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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	CASE NO. 3:73-cv-128-RCJ-WGC IN EQUITY NO. c-125-RCJ-WGC SUBFILE NO. C-125-C **NEVADA DEPARTMENT OF WILDLIFE'S ANSWERING BRIEF TO MINERAL COUNTY'S OPENING BRIEF IN SUPPORT OF INTERVENTION**
MINERAL COUNTY, Proposed-Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Proposed Defendants.	

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Pursuant to the Court's Order, the Nevada Department of Wildlife (NDOW), through its counsel, Catherine Cortez Masto, Nevada Attorney General, and Chief Deputy Attorney General, Marta Adams, submits this Answering Brief in response to Mineral County's brief in support of intervention. As set forth below, NDOW does not object to Mineral County's permissive intervention in this case. NDOW does, however, take serious issue with Mineral County's arguments in support of its claims to intervention as of right. NDOW's position is based upon the papers and pleadings on file in this case, and such other and further argument, testimony, and evidence as the Court may require.

I.

INTRODUCTION

Mineral County's Motion for Intervention and Petition to Intervene present the Court with the difficult question of whether to allow the County to intervene in a water rights adjudication which has been final, as modified, since 1940. While NDOW agrees with Mineral County that Walker Lake is an important and gravely imperiled State resource which deserves protection, NDOW disagrees that Mineral County is uniquely equipped to provide that protection or that NDOW, as an agency of the State of Nevada, has failed to meet its public trust obligations—whatever those are determined to be—toward Walker Lake. Although the County generally asserts that the State of Nevada has not done enough for Walker Lake and is therefore in violation of its obligations under the public trust doctrine,[1] NDOW, the Nevada agency charged with administering the State's wildlife laws,[2] has undertaken considerable efforts on behalf of Walker Lake over the years and continues to do so. NDOW is the holder of water rights both in Walker River and Walker Lake, but has nothing whatsoever to do with administering the Walker River Decree or granting or denying water permits in the Walker River Basin.

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[1] To the extent Mineral County alleges "excessive upstream appropriation" as constituting the State's failure to meet its obligations under the public trust doctrine, it is the Decree Court itself that adjudicated and continues to administer Walker River water rights. *See,* Mineral County's Opening Brief at 4. It is the Nevada State Engineer, administrative head of the Division of Water Resources, and not NDOW, who considers change applications in Nevada under the Walker River Decree and who also administers Nevada's independent groundwater permit program under provisions of NRS Ch. 534.

[2] *See*, e.g., NRS 501.331.

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While it is clear that the public trust doctrine has been adopted by the Nevada Supreme Court, it is unclear what that doctrine means with respect to Walker Lake and whether and how it should be applied by this Court. *See, Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011). Mineral County asserts, nonspecifically, that "past government officials and the Decree Court itself" have failed to protect Walker Lake. *See, e.g.* Mineral County's Opening Brief at 4. The County blames the plight of Walker Lake on the State of Nevada and the Decree Court, but fails to bring into the equation the damaging actions caused by other parties to this litigation. For example, the United States, through the Department of the Interior Bureau of Indian Affairs, constructed and continues to operate Weber Dam for the benefit of tribal agriculture on the Reservation. Construction of Weber Dam is widely understood to have destroyed the ability of Walker Lake's Lahontan Cutthroat Trout to spawn naturally. Similarly, the Walker River Paiute Tribe has filed claims for recognition of Weber Dam and Reservoir in sub-part B of this case. By memorializing a storage right for Weber Reservoir in the Decree, there is the prospect of less water being allowed to flow into Walker Lake as a consequence of confirmed storage in Weber Reservoir. NDOW references these issues to illustrate for the Court the complications inherent in a too-simplistic analysis of the public trust doctrine and how it may be applied in this case. Regardless, and as argued below, responsibility under the public trust doctrine is borne by the State of Nevada and does not "entitle" one county to stand in the State's stead to assert the public trust doctrine.

NDOW, on behalf of the public, has expended considerable efforts to preserve a viable fishery at Walker Lake. Despite these efforts, the Lake is in a state of precipitous decline. This disturbing decline is attributed to a variety of factors, including "overconsumption, declining precipitation levels, and natural lake recession over time." *Mineral County v. Nevada Dep't of Conservation & Natural Res., 20 P. 3d 800, 803 (Nev. 2001).* As more fully discussed below, NDOW, through its predecessor agency the Nevada Department of Fish and Game, acquired a state-issued water right from the Nevada Division of Water Resources for flood waters from the Walker River specifically for wildlife-related uses in Walker Lake. Unfortunately, water

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under this right has only been available in flood years when upstream storage is at capacity. At this time, NDOW's flood right is not incorporated into the Walker River Decree.

Although NDOW disagrees with many of Mineral County's allegations, it recognizes that Mineral County brings an important perspective to this case. Nevada does not object to the County's permissive intervention. Moreover, as discussed below, Nevada is mindful that the Nevada Supreme Court deferred to the Decree Court as the appropriate forum for addressing Mineral County's public trust claims concerning Walker Lake. *Id.*

If the Court allows Mineral County to intervene, the Court will be faced with the daunting task of balancing the arguments advocated by Mineral County on behalf of Walker Lake against the interests of water rights owners who have benefitted from the stability and protection afforded by the Walker River Decree for decades. At the time the Decree was entered in 1936, wildlife and environmental values, including in-stream flows and maintenance of viable fisheries, were not addressed in the adjudication largely focused on the beneficial use of water for agriculture. Now, over 70 years later, Mineral County is relying on the public trust doctrine to assert a substantial water right for Walker Lake. As the basis for its proposed intervention, Mineral County argues that it is better suited to protect the interests of the Lake than either this Court or the State of Nevada. NDOW counters these arguments below. Here, Mineral County, as an intervenor, seeks to assert a water right for Walker Lake which would, if granted, reallocate the water rights throughout the entire Walker River system.

II.

PROCEDURAL BACKGROUND

This case, currently divided into the main docket and subfiles B and C, began in 1924 when the United States filed an original quiet title action in the United States District Court to establish a water right for the Walker River Paiute Tribe's Reservation. The District Court entered the Walker River Decree in the adjudication of the waters of the Walker River on April 14, 1936. The Decree was later amended on April 24, 1940. *See, United States v. Walker River Irrigation District,* 11 F. Supp. 158 (D. Nev. 1935); *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). Pursuant to the Decree, this Court retains jurisdiction for

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the limited purposes of changing the duty of water, correcting or modifying the decree, for regulatory purposes, including changes in place of use and for purposes of enforcing the decree. *Walker River Decree*, paragraphs XIV and XV; Addendum A-16 through A-19. The Walker River Decree is a final judgment. *Nevada v. U.S.*, 463 U.S. 110; 103 S.Ct. 2906 (1983).

In 1989, Bridgeport Reservoir on the Walker River was drained, causing tragic and widely-publicized fish kills. The California State Water Resources Control Board ("CSWRCB") issued orders which placed restrictions on the California water right licenses held by the Walker River Irrigation District (WRID) in which WRID was required to maintain minimum flows and minimum pools under certain conditions in its reservoirs. In 1991, in response to the orders issued by the CSWRCB, WRID filed suit in the Decree Court against the CSWRCB (identified as subfile C-125-A) and requested relief from the CSWRCB's Orders, alleging inconsistencies with the Final Decree which were argued to interfere with the jurisdiction of the Court over the waters of the Walker River and its tributaries. In the alternative, WRID requested that it be allowed to change its point of diversion to storage in Nevada, instead of California.

NDOW moved to intervene on the basis that the CSWRCB's Orders affected water rights held by NDOW for use at the Mason Valley Wildlife Management Area (MVWMA).[3] The Court granted intervention to NDOW and also to California Trout in mid-1992. Within the context of C-125-A, the Walker River Paiute Tribe ("Tribe") filed a counterclaim against all the water users on the river for a right to store water in Weber Reservoir and for a federal reserved right for water for restored reservation lands. The Tribe also filed a cross claim against the CSWRCB to protect and prevent interference with the Tribe's decreed water rights, the Tribe's alleged right to store water in Weber Reservoir and the Tribe's alleged reserved right to water for restored reservation lands.

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[3] Significantly, it was NDOW's ownership of decreed water rights appurtenant to the MVWMA that formed the basis for NDOW's intervention in this case. If Mineral County has issues with the Nevada State Engineer's administration of Nevada water law, both surface and ground, then the Nevada Division of Water Resources should be joined as a party.

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In mid-1992, the United States moved to intervene in C-125-B to align itself with the Tribe. In August 1992, the Tribe stipulated to Nevada's intervention. In July, 1997, the Tribe and the United States each filed expanded First Amended Counterclaims.

On October 25, 1994, Mineral County filed a motion to intervene in this litigation and the Court designated the County's claims to be addressed within Sub-part C-125-C. Notably, Mineral County's proposed intervention seeks reallocation of the waters of the Walker River rather than to support or oppose either the Tribe's or the United States' claims. In its prayer for relief, Mineral County asks that the Court reopen and modify the Decree, and (1) recognize the rights of Mineral County to minimum levels in Walker Lake, (2) order the State of Nevada to grant a certificate to Mineral County for the benefit of Walker Lake, and (3) recognize that minimum flows are necessary to maintain Walker Lake as a "beneficial use and in the public interest and required under the doctrine of maintenance of the public trust."

Before reaching the merits of its proposed intervention in this litigation, Mineral County, along with the Walker Lake Working Group, petitioned the Nevada Supreme Court for a writ of prohibition to prevent the State of Nevada Department of Conservation and Natural Resources (DCNR) from granting additional rights to withdraw surface water or groundwater from the Walker River system and a writ of mandamus alleging that the State of Nevada failed in its public trust obligations to insure adequate water flows into Walker Lake.[4] In denying Mineral County's petition for extraordinary relief, the Nevada Supreme Court observed that Mineral County's claims are pending in the Decree Court and that the Nevada high court lacked jurisdiction over two important parties who are participating in the Decree litigation, namely the Walker River Paiute Tribe (Tribe) and the United States. *Mineral County v. Nevada Dep't of Conservation & Natural Res.,* at 807. The Nevada Supreme Court concluded that "[t]he Decree Court, which has had continuing involvement in the monitoring of the Walker River for more than eighty years, is the proper forum for the redress that

[4] Certainly "a," if not "the," reason Mineral County filed this case against the DCNR is because the Nevada Division of Water Resources is within DCNR. Historically, NDOW and its predecessor agencies, have been independent cabinet level departments, although for a time, beginning in 1993, NDOW too was a division of DCNR.

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Petitioners seek. Moreover, because the Decree involves the allocation of interstate waters between California and Nevada, we believe that a consistent and controlling interpretation by a federal court of competent jurisdiction is more appropriate." *Id.*

III.

PERTINENT FACTUAL BACKGROUND

A. NDOW has historically tried to maintain a viable Walker Lake Fishery.

Walker Lake historically supported fish populations of native Lahontan tui chub (*Gila bicolor pectinifer* and *G. b. obesa*), Tahoe sucker (*Catostomus tahonensis*), Lahontan redside (*Richardsonius egregious*) and Lahontan speckled dace (*Rhinichthys osculus robustus*) as well as a thriving naturally reproducing population of large-size, endemic Lahontan Cutthroat Trout (LCT) (*Oncorhynchus clarki henshawi*). Alterations to the physical, chemical, and biological characteristics of both the river and lake, including the construction and operation of Weber Dam, led to the decline and eventual extirpation of Walker Lake's naturally reproducing LCT population in the early 20th Century. Additionally, Tahoe sucker, Lahontan redside, and Lahontan speckled dace have disappeared from Walker Lake due to its reduced volume and greatly increased total dissolved solids (TDS) levels. LCT annual in-lake spawning continued until 2005, but has since been precluded by high TDS levels. Although the tui chub population continues to persist and has been self-sustaining, tui chub spawning and recruitment ceased when TDS levels rose above 13,500 in 2003 through 2006 (NDOW Walker Lake Reports 2003–2006).

NDOW's efforts both to attempt to manage and maintain the sport fishery, and to recognize and call attention to the decline of the fishery and the need to address the causal factors for that decline, can be considered significant given the level of effort contributed by NDOW staff over the past 60 years to maintain a sport fishery in an inhospitable environment. NDOW has maintained a presence at the lake monitoring both the sport fishery and the ecosystem as a whole (non-game fishes, zooplankton and water quality), and attempting to find strategies and actions that could mitigate against increasingly harsh water chemistry and other impacts. NDOW's annual job progress reports from the early 1950s to the current day

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document those efforts, as well as the history of the lake's decline and its impact on the fishery.

NDOW's historic work on behalf of Walker Lake, through its precursor agencies, the Nevada Fish Commission and the Nevada Fish and Game Commission, began as early as 1909. During the period from 1909 through 1948, these entities were responsible for stocking several trout, salmon, and warm water sport fish species to enhance commercial and sport fisheries in Walker Lake and the Walker River. Although there are limited stocking records for this period, it is believed that LCT and to a more limited extent, rainbow trout, survived and were caught by anglers in Walker Lake. Regrettably for Walker Lake's LCT and other trout species, natural spawning and successful reproduction were precluded by the mid-1930's with the United States' construction of Weber Dam.

The following historical summary underscores NDOW's commitment to the Walker Lake fishery:

1917-1925: 475,000 LCT fry were provided to Mineral County for Walker Lake stocking.

1946-1947: 60,000 LCT provided to Mineral County for Walker Lake stocking.

1948: Reports indicate that commercial carp fishing success had declined to the point it was no longer profitable. Other records indicate that sport fishing success was also poor in the late 1940s. This was likely due to increasing TDS in the lake which had increased to ~5,000 parts per million (ppm).

Mid-1950's-1960's: NDOW biologists conducted periodic monitoring of the fishery as well as regular creel census to identify trends in angler success, catch and fishery composition and fish size/condition. During this period, NDOW biologists documented the gradual decline in average length of LCT in Walker Lake as a result of increasing concentrations of TDS. During this period NDOW implemented efforts to attempt development of an alternative fishery to maintain sport angling opportunities.

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1957-1965: During this period, LCT in the size class 23-29 inches decreased from 33.5% of harvest to 1.2% of harvest, and LCT in excess of 29 inches were absent from harvest by 1965.

1963: NDOW biologists determined that formerly abundant Sacramento perch could no longer reproduce in Walker Lake. By this year, TDS had increased to 8,440 ppm.

1961-1970: NDOW biologists conducted in-lake bioassays to find a fish that could survive in the high alkalinity of Walker Lake. In total, forty-nine different species of fresh water and brackish-water fish were tested. None of these species survived in Walker Lake water.

1970's: Although annual stocking of LCT continued through the 1970s, it was evident that survival of stocked fish was declining due to increased TDS levels in Walker Lake. Because of impacts to sport fishery quality and angler success, NDOW increased efforts to identify specific solutions to maintain the Walker Lake sport fishery.

1982-1983: Record inflow from the Walker River increased lake elevation 16.5 feet and TDS declined from 11,000 to 9,280 ppm.

1983: NDOW begins in-lake bioassays of LCT during the annual spring stocking to determine mortality rates of hatchery-reared LCT being stocked into Walker Lake. Mortality of untreated LCT held in live cages averaged 11.53%. Annual stocking of LCT continued although percentage mortality of stocked LCT continues to increase based on bioassays, because of decreasing lake levels and increasing TDS during an ongoing 7-year drought period through 1993.

1993: A letter written by NDOW to United States Senator Harry Reid helped to precipitate the formation of the Walker Lake Working Group; a citizens group dedicated to protecting Walker Lake after NDOW biologist Mike Sevon documented the deterioration of the lake at the end of the drought in the early 1990's. NDOW worked closely with the Walker Lake Working Group in an advisory capacity and provided it technical advice.

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1994: With TDS levels in Walker Lake reaching 13,500 ppm after 7 years of drought, bioassay mortality of untreated LCT increased to 93.3%. NDOW initiated experimental efforts to pre-acclimate LCT before stocking using lake water. Pre-acclimation appeared to decrease average LCT mortality to 35.7%.

1995: Based on bioassay results, all LCT stocked beginning in 1995 were acclimated in a mix of fresh water and water from Pyramid or Walker Lake prior to stocking in order to improve survival rates.

1995-1999: Several good water years occurred during this period which resulted in an increase of lake levels but TDS which had declined to below 9,000 ppm increased again to over 11,000 ppm by 1999. Regardless, the combination of stocking acclimated LCT to increase survival and a brief period of relatively low TDS levels resulted in trophy-size trout available to anglers for several years through 1999.

2000: This is the last year that tui chub young of the year were common along the western shoreline of the lake. NDOW biologists increased investigations into the status of the tui chub populations in the lake. Annual tui chub research continues through 2012.

2003-2005: The Walker Lake Biology Team was formed to address technical questions raised in an unsuccessful mediated settlement effort.

2005: Based on in-lake bioassays, very few LCT survived stocking even after acclimation procedures. In-lake stocking of LCT by NDOW and the U.S. Fish and Wildlife Service (USFWS) was abandoned.

2005: Desert Terminal Lakes Program funding was appropriated by Congress (*see* description of program below).

2006: LCT were stocked into the Walker River immediately above the lake in an effort to allow fish to self-acclimate to the high TDS levels. Future annual stocking efforts will follow this same protocol.

2007: NDOW entered into a cooperative agreement with USFWS to implement the Walker Lake Fishery Improvement Plan through the Desert Terminal Lakes Program.

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2008: NDOW received approval to expand on the work being conducted on tui chub under the Fishery Improvement Plan. NDOW increased efforts to document evidence of tui chub recruitment. Additionally, NDOW biologists pursued opportunities to establish a refuge population of tui chub in the event the resident Walker Lake population was lost.

2009: LCT annual stocking did not occur due to lack of flow in the Walker River. Rose Creek Reservoir, on the Hawthorne Ammunition Depot, was established as a tui chub refuge.

2010: This is the first year that no LCT were documented from Walker Lake by NDOW biologists or reported by anglers. Lake elevation at the end of 2010 was 3924 feet above MSL and the TDS level was 19,199 ppm by November 2010.

2011-2012: NDOW management and monitoring efforts continue in cooperation with the Walker Lake Fisheries Improvement Team partners. Most recent monitoring has determined that tui chub catch rates have declined approximately 90% as Lake TDS levels have increased from 15,000 ppm to near 20,000 ppm. Observations of tui chub lack of recruitment, physiological stress and mortality, and companion research by the University of California Sierra Nevada Aquatic Research Laboratory on invertebrate species, suggest that TDS levels of around 20,000 ppm may represent both the maximum tolerance for adult tui chub and also for key invertebrate species essential for survival of tui chub and other fishes.

B. NDOW has worked to increase water flows into Walker Lake.

NDOW's recognition of Walker Lake's deteriorating condition dates back to at least the mid-1950s. From the 1950's to the 1970's, efforts were made to identify alternative species which could survive and even thrive in Walker Lake despite increasing TDS levels. These attempts to maintain the sport fishery by finding alternative species to LCT were largely unsuccessful. Management, monitoring and research have been and continue to be conducted on an annual basis by NDOW biologists. Bioassay assessments of annually stocked LCT were initiated in 1983 to identify parameters that could optimize survival of

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stocked fish to maintain the sport fishery. Protocols were developed for pre-acclimation of stocked fish by 1994 which substantially increased stocked fish survival, and enhanced fishery conditions and angler success until increasing TDS levels reduced survival of even acclimated trout.

On September 17, 1970, NDOW's predecessor, the Nevada Department of Fish and Game, applied to the Nevada State Engineer for a flood water right for the Walker Lake fishery in recognition of the need for additional flows below Weber Reservoir to support a more stable lake level in Walker Lake and a healthier Walker Lake fishery for the public's benefit. Application 25792 was filed to appropriate up to 8000 cubic feet per second (cfs) of all "unappropriated flood waters" in the "East Walker, West Walker Rivers, Walker River and tributaries" for fish, game, and recreation. In April, 1972, the Nevada Department of Fish and Game received a certificated Walker River water right, Nevada Certificate 10860. Certificate 10860 authorizes up to 575,870 acre feet of water per year for use in the Walker Lake fishery. Unfortunately, the late September 1970 priority date does little to secure water for Walker Lake in most years since decreed water rights and any other senior rights must be satisfied before NDOW's flood water right can be satisfied. Certificate 10860 nevertheless offers some protection for Walker Lake for those river flows below Weber Reservoir which would otherwise be available for appropriation by later applicants seeking to appropriate water for other, non-wildlife related uses. Actual water has only been available under NDOW's flood water right in those years when flood conditions are present in the system and all other demands on the system have been met. Essentially, Certificate 10860 can be served only when other demands are met and reservoir storage is physically or legally unavailable.[5]

Because it is understood that Certificate 10860 is insufficient to ensure a water supply for Walker Lake, NDOW has also pursued other strategies to benefit Walker Lake. In 2003, NDOW entered into an agreement with the United States Bureau of Reclamation (BOR) to construct various water conservation projects on NDOW's Mason Valley Wildlife Management

[5] Sub-file B includes the Walker River Paiute Tribe's claim to a storage right in Weber Reservoir. This claim has serious implications for Walker Lake, particularly in non-flood years.

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Area (MVWMA). Under the terms of the agreement, BOR provided funding through the Desert Terminal Lakes program (see program description below) for the construction of water conservation projects at the MVWMA in exchange for NDOW's agreement to deliver a quantity of water to Walker Lake during the 2004 irrigation season. When NDOW applied to the State Engineer to temporarily change the place of use of MVWMA water to Walker Lake, protests were lodged objecting to the proposed change. NDOW was able to resolve the protests by entering into a stipulated agreement that allowed NDOW to transfer 55 percent of its MVWMA water to Walker Lake while the remaining 45 percent was retained in the various supply ditches so as to avoid causing harm to neighboring farmers. The end result of this effort was that approximately 4,900 acre feet of NDOW-owned water was allowed to flow into Walker River for use at Walker Lake during that water season.

This infusion of water into Walker River for use in Walker Lake was made possible by NDOW's agreement to temporarily forego use of water that would normally be used to maintain wetlands and other wildlife habitat at the MVWMA. In addition, pursuant to its agreement with BOR, NDOW agreed to make a good faith effort to deliver additional water to Walker Lake in future years made possible by the water savings achieved through the BOR-funded conservation projects at the MVWMA. The water conservation projects have been completed. NDOW is currently consulting with the Nevada Division of Environmental Protection (NDEP) to determine how the MVWMA water, which may not meet established water quality standards for discharge into the Walker River, can legally be introduced into the river for use in Walker Lake. Once NDEP issues NDOW a discharge permit, NDOW will file a change application with the State Engineer to authorize delivery of the water for use in Walker Lake. Assuming the changes are approved by the State Engineer, this Court will be asked to approve the changes pursuant to the administrative provisions of the Decree.

Finally, NDOW is involved with very preliminary discussions with the National Fish and Wildlife Foundation (NFWF) to identify possible additional water conservation strategies that may further reduce water consumption at the MVWMA.

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C. NDOW is a partner in efforts to improve Walker Lake through the Desert Terminal Lakes funds which are intended to benefit Walker Lake.

Congress, at the urging of Senator Harry Reid, appropriated money for the Desert Terminal Lakes Program in November 2005. *See,* H. R. 2419 (Energy and Water Development Appropriations Act of 2006). Section 208 of H.R. 2419 created a program to fund the acquisition of water rights from willing sellers in the Walker River Basin with the intention that purchased rights would be changed for the benefit of Walker Lake. In order to promote an ecologically and economically sustainable program of water acquisitions, a large-scale integrated research program was called for in the legislation. The goal of the Walker Basin Project is to provide the hydrologic, ecologic, economic, and agricultural data needed to inform decisions related to water acquisitions.

In addition to funding a water purchase program, the Desert Terminal Lakes Program funds the Walker Lake Fishery Improvement Program. This program enabled the creation of a collaborative partnership among NDOW, the Walker River Paiute Tribe, and U.S. Fish and Wildlife Service intended to design and implement fishery improvements in Nevada with an emphasis on the Walker River Basin. The Walker Lake Fishery Improvement Team has developed and is implementing the Walker Lake Fishery Improvement Plan which is directed toward improving the survivability of LCT, and refining strategies for establishing a self-sustaining LCT population. Funding through the Desert Terminal Lakes Program enabled NDOW to hire and fund a full-time fisheries biologist specifically dedicated to Walker Lake.

IV.

ARGUMENT

A. Rule 24(a) Intervention as of Right.

Intervention as of right requires that the applicant claim an interest the protection of which may as a practical matter be impaired or impeded if the lawsuit proceeds without the applicant unless the applicant's interest is adequately represented by existing parties. *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1480 (9th Cir. 1993). Mineral County alleges that it, rather than NDOW, is the appropriate entity to advocate on the Lake's behalf. This argument is belied by NDOW's

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demonstrated concern for Walker Lake which is evident in its historic endeavors to enhance the lake's water supply and to maintain a viable fishery. Although Mineral County argues that its interests in Walker Lake are not adequately represented, NDOW has demonstrated a 100 plus year commitment toward Walker Lake.

Federal Rule of Civil Procedure 24(a) requires a four-part analysis to determine whether an applicant is allowed intervention as of right. Under Rule 24, (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action. *Id.*

Mineral County argues that each relevant subsection of the Rule 24(a) criteria applies to it and intervention should be granted. Although the right to intervene has been more liberally granted in recent years, the rules governing intervention balance two competing underlying policies: (1) the interest of the legal system in insuring adequate representation to those who are not parties to an action but who have interests that may be affected by its outcomes; and (2) the interests of the initial parties, who bear the primary expenses of the litigation, in the prompt disposition of their claims and defenses. J. Friedenthal, M. Kane, A. Miller, *CIVIL PROCEDURE,* § 610 (1985). These policies must be evaluated and balanced in light of the circumstances of each case. *Id.*

1. Mineral County's Motion to Intervene may not be timely.

Mineral County's claim to a substantial portion of the average flow of water in the Walker River stream systems ideally should have been made while the Walker River was being adjudicated in the 1920's and 1930's. Of course, wildlife values were not recognized "beneficial uses" of water at the time the Decree was entered.[6] Now, Mineral County is seeking reallocation of the Walker River to re-establish a viable fishery and ecosystem in Walker Lake. NDOW does not intend to argue whether Mineral County's claim will be impaired or impeded by disposition of

[6] The Nevada water statutes were amended in 1989 recognizing "wildlife purposes." NRS 533.023.

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the Tribe's and the federal claims in Sub-file B or the timeliness of Mineral County's motion to intervene. It is worth noting, however, that in addition to the failure of the County to intervene during the adjudication culminating in the 1936 Walker River Decree, 18 years have elapsed since Mineral County's claims were first lodged with the Court. While various attempts at settlement have been undertaken over the years which may, in part, explain the County's delay in accomplishing service, Mineral County's service efforts have been undeniably protracted.

2. Questions persist as to Mineral County's claims to a "significantly protectable" interest relating to the subject matter of this lawsuit.

A water rights adjudication is analogous to "a quiet title action in equity for the purposes of settling all claims to the waters of the watercourse that is the subject of the adjudication. (*United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1308 (9th Cir. 1981), *United States v. Alpine Land and Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983)." *Amended Memorandum of Points and Authorities in Support of Mineral County's Amended Complaint In Intervention*, p. 15. An adjudication of water rights "enables the court...to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply." 3 C. Kinney, *LAW OF IRRIGATION AND WATER RIGHTS* § 1535, p. 2764 (2d ed. 1912).

It belies the obvious to state that the very purpose of an adjudication is to permanently settle competing claims to water in a single proceeding. This purpose is undermined by allowing a claim as large as the one being asserted by Mineral County to be made *after* the water rights of the Walker River have been adjudicated. In a similar case commenced in 1973, the United States brought a new action on behalf of the Pyramid Lake Paiute Tribe seeking additional water rights for fish preservation. The defendants asserted res judicata as an affirmative defense, arguing that the United States and the Tribe were precluded by the Orr Ditch Decree from litigating the asserted claim. *Nevada v. U.S.,* 463 U.S. 110; 103 S.Ct. 2906 (1983). The Supreme Court ultimately relied on the doctrine of res judicata and rejected the Pyramid Lake

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Tribe's claim. In finding that the United States and the Pyramid Lake Tribe were prevented from relitigating the Tribe's claim for water, the Supreme Court announced that:

> [t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. (Citations omitted.) "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open."
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> * * *
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> A quiet title action for the adjudication of water rights...is distinctively equipped to serve these policies because "it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply."

Id. at 2918 n.10.

The United States Supreme Court recognized that the strict adversity requirements of res judicata do not necessarily fit the realities of water adjudications, and that stability in water rights requires that all parties are bound in all combinations. The *U.S. v. Nevada* Court further held that in water adjudication cases, an exception to the res judicata mutuality requirement is necessary, and that appropriators of water subsequent to the judicial decree adjudicating the waters could use the final decree against the original plaintiffs to bind them to the terms of the decree. *Id.* at 2922–2925.

If subsequent appropriators can enforce a final decree adjudicating the waters of a stream system, other entities may be similarly bound by the rights determined in the decree. In other words, Mineral County's ability to assert its claims should be appropriately balanced against the rights of those whose water rights were subject to the adjudication which ended in 1936. As the U.S. Supreme Court observed:

> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . [W]here courts vacillate and overrule their own decisions...affecting title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

Nevada v. U.S., 463 U.S. at 2918, n. 10.

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In addition to asserting a new, significant water right for Walker Lake, Mineral County argues that it is "entitled to intervene" based on Mineral County's interest in NDOW's flood water right (Certificate 10860). *See,* Mineral County's Opening Brief at 15. There is no doubt that NDOW holds Certificate 10860 for the benefit of the Walker Lake fishery and the citizens of Nevada, including those who live in Mineral County. This public aspect of NDOW's water right does not, however, translate into a rightful claim by the County to an ownership interest in NDOW's certificated water right.[7] Contrary to Mineral County's assertions, NDOW, on behalf of the State of Nevada, has repeatedly demonstrated the will to advocate for the public's interests in Walker Lake. Regardless of whether Mineral County may have standing to assert its claims, there is no question that NDOW has and continues to serve the public's interests in Walker Lake. The County's assertion that it can better represent the public than NDOW simply has no merit.

B. Any Duty under the Public Trust Doctrine belongs to the State of Nevada and Mineral County is not "entitled" to intervene to assert the doctrine.

Mineral County argues that it, rather than the State of Nevada, is entitled to intervene by virtue of the public trust doctrine. This argument is also without merit. Sovereign lands are held by the State. Smaller political subdivisions are not capable of exercising the duties of the trustee due to their limited legal and geographical power. *See, First Nat. Bank v. Nye County*, 38 Nev. 123, 145 P. 932, 936 (1914) (counties have limited jurisdiction and may only exercise such powers as are granted by statute or necessarily implied from the statutes). Mineral County can certainly speak for itself and its citizens and it can reasonably assert economic and other interests which have been harmed by the deterioration of Walker Lake. However, Mineral County cannot speak for all Nevadans and cannot conceivably perform a public trust duty on behalf of citizens of other counties within Nevada.

In the *Lawrence* case, the Nevada Supreme Court considered whether state-owned land that was once submerged under a waterway could be transferred to Clark County. The

[7] Interestingly, Mineral County previously, but unsuccessfully, attempted to acquire NDOW's state-issued water right. During the 1981 session of the Nevada Legislature, Assembly Bill (AB) 634 was introduced which would have ordered the State Engineer to transfer to Mineral County the water right held by NDOW. The bill was referred to the Committee on Economic Development and Natural Resources where it died. *See*, Exhibit "1" attached hereto and incorporated by this reference.

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question raised was whether the public trust doctrine prohibits such a transfer. Generally, under the public trust doctrine, a state holds the banks and beds of navigable waterways in trust for the public and subject to restraints on alienability. *Lawrence v. Clark County,* 254 P.3d 606 (Nev. 2011). Clark County argued that the legislation directing the transfer is not within the scope of the public trust doctrine because the transfer would be to Clark County and not to a private entity. The Nevada Supreme Court rejected this argument:

> If we were to accept the County's argument, the state could easily use a government subdivision as a conduit to circumvent its trustee duties. *See* 65 C.J.S. *Navigable Waters* § 131 (2010) (explaining that although the state may generally grant public trust land to municipalities, such transfers must be made for a purpose that is consistent with the public trust doctrine); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L.Rev. 471, 490 (1970) ("When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties."). We therefore conclude that legislation conveying public trust property from the state to a government subdivision is within the ambit of the public trust doctrine and must be analyzed to determine whether such a conveyance results in a violation of the public trust.

Id. at 617, FN 5.

Indisputably, Mineral County cannot speak for the entire State and the State would be remiss to allow it, particularly where, as here, Lyon County is also a party in the litigation and offers a much different perspective on behalf of its public. The public trust doctrine protects the interests of all citizens of Nevada. In order to ensure that all citizens are equally protected, the State, as the higher sovereign, must remain the ultimate trustee. The U.S. Supreme Court recognized this principle in the seminal case *Illinois Central* as well, where it explained:

> [S]uch powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.

Illinois Central R.R. Co. v. State of Illinois, 146 U.S. at 453-54.

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In essence, the public trust doctrine provides that the bed and banks of a state's navigable waterways are held in trust by the state for the benefit of the people and that state officials are subject to the public trust doctrine in some capacity. *Lawrence v. Clark County*, *Id.* at 610, citing Judge Rose's concurring opinion in *Mineral County v. Nevada Dep't. of Conservation & Natural Res.,* 117 Nev. at 246. In *Lawrence,* the Nevada Supreme Court referenced Judge Rose's public trust analysis in which he found a basis for the public trust doctrine in the express language of NRS 533.025 in the Nevada water code. NRS 533.025 provides that "water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public."

In advancing the argument that the public trust doctrine is an integral aspect of Nevada's legal landscape, Judge Rose emphasized:

> This court has itself recognized that this public ownership of water is the "most fundamental tenet of Nevada water law." Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times "forms the outer boundaries of permissible government action with respect to public trust resources." In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

Id.

While the application of the public trust doctrine to this case remains an open question, it is clear that any duty derived under the public trust doctrine is the State of Nevada's and not any one of the Nevada's seventeen counties. Mineral County is not "entitled" to intervene based on the public trust doctrine.

C. NDOW does not object to Mineral County's Permissive Intervention.

Mineral County argues, in the alternative, that it meets the requirements for permissive intervention under Federal Rule Civil Procedure 24(b)(1)(B). NDOW does not object to Mineral County's permissive intervention.

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CONCLUSION

As set forth above, NDOW disputes Mineral County's arguments in support of its claims to intervention as of right and respectfully requests that the Court find that Mineral County fails to meet the requirements of Fed. R. Civ. P. 24(a). Based on the foregoing, NDOW does not object to Mineral County's permissive intervention in this case under provisions of Fed. R. Civ. P. 24(b).

Submitted this 13th day of December, 2012.

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CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada, Office of the Attorney General and on this 13th day of December 2012, I electronically filed the foregoing **NEVADA DEPARTMENT OF WILDLIFE'S ANSWERING BRIEF TO MINERAL COUNTY'S BRIEF IN SUPPORT OF INTERVENTION** with the Clerk of the U.S. District Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case; and I further certify that I served a copy of the foregoing on the following non-CM/ECF participants by U.S. Mail, postage prepaid, this 13th day of December 2012:

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LIST OF EXHIBITS

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1.	Assembly Bill No. 634, May 7, 1981	18