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IN THE 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, MINERAL COUNTY, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et. al., Defendants.	IN EQUITY NO. C–125–RCJ Subproceedings: C–125–B & C–125–C CASE NO: 3:73–CV–00127 **RESPONSE TO MOTIONS TO DISMISS**

The State of Nevada, Nevada Department of Wildlife (NDOW), hereby replies to the Walker River Paiute Tribe's (WRPT's) *Response to Motions to Dismiss* (Doc. 2184) and the United States' *Response to Motions to Dismiss* (Doc. 2185). NDOW also replies to and opposes Mineral County's characterization of the state of Nevada law concerning public trust

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issues in Section IV, C, ii of *Mineral County's Points and Authorities in Response to Walker River Irrigation District's Motion to Dismiss or in The Alternative to Stay*; (Exhibit 1 to Doc 2186) incorporated by reference to Mineral County's *Response to Motions to Dismiss Concerning Threshold Jurisdictional Issues*, (Doc. 2186).

MEMORANDUM OF POINTS AND AUTHORITIES

I. POINTS IN REPLY

1. State courts have jurisdiction over groundwater rights issued by the Nevada State Engineer.

2. Issues concerning the extent and application of the public trust doctrine over water in Nevada are far from clear.

II. INTRODUCTION

NDOW's Motion to Dismiss was limited to the issue of jurisdiction over groundwater rights issued by the Nevada State Engineer in the sub-basins outside the reservation. However, NDOW also has an interest in all public trust values related to the Walker River. Mineral County's Response ignores the complex relationship between water rights and the protection provided under the public trust doctrine.

III. ARGUMENT

A. State Court Jurisdiction Over Groundwater Creates a Presumption Against Federal Court Jurisdiction Over Groundwater Claimants

In its First Amended Counterclaim, the Tribe asserts that "Counterdefendants are the WRID, the State of Nevada, and all claimants to the waters of the Walker River and its tributaries, including groundwater." Doc 58 at 15. The United States, in its First Amended Counterclaim states that, "Counterdefendants are all claimants to water of the Walker River and its tributaries, including groundwater." Doc 59 at 11. These assertions in the pleadings of the Tribe and the United States appear to ask this Court to take jurisdiction over the groundwater rights in the Hydrographic Basins that make up the Walker River watershed.

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As argued extensively by the Tribe and the United States, it is axiomatic that the first court to take jurisdiction over water rights retains that jurisdiction. *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1014 (9th Cir. 1999) ("The Nevada state court could not have exercised in rem jurisdiction first because the federal district court had already asserted jurisdiction over the water rights in question when it adjudicated the Alpine and Orr Ditch Decrees and because it continued to retain such jurisdiction."); *State Engineer v. S. Fork Band of Te-Moak Tribe*, 339 F.3d 804, 809 (9th Cir. 2003) ("The most obvious jurisdictional hurdle is the 'ancient and oft-repeated . . . doctrine of prior exclusive jurisdiction—that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court'"). The State Engineer and state courts of Nevada have had jurisdiction over the administration over groundwater since the enactment of the groundwater statutes in 1939. *See generally* NRS Chapter 534. Nevada courts have asserted jurisdiction over groundwater users in the hydrographic basins in the Nevada portion of the Walker River watershed. *See Griffin v. Westergard*, 96 Nev. 627, 615 P.2d 235 (1980) (Groundwater application in Smith Valley Artesian Basin denied by the State Engineer as it could interfere with decree rights).

In a similar case, this Court enjoined pumping from certain wells that had been shown to have a direct and substantial impact on the federal reserved water right in the Devil's Hole. *United States v. Cappaert*, 455 F. Supp. 81 (D. Nev. 1978). If the United States produces evidence that certain wells are having a direct and substantial impact on the Tribe's decreed water right, then an action against the owner of that specific well can conceivably be maintained in the Decree Court. Without a prima facie showing of such specific conflicts, however, there is no legal basis for the inclusion of groundwater users in this action, and the claims against them must be dismissed.

The court in *Cappaert* also held that the water level in Devil's Hole must not drop below 2.7 feet below a designated reference point. *Id*. The court then left the management of the remainder of the resource to the State Engineer and state courts to manage groundwater

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pumping in the Amargosa Desert Hydrographic Basin. *Cappaert v. U. S., 426 U.S. 128, 141, (1976)*. ("The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation").

This Court has jurisdiction only to determine whether the State "Engineer's allocation of groundwater rights adversely affects the Tribe's rights under the Decree . . . ." *United States v. Orr Water Ditch Co.*, 600 F.3d at 1152, 1160 (9th Cir. 2010). The Ninth Circuit further directed that:

> If the court concludes that the allocation will have an adverse effect on the Tribe's decreed rights, it will instruct the [State] Engineer to reduce the amount of allocated groundwater rights by an amount necessary to eliminate that effect.

Id. These cases create a clear presumption that this Court lacks primary jurisdiction over groundwater users, but instead may exercise only the limited jurisdiction to determine whether groundwater use in general interferes with decreed water rights. *Id*.

A simple example may show the blatant error in the arguments being advanced by the Tribe and the United States. Hypothetically, using round numbers to illustrate this point, the hypothetical court hears evidence of the impact of groundwater pumping on decreed water rights and finds that pumping in excess of 2,000 acre-feet annually will impact the decreed rights. In this example, there are 5 groundwater right holders, each of which has a groundwater right for 500 acre-feet annually with the following priority dates:

Black:	1859
Green:	1865
Red:	1890
Orange:	1900
Blue	1905

Under the theories presented by the Tribe and the United States, the court would issue an injunction against Blue rescinding their groundwater rights. However, under the current law argued by NDOW herein, the court would order the State Engineer to keep groundwater pumping below 2,000 acre-feet annually. Blue would maintain the water right, but could not

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pump if the senior rights were being fully utilized. However, in those years when pumping by the four senior rights was less than 2,000 acre-feet annually, the State Engineer could allow Blue to pump the difference, as long as total pumping did not exceed the 2,000 acre-feet annually.

The State Engineer and the Nevada courts should continue to manage groundwater rights in the basins to avoid interference with decree water rights. Therefore, the United States' and the Tribe's claims against individual groundwater users must be dismissed.

B. Mineral County's Characterization of the Public Trust Doctrine is Oversimplified.

Mineral County's is blatantly incorrect to argue that the public trust doctrine in Nevada is settled in regard to water rights. The nature and extent of the Public Trust is a matter of state law. *See Lawrence v. Clark Cnty.*, 127 Nev. Adv. Op. 32, 254 P.3d 606, 615 (2011) (citation omitted.) ("Resolution of disputes over title to public trust land is a matter of state law").

The public trust in this case is far more complex than Mineral County would lead this Court to believe. Upstream environmental public trust values include riparian wildlife habitat, in-stream fish habitat and the public trust values supported within the Mason Valley Wildlife Management Area (MVWMA). All of these are important resources deserving of protection under the public trust doctrine. The NDOW-managed fish hatchery at MVWMA has historically provided fish for the fishery at Walker Lake. MVWMA provides significant waterfowl habitat, an important public trust value in itself, and is clearly dependent upon both Walker River water and groundwater.

The supremacy of the public trust values over all other water rights is also not as clear as Mineral County would lead this Court to believe. The beneficial use of water by the people of Nevada is essential to life. The Nevada Supreme Court has ruled that "The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states." *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). The Nevada Supreme Court should decide how the balance between these interests must be applied.

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Mineral County's prior lawsuit was procedurally flawed, and the Nevada Supreme Court properly dismissed it. *Mineral Cnty. v. Dep't of Conservation & Natural Res.*, 117 Nev. 235, 20 P.3d 800 (2001). This Court has jurisdiction over the water rights established by the Walker River Decree. NRS 533.450(1) (" . . . on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree.") However, the Nevada Supreme Court is the highest court with respect to issues of pure Nevada state law. *Danforth v. Minnesota*, 552 U.S. 264, 291-92, (2008) ("State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law").

These are important issues of state law that are far from settled. If this Court accepted Mineral County's myopic version of the public trust doctrine, the balancing required by the public trust doctrine would be lost and Nevada water law would be thrown into chaos. *See Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983) ("As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses.")

NDOW agrees with Mineral County to the extent that certification of questions concerning the public trust to the Nevada Supreme Court is the best way for this Court to obtain a definitive answer concerning the nature and extent of the public trust over water in Nevada. Once the questions are answered, this Court should decide the impact of those answers upon its jurisdiction over the decreed waters.

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IV. CONCLUSION

The claims against individual groundwater users must be dismissed as they are not proper parties to the decree and the water rights held by them are under the jurisdiction of the State Engineer and the state courts. Mineral County's arguments concerning the nature and extent of the public trust doctrine in Nevada are incorrect and this court should consider certification of the questions to the Nevada Supreme Court.

DATED this 20th day of April, 2015.

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CERTIFICATE OF SERVICE

I, Sandra Geyer hereby certify that on this 20th day of April, 2015, I electronically filed the foregoing with the Clerk of the 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 to the following non CM/EFC participants by U.S. Mail, postage prepaid, this 20th day of April, 2015.

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