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WALKER RIVER IRRIGATION DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

12	UNITED STATES OF AMERICA,)	In Equity No. C-125-ECR
13)	Subfile Nos. C-125-B and C-125-C
14	Plaintiff,)	
15	WALKER RIVER PAIUTE TRIBE,)	WALKER RIVER IRRIGATION
16)	DISTRICT'S REPLY POINTS AND
17	Plaintiff-Intervenor,)	AUTHORITIES IN SUPPORT OF
18	v.)	MOTION OF MEDIATING PARTIES
19	WALKER RIVER IRRIGATION DISTRICT,)	TO CONTINUE STAY OF LITIGATION
20	a corporation, et al.,)	
)	
	Defendants.)	

I. INTRODUCTION

The Landolts oppose the continuation of the ongoing mediation and any stay of litigation pending that mediation. *See, Landolt Opposition to Extension of Mediation Process and Litigation Stay* dated February 7, 2005 (the "Landolt Opposition"). The Circle Bar N Ranch and others ask that the mediation be expanded to include all defendants or, if not so expanded, be discontinued. *Response to Joint Motion of Mediating Parties to Continue Stay of Litigation In C-125-B and C-125-C Subproceedings* dated February 7, 2005, at 2-4 (the "Circle

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1 Bar N Response"). However, the Circle Bar N Response recognizes that regardless of whether
2 the mediation process continues, the litigation should be stayed until all parties are properly
3 served. That is already the case because of the provisions of this Court's April 19, 2000, Case
4 Management Order in Subfile C-125-B and its January 24, 1995, Order Requiring Service of
5 and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County in
6 Subfile C-125-C.
7

8 The Landolt Opposition is based upon a fundamental misunderstanding of the nature of
9 the litigation. The Landolt Opposition and the Circle Bar N Response misrepresent the origin
10 of the ongoing mediation and its objectives.¹ The United States, the Walker River Paiute Tribe
11 and others have jointly filed a Reply in Support of Motion of Mediating Parties to Continue
12 Stay of Litigation. The Walker River Irrigation District (the "District") joins in that response.
13

14 **II. THE MEDIATION**

15 **A. Origins of the Mediation.**

16 In the fall of 2001, the District joined with Nevada, California, the Walker River Paiute
17 Tribe, Mono County, California, Lyon County, Nevada, Mineral County, Nevada, and the
18 Walker Lake Working Group in requesting that the United States, through the Department of
19 Justice and the Department of the Interior, assemble a team to represent the interests of the
20 United States in negotiations with them with respect to issues on the Walker River system.
21 While waiting for a response from the United States, those parties interviewed candidates to act
22 as a mediator and, subject to approval by the United States, selected a mediator.
23
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25
26 ¹ Counsel for the District was not served with either the Circle Bar N Response or the Landolt
27 Opposition. District Counsel was served with the Circle Bar N and Landolt pleadings in
28 November, 2004. However, as is apparent from the Certificate of Service attached to the Circle
Bar N Response and from the Proof of Service regarding the Landolt Opposition, counsel for
the District is not on either list. However, copies of the Oppositions were sent to the District
Manager.

1 In May, 2002, the United States appointed a team to represent its interests. Thereafter,
2 the Mediation Process Agreement was negotiated. The Mediation Process Agreement was
3 executed by the Mediating Parties in late April and early May, 2003. All of this occurred
4 without direction or order from this Court under Local Rule 16-5 or the Alternative Dispute
5 Resolution Act of 1998, 28 U.S.C. §§651 et seq.
6

7 **B. The Role of the Court.**

8 Section 9.1 of the Mediation Process Agreement provided that it could not become
9 effective until the Court entered an order "substantially in accordance with the attached
10 Proposed Order Governing Mediation Process." The Proposed Order had two key purposes.
11 The first was to ensure that the communications in the process would not be admissible or
12 discoverable in the litigation, except as expressly allowed by the Mediation Process Agreement.
13 See, Order Governing Mediation Process at para. 3, Docket No. 430; see also, 28 U.S.C.
14 §652(d). The second was to ensure that, except as to issues related to service of process, the
15 litigation would be stayed. Id. at para. 2.
16

17 Therefore, on May 9, 2003, the Mediating Parties filed a joint motion requesting that
18 the Court enter the proposed *Order Governing Mediation Process*. On May 27, 2003, the
19 *Order Governing Mediation Process* was entered, as proposed. See, C-125-B, Docket No. 430.
20 The entry of that Order did not convert the mediation into a court sanctioned or court sponsored
21 mediation, under Local Rule 16-5 or the Alternative Dispute Resolution Act. The Order did
22 not direct that the mediation commence and did not make it exclusive. See Landolt Opposition
23 at 2; 3.
24

25 In addition, contrary to the assertions of the Landolts and Circle Bar N, on December 1,
26 2004, this Court did not direct that the motion presently before the Court address the issue of
27 whether or not the mediation should continue. The continuation of the mediation was left to
28

1 the Mediating Parties. The Court directed only that a motion to continue the stay of litigation
2 be filed by a date certain. See, December 1, 2004, Transcript of Proceedings at pgs. 15-19; see
3 also, December 1, 2004, Minute Order, Docket No. 736.

4
5 **C. The Objectives of the Mediation.**

6 The Landolt Opposition states that the object of the mediation process is to "adjudicate
7 and reallocate the water, thus presumably to adjudicate and reallocate water property rights
8 currently belonging to the [Landolts]" with the Landolts being allowed an opportunity only for
9 comment after the fact. See, Landolt Opposition at pg. 8; 4. Similarly, the Circle Bar N
10 Response suggests that the Mediating Parties intend to resolve the litigation in ways
11 inconsistent with the rights of individual water right holders and without their input. Circle Bar
12 N Response at pgs. 3-4. Those assertions have no basis in fact.

13
14 Certainly, when parties begin mediated discussions concerning complex litigation, there
15 is no way to know the details of the final product of the mediation. One of the benefits of
16 seeking a mediated, rather than litigated, outcome is that solutions not available in litigation
17 may be considered. Paragraphs 6 and 7 of the Mediation Process Agreement recognize those
18 facts, as well as the fact that the Mediating Parties may be able to accomplish nothing more
19 than the establishment of a foundation on which a final settlement may be based.

20
21 From the outset, the Mediating Parties have recognized that proposals for settlement
22 must be susceptible to implementation practically and legally within a reasonable period of
23 time. They are well aware that no single party or combination of parties involved has the
24 power to compromise the water rights of the hundreds of parties not directly involved in the
25 mediation. They have not considered proposals for settlement that do nothing more than
26 realign the parties to the litigation, such that the parties to the mediation become aligned against
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1 those who are not, with the result that "new" litigation ensues which is every bit as
2 complicated, controversial and lengthy as that already pending ensues.

3
4 **D. The District's Public Meeting Concerning Continuing the Mediation and
Continuing the Stay.**

5 On December 15, 2004, the District held a properly noticed meeting of its Board of
6 Directors. A copy of the agenda for that meeting is attached hereto as Exhibit A. Among the
7 purposes of the meeting was to report concerning the mediation and its continuation, and to
8 consider and take action on whether the District shall continue to participate in the mediation
9 and, if so, support a continuation of the stay of the pending litigation. Exhibit A, Agenda Items
10 3 and 5.
11

12 Under Agenda Item 3, counsel for the District provided a report on the status of the
13 mediation, on the Walker River Tribe's proposed framework for a comprehensive settlement,
14 and on the responsive framework for comprehensive settlement presented by the upstream
15 interests, i.e., the District, Lyon County, Mono County, California and Nevada. The Landolts
16 and their counsel, Mr. Schaeffer, were present at that meeting. The assertions that the District
17 has refused to provide information allowed by paragraph 8.3.4 of the Mediation Process
18 Agreement is simply not accurate. See, Landolt Opposition at pg. 7.
19

20 **E. The Appearance of Counsel for the District as Counsel for Persons Who
21 Have Waived Personal Service of Process in Subfile C-125-B.**

22 As the Court is well aware, the United States and Tribe are and for some time have been
23 seeking waivers of personal service from water right holders within the District. Water right
24 holders who waive personal service are also required to file and serve a *Notice of Appearance*
25 *and Intent to Participate* in the litigation. They may identify an attorney in that *Notice of*
26 *Appearance*. The undersigned counsel for the District has agreed to be identified and has been
27
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1 identified as counsel for many of those persons with respect to the claims of the United States
2 and the Tribe.²

3
4 The Landolts argue that that representation has expanded the identity of the Mediating
5 Parties, thus further exacerbating the Court's alleged prevention of the Landolts being
6 included.³ The identity of the Mediating Parties has not changed. It is the District which is the
7 Mediating Party, not its counsel. The parties to the Mediation Process Agreement, not the
8 Court, preclude the Landolts' direct participation. However, because the District, acting
9 through its elected directors, is a Mediating Party, the interests of all District electors, including
10 the Landolts, are represented in the process.

11
12 **III. THE LANDOLTS ARE NOT BEING DENIED ACCESS TO THE COURTS**

13 The Landolts contend that the stay requested prevents them from "petitioning for
14 redress of grievances." Landolt Opposition at 6. They assert that the stay allows "violations of
15 the Decree [to] go on unabated." *Id.*, at 11. In reality, however, under the guise of an order to
16 show cause, the Landolts seek to litigate the underlying merits of the Tribe's claims for
17 additional water. Although the Landolts portray themselves as the guardians of those
18 stakeholders not involved in the mediation, they seek to litigate issues critical to the merits of
19 the Tribe's claims before those stakeholders have been served and have had an opportunity to
20 appear and participate.

21
22 The Landolts' desire to advance the litigation over the Tribe's claims faces an obstacle
23 wholly independent of the stay requested here. The Case Management Order was very
24 carefully crafted by the Court after extensive briefing by the active parties to this case. The

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26 ² The Landolts assert that such representation is a "clear conflict of interest." Landolt
27 Opposition at pg. 4. That assertion demonstrates a lack of understanding of both the issues in
that litigation and of the manner in which that litigation will proceed.

28 ³ As the Tribe and others point out in their joint Reply, the Landolts seek to litigate, not
mediate. *See*, Reply of Walker River Tribe, et al. at 5-6.

1 Court recognized that, even before the merits of the Tribe's claims were litigated, there were
2 numerous threshold issues which should be considered and decided. It also recognized that
3 none of those issues should be considered until all parties were joined. All parties have not
4 been joined, and the threshold issues have not been considered and decided. The Case
5 Management Order prevents any litigation concerning the merits of the Tribe's claims until its
6 provisions have been followed and satisfied.
7

8 On the other hand, there is nothing in the stay requested here or in the Case
9 Management Order which prevents the Landolts or any other water right holder from
10 petitioning the Court in the event that they are not receiving the water to which they are entitled
11 under the *Walker River Decree*. The implication that there is "anarchy" on the Walker River
12 and that the Case Management Order or the stay requested here prevents the proper
13 administration of the *Walker River Decree* is nonsense.
14

15 **IV. THE MEDIATION DOES NOT VIOLATE ANY DUE PROCESS OR EQUAL**
16 **PROTECTION RIGHTS OF THE LANDOLTS OR ANYONE ELSE**

17 The Landolts contend that they are somehow deprived of due process and equal
18 protection by the mere existence of the ongoing mediation. With respect to the alleged due
19 process violation, the Landolts assume a settlement which takes their water rights after a
20 limited comment period. With respect to their equal protection claim, the Landolts again
21 assume that the mediation without more will determine their rights and that it is the Court that
22 prevents their participation in the mediation. They make no effort to present their claims in the
23 context of the applicable law.
24

25 Procedural due process requires that parties who may be deprived of property be given
26 notice and a meaningful hearing before any deprivation occurs. See e.g., *Fuentes v. Shevin*,
27 407 U.S. 67, 80-82 (1983). Other than wild speculation, there is nothing to suggest that the
28 Mediating Parties will propose a settlement which deprives the Landolts or anyone else of their

1 property. The District will not become a party to such a settlement. The Landolts' position also
2 requires the assumption that if such a settlement were proposed, the Court would implement it
3 without satisfying due process requirements. The record of the Court's insistence in this matter
4 on due process for all water right holders belies that contention. See, Reply of the Walker
5 River Tribe, et al., at 9-10.
6

7 As noted above, the mediation was not established or ordered by the Court and thus it is
8 not the Court who has determined the identity of the Mediating Parties. However, even if the
9 mediation were of the Court's making, the classifications represented by who is and who is not
10 a Mediating Party are rationally related to a legitimate purpose. See, *Fitzgerald v. Racing Assn.*
11 *of Central Iowa*, 539 U.S. 103, 107 (2003).
12

13 Exploring the potential to resolve, or at least narrow, issues in a case involving
14 hundreds, if not thousands, of parties, and which the Court has correctly described as enormous
15 and complex, is a legitimate purpose. Indeed, the Alternative Dispute Resolution Act of 1998
16 is a determination by the United States Congress of the legitimacy of that purpose.
17

18 It cannot be seriously suggested that the only mediation which is constitutionally
19 permissible in a case like this one, is one which must include every party, each with separate
20 representation. If that were the standard, there could be no mediation. Thus, to pursue the
21 legitimate purpose of alternative dispute resolution here, it is necessary to limit the number of
22 participants in some manner. In so doing, it is rational to include as participants the parties
23 seeking, or attempting to seek, additional water. Therefore, it is reasonable to include the
24 Walker River Tribe, the United States and Mineral County.⁴ It is also rational to include those
25 who would have an interest in ensuring that the parties seeking additional water do not in fact
26

27 ⁴ Contrary to the suggestion in the Circle Bar N Response, it is therefore not illogical to include
28 Mineral County even though it has not been granted permission to intervene. See, Circle Bar N
Response at 4.

1
2 acquire any. It is especially rational to include an entity whose electors constitute the very
3 individuals whose water rights may be affected and whose elected directors are among those
4 individuals. Thus, it is reasonable to include the District. It is reasonable to include the County
5 in which the District is located, Lyon. In the absence of an entity similar to the District in
6 California, it is reasonable to include the county in which the farms of affected water users are
7 located, Mono County. Finally, the presence of the two states is important because of the
8 interstate nature of the Walker River Basin and because of their broader interests in the basin.
9

10 In short, then, even if the Court had ordered the mediation and had established the limits
11 on participation, its actions would not have violated the equal protection rights of the Landolts
12 or anyone else.⁵

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27 ⁵ The Landolts' reliance on *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S.
28 544 (1923) is misplaced. That case stands for nothing more and nothing less than a
requirement that classifications must have a rational relationship to a legitimate purpose. Any
classification here meets that test.

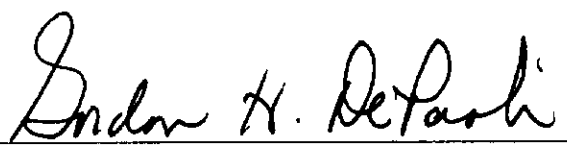
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V. **CONCLUSION**

The Court should continue the stay. All other aspects of the Order Governing Mediation Process remain in full force and effect even after the mediation ends. See, Order Governing Mediation Process at para. 4.

Dated this 22nd day of February, 2005.

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***WALKER RIVER IRRIGATION DISTRICT'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF MEDIATING PARTIES TO CONTINUE STAY OF LITIGATION*** in an envelope addressed to:

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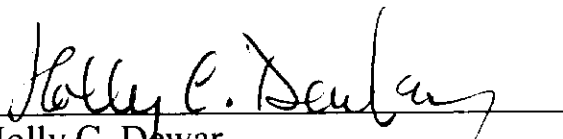
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Dated this 22nd day of February, 2005.


Holly C. Dewar

WALKER RIVER IRRIGATION DISTRICT
BOARD OF DIRECTORS' SPECIAL MEETING
CASINO WEST CONVENTION CENTER
11 NORTH MAIN STREET, YERINGTON, NEVADA

December 15, 2004
Wednesday
10:00 A.M.

Note: Items on the agenda without a time designation may not necessarily be considered in the order in which they appear on the agenda.

OFFICIAL AGENDA

All items are action items unless otherwise noted.

1. Roll Call and Determination of Quorum
2. Public Forum (10:00 AM)
Any member of the public may address and ask questions of the Board relating to any matter within the Board's jurisdiction. Public comments need not be related to any item on the agenda. Action will not be taken on any matter raised by the public until the matter is specifically included on an agenda as an item upon which action will be taken.
3. Report from legal counsel concerning the Mediation involving the Walker River Issues and concerning the continuation of the Mediation.
4. Public testimony and action on whether the District Manager and legal counsel should be authorized and directed to prepare and submit a proposal to the Bureau of Reclamation under the provisions Section 207(b) of Public Law 108-7 for funding of a voluntary pilot program pursuant to which District Farmers could voluntarily provide a portion of stored water allocated in 2005 to provide water to Walker Lake. The elements of the voluntary pilot program will be presented to the Board and the public at the meeting.
5. Public testimony and action on whether the District should continue to participate in the Mediation Process and, if so, whether the District should support a continuation of the stay of pending litigation.
6. Adjourn.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please contact Tricia Irvine at (775) 463-3523 at least 24 hours in advance.

EXHIBIT A