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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATE OF AMERICA,)	3:73-cv-00127-ECR-RAM
Plaintiff,)	
)	In Equity No. C-125-ECR-RAM
WALKER RIVER PAIUTE TRIBE,)	Subfile No. C-125-B
Plaintiff-Intervenor,)	
)	WALKER RIVER IRRIGATION
vs.)	DISTRICT'S POINTS AND
)	AUTHORITIES IN OPPOSITION TO
WALKER RIVER IRRIGATION DISTRICT,)	MOTION TO CLARIFY JUDGE REID'S
a corporation, et al.)	(sic) CASE MANAGEMENT ORDER
)	<u>DATED APRIL 18, 2000</u>
Defendants.)	
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I. BACKGROUND.

A. The Motion to Clarify.

Joseph and Beverly Landolt seek an order clarifying the Case Management Order entered April 19, 2000 (the "CMO"). See, Subfile C-125-B, Docket No. 108. Although the Landolts attempt to present the Clarification Motion as seeking confirmation that the CMO does not stay litigation "over the rights and responsibilities existing under the operative Decree of 1936," in reality, they ask the Court to amend the CMO to allow litigation now over the potential merit of the Tribal Claims, as defined in the CMO. Compare Clarification Motion, pg. 2, lns. 5-9 with pg. 2, lns. 13-17; pg. 4 lns. 1-5; pg. 5, lns. 2-9.

The Clarification Motion includes a number of misstatements concerning when, how and why this proceeding commenced. It confuses the Mediation which began in 2003 with the origins of the CMO. *See*, Clarification Motion, pgs. 3-4. It is helpful to provide some background information which corrects those misstatements.

B. The Case Management Order.

The Tribe and the United States filed their original counterclaims in this matter in 1992. By Order dated October 22, 1992, the Court directed the Tribe and the United States to serve their original counterclaims on all claimants to the waters of the Walker River and its tributaries pursuant to Rule 4 of the Federal Rules of Civil Procedure. In its 1992 Counterclaim, the Tribe sought recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation and for a federal reserved water right for 167,460 acres of land included in the Reservation in 1936. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the *Walker River Decree*. The 1992 counterclaim of the United States asserted parallel claims to water for the benefit of the Walker River Indian Reservation.

On or about July 30, 1997, the Tribe amended its earlier claim (“Tribe’s First Amended Counterclaim”). In addition to its original surface water claims, the Tribe’s First Amended Counterclaim includes groundwater claims for the entire Reservation. At the same time, the United States also amended its claim (“United States’ First Amended Counterclaim”). In addition to its original surface water claims, the United States’ First Amended Counterclaim includes several specific claims to surface water and groundwater in the Walker River Basin for other federal enclaves, including the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps and the Bureau of Land Management. The United States’ First Amended Counterclaim also advances claims for surface and groundwater for the Walker River Indian Reservation, the

Yerington Reservation, the Bridgeport Paiute Indian Colony and several individual Indian allotments.

After extensive briefing, on April 19, 2000, the Court entered the Case Management Order. See, Subfile C-125-B, Docket No. 108. The April 19, 2000 Case Management Order (the "CMO") bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). It stays all proceedings related to the Federal Claims and sets forth initial procedures for the prosecution of the Tribal Claims. CMO at 1-4.

The CMO requires the Tribe and United States to serve their amended pleadings and related service documents on and thereby join numerous individuals and entities who hold surface and groundwater rights within the Walker River Basin. It groups these individuals and entities into nine different categories. CMO at 4-6.

The details with respect to service of process were left to the Magistrate Judge. See, e.g., CMO at 6-8. Consistent with the CMO, the active parties in Subfile No. C-125-B, through briefing, argument and agreement and with the assistance of the Magistrate Judge, have addressed many of those details. See, e.g., Subfile C-125-C, Docket No. 580; Subfile C-125-B, Docket No. 206; 207. The United States and the Tribe have commenced phased service. That service commenced in 2004, and is not complete.

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I consists of "threshold issues as identified and determined by the Magistrate Judge." Phase II will "involve completion and determination on the merits of all matters relating to [the] Tribal Claims" and may also include in that phase or subsequent phases:

- (a) All other claims, crossclaims, counterclaims, defenses and issues raised by the pleadings of the parties that included in the threshold issues.
- (b) All other issues related to the Tribal Claims.
- (c) All issues related to the other Federal Claims.

See, CMO, pp. 11-12.

The identification of threshold issues is left to the Magistrate Judge and those issues shall “not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined.” CMO, pp. 9. Included among the possible threshold issues to be considered for inclusion by the Magistrate Judge were issues related to the Court's jurisdiction and equitable defenses to the Tribal Claims. See, CMO, pp. 9-11.

C. The Order Governing Mediation Process.

On May 9, 2003, the United States of America, the Walker River Paiute Tribe, the Walker River Irrigation District, the State of Nevada, the State of California, Mineral County, Nevada, Lyon County, Nevada, Mono County, California, and the Walker Lake Working Group (collectively "Parties to the Mediation Process") filed a joint motion respectfully requesting that the Court enter the proposed *Order Governing Mediation Process*. After lengthy discussions over parts of 2002 and 2003, the Parties to the Mediation Process agreed upon the *Mediation Process Agreement* to guide their settlement negotiations concerning, among other matters, the C-125-B subproceeding, described above, and also the C-125-C subproceeding, where Mineral County seeks to intervene for purposes of asserting claims for water for Walker Lake. The Joint Motion was assigned by the Court to the Magistrate Judge. On May 27, 2003, he entered the Order Governing Mediation Process, as proposed. See, C-125-B, Docket No. 430.

D. The Landolt Motion for Order to Show Cause Re: Contempt.

On March 10, 2004, Joseph and Beverly Landolt moved the Court for an order to show cause (the "Show Cause Motion") why the Walker River Paiute Tribe (the "Tribe") "should not be held in contempt for their (sic) failure to obey this Honorable Court's orders and decrees; specifically, the Court's Decree of April 14, 1936 modified, Order for Entry of

Amended Final Decree to Conform to Writ of Mandate, Etc. (April 24, 1940)." Landolt Motion (Docket No. 622) at 1. Relying on a "Summary of Basin Surface Water Inflows and Outflows" for the period 1926 to 1995 published by the Nevada Division of Water Planning in 1999, the Landolts contended that that Tribe is "taking more water than it is allotted in the 1936 Decree." Id. at 2-4.

In response to that motion, the District asserted that, assuming arguendo that the Landolts were correct in that assertion, the Court should not issue an order to show cause because it would have involved the Court and the parties in litigation concerning issues related to the Tribe's claim of entitlement to water in addition to what is provided in the Decree. Such litigation would have been, and is, inconsistent with the Case Management Order entered April 19, 2000, in Subfile No. C-125-B. The Tribe moved to stay responses to the Show Cause Motion or, alternatively, to dismiss it without prejudice.

After a hearing on October 1, 2004, the Magistrate Judge granted the Tribe's Motion to Stay. See, Doc. No. 469. In granting the Tribe's motion, the Magistrate Judge said:

I'm going to -- I'm going to grant the motion. It seems to me that the Landolts, number one, have shown no evidence or any claim of any injury. They are upstream from the Tribe, and they haven't shown even a modicum of any injury, let alone of any immediate or irreparable injury that might occur. And I think that some showing in that regard needs to be made to attempt to get the relief that they are seeking.

I also think that to litigate their motion, as I just said, would be to litigate basically the merits of the case. I think it would require extensive discovery, further extensive briefing, and probably some evidentiary hearings by the Court, and I think that is contrary to both the Case Management Order and the order governing mediation.

The Case Management Order provides that the merits of this action are not going to be litigated until the last step. And that last step is a long ways away. It provides service first, decision on threshold issues next, and then the merits.

The order governing mediation stays everything except service. And the very precise reason for that order, and the reasoning behind that order was to preclude the ongoing litigation in this action during the mediation process.

I'm also somewhat troubled by the timing of the motion, as I said. This case has been going on since 1992 and there were extensive proceedings in the late nineties that culminated in the Case Management Order in April of 2000. The Landolts were aware of the report upon which they now rely, since June of 1999 when it was published. And, there has been regular ongoing activity in this case since at least April of 1996 when I got appointed to this position. I am somewhat troubled and question that if the Landolts were so concerned about the Tribe getting more water than it was entitled to, why they waited until March 10th, 2004 to file this motion.

It's apparent that they're unhappy with the mediation process, and they would like to be included. But to litigate this motion would disrupt the process, and the process provides that they will have input at a time if that process is successful.

And finally, and the Court would note that not only have the Landolts not shown any injury, there has been no showing of any kind, and the Court is aware of no instances of any kind of the anarchy that the Landolts claim will result unless their motion is heard, is heard and granted.

October 1, 2004, Transcript of Status Conference, pg. 18, ln. 5- pg. 19, ln. 25.

II. THE CASE MANAGEMENT ORDER SHOULD NOT BE CLARIFIED TO INVOLVE THE PARTIES IN LITIGATION OVER THE MERITS OF THE TRIBAL CLAIMS.

Assuming, arguendo, that the Landolts are correct in their assertion that the Tribe is "taking more water than it is allotted in the 1936 decree," the clarification they seek is intended to involve the Court and the parties in issues related to the Tribe's claim for additional water, as set forth in its First Amended Counterclaim. The Case Management Order was very carefully crafted by the Court after extensive briefing by the active parties to this case. The Court recognized that, even before the merits of those claims were litigated, there were numerous threshold issues which should be considered and decided. *See*, pp. 2-3, *supra*. It also recognized that none of those issues should be considered until all parties were joined. All parties have not been joined, and the threshold issues have not been considered and decided. It

is not appropriate at this time to engage in any litigation concerning the merits of the Tribe's claims until the provisions of the Case Management Order have been followed and satisfied.

The Landolts and their counsel seem to believe that until a water right is recognized in the Walker River Decree, it cannot be exercised. Without conceding that Tribal Claims are not otherwise barred or that the facts, when presented, will support a water right based upon the federal implied reservation of water doctrine, the law with respect to that doctrine is at the present time clear in a number of respects relevant to the Landolts' desire to prevent any exercise of such a right until the Court recognizes it in the Walker River Decree.

Federal Indian reserved water rights are a creature of federal law as first set forth by the Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). Under the *Winters* doctrine, at the time that a federal Indian Reservation was created and the land was reserved from the public domain, the United States also impliedly reserved the right to sufficient water to serve the purposes of the reservation. See also, *Arizona v. California*, 373 U.S. 546, 599-600 (1963). Such rights, therefore, became vested and perfected, not when the water was actually put to use, but when the reservation is established or when additional land is added to it. See, *Arizona v. California*, 373 U.S. at 600 (Indian reserved water rights were "present perfected rights" as of the date of the reservation and so predate the Boulder Canyon Project Act).

Thus, if the Tribal Claims have merit under the *Winters* doctrine, and are not otherwise barred, they are "present and perfected" water rights, and can be exercised even though not referenced in the Walker River Decree.¹ That is why the "clarification" sought by the Landolts will take the Court and the parties directly to the threshold issues and the merits of the Tribal Claims in complete disregard of the provisions of the CMO.

¹ Similarly, rights to water from the Walker River can be, and have been, established under Nevada and California law since entry of the Decree. Such rights can also be exercised, and are exercised, even though they are not referenced in the Walker River Decree.

The Clarification Motion should be denied.

Dated this 30th day of January, 2006.

WOODBURN AND WEDGE

/s/ Gordon H. DePaoli

By: _____

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on the 30th day of January, 2006, I electronically filed the foregoing *Walker River Irrigation District's Points and Authorities in Opposition to Motion to Clarify Judge Reid's (sic) Case Management Order Dated April 18, 2000* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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