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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.	3:73-cv-00127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B PRELIMINARY LEGAL THEORIES

Pursuant to the court's order of August 20, 2007, Joseph and Beverly Landolt ("Landolts") hereby submit their preliminary legal theories in defense against the claims of the Walker River Paiute Tribe and the United States, as follows:

Incorporation of Theories. Landolts refer to those legal theories proposed herein by Nevada Department of Wildlife, Walker River Irrigation District and Thomas Reviglio and incorporate same herein by this reference.

Waste. The claims made by the Walker River Paiute Tribe ("Tribe") for additional water are barred by waste based upon the Tribe's sufferance and maintenance of beaver dams which consume significant waters otherwise available for the purposes for which they seek additional water rights.

Unclean Hands. The Tribe seeks this Court's exercise of equitable powers in its requests herein. Its claims are barred by unclean hands based upon its misappropriation of significantly more water to its own use than that to which it is entitled under the currently effective Decree.

Res Judicata. The rights adjudicated by this Court in 1936 were made in contemplation and with full notice of the addition, that same year, of that acreage upon which the United States and the Tribe base their current request for a decree of additional water rights. Their current claims were ripe then and compulsory.

Laches. The Tribe waited nearly 70 years to assert the current claims during which time the United States encouraged settlement and the population of the area owned by the Landolts, all others similarly situated and their predecessors in interest. The Tribe allowed the assertion and establishment of water rights by the Landolts, all others similarly situated

and their predecessors in interest on which those parties all relied without question or challenge. The Tribe rested too long on its asserted rights before bringing the instant action.

Detrimental Reliance. The Landolts, their predecessors and all others similarly situated relied to their detriment on the Tribe's failure to assert the rights it alleges herein and invested heavily in time and treasure in the establishment of homes, farms and other businesses. The Tribe's late assertion herein of rights to water belonging to the Landolts and all others similarly situated, is barred by detrimental reliance.

Preservation of Rights. The water rights owned by the Landolts, all others similarly situated and their predecessors in interest were specifically preserved by the legislation that transferred that property upon which the Tribe and the United States base their current claims. Any decision that would abrogate the rights on which these parties have relied would properly result in monetary claims against the United States.

Purpose of Transfer. The legislation through which the land transfer upon which the Tribe and the United States base their current claims specifically provides that the land was to be transferred for grazing purposes only. Any water rights implied in that transfer are limited to that amount of water necessary to accomplish that purpose. No water is necessary to accomplish the purpose of supporting grazing on the land in question since grazing proceeded on said land for at least a century without the infusion of any water other than that provided through natural processes such as precipitation.

Prior Appropriation. The Tribe and the United States based the bulk of their claims on *Winters v. United States* 207 U.S. 564. That case reserves for Indian tribes, by implication, appurtenant water only to the extent that it has not previously been appropriated. The Landolts, all others similarly situated and their predecessors in interest own water rights that

were appropriated prior to transfer of the land that gives rise to the Tribe's claims herein and, therefore, are preserved to those water rights holders.

The foregoing does not necessarily encompass all of the Landolt's potential legal theories not only because the Landolts have been precluded from proceeding with discovery under the Case Management Order but, also, because the Tribe and the United States have suggested that they may change or modify the legal theories they have heretofore asserted. The Landolts, therefore, reserve the right to change or supplement these legal theories during the pendency of this case.

Date: December 28, 2007

John W. Howard
Pro Hac Vice Counsel for
Joseph & Beverly Landolt

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2007, I served the foregoing *Preliminary Legal Theories* in said action to the following participants by U.S. Mail, postage prepaid, this 28th day of December, 2007:

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