new rule is the desire to accelerate the exchange of basic information and to save court and party resources in seeking it out. (Adv. Comm. Notes on 1993 Amendments to FRCP 26(a)). It also forces counsel and parties to

evaluate the case at an early stage enhancing settlement opportunities and narrowing the scope of the litigation to focus on the most important, and perhaps, dispositive issues. ("*In Defense of Automatic Disclosure in Discovery*" (1993) 27 Georgia Law Review 655).

In light of these policy considerations and the instrumentalities now available, it would be appropriate for this court to consider modifying its order to require limited disclosure and allow limited discovery. In doing so, it will get the respective parties' positions before the court at an early time and streamline the current procedure.

The parties have, for example, been dancing gingerly around the question of the legal basis for the Tribal Claims. If that basis is the Winters Doctrine [*Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207 (1908)], as many suspect, it might be possible to brief and decide that issue without extensive discovery. If there are other bases for the Tribe's claims, there is no reason not to disclose them now. Surely, the government and the Tribe proceeded already aware of the legal basis for their claims since that is required under the rules. It would work no hardship on the Tribe or the United States, therefore, to disclose those basic legal theories now and a narrowly drawn initial disclosure could put them before the court and opposing parties.

If among the defenses to the Tribal Claims is that of laches, it is probable that that defense can be fully briefed and decided prior to the joining of all parties. Again, it would work no hardship on the appearing defendants to set forth the full range of affirmative defenses they currently intend to assert.

All parties are currently aware of documents they believe would be important in the full litigation of this case even though they may not, as yet, know all such documents that might exist. Therefore, there is no reason why document discovery cannot proceed at this time. Some of the documents that may be relevant will be extremely difficult to locate as they may be

decades, even centuries, old. It behooves the parties, then, to begin the process of finding them so this case is not needlessly extenuated by a delay in starting the effort.

The parties' disclosure of their respective positions could result in the consideration of dispositive motions at an early date. The benefit of such motions could be to conclude the case without the anticipated long term and comprehensive litigation currently expected. Or, they could simply narrow the issues. But there is no reason why such motions should not be considered at the earliest possible time. If, for example, the defendants intend to posit the defense of laches, that defense could be fully briefed and decided long before either the Threshold Issues are decided or significant discovery is performed depending, as it does, mainly on the passage of time. It is hard to conceive of evidence that would change the result either way and the Threshold Issues would be irrelevant if the defense were found meritorious. If the court were to grant a motion to dismiss based on that defense, the case would, to that extent, be over. If it were to deny it, the issues would be narrowed. Either way the court and parties benefit.

While the mediation was proceeding, an argument could be (and was) made that engaging in some litigation would be a waste of resources on activities that the mediation might obviate. While we disagreed with that notion, it was not an unreasonable argument to make. There can be no further argument by any party, at this point, however, that undertaking the sort of activity suggested in the instant motion would work a hardship because it would force parties to work on two tracks. Since the end of the mediation process, the current track is the only track on which the case is now moving and it makes sense to accelerate that movement so the parties can be spared further delay in obtaining a resolution of the critical issues this case is designed to address.

We suggest, therefore, that this court modify its Case Management Order to provide for limited initial disclosure of the parties' respective legal theories, full document discovery and appropriate dispositive motions.

Prejudice to Later Joining Parties.

As we have observed above, we take it that among the reasons this court has imposed a stay is to avoid prejudice to newly joining parties who will not have had ongoing, day to day participation in the litigation process. The thought, apparently, is that allowing discovery before a party has joined would result in such parties having missed the give and take of the discovery process and, therefore, be hopelessly behind in that process, thus putting them at a disadvantage relative to other parties. Such a procedure might, also, have required some parties to respond to multiple duplicative discovery requests as new parties joined the case, thereby increasing the cost to those responding.

Any potential prejudice in this regard can be ameliorated by the use of web posting of document requests, responses and documents produced, together with an index so such documents can be more easily accessed by newly joining parties. Any modification of the Order could require the creation of a website on which would be posted any request for production, any response to any request for production and an electronic copy of any document produced pursuant to any request for production, together with an index of documents produced. In that way, all parties, present and future, would have complete access to all documents at all times and would not have to go through the process of having to analyze what documents might be needed in order to prepare and serve document requests. Indeed, there is an argument to be made that not only would newly joining parties not be prejudiced by this procedure, but they would get an

affirmative benefit in having the ability to more completely analyze their positions even before appearing in the case.

In addition, the current parties should be required to disclose their anticipated legal theories both in prosecuting and in defending this case. The order to this effect could be without prejudice to a party's assertion of additional theories and defenses but should include a requirement that later asserted legal theories be justified by a showing as to why those theories were not asserted originally and good cause for any delay in doing so.

Web posting would make all of this available to most parties at any time. To address the problem of prejudice to those who do not have internet access or ability, repositories of documents could be created at various places so parties could review and copy them. We would suggest libraries and/or schools where the documents could be maintained with copy services available to those parties who cannot access the documents electronically. As an alternative, indices could be delivered to all parties by mail with directions as to how copies of indexed documents could be obtained.

To ameliorate any damage to a responding party in having to respond to multiple requests for the same documents, the court could require that all newly joined parties review already produced documents and be prohibited from requesting any of those documents. Each newly joining party should be required to affirm that he or she has reviewed the posted discovery materials prior to propounding discovery on any party and sanctions should be available to anyone forced to respond to a request that is duplicative of earlier requests.

The court and current parties should be realistic about who is going to be joined as service continues and who is already at the table. It is quite unlikely that anyone with the inclination and resources to fully litigate this case has not already been joined. While due

process requires that all parties have the opportunity to be heard, a position we have repeatedly argued in this court, the truth is it is not likely that any later joined party will come up with an inventive new theory that no one currently involved has yet discovered. If they do, their rights to move forward on those theories will be preserved. But the mere possibility that someone might do so should not be reason to prevent those parties at the table to proceed.

To the criticism that parties should not have to repeatedly address the same motions, we suggest that that possibility, too, can be addressed by a narrowly tailored order. In this way, no party will exposed to repeated motions making the same assertions or seeking the same relief based on theories the court has already addressed.

Status Quo.

While this litigation is pending, it is critical that the status quo be maintained.

The court and the parties have and will invest significant resources in this case and parties should not be allowed to circumvent the eventual outcome by acts that attempt to alter the status quo. No one should be allowed to argue that changes over which they have had control have occurred that militate in favor of one position or the other. As noted hereinabove, while the mediation was still proceeding, there was an argument to be made that parties would be prejudiced by having to expend resources pursuing two separate tracks in this case one of which might obviate the other. But the mediation is no longer proceeding and there is no reason why this court should not be called upon to preserve the status quo if the status quo is threatened and every reason why it should take every action necessary to prevent an invasion of the status quo by any party. Otherwise, the court's final decision might be thwarted long before the decision is made.

Proposed Modifications of Order.

Therefore, Defendants/Counter-Defendants Haight and Reviglio request that the Case Management Order be modified as follows:

1. The parties shall make initial disclosures of the legal bases for their claims and defenses within sixty (60) days of the modification of the Case Management Order. The making of initial disclosures shall be without prejudice to any party's making later disclosures.

2. No party shall make disclosures after the date provided in paragraph 1 above unless accompanied by a declaration of counsel indicating that it is based on newly discovered facts or law.

3. The parties may undertake document discovery.

4. A website shall be established on which all discovery requests, responses to discovery requests, produced documents and initial disclosures will be posted and open to the public.

5. Indices shall be prepared which note each initial disclosure document that has been prepared; each discovery request that has been made; each response to any document request and each document that has been produced pursuant to the request. The documents shall be listed in numerical order based on the date posted. The index shall identify the party propounding the request or response to the request, the dates of the discovery requests and responses to discovery requests, the name and date of each initial disclosure document filed and the name, date and source of any document produced.

6. Depositories for initial disclosures, discovery requests, responses to discovery requests and copies of documents produced will be established at public libraries throughout the district or other convenient places where parties may view and make copies of any such materials.

Copies of the indices for such documents and other materials will likewise be deposited in said depositories to ease the review of documents by interested parties.

7. No later joined party may make any request for any document that has already been produced. Every party joined in the action after the modification of the Order shall review all posted discovery prior to propounding any discovery to any party and shall provide a declaration that same has been done to accompany any discovery request propounded by any later joined party to the action.

8. Sanctions may be imposed upon any party who propounds discovery requesting materials that have already been produced unless the request has been withdrawn pursuant to a request therefore in writing by the party to whom the discovery request has been directed.

9. The parties may bring dispositive motions based on the initial disclosures and any documents produced by any party.

10. No party may bring any dispositive motion on the same legal basis as any such motion on which the court has already ruled unless supported by an affidavit indicating that it is based on facts or law different from any other such motion directed to the same claim or defense.

At this point in the litigation, it is appropriate that the court revisit its original order with an eye toward streamlining this case by allowing for limited litigation activity that might have the effect of abbreviating the process and we urge that it do so.

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Dated: April 23, 2007

By: John W. Howard