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BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	IN EQUITY NO. C-125-ECR; Subproceeding: C-125-B, C-125-C **REPLY BRIEF IN SUPPORT OF JOINT MOTION OF MEDIATING PARTIES TO CONTINUE STAY OF LITIGATION IN C-125-B AND C-125-C SUBPROCEEDINGS**

I. INTRODUCTION

On February 8, 2005, Joseph and Beverly Landolt filed an *Opposition to Extension of Mediation Process and Litigation Stay* (Feb. 8, 2005) ("Landolt Opposition"), in response to the *Joint Motion of Mediating Parties to Continue Stay of Litigation in C-125-B and C-125-C Subproceedings* (Jan. 18, 2005) ("Joint Motion"). Also on February 8, 2005, Circle Bar N Ranch and others filed their *Response to Joint Motion of Mediating Parties to Continue Stay of Litigation in C-125-B and C-125C Subproceedings* (Feb. 8, 2005) ("Circle Bar N Ranch Response"). For the reasons set forth herein, nothing in the Landolt Opposition or the Circle Bar N Ranch Response countenances the resumption of litigation or the lifting of the stay currently in

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place to enable the parties to the mediation process to continue their efforts to reach a negotiated settlement of the litigation.[1]

II. THE CASE MANAGEMENT ORDER CURRENTLY STAYS THE C-125-B AND C-125-C SUBPROCEEDINGS PENDING COMPLETION OF SERVICE

The Circle Bar N Ranch Response opposes continuation of the current stay of litigation "if this Court allows the Mediating Group to continue to exclude parties to the litigation." *Id.* at 2. While they do object to the exclusion of the specific individuals who comprise the Circle Bar N Ranch respondents from the mediation process, the Circle Bar N Ranch respondents do not oppose continuation of the current stay, and in fact request that the Court continue the stay "until service of all necessary parties has been completed in subproceedings C-125-B and C-125-C." *Id.* at 5.

The relief that the Circle Bar N Ranch respondents request is already the current state of affairs in the two subproceedings in this matter. The *Case Management Order*, No. C-125-B

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[1]The Landolts have mischaracterized the nature and purpose of the C-125 case and its subproceedings in their opposition to continuation of the stay, apparently claiming that the case is one in which the United States seeks to amend the Decree in order to direct more water to Walker Lake. *See* Landolt Opposition at 2. Obviously, this is not the purpose of the C-125-B subproceeding which involves the claims by the Walker River Paiute Tribe ("Tribe") and the United States on behalf of the Tribe to additional surface water from the Walker River, to store water in Weber Reservoir, and to groundwater underlying the Reservation for use on the Reservation. *See First Amended Counterclaim of the Walker River Paiute Tribe* at 16-17, No. C-125-B (July 31, 1997); *First Amended Counterclaim of the United States of America* at 12-13, No. C-125-B (July 31, 1997). The United States has also made claims to water for other federal interests in the Walker River Basin. First Amended Counterclaim of the United States of America at 13-31. Nor is the C-125-C subproceeding an action by the United States; it involves the intervention motion of Mineral County to assert a claim to the Walker River on behalf of Walker Lake. There is no merit to the Landolts' reliance upon environmental compliance documents to prove that the amended counterclaims and Mineral County's intervention papers are a "smoke screen."

(Apr. 18, 2000), divides the consideration of the *First Amended Counterclaim of the Walker River Paiute Tribe*, No. C-125-B (July 31, 1997), and the *First Amended Counterclaim of the United States of America*, No. C-125-B (July 31, 1997), into two phases. The first phase consists of the claims made by the Walker River Paiute Tribe ("Tribe") and the United States on behalf of the Tribe, and the second phase consists of all other claims made by the United States. *See Case Management Order* at 4. Significantly, service of all water rights claimants who could be affected must be completed before the Court and the parties may consider certain threshold issues identified in the order, or the merits of the tribal claims: "Prior to the resolution of the Threshold issues identified below, the U.S./Tribe shall effect service of their respective First Amended Counterclaims . . . on all of the members of the categories of water rights holders described below." *Id.* at 5. Indeed, the outstanding issues and claims "will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." *Id.* at 9.[2]

Similarly, the Court has ruled repeatedly that the merits of Mineral County's intervention motion may not be addressed until Mineral County has completed service in the C-125-C subproceeding. *See, e.g., Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County* at 2-3, No. C-125-C (Jan. 24, 1995); *Order* at 10, No. C-125-C (Feb. 25, 1999) ("The requirement that every defendant be informed of actions that may deprive him or her of property is a fundamental right of due process, and our procedural rules [requiring service] have developed as the best way to protect that right.").

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[2]Service of potential counter-defendants has proceeded in the C-125-B subproceeding. As demonstrated in the regular reports to the Court on the status of service, *e.g. Third Report of the United States of America Concerning Status of Service on Certain Persons and Entities*, No. C-125-B (Dec. 14, 2004), that service effort has been anything but "ham-handed" or "threatening" as claimed by the Landolts. Landolt Opposition at 3-4.

The *Order Governing Mediation Process* (May 27, 2003), captures the service requirement that is active in both subproceedings:

> The ongoing efforts to complete service in C-125-B and C-125-C should be completed as soon as possible. The Parties to the mediation process agree that it is important that the Court work closely with the Parties in both C-125-B and C-125-C to resolve all service issues and complete service. Although the Parties agree that the remainder of the proceedings in these two matters should be stayed during the mediation process, they look to the Court to play an active role in the resolution of service issues.
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> . . . .
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> All other proceedings in these two matters shall be held in abeyance until December 2004 or until ruled otherwise by the Court.

Id. (c) at 2-3. In short, the litigation of the outstanding claims in this case is stayed, and, therefore, the Circle Bar N Ranch respondents' request is already the state of the case. The Court, therefore, need not act on the Circle Bar N Ranch respondents' request for a stay pending completion of service.

III. THE STAY OF PROCEEDINGS IN THE C-125-B AND C-125-C SUBPROCEEDINGS DOES NOT JEOPARDIZE THE LANDOLTS' RIGHTS OR VIOLATE THE CONSTITUTION

The Court should reject the Landolt Opposition as contrary to the *Case Management Order*, and the *Order Governing Mediation Process*. The Landolt Opposition fundamentally misunderstands the purpose of the litigation, as set forth in the amended counterclaims of the United States and the Tribe, and in the intervention papers filed by Mineral County. The Landolt Opposition also flouts the carefully managed history of this case since the Tribe and the United States filed their amended counterclaims in 1997. Nothing in the Court's conduct of the case and its subproceedings threatens the Landolts' property rights or violates the Constitution.

A. THE LANDOLTS OPPOSE SETTLEMENT NEGOTIATIONS BECAUSE THEY WISH TO LITIGATE.

Simply stated, the Landolts are opposed to a negotiated settlement of the claims that are at issue in the C-125-B, and presumably C-125-C, subproceedings. They have shown no interest in participating in the negotiated resolution of the outstanding claims in those matters, but seek to halt the mediation process altogether: "The mediation process has gone on far too long. . . . 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." Landolt Opposition at 14. Their opposition is aimed at lifting the current stay in order to allow them to challenge the use of water by the Tribe on the Walker River Indian Reservation. *See id.* at 11-13. However, the Court already has ruled that the litigation of the merits of the tribal claims may not proceed outside of the process and order set forth in the *Case Management Order*. That order provides that two significant hurdles must be surmounted prior to the adjudication of the claims at issue in the C-125-B matter: completion of service of the Tribe's and United States' First Amended Counterclaims; and resolution of certain identified and unidentified threshold issues. The Court has been very clear that adjudication of the merits of the claims at issue in the C-125-B subproceeding can only occur after completion of these first two steps, and challenging tribal use of water at this stage "is contrary to both the Case Management Order and the order governing mediation." *Transcript of Status Conference* at 18, No. C-125-B (Oct. 1, 2004) ("Transcript").

Significantly, the *Order Governing Mediation Process*, in accord with the *Case Management Order*, requires completion of service in both the C-125-B and C-125-C subproceedings even during the stay of the remainder of the two subproceedings. *See supra* Part

II. Even if the settlement negotiations were to cease, and the litigation were to resume, the *Case Management Order* requires completion of service prior to resolution of the threshold issues and prior to the adjudication of the outstanding claims. *Case Management Order* at 5. In the end, the Landolts would be in the precisely same situation that they are in now, and their challenge to the merits of the claims at issue in the C-125-B subproceeding could not occur at this time. *See* Transcript at 18, No. C-125-B (Oct. 1, 2004) ("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."). Stated another way, the Landolts have not shown -- except by sheer speculation -- that they are being injured by the mediation process.

Indeed, the Landolts have, at most, speculated that the mediation process will endanger their property rights under the Decree. The Tribe has shown in prior pleadings that speculation of injury is insufficient to satisfy the actual injury requirement for standing. *See Reply of the Walker River Paiute Tribe to Landolt Opposition to Motion to Stay or Dismiss* at 6-7; *accord* Transcript at 18 ("[T]hey 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."). Additionally, the Landolts now purport to represent the interests of other stakeholders under the Decree, claiming that "all other stakeholders . . . have been denied the right both to litigate their claims and to participate in the mediation." Landolt Opposition at 4. Like the failure to demonstrate any injury from alleged downstream practices, the Landolts have failed to demonstrate standing to represent the interests of others claiming rights under the Decree. In fact, the Landolts have no such standing, and the

Court should disregard their assertions purportedly on behalf of others claiming rights under the Decree.

Nothing in the *Case Management Order*, the *Mediation Process Agreement* (Jan. 14, 2003), or the *Order Governing Mediation Process*, precludes the administration of Decree. In fact, the Court has continued to hold its regular, annual hearing to consideration the plan of distribution for each year while the mediation process has been ongoing. To the extent the Landolts believe that they have not received their water rights, they can pursue that claim, but nowhere have they made such a claim.

B. THE CONTINUATION OF THE STAY DOES NOT VIOLATE THE LANDOLTS' CONSTITUTIONAL RIGHTS.

The Landolts and the Circle Bar N Ranch respondents complain that their exclusion from the mediation could result in the loss of their property rights. Landolt Opposition at 8 ("In the end, it is the stakeholders' property rights that are being discussed in the mediation process. . . . The Fifth Amendment prohibits the taking of property with out due process of law."); Circle Bar N Ranch Response at 4 (asserting that the Mediating Parties "intend [t]o resolve" issues that will bind the respondents without including the respondents in that process). The Landolts go on to presuppose the outcome of the settlement negotiations by complaining that they will be deprived of their property without representation and without due process of law. *See* Landolt Opposition at 4 (any settlement reached by the mediating parties will be "set in stone by agreement of the mediating parties."), and 8 (the mediating parties are engaged in "secret negotiations through which the stakeholders' interests will be decided, followed by perfunctory call for comment,

followed by a determination of what the stakeholders' interests are based on a report by the exclusive committee").

Such speculation flies in the face of this Court's careful conduct of these proceedings to ensure that all individuals and entities whose claims to water from the Walker River, its tributaries and to groundwater in the basin have notice and an opportunity to be heard. The dismissal of the opportunity to provide comment on any settlement agreement that the mediating parties reach demeans the judicial process that this Court has established to ensure that all parties will interests have notice and an opportunity to be heard on matters that may affect their property rights.[3]

Clearly, any negotiated settlement will not become effective until the Court issues an order implementing it. Given the Court's conduct of these proceedings to date, it is highly unlikely that this Court would issue such an implementing order without allowing every adjudicated right holder an opportunity to be heard on the subject. Moreover, any implementing order would have to be consistent with existing adjudicated rights in the Walker River Basin as set forth in the Decree as amended from time to time. The Court has made clear that it intends to protect the rights of all individuals and entities who could be affected by the claims in the C-125-B and C-125-C subproceedings. For example, in denying the motion of the United States and the Tribe to certify a defendant class for purposes of addressing the threshold issues identified in the

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[3]The Landolts' assertion that they have been deprived of information regarding the settlement negotiations is false. *See* Landolt Opposition at 7; *see also* Circle Bar N Ranch Response at 3. With the consent of the mediating parties, the Walker River Irrigation District has held a public meeting to inform its constituents of the proposals in the settlement negotiations, and the Landolts and the Circle Bar N Ranch respondents were represented at that meeting. *Walker River Irrigation District's Reply Points and Authorities in Support of Motion of Mediating Parties to Continue Stay of Litigation* at 5 (Feb. 18, 2005).

Case Management Order, the Court affirmed its regard for individual claims and responses to the Tribe's and United States' position: "We find it very persuasive that our case management order requires all of the parties to be served before determinations are made as to their water rights." *Order* at 20, No. C-125-B (Apr. 26, 2002). Notice and an opportunity to be heard, the twin requirements of the right to due process of law under the Fifth and Fourteenth Amendments to the Constitution, clearly are at the forefront of the Court's conduct of this case. There is nothing to suggest that the Court would act any differently in considering whether to enter an order implementing a settlement agreement reached by the mediating parties.

Nor has there been any denial of the Landolts' equal protection rights. Landolt Opposition at 10. They will have the same rights to challenge the claims of the Tribe, the United States and Mineral County when service is complete and when the Court lifts the stay currently in place under the *Case Management Order*, as to matters beyond service of process. *Id.* at 4.[4]

In short, continuation of the stay does not threaten or adversely affect any property rights under the Decree, nor does it violate the Landolts' constitutional rights.

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[4]It is worth noting that the Landolts have failed to set forth the test established by the United States Supreme Court for challenges to governmental actions alleged to violate constitutional rights. The test is well-settled: where no suspect classification is present, a plaintiff challenging a governmental action must show that the action does not have a rational basis related to a legitimate state interest. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Since governmental actions which do not attempt to make suspect classifications are presumed to be constitutional, the burden is on the Landolts to demonstrate that they have satisfied all elements of the test. *See id.* Clearly, they have not carried that burden, or even identified what it is.

IV. CONCLUSION

Nothing in the responsive pleadings filed by the Landolts and the Circle Bar N Ranch respondents countenances lifting the stay. In fact, the Circle Bar N Ranch respondents do not appear to oppose the current posture of the case. The mediating parties have determined to negotiate among themselves, and have determined that prior to seeking to implement any proposed settlement, the existing mediating parties constitute the appropriate entities to develop a proposal for the resolution of the outstanding issues on the Walker River. There is absolutely no basis for the Landolts' assumption that this Court will implement a proposed settlement without giving all affected parties the full opportunity to be heard on any aspect of the settlement that may injure their legitimate interests. To be sure, the landscape may change during the course of the settlement negotiations with the result that participation in the mediation may also need to be changed. That cannot be predicted at this time, and the speculation offered by those challenging the mediation process is not cause to lift the stay.

The Court should, then, continue the stay to allow the mediating parties to carry on their efforts to develop a proposal for a negotiated settlement.

Date: Feb. 18, 2005

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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing *Reply Brief in Support of Joint Motion of Mediating Parties to Continue Stay of Litigation in C-125-B and C-125-C Subproceedings* in the U.S. Mail, first-class postage paid , on this 18th day of February, 2005, addressed to:

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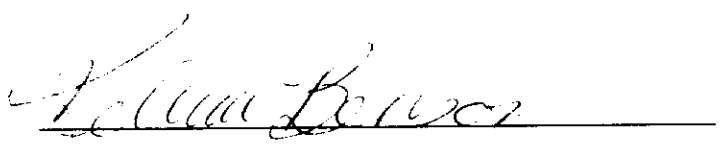
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