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7 **IN THE UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 WALKER RIVER PAIUTE TRIBE,

12 Plaintiff-Intervenor,

13 vs.

14 WALKER RIVER IRRIGATION DISTRICT,
15 a corporation, et al.,

16 Defendants,

17 MINERAL COUNTY,

18 Plaintiff-Intervenor,

19 vs.

20 WALKER RIVER IRRIGATION DISTRICT,
21 a corporation, et. al.,

22 Defendants.
23

IN EQUITY NO. C-125-RCJ
Subproceedings: C-125-B & C-125-C
CASE NO: 3:73-CV-00127

ERRATA

**REPLY IN SUPPORT OF MOTION
TO DISMISS**

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

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1 issues in Section IV, C, ii of *Mineral County’s Points and Authorities in Response to Walker*
2 *River Irrigation District’s Motion to Dismiss or in The Alternative to Stay*; (Exhibit 1 to Doc
3 2186) incorporated by reference to Mineral County’s *Response to Motions to Dismiss*
4 *Concerning Threshold Jurisdictional Issues*, (Doc. 2186).

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. POINTS IN REPLY**

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

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

11 **II. INTRODUCTION**

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

17 **III. ARGUMENT**

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

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

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

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

25 The court in *Cappaert* also held that the water level in Devil’s Hole must not drop below
26 2.7 feet below a designated reference point. *Id.* The court then left the management of the
27 remainder of the resource to the State Engineer and state courts to manage groundwater

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1 pumping in the Amargosa Desert Hydrographic Basin. *Cappaert v. U. S.*, 426 U.S. 128, 141,
2 (1976). (“The District Court thus tailored its injunction, very appropriately, to minimal need,
3 curtailing pumping only to the extent necessary to preserve an adequate water level at Devil’s
4 Hole, thus implementing the stated objectives of the Proclamation”).

5 This Court has jurisdiction only to determine whether the State “Engineer’s allocation of
6 groundwater rights adversely affects the Tribe’s rights under the Decree” *United States v.*
7 *Orr Water Ditch Co.*, 600 F.3d at 1152, 1160 (9th Cir. 2010). The Ninth Circuit further directed
8 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.

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

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

- 20 Black: 1859
- 21 Green: 1865
- 22 Red: 1890
- 23 Orange: 1900
- 24 Blue 1905

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

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

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

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

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

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

22 The supremacy of the public trust values over all other water rights is also not as clear
23 as Mineral County would lead this Court to believe. The beneficial use of water by the people
24 of Nevada is essential to life. The Nevada Supreme Court has ruled that "The concept of
25 beneficial use is singularly the most important public policy underlying the water laws of
26 Nevada and many of the western states." *Desert Irrigation, Ltd. v. State Engineer*, 113 Nev.
27 1049, 1059, 944 P.2d 835, 842 (1997). The Nevada Supreme Court should decide how the
28 balance between these interests must be applied.

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

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

15 NDOW agrees with Mineral County to the extent that certification of questions
16 concerning the public trust to the Nevada Supreme Court is the best way for this Court to
17 obtain a definitive answer concerning the nature and extent of the public trust over water in
18 Nevada. Once the questions are answered, this Court should decide the impact of those
19 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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