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U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED
FEB - 8 2005
CLERK, U.S. DISTRICT COURT
BY DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff, Intervenor v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et.al., Defendants.	CV-N-73-0125-ECR In Equity No. C-125 ✓(C-125(B) **OPPOSITION TO EXTENSION OF MEDIATION PROCESS AND LITIGATION STAY** TIME: 1:30 p.m. DATE: March 8, 2005 Magistrate: McQuaide

BACKGROUND

In 1936, this court issued a decree through which it adjudicated water rights for various categories of water users in the Walker River Basin. It was a comprehensive decree that provided, among other things, that a procedure would be set up, under the auspices of the court, which would provide for the delivery of particular amounts of water to particular, designated interests. Apparently, the process worked well for over fifty years until Northern Nevada began

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to perceive a cyclical change in precipitation that diminished the amount of water available for the purposes set forth in the decree. Some claim that this change in precipitation, combined with a drastic increase in population and the diversity of activity, began to strain the limitations of the decree. The current litigation ensued.

The purpose of the current litigation is to revisit the provisions of the Decree, identifying the competing interests, determining available resources and working through the controversy with an eye toward, perhaps, adjusting the Decree to respond to the changed circumstances. To this end, the court concluded that the best procedure would be to sponsor a mediation at which the various interests would be represented in the hope that the parties themselves could come up with an agreed upon plan which it would, then, present to the court. The Mediation Order provided for the services of a mediator and a series of meetings followed by a report and, thereafter, a right by interested stakeholders to comment on the final document.

The stated purposes for the reopening of the instant litigation are, though, a smoke screen. Several years ago, the federal government attempted to implement a plan to "save" Walker Lake. It initiated an environmental impact process which ground to a halt when it was demonstrated that not only was it not possible to "save" Walker Lake, the adverse impact of the government's plan on surrounding and competing interests was not justified by any theoretical benefit to the lake.

Not to be daunted by the inconvenient scientific fact that its plan would not accomplish its purpose, the government, in concert with the Walker River Paiute Tribe, has attempted to circumvent the appropriate processes under National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") and continued the effort to divert extra water to a lake that will inevitably die through a natural process driven by cyclical precipitation patterns. In doing

so, it has enlisted the assistance of this court to prevent affected stakeholders from asserting their claims and protecting their interests.

The method was to suggest to this court that a mediation process be implemented intended to result in the negotiated resolution of the competing interests. The suggestion was made when the only parties to the instant litigation were the United States government, the Walker River Paiute Tribe ("Tribe"), The Walker River Irrigation District ("WRID"), Lyon County, Mono County, Mineral County, Walker Lake Working Group, California and Nevada and before interested stakeholders were brought into the case, thus avoiding the inconvenience of having to deal with the individuals whose rights were going to be affected by any agreement. One can be forgiven for suspecting that this was intentionally done so that it could be presented as a fait accompli to later appearing stakeholders thus minimizing their influence. The suggestion for mediation was accompanied by a request for a stay of further litigation while the mediation was pending to allow the mediating parties to focus their attention primarily on settlement rather than litigation. It was also asserted that the parties' resources could be conserved by not having to engage in litigation activities that might become moot should the parties come to an agreement through the mediation. That allowed those parties who wish to control the process and prevent the stakeholders from having any influence on the outcome to deny the stakeholders access to the only process that would afford them relief.

This court ordered the mediation process to commence and made it exclusive. It also allowed the government to join, as parties, the many individual stakeholders whose rights would have to be litigated in the absence of mediation. Indeed, the government has insisted that all stakeholders appear and, since that time, dozens of stakeholders have been made *parties* to the instant action, in part, by the mailing of pleadings accompanied by ham-handed, threatening

letters from federal lawyers threatening sanctions if they do not stipulate to service. But the mediation continues to exclude the vast majority of *parties* to the instant litigation, who remain completely unrepresented.

The unrepresented parties have attempted to enlist this court's aid in ensuring that its 1936 Decree is obeyed by all parties during the mediation process. The court declined on the basis that there is currently a stay in all litigation pending completion of the mediation. The unrepresented parties have attempted to participate in the mediation but the court has denied them all right to participate in it. The participants have dismissed the unrepresented parties with a figurative condescending pat on the head and the assurance that they may "comment" on the outcome after it has been set in stone by agreement of the mediating parties. So much for meaningful participation.

The Landolts and all other stakeholders unrepresented in the mediation are *parties* in the instant litigation. This court has made them so. That means that they have rights under the law. They have a right to participate in the litigation to the same extent as all other parties to the litigation. Their legal rights are no more, nor less, important that those who have been allowed to participate in the mediation process. But they have been denied the right both to litigate their claims and to participate in the mediation. And, at this point, it is hard to imagine how an agreement entered into among only some parties to this proceeding can legitimately and adequately govern the process that will "adjudicate" the rights of those who are unrepresented. Worse, the unrepresented stakeholders have been placed at a huge disadvantage because other stakeholders have secured the representation of Gordon De Paoli in their behalf who, in a clear conflict of interest, also represents WRID and participates, in that capacity, in the mediation process. The fact that some stakeholders have a back door place at the table through Mr.

DePaoli, while others, who opt for alternate counsel, are denied that place, is not only outrageous, it is a denial of equal protection.

The Landolts, and many, many others, have been denied access to the mediation. Their interests are being debated without their having any participation in the process. Their interests are not being protected by those who purport to represent those interests. And, of course, how would anyone really know? Those who are charged with representing the stakeholders' interests refuse to talk to them or to disclose what is being discussed, what progress is being made and what proposals are on the table.

At hearing on December 1, 2004, this court indicated that the mediating parties could file a motion to continue the mediation and for a further stay of litigation. (Transcript pps. 16-17) The court gave the mediating parties until January 18, 2005 to move for a continuation of the mediation process and for a further stay of litigation. We note, for the record, that the only motion that has been filed, at this point, by the mediating parties, is for a further stay of litigation. Their moving papers do not request that this court issue an order continuing the mediation process and there is, therefore, no such motion before this court at this time. Since there is no such motion before this court, there is no basis on which to extend the litigation stay since the mediation process, without extension, will expire. And there is no basis for issuing an order continuing the process since there is no motion for same. Continuing the mediation would be inappropriate, in any event, as we demonstrate hereinbelow.

THE LANDOLTS HAVE A RIGHT TO ACCESS TO THE COURTS

Nothing, in American jurisprudence, could be more basic than the right of citizens to access to the courts. "For every right, it is a maxim that there is a legal remedy for its violation." *Satterlee v. Matthewson* 27 U.S. 380, 389 (1829). The First Amendment provides a right to

petition for redress of grievances which the Supreme Court has repeatedly held includes the right of access to the courts. *Logan v. Zimmerman Brush Company* (1982) 455 U.S. 422, 429; 102 S.Ct. 1148. ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internatinale v. Rogers* 357 U.S. 197..., for example --where a plaintiff's claim had been dismissed for failure to comply with a trial court's order-- the court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case…Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures when such an action would be **"the equivalent of denying them an opportunity to be heard upon their claimed rights"**. *Boddie v. Connecticut* 401 U.S. 371, 380.") (emphasis in original)

Like the right to free speech, the right to petition for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mineworkers of America, District 12 v. Illinois State Bar Ass'n,* 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967). *U.S. v. Kuball* 976 F.2d 529, 531 (C.A.9 (Alaska),1992)

This court has issued a stay of all litigation related to such matters as are currently before this court in this case, effectively preventing dozens of stakeholders from petitioning for redress of grievances, on the theory that the mediation process *may* (not will, but *may*) result in a resolution of the competing interests. It has also denied the Landolts, and dozens of other interested stakeholders, the right to participate in the mediation process, thus shutting those

parties to the instant litigation (but not *all* parties to the instant litigation) out of any means of redressing their grievances, enforcing their rights or having any meaningful access to the court. The Landolts are, therefore, in a state of limbo, unable to defend themselves, unable to seek the court's intervention and unable to affect the process even by participation in a mediation that must, inevitably, fail because most stakeholders have been shut out of the process. Continuing the litigation stay, therefore, is improper especially given that the stakeholders have also been denied participation in the mediation process.

This institutional, artificial paralysis is not constitutionally acceptable and must be redressed either by this court or by resort to appellate intervention.

THE CONTINUED DENIAL OF ACCESS TO THE LITIGATION PROCESS OR A MEANINGFUL PARTICIPATION IN THE ONGOING MEDIATION IS A DENIAL OF EQUAL PROTECTION

The Landolts are well aware that their criticism of those who are charged with representing their interests offends them. Those representatives have only themselves to blame for their refusal to communicate with the stakeholders, with their refusal to allow the stakeholders a "place at the table", for their arrogant refusal to consider themselves answerable for their flawed "representation". It is not only a reprehensible failure to carry out their duty to their purported constituents, it is a violation of paragraph 8 of the Mediation Agreement which requires that the general public be kept informed of the progress of the mediation process, something that has not only not been done, but has been affirmatively thwarted by representatives of the Walker River Irrigation District.

Indeed, the Landolts have repeatedly requested information pursuant to paragraph 8.3.4 of the Mediation Agreement have been repeatedly denied such information. In fact, as this court

will recall, at the hearing immediate preceding the last one on this matter, the court itself requested an update on the status of the mediation and, in the name of confidentiality, was denied any information. The court acquiesced to this insolent response, but the denial of general information is a violation of the parties' duties under the Mediation Agreement.

In the end, it is the stakeholders' property rights that are being discussed in the mediation process. The Mediation Process Agreement itself spells out that the object of the process is to "adjudicate and reallocate the water", thus, presumably to adjudicate and reallocate water property rights currently belonging to the stakeholders. The Fifth Amendment prohibits the taking of property without due process of law. "Due Process" surely does not contemplate or include secret negotiations through which the stakeholders' interests will be decided, followed by a perfunctory call for comment, followed by a determination of what the stakeholders' interests are based on a report by the exclusive committee. This is not Due Process and it certainly is not what is demanded by the Fifth Amendment. "Due Process" requires (1) adequate notice of proposed action; (2) a neutral decision maker; (3) and opportunity to make a presentation to the decision maker; (4) an opportunity to present witnesses; (5) the right to confront and examine witnesses; (6) a decision based on the record, and other substantive and procedural safeguards. The essential guarantee of the due process clause is that of fairness and the procedure must be fundamentally fair to the individual affected. *In re Murchison* (1955) 349 U.S. 133, 136.

The Landolts and other stakeholders are not being permitted to participate in a process that will ultimately result in an adjudication of their rights. That is a denial of their due process rights and the mere opportunity to comment after the fact is not adequate protection under the law.

The right to comment does not provide a viable means of protecting real interests. It does not, in any meaningful sense, allow stakeholders to affect the outcome. Many stakeholders are unaware that the meetings are going on. No stakeholders are privy to the discussions as there has been an order keeping the discussions secret. When a court presumes to act in the capacity of the executive branch on matters affecting the rights of conflicting parties, it has the duty to make its acts and processes as transparent as that demanded of the executive branch. If it is to be consistent with its duties and the limitations of the Fifth and Fourteenth Amendments, it must also provide the means by which interested stakeholders can have meaningful participation.

"At its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut* 401 U.S. 371, 372, 91 S.Ct. 780. "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voice the doctrine that '(w)herever one is assailed in his person or property, there he may defend' [citation]" Id at 377 "What the Constitution does require is 'an opportunity… granted at a meaningful time and in a meaningful manner,' …for a hearing appropriate to the nature of the case." Id at 378

There is no "state interest of overriding significance" that justifies the denial of due process that a denial of both the right to litigate and the power to participate in the mediation process represents in the instant case.

The question is, what so frightens the currently mediating parties about the participation of those with the greatest stake in the outcome? And what can possibly justify this court's refusal to order that participation?

THIS COURT'S ACQUIESENCE IN THE UNEQUAL TREATMENT OF LITIGANTS BEFORE IT WOULD BE A DENIAL OF EQUAL PROTECTION

All parties appearing before any court are entitled to equal treatment under the law. If any party is favored in any way, it is a denial of equal protection to the other parties. All parties to the instant litigation are prohibited from litigating their separate claims, at this point, but only the original seven parties are allowed to participate in the mediation, a process that is intended to determine the rights of *all* parties, and the majority of the parties are excluded. That, by itself, is unequal treatment. Worse, though, some parties who are not officially participating in the mediation are represented in that process by their attorney, Gordon De Paoli, who, though not officially appearing for them in the mediation is, nevertheless, there and has the same duty as any lawyer has to clients in protecting his clients' interests. That means that those stakeholders who are neither of the original seven nor represented by Mr. De Paoli are completely unrepresented in the process and are, therefore, receiving unequal treatment under the aegis of this court. That is black letter denial of equal protection and it must stop.

A court cannot treat similarly situated litigants differently. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.* 262 U.S. 544, 550, 43 S.Ct.636, 638 (U.S.1923)[Striking down special requirments for out of state corporate plainitffs that did not apply to in state plainitffs as a violation of equal protection]. "For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly. But that statement of the rule does little to determine whether or not a question of equality is even involved in a given case. For the crux of the problem is whether persons are similarly situated for purposes of the state action in issue." *Trimble v. Gordon* 430 U.S. 762, 780, 97 S.Ct. 1459, 1470 (U.S.Ill., 1977)

THE MEDIATION PROCESS IS BEING ABUSED AS A DELAYING TACTIC WHILE SOME STAKEHOLDERS MISAPPROPRIATE MORE WATER THAN THEY ARE ENTITLED TO UNDER THE DECREE

This Court refused to hear the Landolt's request to be heard on the issue of whether or not the Tribe is misappropriating more water than the amount to which it is entitled. There is, therefore, no mechanism for enforcing the 1936 Decree and for ensuring that the various interests are taking no more than that to which they are entitled, a position that will, in due course, be more widely known by other stakeholders. It remains to be seen whether or not they will act on that knowledge. Meanwhile, however, the Tribe continues to misappropriate more than its share of water without anyone's having the ability to stop them while the mediation process proceeds. It is clearly in the Tribe's interest to allow the mediation to proceed as slowly and endlessly as possible since, while it is underway, it can misappropriate, with complete abandon, whatever it wishes to misappropriate. But it is in the interests neither of justice nor the orderly management of water resources.

It is imperative that the process be ended so stakeholders can protect their rights in a full, adjudicatory process and the 1936 Decree enforced, by its terms.

The mediation process has already consumed nearly two years of time without any apparent progress having been made. Indeed, service has not even been fully accomplished in the two years the mediation has been pending, so not all interested parties are even yet at the table. It is a uncertain how much longer it will take for service to be effectuated, much less when everyone will be present. Meanwhile, violations of the Decree go on unabated.

WHATEVER THE RESULT OF THE MEDIATION PROCESS, FURTHER LITIGATION WILL ENSUE

It should come as no surprise that stakeholders excluded from the process will never believe that their interests have been adequately protected. There is a clear difference between having input during the process and having the ability to comment on it after it has been completed. These parties can assure the Court, therefore, that there is little doubt that, whatever the final recommendation, they will contest it through appeal. If the object of mediation is, at least in part, to minimize litigation, the process, as it is currently constituted, is guaranteed to accomplish just the opposite.

Already, actions are being prepared to respond to the Tribe's end run abound the process by the preparation of a draft environmental impact statement with regard to Weber Dam. State litigation is in the first stages of preparation having to do with peripheral issues of representation. And further action is being prepared relative to the court's sanctioned water master whose records (or lack thereof) demonstrate large scale water misappropriation. These, and other, issues will present this court with deep questions of conflict of interest.

Finally, of course, the exclusion of stakeholders from the process will, if continued, necessarily result in further review.

THE TRIBE IS USING MEDIATION AS COVER TO DO AN END RUN AROUND THE PROCESS

At the same time as the Tribe is opposing, on the basis that water rights will be determined in the mediation process, any litigation surrounding its misappropriation of more than its share of water, it is making plans to reconstruct a dam that will, by default, impact the very issues this court is attempting to mediate.

In May, 2004, the Tribe produced a draft environmental impact statement that says, in part: "The Tribe is interested in actively pursuing LCT recovery and fishery which includes taking steps to provide that opportunity in Walker Lake and the lower Walker River as the recovery program progresses. Weber Reservoir can be managed in such a way to promote LCT passage and the LCT fishery that could develop in the entire Walker River as the recovery program progresses.". P. 4-22 Draft EIS, *Weber Dam Repair and Modification Project*. The Tribe's object is to reconstruct the dam that will necessarily affect water flows and usage and to present it as a *fait accompli*. Though this effort is something that will probably be pursued in a different forum, it necessarily impacts this court's work in the instant case and is something that will, at least, be brought to this court's attention in the near future.

But the larger issue is in the fact that one party to the instant litigation is using the mediation shield as a means of pursuing other avenues of attacking the same problem without other stakeholders' having the ability to protect their own interests.

THE CURRENT MEDIATION PROCESS, EXCLUDING THE MAJORITY OF PARTIES TO THE INSTANT LITIGATION VIOLATES THE POLICY JUSTIFICATION FOR MEDIATION

While there are not, yet, enforceable national standards for mediation that are binding on federal courts, national mediation organizations have propounded a set of principles that set forth, at least, minimum policies that should be included in the mediation process. While emphasizing the voluntary nature of mediation (something that has been denied the Landolts) the policies make clear that unless voluntarily done, access to other forms of relief should not be denied.

> "A. Voluntary Participation. The values of a democratic society are maximized when parties voluntarily elect to participate in a dispute settlement process of their own

> choosing. To the extent participation in an alternative dispute resolution process is mandated, or the product of an alleged agreement not voluntarily entered into, the resolution of the dispute should not be binding. Nor should access to public administrative or litigative dispute resolution processes be precluded unless knowingly and voluntarily waived by the affected party."

Standards, California Dispute Resolution Council

The purpose of mediation is thwarted when parties are denied meaningful participation. When that occurs, there is little likelihood that those excluded will respect the result. In the instant matter, the only parties participating in the mediation process (with one exception) are those entities having little direct stake in the outcome and those having such a direct stake are excluded. Such a situation not only makes universal agreement unlikely, it flies in the face of the policy reasons that make mediation attractive to begin with.

There is simply no reason to continue the flawed process put in place when there were only a half-dozen parties to the instant litigation. Now there are dozens of parties, most excluded, and the changed circumstance vitiates any utility to the process.

CONCLUSION

The mediation process has gone on far too long. It is far too exclusive to withstand Constitutional scrutiny. It will not accomplish what this court wants it to accomplish because, by its nature, it will be subject to attack and is promotive of further litigation. The Landolts respectfully submit, therefore, that the mediation order should be allowed to expire and the litigation of the issues that were its subject allowed to proceed at court.

Dated: February 7, 2005

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff, Intervenor v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et.al., Defendants.	)	CV-N-73-0125-ECR In Equity No. C-125 **PROOF OF SERVICE BY MAIL**

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am over the age of 18 years, employed in the county of San Diego and not a party to the within action; my business address is 625 Broadway, Suite 1206, San Diego, California.

On February 8, 2005 I served the within

Opposition to Motion Continue Mediation Process and Litigation Stay

in said action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows and deposited same in the United States Mail at San Diego, California:

See attached service list

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of February, 2006 at San Diego, California.

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February 8, 2005

BY OVERNIGHT MAIL

Court Clerk
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RE: **United States, et.al. v. Walker River Irrigation District**
In Equity No. C-125-ECR
Subfile No. C-125-B and C-125-C

Dear Brenda:

Enclosed herewith, please find our Opposition to Motion of Mediating Parties to Continue Stay of Litigation for hearing on March 8, 2005 at 1;30 p.m. before Magistrate McQuaide. There is an original and two copies. As you will recall, we filed the original yesterday by fax and I indicated that I would send along original hard copies for your files by overnight mail. Please file the original and keep as many copies as you need. Please conform the extra copy and return it to us in the enclosed stamped, self-addressed envelope.

If you have any questions regarding any of this, please do not hesitate to contact this office. Thanks, so much, for your help in this. It was very kind of you and I cannot tell you how deeply I appreciate it.

Very truly yours,

John W. Howard

JWH/em