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IN THE UNITED STATES DISTRICT COURT OF NEVADA

UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE, Plaintiff(s), v. THE WALKER RIVER IRRIGATION DISTRICT, et al, Defendant(s).	IN EQUITY NO. C-125 SUBFILES C-125-B, C-125-C **RESPONSE TO JOINT MOTION OF MEDIATING PARTIES TO CONTINUE STAY OF LITIGATION IN C-125-B AND C-125-C SUBPROCEEDINGS**

CIRCLE BAR N RANCH (TOM REVIGLIO, TONY REVILGIO); BORSINI RANCH, INC (DALE BORSINI); PEAVINE LEASING, LLC (MIKE FARETTO); PERI BROTHERS & SONS (DAVE PERI, BUTCH PERI); L & M FAMILY LIMITED PARTNERSHIP (BRIAN MASINI); and THOMAS BOBRICK TRUST (TOM BOBRICK) ("Respondents"), file this response to the United States of America, State of California, State of Nevada, Walker River Paiute Tribe, Mono County, California, Lyon and Mineral County, Nevada, Walker River Irrigation District ("WRID") Walker River Working Group ("Mediating Group"), requesting that this Court order the Mediating Group to incorporate the additional parties who have been served

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in the subproceedings of Case No. C-125 in the mediation proceedings, or to terminate the court sanctioned mediation process.

I. BACKGROUND

In May 2003, this Court entered an order sanctioning the mediation process requested by parties and proposed intervenors in Case No. C-125 and its subfile proceedings, and setting out procedures for the mediation. *See Order Governing Mediation Process*. While the parties in the Mediating Group may have been inclusive of those actively involved in the subfile litigation at the time the order was issued, the situation has changed. At this point, additional parties have been served with the counterclaims of the United States and the Tribes, pursuant to this Court's case management orders.

Despite their status as necessary parties to the litigation, these parties are refused a place in the mediation process. Accordingly, these parties are deprived of proper notice and an opportunity to meaningfully participate in proceeding.

While the Mediating Group has couched its motion as a motion to continue the stay of the litigation in subproceedings C-125-B and C-125-C, in reality this Court during its status conference of December 1, 2004, instructed parties to address both the merits of extending the mediation process and the matter of staying these subproceedings. While the Mediating Group did not address the merits of the mediation process, implicit in their argument was an assumption that the mediation should be continued. Respondents would disagree with this premise, if this Court allows the Mediating Group to continue to exclude parties to the litigation.

II. THE MEDIATION PROCESS MUST BE OPEN TO ALL PARTIES TO THESE SUBPROCEEDINGS OR SHOULD BE DISCONTINUED

The mediation proceedings are limited a select group of participants, yet they are intended to resolve the issues raised in subproceedings C-125-B and C-125-C. The Mediating Group is seeking to create "an efficient and mutually beneficial resolution of the Walker River Issues, including certain unresolved portions of the C-125 case and subproceedings C-125-B and

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C-125-C, through mediation...." *Joint Motion for Entry of Order Governing Mediation Process, Attachment 2* at 2. The parties to the Mediation Process Agreement agreed that with the assistance of a mediator they would identify the issues, develop potential alternatives and approaches to resolve those issues, resolve the issues, and achieve an appropriate resolution of the Walker River Issues. *Id., Attachment 2* at 8. As expressed in the joint motion for entry of order governing mediation process, it is the Mediating Group's intent to create "a written settlement agreement to be used to develop appropriate papers seeking to conclude the relevant portions of the C-125 case and its subproceedings, obtain necessary congressional legislation and other appropriate papers and/or other actions to implement the agreement possibly including one or more separate agreements when signed by appropriate authorities, and achieve all other implementation requirements." *Joint Motion for Entry of Order Governing Mediation Process* at 3. Included in these issues are the active claims of the United States, the Tribe and Mineral County for water rights not recognized under the Decree.

Respondents are individual water rights holders whose rights are recognized under the Decree. Additionally, they hold groundwater rights. There is no indication that the means by which the parties to the Mediation Process Agreement plan to attain their goals are consistent with the rights and interests of these individual water rights holders. The proceedings are confidential, pursuant to this Court's order, as well as pursuant to the Mediation Process Agreement. *See Order Governing Mediation Process; Joint Motion for Entry of Order Governing Mediation, Attachment 2*. The confidentiality requirements of this Court's order exacerbate the excluded parties' concerns. As is clear from the Mediating Group's statements in their motion and their agreement, it is their intent to limit and resolve issues before this Court without any input from other necessary parties. As parties to the case, Respondents should not be excluded from court sanctioned proceedings that impact their rights.

This Court has recognized the merits of the argument made previously by members of the Mediating Group that in order to satisfy concepts of due process and fundamental fairness and to

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ensure that the Court's decisions bind all affected parties and their successors in the future, that necessary parties must be joined before decisions concerning identification of threshold issues are resolved See *Walker River Irrigation District's Reply Points and Authorities in Support of Joint Motion Concerning Case Management* at 4. Yet the Mediating Group not only intends to identify the issues in isolation, thereby arbitrarily limiting those issues, but they intend resolve those issues without input from other parties to the litigation. The Mediating Group lacks legal authority to act for these necessary parties in this way. Alternatively, if the Mediating Group is suggesting that the excluded parties are not necessary to the proceeding, the Mediating Group should move to dismiss those parties from the litigation and take no further action to affect their private property interests. The Mediating Group should not be allowed to continue operating in this inconsistent manner, precluding necessary parties from participating in the settlement negotiations.

The unreasonableness of the Mediating Group's exclusionary position may be further called into question by its willingness to give Mineral County a seat at the mediation table. Mineral County has not been granted party status nor does it holds rights under the Decree, yet it has been allowed to participate in the mediation process. Given the aspirations of the Mediating Group regarding limiting and resolving the issues before this Court, it is illogical to allow an entity who has not yet secured intervenor status to participate in these settlement activities while excluding necessary parties to the litigation from the settlement proceedings.

Respondents do recognize that if certain parties want to mediate in private there is nothing to preclude them from doing so. However, they should not be allowed to continue to do so as a court sanctioned activity, nor should this activity prevent the parties from moving forward with the litigation once service of all parties is achieved.

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III. THE COURT SHOULD CONTINUE THE STAY OF LITIGATION BECAUSE SERVICE HAS NOT BEEN EFFECTED ON ALL PARTIES

While the Respondents recognize that the stay must remain in place, they disagree with the rationale put forward by the Mediating Group for the basis of the stay. Until all parties are properly served, this Court has determined that a stay is appropriate.

This does not mean, however, that the Mediating Group's activities must necessarily continue. As the Mediating Group asserts, the possibility of inconsistent outcomes between litigation and mediation would represent a waste of the Mediating Group's resources. *Brief in Support of Joint Motion of Mediation Parties to Continue Stay of Litigation in C-125-B and C-125-C Subproceedings* at 4. To preclude the participation of necessary parties to the subproceedings in the mediation process would similarly lead to a waste of the Mediating Group's resources as subsequent litigation is inherently likely to occur.

CONCLUSION

Respondents respectfully request this Court to stay litigation until service of all necessary parties has been completed in subproceedings C-125-B and C-125-C. Service is necessary to insure that satisfaction of due process and fundamental fairness requirements are met, and to ensure that the Court's decisions bind all affected parties and their successors in the future. Additionally, Respondents request that this Court condition its order for continuation of court sanctioned mediation upon the requirement that Mediating Group include all parties who have been served in these subproceedings.

DATED this 7th day of February, 2005.

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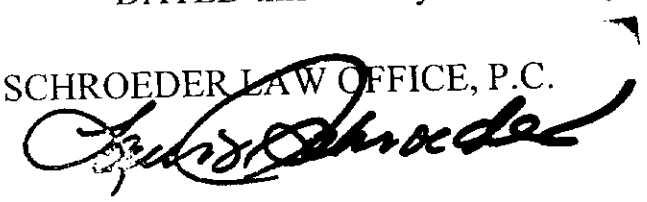

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Schroeder Law Offices, P.C., and that I mailed a true and correct copy of the foregoing ***RESPONSE TO JOINT MOTION OF MEDIATION PARTIES TO CONTINUE STAY OF LITIGATION IN C-125-B AND C-125-C SUBPROCEEDINGS***, by U.S. Mail postage prepaid and addressed to:

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Dated this 7th day of February, 2005

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