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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.	Case No: 03:73:cv-127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **REPLY TO OPPOSITION TO MOTION TO CLARIFY JUDGE REED'S CASE MANAGEMENT ORDER DATED APRIL 18, 2000**

The Landolts filed the instant motion to clarify this Court's Case Management Order because the Order has been interpreted in a manner the effect of which is to make the Decree of 1936 unenforceable while the various sub-proceedings are proceeding. It would be unique in Federal Jurisprudence for a court to prevent parties from enforcing a long-standing decree on the basis that some other party subject to that decree has requested that it be modified going forward. That is probably why the various parties opposing this motion have failed to cite one example in which this has been done.

The 1936 Decree comprehensively governs the rights and duties of the various parties subject to it in the allocation of water rights. The Tribe and the government have initiated the instant proceeding for the purpose of establishing rights to water that are not recognized under the 1936 Decree. The Landolts' originally filed a motion on the basis that the Tribe is taking more water than it is entitled to take under the 1936 Decree ("Decree"). Their position was that no one subject to the Decree has the right to act in violation of it. That motion was denied on the basis that the Case Management Order stayed all litigation bearing on water management pursuant to the 1936 Decree. The instant motion is to clarify that the Case Management Order did not intent to neuter the 1936 Decree but, only, to stay litigation on the issues presented by the Tribe's counterclaims herein.

In opposing the Landolt's motion, the Walker River Irrigation District ("WRID") has invoked the *Winters* doctrine (*Winters v. United States*, 207 U.S. 564 (1908) suggesting that in deciding whether or not the Tribe is violating the Decree, the court will have to decide all of the ultimate issues presented by the Tribe's counterclaim. WRID argues that if the Tribe has the

rights it claims, they exist and are perfected irrespective of what the Decree says and may be exercised at will by the Tribe. (Opposition at page 7).

If WRID's interpretation is correct, why are we all here? What is the purpose of this litigation but to establish, and receive a court judgment, that the Tribe has the rights it claims? If it does not need that judgment, why, then, does it seek it? The fact is that the Tribe needs the judgment it seeks because without it, its claims are colorable and probably ultimately unenforceable. What this court is asked to decide is whether or not the Tribe's claims to a massive amount of additional water have merit. Until the Court makes that decision, though, it must be presumed that the Tribe's claims are unestablished.

Until the Tribe's claims are established, the only governing document is the 1936 Decree and it should be enforceable. If parties subject to the Decree are acting in a manner that violates that Decree, other parties to it should have the right to enforce their rights under it. That is all the Landolts have attempted to do and that is why they seek a clarification of the Order solely for the purpose of clarifying that the Decree is alive and enforceable.

Enforcement of the Decree does not necessitate a decision on the merits of the Tribe's claims. If, for example, the Tribe were taking water in excess of that allocated to it under the Decree, this Court could so find and prohibit it from doing so reserving until the instant litigation is completed the various issues presented by the Tribe's counterclaim herein. The Tribe could posit the *Winters* doctrine in opposition to any motion to enforce the decree, but this Court would still be able to reserve that issue until the Tribe's counterclaim is fully litigated at the same time as it enforces the Decree as it sits now.

To use an analogy, if one person held title to a vehicle and another person were to claim that the vehicle belonged to him and, on that basis, simply took it, the title holder would clearly

be able to get the vehicle returned and use it until the court made the ultimate decision as to ownership. Similarly, if a landowner were to secure his land by fence and an adjoining landowner were to claim that he had a prescriptive easement for ingress across the first landowner's property, the first landowner would surely have the right to maintain his fence and exclude the adjoining landowner until a court had decided whether or not the adjoining landowner did, in fact, own an easement by prescription. In either analogy, the presumed right to possession and use would be maintained without disrupting or foreclosing the ultimate decision regarding ownership. And in both, the ultimate decision could be that the claimant did, in fact, have a prior right that mere title did not affect.

So it is here. In this instance, the presumed status of water rights are those in the Decree. The Tribe believes it has a vested and perfected right to water resources that is unaffected by the Decree. But we must presume, for present purposes, that the Decree is correct. If the Tribe, therefore, is misappropriating more water than is authorized under the Decree, it must be prevented from doing so until this Court can make the ultimate decision on the merits of the Tribe's claim.

Surely, it must not be as easy to thwart the law as WRID suggests. Surely, this Court did not intend to allow anyone subject to the Decree to act in contravention to it and escape penalty by filing a counterclaim suggesting he has a prior right that he can exercise while the court decides whether or not his claim has merit. But that is what WRID is suggesting and it flies in the face of the orderly resolution of disputes.

Simply put, WRID's argument in opposition simply makes no sense. If the *Winters* doctrine is so powerful that it is unaffected by anything this Court might do, then we can all agree to dismiss the instant action and go home and the Tribe can arrogate to itself whatever

water resources it would like. But if the Tribe's claims must, like everything else in the law, be established, then, until they are, they must be presumed not to exist. And that means that the parties' rights and duties under the existing Decree must be enforceable and enforced. Therefore, it is entirely appropriate that this Court clarify the Case Management Order so that it is clear that all who are subject to the 1936 Decree are expected to abide by its terms and that those who do not can be forced to do so by means of enforcement.

Dated: February 20, 2006

/s/ John W. Howard

John W. Howard
Attorney for Landolts

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2006, I electronically filed the foregoing REPLY TO OPPOSITION TO MOTION TO CLARIFY JUDGE REED'S 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 e-mail addresses:

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