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

9 I.

10 **INTRODUCTION**

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

24
25 _____
26 ¹ To the extent Mineral County alleges "excessive upstream appropriation" as constituting the State's
27 failure to meet its obligations under the public trust doctrine, it is the Decree Court itself that adjudicated and
28 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.

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

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

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

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

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

20 II.

21 **PROCEDURAL BACKGROUND**

22 This case, currently divided into the main docket and subfiles B and C, began in 1924
23 when the United States filed an original quiet title action in the United States District Court to
24 establish a water right for the Walker River Paiute Tribe's Reservation. The District Court
25 entered the Walker River Decree in the adjudication of the waters of the Walker River on April
26 14, 1936. The Decree was later amended on April 24, 1940. *See, United States v. Walker River*
27 *Irrigation District*, 11 F. Supp. 158 (D. Nev. 1935); *United States v. Walker River Irrigation*
28 *District*, 104 F.2d 334 (9th Cir. 1939). Pursuant to the Decree, this Court retains jurisdiction for

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

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

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

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26
27 ³ Significantly, it was NDOW's ownership of decreed water rights appurtenant to the MVWMA that
28 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.

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

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

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

26
27 ⁴ Certainly "a," if not "the," reason Mineral County filed this case against the DCNR is because the
28 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.

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

4 III.

5 **PERTINENT FACTUAL BACKGROUND**

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

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

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

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

3 NDOW's historic work on behalf of Walker Lake, through its precursor agencies, the
4 Nevada Fish Commission and the Nevada Fish and Game Commission, began as early as
5 1909. During the period from 1909 through 1948, these entities were responsible for stocking
6 several trout, salmon, and warm water sport fish species to enhance commercial and sport
7 fisheries in Walker Lake and the Walker River. Although there are limited stocking records for
8 this period, it is believed that LCT and to a more limited extent, rainbow trout, survived and
9 were caught by anglers in Walker Lake. Regrettably for Walker Lake's LCT and other trout
10 species, natural spawning and successful reproduction were precluded by the mid-1930's with
11 the United States' construction of Weber Dam.

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

14 **1917-1925:** 475,000 LCT fry were provided to Mineral County for Walker Lake
15 stocking.

16 **1946-1947:** 60,000 LCT provided to Mineral County for Walker Lake stocking.

17 **1948:** Reports indicate that commercial carp fishing success had declined to the point
18 it was no longer profitable. Other records indicate that sport fishing success was also
19 poor in the late 1940s. This was likely due to increasing TDS in the lake which had
20 increased to ~5,000 parts per million (ppm).

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

27 ///

28 ///

1 **1957-1965:** During this period, LCT in the size class 23-29 inches decreased from
2 33.5% of harvest to 1.2% of harvest, and LCT in excess of 29 inches were absent from
3 harvest by 1965.

4 **1963:** NDOW biologists determined that formerly abundant Sacramento perch could no
5 longer reproduce in Walker Lake. By this year, TDS had increased to 8,440 ppm.

6 **1961-1970:** NDOW biologists conducted in-lake bioassays to find a fish that could
7 survive in the high alkalinity of Walker Lake. In total, forty-nine different species of
8 fresh water and brackish-water fish were tested. None of these species survived in
9 Walker Lake water.

10 **1970's:** Although annual stocking of LCT continued through the 1970s, it was evident
11 that survival of stocked fish was declining due to increased TDS levels in Walker Lake.
12 Because of impacts to sport fishery quality and angler success, NDOW increased
13 efforts to identify specific solutions to maintain the Walker Lake sport fishery.

14 **1982-1983:** Record inflow from the Walker River increased lake elevation 16.5 feet and
15 TDS declined from 11,000 to 9,280 ppm.

16 **1983:** NDOW begins in-lake bioassays of LCT during the annual spring stocking to
17 determine mortality rates of hatchery-reared LCT being stocked into Walker Lake.
18 Mortality of untreated LCT held in live cages averaged 11.53%. Annual stocking of
19 LCT continued although percentage mortality of stocked LCT continues to increase
20 based on bioassays, because of decreasing lake levels and increasing TDS during an
21 ongoing 7-year drought period through 1993.

22 **1993:** A letter written by NDOW to United States Senator Harry Reid helped to
23 precipitate the formation of the Walker Lake Working Group; a citizens group dedicated
24 to protecting Walker Lake after NDOW biologist Mike Sevon documented the
25 deterioration of the lake at the end of the drought in the early 1990's. NDOW worked
26 closely with the Walker Lake Working Group in an advisory capacity and provided it
27 technical advice.

28 ///

1 **1994:** With TDS levels in Walker Lake reaching 13,500 ppm after 7 years of drought,
2 bioassay mortality of untreated LCT increased to 93.3%. NDOW initiated experimental
3 efforts to pre-acclimate LCT before stocking using lake water. Pre-acclimation
4 appeared to decrease average LCT mortality to 35.7%.

5 **1995:** Based on bioassay results, all LCT stocked beginning in 1995 were acclimated
6 in a mix of fresh water and water from Pyramid or Walker Lake prior to stocking in order
7 to improve survival rates.

8 **1995-1999:** Several good water years occurred during this period which resulted in an
9 increase of lake levels but TDS which had declined to below 9,000 ppm increased
10 again to over 11,000 ppm by 1999. Regardless, the combination of stocking acclimated
11 LCT to increase survival and a brief period of relatively low TDS levels resulted in
12 trophy-size trout available to anglers for several years through 1999.

13 **2000:** This is the last year that tui chub young of the year were common along the
14 western shoreline of the lake. NDOW biologists increased investigations into the status
15 of the tui chub populations in the lake. Annual tui chub research continues through
16 2012.

17 **2003-2005:** The Walker Lake Biology Team was formed to address technical
18 questions raised in an unsuccessful mediated settlement effort.

19 **2005:** Based on in-lake bioassays, very few LCT survived stocking even after
20 acclimation procedures. In-lake stocking of LCT by NDOW and the U.S. Fish and
21 Wildlife Service (USFWS) was abandoned.

22 **2005:** Desert Terminal Lakes Program funding was appropriated by Congress (see
23 description of program below).

24 **2006:** LCT were stocked into the Walker River immediately above the lake in an effort
25 to allow fish to self-acclimate to the high TDS levels. Future annual stocking efforts will
26 follow this same protocol.

27 **2007:** NDOW entered into a cooperative agreement with USFWS to implement the
28 Walker Lake Fishery Improvement Plan through the Desert Terminal Lakes Program.

1 **2008:** NDOW received approval to expand on the work being conducted on tui chub
2 under the Fishery Improvement Plan. NDOW increased efforts to document evidence
3 of tui chub recruitment. Additionally, NDOW biologists pursued opportunities to
4 establish a refuge population of tui chub in the event the resident Walker Lake
5 population was lost.

6 **2009:** LCT annual stocking did not occur due to lack of flow in the Walker River. Rose
7 Creek Reservoir, on the Hawthorne Ammunition Depot, was established as a tui chub
8 refuge.

9 **2010:** This is the first year that no LCT were documented from Walker Lake by NDOW
10 biologists or reported by anglers. Lake elevation at the end of 2010 was 3924 feet
11 above MSL and the TDS level was 19,199 ppm by November 2010.

12 **2011-2012:** NDOW management and monitoring efforts continue in cooperation with
13 the Walker Lake Fisheries Improvement Team partners. Most recent monitoring has
14 determined that tui chub catch rates have declined approximately 90% as Lake TDS
15 levels have increased from 15,000 ppm to near 20,000 ppm. Observations of tui chub
16 lack of recruitment, physiological stress and mortality, and companion research by the
17 University of California Sierra Nevada Aquatic Research Laboratory on invertebrate
18 species, suggest that TDS levels of around 20,000 ppm may represent both the
19 maximum tolerance for adult tui chub and also for key invertebrate species essential for
20 survival of tui chub and other fishes.

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

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

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

5 On September 17, 1970, NDOW's predecessor, the Nevada Department of Fish and
6 Game, applied to the Nevada State Engineer for a flood water right for the Walker Lake
7 fishery in recognition of the need for additional flows below Weber Reservoir to support a
8 more stable lake level in Walker Lake and a healthier Walker Lake fishery for the public's
9 benefit. Application 25792 was filed to appropriate up to 8000 cubic feet per second (cfs) of
10 all "unappropriated flood waters" in the "East Walker, West Walker Rivers, Walker River and
11 tributaries" for fish, game, and recreation. In April, 1972, the Nevada Department of Fish and
12 Game received a certificated Walker River water right, Nevada Certificate 10860. Certificate
13 10860 authorizes up to 575,870 acre feet of water per year for use in the Walker Lake fishery.
14 Unfortunately, the late September 1970 priority date does little to secure water for Walker
15 Lake in most years since decreed water rights and any other senior rights must be satisfied
16 before NDOW's flood water right can be satisfied. Certificate 10860 nevertheless offers some
17 protection for Walker Lake for those river flows below Weber Reservoir which would otherwise
18 be available for appropriation by later applicants seeking to appropriate water for other,
19 non-wildlife related uses. Actual water has only been available under NDOW's flood water
20 right in those years when flood conditions are present in the system and all other demands on
21 the system have been met. Essentially, Certificate 10860 can be served only when other
22 demands are met and reservoir storage is physically or legally unavailable.⁵

23 Because it is understood that Certificate 10860 is insufficient to ensure a water supply
24 for Walker Lake, NDOW has also pursued other strategies to benefit Walker Lake. In 2003,
25 NDOW entered into an agreement with the United States Bureau of Reclamation (BOR) to
26 construct various water conservation projects on NDOW's Mason Valley Wildlife Management
27

28 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.

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

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

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

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

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

12 Mineral County argues that each relevant subsection of the Rule 24(a) criteria applies to it
13 and intervention should be granted. Although the right to intervene has been more liberally
14 granted in recent years, the rules governing intervention balance two competing underlying
15 policies: (1) the interest of the legal system in insuring adequate representation to those who are
16 not parties to an action but who have interests that may be affected by its outcomes; and (2) the
17 interests of the initial parties, who bear the primary expenses of the litigation, in the prompt
18 disposition of their claims and defenses. J. Friedenthal, M. Kane, A. Miller, *CIVIL PROCEDURE*,
19 § 610 (1985). These policies must be evaluated and balanced in light of the circumstances of
20 each case. *Id.*

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

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

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

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

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

9 A water rights adjudication is analogous to "a quiet title action in equity for the purposes of
10 settling all claims to the waters of the watercourse that is the subject of the adjudication. (*United*
11 *States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1308 (9th Cir. 1981), *United States v.*
12 *Alpine Land and Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983)." *Amended Memorandum of Points*
13 *and Authorities in Support of Mineral County's Amended Complaint In Intervention*, p. 15. An
14 adjudication of water rights "enables the court...to acquire jurisdiction of all the rights involved
15 and also of all the owners of those rights, and thus settle and permanently adjudicate in a single
16 proceeding all the rights, or claims to rights, of all the claimants to the water taken from a
17 common source of supply." 3 C. Kinney, *LAW OF IRRIGATION AND WATER RIGHTS* § 1535, p. 2764
18 (2d ed. 1912).

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

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

3 [t]he policies advanced by the doctrine of res judicata perhaps are at
4 their zenith in cases concerning real property, land and water.
5 (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."

6 * * *

7 A quiet title action for the adjudication of water rights...is distinctively
8 equipped to serve these policies because "it enables the court of
equity to acquire jurisdiction of all the rights involved and also of all
9 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."

10 *Id.* at 2918 n.10.

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

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

22 As the U.S. Supreme Court observed:

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

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

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

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

14 Mineral County argues that it, rather than the State of Nevada, is entitled to intervene
15 by virtue of the public trust doctrine. This argument is also without merit. Sovereign lands are
16 held by the State. Smaller political subdivisions are not capable of exercising the duties of the
17 trustee due to their limited legal and geographical power. See, *First Nat. Bank v. Nye County*,
18 38 Nev. 123, 145 P. 932, 936 (1914) (counties have limited jurisdiction and may only exercise
19 such powers as are granted by statute or necessarily implied from the statutes). Mineral
20 County can certainly speak for itself and its citizens and it can reasonably assert economic
21 and other interests which have been harmed by the deterioration of Walker Lake. However,
22 Mineral County cannot speak for all Nevadans and cannot conceivably perform a public trust
23 duty on behalf of citizens of other counties within Nevada.

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

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27 ⁷ Interestingly, Mineral County previously, but unsuccessfully, attempted to acquire NDOW's state-issued
28 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.

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

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

24 *Id.* at 617, FN 5.

25 Indisputably, Mineral County cannot speak for the entire State and the State would be
26 remiss to allow it, particularly where, as here, Lyon County is also a party in the litigation and
27 offers a much different perspective on behalf of its public. The public trust doctrine protects
28 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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1 In essence, the public trust doctrine provides that the bed and banks of a state's
2 navigable waterways are held in trust by the state for the benefit of the people and that state
3 officials are subject to the public trust doctrine in some capacity. *Lawrence v. Clark County*,
4 *Id.* at 610, citing Judge Rose's concurring opinion in *Mineral County v. Nevada Dep't. of*
5 *Conservation & Natural Res.*, 117 Nev. at 246. In *Lawrence*, the Nevada Supreme Court
6 referenced Judge Rose's public trust analysis in which he found a basis for the public trust
7 doctrine in the express language of NRS 533.025 in the Nevada water code. NRS 533.025
8 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."

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

11 This court has itself recognized that this public ownership of water
12 is the "most fundamental tenet of Nevada water law." Additionally,
13 we have noted that those holding vested water rights do not own or
14 acquire title to water, but merely enjoy a right to the beneficial use
15 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.

16 *Id.*

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

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

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

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V.

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

1
2 I declare that I am an employee of the State of Nevada, Office of the Attorney General
3 and on this 13th day of December 2012, I electronically filed the foregoing **NEVADA**
4 **DEPARTMENT OF WILDLIFE'S ANSWERING BRIEF TO MINERAL COUNTY'S BRIEF IN**
5 **SUPPORT OF INTERVENTION** with the Clerk of the U.S. District Court using the CM/ECF
6 system, which will send notification of such filing to the email addresses that are registered for
7 this case; and I further certify that I served a copy of the foregoing on the following non-
8 CM/ECF participants by U.S. Mail, postage prepaid, this 13th day of December 2012:
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LIST OF EXHIBITS

Exhibit No.

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1.

Assembly Bill No. 634, May 7, 1981

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