

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE

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5 UNITED STATES OF AMERICA, :
6 Plaintiff, : No. In Equity No. C-125-RCJ
7 WALKER RIVER PAIUTE TRIBE, : Subproceedings: C-125-B and
8 Plaintiff-Intervenor, : C-125-C
9 -vs- : 3:73-CV-125-RCJ-WCG
10 : 3:73-CV-127-RCJ-WGC
11 : 3:73-CV-128-RCJ-WGC
12 :
13 WALKER RIVER IRRIGATION : September 23, 2013
14 DISTRICT, a corporation, et :
15 al., :
16 Defendants. :
17 :
18 :
19 :
20 :
21 :
22 :

23 TRANSCRIPT OF MOTION HEARING

24 APPEARANCES:

25 FOR THE PLAINTIFF: ANDREW "GUSS" GUARINO and
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Denver, Colorado

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(Appearances continue on next page.)

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4	FOR WALKER RIVER	GORDON H. DePaoli and
5	IRRIGATION DISTRICT:	DALE E. FERGUSON
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7	FOR U.S. BOARD OF	KAREN A. PETERSON
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25	(Appearances continued on next page.)	

1 APPEARANCES (Continued.)

2
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9 FOR CIRCLE BAR N RANCH THERESE URE
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12 FOR NATIONAL FISH AND DON SPRINGMEYER and
13 WILDLIFE FOUNDATION: Attorney at Law
Reno, Nevada

14 JIM SHAW, WATER MASTER
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1 RENO, NEVADA, MONDAY, SEPTEMBER 23, 2013, 1:30 P.M.

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4 THE COURT: Thank you. And please be seated.
5 Welcome.

6 This is Judge Jones. We're here in United States
7 versus Walker River Irrigation District, and specifically what
8 I have on calendar, of course, is Mineral County's motion to
9 intervene in 127, filed there, but petition to intervene
10 generally and also in the Tribe's petition.

11 I need to get you all of record so let's go through
12 the process again, please, as we make it a matter of record.
13 Could we start here in the courtroom, please, and note your
14 appearance for the record.

15 MR. HERSKOVITS: Yes. Good afternoon, your
16 Honor. I'm Simeon Herskovits, lead counsel for Mineral
17 County. With me today is Sean Rowe, the District Attorney for
18 Mineral County.

19 THE COURT: Thank you.

20 MR. WILLIAMS: Good afternoon. Wes Williams,
21 Jr., on behalf the Walker River Paiute Tribe.

22 THE COURT: Thank you, Mr. Williams.

23 MR. GUARINO: Good afternoon. Guss Guarino for
24 the United States.

25 THE COURT: Mr. Guarino, thank you, sir.

1 MR. NEGRI: Your Honor, David Negri for the
2 United States also.

3 THE COURT: Thank you.

4 MR. NEGRI: Thank you.

5 MR. DePAOLI: Good afternoon, your Honor.
6 Gordon DePaoli and Dale Ferguson for the Walker River
7 Irrigation District.

8 THE COURT: Thank you.

9 MR. BENESCH: Good afternoon, your Honor.
10 George Benesch for Lyon County.

11 THE COURT: Thank you.

12 MR. SWAINSTON: Harry Swainston for Swainston
13 Farms.

14 THE COURT: Thank you.

15 MS. ADAMS: Good afternoon, your Honor. Marta
16 Adams for the Nevada Department of Wildlife, and with me in
17 the courtroom is Bryan Stockton.

18 THE COURT: Thank you.

19 MS. URE: Good afternoon, your Honor. My name
20 is Therese Ure from the Schroeder law office representing
21 Circle Bar N Ranch and Mica Farms.

22 THE COURT: Thank you.

23 MR. SPRINGMEYER: Good afternoon, your Honor.
24 Don Springmeyer for National Fish and Wildlife Foundation.

25 THE COURT: Thank you.

1 MS. SIMON: Good afternoon. Stacy Simon for
2 Mono County.

3 THE COURT: Thank you.

4 MS. PETERSON: Karen Peterson, U.S. Board of
5 Water Commissioners, and the Water Master is here also.

6 THE COURT: Thank you, and welcome. Thank you,
7 sir.

8 And on the telephone, please.

9 MR. NEVILLE: Yes, good afternoon, your Honor.
10 This Michael Neville, N-e-v-i-l-l-e, with the California
11 Attorney General's office representing the California state
12 agencies.

13 THE COURT: Thank you.

14 MS. ALMENDRAS: And this is an Annadel Almendras
15 also with the California Attorney General's office
16 representing the California state agencies.

17 THE COURT: Thank you.

18 MS. MAHANEY: Erin Mahaney with the California
19 State Water Resources Control Board.

20 THE COURT: Thank you.

21 All right. Do I have all appearances?

22 Thank you. As I suggested, we're here on Mineral
23 County's motion to intervene, and just some -- like you like
24 to receive from state court, or some federal judges, a
25 predilection of where we're going, as well as the past history

1 especially of this motion.

2 As I indicated previously, I was in accord -- even
3 though we changed the case management order, I was in accord
4 with Judge Reed's original direction, and that is that we have
5 some initial issues, including jurisdiction and other matters,
6 that need to be addressed before normal motions to dismiss.
7 That still pertains.

8 And, also, in relation to this petition, this
9 request to intervene, I was reviewing Judge Reed's original
10 order which allowed for the bifurcation of the files, and I
11 noted in particular, in which I'm in total accord, the initial
12 reason and statement when he did bifurcate those files is that
13 this is without prejudice to any parties filing or being
14 required to file in one file or the other, that it's still one
15 single case, and even though we may call for different rounds
16 of briefing or whatever, it's one case, and therefore the
17 bifurcation into separate files was without prejudice, of
18 course, to the fact that you're moving in one single case.

19 And I've already told you predilection at the prior
20 status hearing that we had with Judge Cobb that I intended to
21 handle resolution of the merits, both the initial merits on
22 jurisdiction and otherwise, as well as dismissal, and also the
23 ultimate merits on the various petitions, at the same time so
24 that they'll all be going up on appeal at the same time. We
25 won't be getting contradictory results.

1 By way of predilection on this particular motion,
2 it's subject to your argument, of course, and persuasion
3 otherwise, I believe I'm persuaded that we must grant this
4 motion to intervene, without addressing the merits of
5 jurisdiction, without addressing the merits of jurisdiction on
6 the groundwater users, et cetera, it's just that we have to --
7 we must allow, because they have standing, they have status as
8 far as I'm concerned subject to your argument, the request of
9 Mineral County is timely, and no doubt about it, their
10 interests would be very much affected by the Tribe's petition,
11 and, accordingly, I believe that the best course is to grant
12 the motion to intervene without ruling at all on the efficacy,
13 futility, jurisdiction, if you will, or merits of Mineral
14 County's petition.

15 And, again, with a reminder, if I do that, that
16 while we have bifurcated files, it is still just one case.
17 And while I may bifurcate the briefing on motions to dismiss
18 into basic jurisdiction issues and then more merit-centered
19 issues, they will be at the same time on all of these separate
20 files.

21 We'll have some of these same issues, some different
22 issues, on jurisdiction over groundwater users, as well as
23 upstream users and groundwater users, that may be affected by
24 both Mineral County, by the Tribe's petition, by the Forest
25 Service's request. I will be answering those questions at the

1 same time, maybe in separate groups of pleadings, but very
2 likely at the same time and maybe even in the same order.

3 Now, then, let's proceed, though, to your positions
4 both on what we have on calendar today and your arguments, of
5 course, on the motion to intervene, or to persuade me
6 otherwise, or if you have a different view of the course of
7 the litigation.

8 I'll call upon Mineral County first.

9 MR. HERSKOVITS: Thank you, and good afternoon
10 again, your Honor. Once again, this is Simeon Herskovits for
11 Mineral County.

12 Your Honor, I think it almost goes without saying
13 that we are in complete agreement with what you've outlined as
14 the Court's predilection, and it sounds like for me to argue
15 points in which you are already inclined to agree with our
16 arguments and our briefs would perhaps not be a good use of
17 time. So I wonder if perhaps it would make more sense, given
18 what you've stated --

19 THE COURT: That's fine. By way of response,
20 you'll have final reply.

21 And one other reminder, too, is that Judge Reed's
22 general course with regard to service was that Mineral
23 County's, the Tribe's, the Forest Service's petitions had to
24 be served, not just on parties who were parties technically to
25 the litigation at the time he had the case, but to all

1 potential users both of groundwater and surface rights.

2 So I believe that's the current status of the
3 service obligation. Mineral County's petition had to be
4 served in the same fashion.

5 MR. HERSKOVITS: Well, your Honor, that's one
6 point which is actually not involved in the question of
7 intervention.

8 But I would just want to respectfully disagree or
9 point out to the Court that, in fact, in the orders in the --
10 on Mineral County's motion and amended complaint in
11 intervention and all of the proceedings, the orders all talked
12 about and our claim was only asserted against claimants to
13 appropriative water rights of surface waters within the Walker
14 River system.

15 So it was only really decree right holders to
16 surface waters and later claimants of appropriative water
17 rights to surface holders. So we've never asserted
18 jurisdiction or claims affecting --

19 THE COURT: And I respectfully disagree with
20 you. As was apparent in our last hearing, your claim, if it
21 were granted in any part, would obviously affect groundwater
22 users as well and the state's obligations for recognizing and
23 priority given to those rights.

24 I understand we had a little bit of a disagreement
25 at the last hearing on that, but that's my view of the case,

1 and for that reason, just as suggested by the government, by
2 the Tribe, by others, by the water district, your service
3 would have to be contemporaneous, coterminous with the Tribe's
4 obligation to serve.

5 So I think it affects the same parties, the same
6 parties have to be made a part, and therefore I do intend as
7 well to subject you to the same service obligations.

8 Again, these are bifurcated files, it is not a
9 bifurcated case, and, accordingly, your service would have to
10 be coterminous with the other applicants as well.

11 MR. HERSKOVITS: I appreciate the clarification,
12 your Honor. That was not something that I understood clearly
13 after our last status conference.

14 THE COURT: Okay. You do now.

15 But, of course, we'll make that service much easier
16 for you. You know, we're converting to a website, we're
17 converting to a method for service of your pleadings on the
18 website, and we'll be applying those same requirements that
19 we've previously imposed upon the Tribe with respect to your
20 petition as well.

21 MR. HERSKOVITS: Okay. I understand.

22 THE COURT: All right? Opposition, though.

23 MR. HERSKOVITS: And I am -- I think you have
24 already answered this, your Honor, but would like to reserve
25 time to respond to whatever arguments --

1 THE COURT: Certainly.

2 MR. HERSKOVITS: Thank you.

3 MR. DePAOLI: Good afternoon, your Honor.

4 Gordon DePaoli on behalf of the irrigation district.

5 Your Honor, I have a fairly high mountain to climb
6 based upon your comments at the outset.

7 THE COURT: Right.

8 MR. DePAOLI: And I will start where I had hoped
9 to end which is that I do not think that the Court should or
10 that the law requires the Court to grant Mineral County's
11 intervention here to assert what I would interpret in that
12 context as a counterclaim against the Tribe and the United
13 States and a cross-claim against some but not all of the
14 defendants in the B subproceeding.

15 THE COURT: In particular, the water district,
16 also the California board.

17 MR. DePAOLI: And, in particular, all of the
18 many thousands of groundwater users and --

19 THE COURT: In other words, adding would go
20 beyond the parties that we previously have.

21 MR. DePAOLI: Yes, it would, your Honor.

22 THE COURT: Right.

23 MR. DePAOLI: It seems to me it ought to be
24 treated for what it is which is a request, either through a
25 complaint or a motion, to modify the Walker River Decree to

1 adjust existing water rights to meet an alleged public trust
2 claim for Walker Lake.

3 In taking that position, the district is not taking
4 a position that is inconsistent with that which it took before
5 the Nevada Supreme Court in 2001, nor is it inconsistent with
6 what the supreme court said in that case.

7 And our position there and the supreme court's
8 decision is that this court is the proper forum to determine
9 whether existing water rights need to be modified in some
10 fashion to meet a public trust obligation to Walker Lake, and
11 we recognize that and are not in any way contending otherwise.

12 THE COURT: What's the rationale of the supreme
13 court for doing that, which I just want you to emphasize?

14 MR. DePAOLI: The rationale is that --

15 THE COURT: This decree and this decree court
16 affect those rights, or would affect them.

17 MR. DePAOLI: Correct. And what was requested
18 in that case, your Honor, was that the State Engineer step in
19 and adjust all those water rights, and that would be a clear
20 interference with this court's jurisdiction over those water
21 rights. So it has to -- if anything is going to happen, it
22 has to happen here.

23 THE COURT: Right. Now, that corresponds a
24 little bit with my view of jurisdiction in the case, too, as I
25 gave you predilections to last time.

1 My predilection view of the case is that with
2 respect to Nevada users and all applicants and petitioners,
3 this Court has both *in rem* and *in personam* jurisdiction, *in*
4 *personam* on those that have been served, and *in rem* with
5 respect to all users on the Nevada side.

6 As we detailed last time, the parties didn't think
7 that I had, nor prior court decisions construed it as, *in rem*
8 jurisdiction over users upstream on the California side, and
9 for that reason a number of you added for that -- that's why
10 Judge Reed required us to serve.

11 So my present view of the case is that I have both
12 *in rem* and *in personam* over Nevada users. By means of *in rem*,
13 I mean I have jurisdiction over the water system on this side
14 of the river.

15 And whether a party was specifically named last time
16 or not, as long as due process requirements were met, all of
17 those people, whether parties at that time, whether parties
18 now, will be bound by the decision of this Court.

19 With respect to those on the California side, my
20 view is it's primarily *in personam* jurisdiction. I'm not sure
21 but what I couldn't assert *in rem* jurisdiction over the
22 watershed altogether, but basically I think everybody is in
23 accord that that's *in personam* jurisdiction. They have been
24 served, and, of course, Judge Reed required that upstream
25 California side users, including groundwater users, be served,

1 did he not?

2 MR. DePAOLI: He required clearly the water
3 right -- surface water right users in California who had
4 rights originating in the decree to be served.

5 THE COURT: Did he require groundwater users to
6 be served?

7 MR. DePAOLI: He only required in California two
8 categories of groundwater users, your Honor.

9 THE COURT: Please.

10 MR. DePAOLI: The users for irrigation purposes
11 and users for municipal and industrial use.

12 THE COURT: Okay.

13 MR. DePAOLI: He did not require service on
14 domestic users, nor did he require -- and in California, in a
15 groundwater sense, you have something similar to what
16 California refers to as their dormant riparian water rights.
17 In California, anyone who has land that overlies groundwater
18 has, in essence, a dormant right to use that groundwater, and
19 none of those people have been served either by the United
20 States and the Tribe or Mineral County.

21 THE COURT: Okay. Now, aside from the last
22 distinction, why did Judge Reed distinguish and not require
23 consumers without adjacent riparian rights, why did he not
24 require household users to be served?

25 MR. DePAOLI: Because in that -- when he made

1 that determination, your Honor, he was looking strictly at the
2 Tribe's claims. He did not have Mineral County's claims in
3 mind at all. He was looking at the claims the Tribe was
4 making and --

5 THE COURT: He determined that it would not
6 affect those parties' rights.

7 MR. DePAOLI: Yes, he determined, I think, two
8 things. One, that the groundwater claims that the Tribe and
9 the United States were asserting would not affect anybody
10 using a domestic -- having a domestic right clear upstream in
11 the Antelope Valley or --

12 THE COURT: Which is probably very realistic and
13 worthy of re-echoing. Under the recent Ninth Circuit case
14 that said Judge George had jurisdiction over groundwater
15 rights adjacent to the Truckee because they were a supply or a
16 source of resupply of the Truckee, that's unlikely to be
17 present in our case.

18 People up in Bridgeport, or in the valley up there,
19 their household well groundwater tapping is unlikely to be a
20 source of -- for the Walker to the extent it would be required
21 to be tapped in for granting additional rights to the Tribe.

22 In other words, whatever water is flowing down is
23 flowing down through the river. No doubt about it that those
24 groundwaters are also a source of supply to the Walker River
25 up in Bridgeport, but by the time they get to Nevada, it's all

1 surface as far as the Tribe is concerned.

2 That would be my suspicion and guess.

3 MR. DePAOLI: Yeah. I think he believed that
4 the groundwater rights that the Tribe was asserting would not
5 affect those groundwater rights upstream.

6 On the other side, the reason he required what he
7 considered would be potentially large users of groundwater in
8 California to be involved, related to the argument that the
9 Tribe and the United States make that the surface and water
10 supplies, surface and groundwater supplies, should be
11 regulated as a single source of supply in priority.

12 THE COURT: Right.

13 MR. DePAOLI: And that argument could impact
14 those groundwater -- those large groundwater users.

15 THE COURT: I appreciate that update, and
16 basically what it brings me a little bit more solidly to is,
17 on this side of the border, I've got both *in rem* and *in*
18 *personam* to the extent they've been served, and north of the
19 border, west of the border, I've got *in personam*.

20 And, clearly, the California board has been *in*
21 *personam* related since the beginning, or at least a long time,
22 and, of course, the additional parties that Judge Reed
23 required be served would be *in personam* jurisdiction.

24 MR. DePAOLI: At some point I think I would like
25 an opportunity to, you know, get into those issues in more

1 detail. I'm not sure if your Honor is indicating that your
2 Honor is of the opinion that --

3 THE COURT: That's my present opinion. I
4 haven't issued it as a ruling. And, of course, will be
5 calling for a round of motions to dismiss, for example, the
6 motion to dismiss Mineral County's petition, and jurisdiction
7 and all such remain open issues.

8 MR. DePAOLI: Thank you.

9 THE COURT: Go ahead. Why else should we not
10 grant the motion to intervene, though?

11 MR. DePAOLI: Well, the other thing, your Honor,
12 that I -- I'm not suggesting at all that Mineral County should
13 not proceed or be allowed to participate in Subproceeding B in
14 any fashion that it chooses, indeed, the Mineral County
15 commissioners are already a defendant in that -- in that
16 proceeding.

17 The reason that I think these things need to be
18 handled as entirely separate proceedings is that there is, in
19 my judgment at least, your Honor, no relationship between the
20 public trust claim that Mineral County seeks to assert and the
21 claims that are at issue in Subproceeding B.

22 I also respectfully disagree that the Mineral County
23 claim is going to be in any way impaired or impeded by the
24 outcome of the Tribal and federal claims.

25 Those two things are often considered together, but

1 the reason I take that position, your Honor, is that the
2 subject matter of those claims are very different than the
3 subject matter of the Mineral County claim.

4 As your Honor knows, an implied reserved water right
5 claim is based on federal law, it's based on factual issues as
6 to whether -- at the time a reservation was set aside whether
7 it's primary purpose required water, and, if so, how much
8 water.

9 Implied reserved rights are deemed to exist as of
10 the date -- exist and be fully perfected as of the date of
11 reservation.

12 So what is at issue in the B case is simply the
13 question as to whether they exist, what they -- what their
14 quantity is and whether they should be recognized to exist.

15 There is no effort in that case to reconsider or
16 change in any fashion the water rights that are already
17 recognized and part of the Walker River Decree. That simply
18 is not involved there, and Mineral County, in contending that
19 it is, is simply not correct.

20 On the other hand, the public trust claim is a claim
21 that is based upon state law, and it is informed and shaped by
22 state law, state constitutions.

23 The most obtrusive example of that in a water rights
24 context is the *Audubon* case in California where the California
25 Supreme Court said that under the public trust doctrine the

1 water rights of a single party could be reconsidered on the
2 theory that when they were granted, they were subject to that
3 trust. So it's -- those claims are going to involve
4 consideration of state law issues.

5 That process here is potentially going to involve
6 hundreds of parties and existing water rights. It's going to
7 be lengthy and complicated, and it's going to involve a
8 different set of facts and legal issues than the Tribe and the
9 U.S. claims.

10 The relationship requirement for intervention is
11 satisfied only if resolution of the Tribe and the U.S. claims
12 here will actually affect Mineral County's public trust claim,
13 and the reason that, in my judgment, they will not is that
14 that legal relationship between Mineral County's public trust
15 claim and the claimed federal and reserved rights exists and
16 has existed since either of those rights were -- since
17 essentially that when the public trust doctrine became
18 applicable and when the reservations at issue were
19 established. They are pre-existing.

20 Mineral County's claim for -- under the public trust
21 doctrine cannot affect or result in the reserved rights not
22 being deemed to exist.

23 On the flip side of that, the existence of the
24 reserved rights will not in any way defeat or impact whether
25 or not Mineral County's public trust claim can require those

1 rights to be regulated in some fashion to meet a public trust
2 doctrine.

3 And I think one of the -- perhaps the example of
4 that is the fact that Mineral County seeks to assert its
5 public trust claim against the 1859 right that is already
6 recognized for the Walker River Indian Reservation in the
7 decree.

8 Just -- from just a practical standpoint, if Mineral
9 County's public trust claim affects federal reserved rights,
10 it's going to affect the ones that are recognized and the ones
11 to be recognized.

12 On the other hand, if it doesn't, it will not -- and
13 the recognition of those rights is not going to in any way
14 defeat Mineral County's claim that they ought to be regulated
15 or limited by a public trust claim, and I think from a
16 permissive intervention analysis, that comes out even more
17 persuasively.

18 What we will have here, it seems to me, is that if
19 we proceed -- bring them together and allow them to be handled
20 in a single proceeding, in a single matter, is we're going to
21 be trying two entirely separate proceedings involving
22 different law and different facts in a context where -- at
23 least until -- and maybe I'm mistaken about this, but Mineral
24 County is not asserting that claim against groundwater users
25 and is not asserting that claim against groundwater users in

1 California.

2 So we're going to have several thousand defendants
3 who are party to the Tribal case who have no interest one way
4 or the other in the outcome of the Mineral County claim, and
5 that, it seems to me, is just simply going to delay
6 Subproceeding B, or delay Mineral County's claim and for no
7 good reason.

8 They arise out of different law, different facts,
9 and they ought to stay separate, which is not to say that the
10 Court clearly has -- as the decree court, clearly has the
11 right to determine whether or not existing rights should or
12 should not be modified to meet the public trust claim which
13 Mineral County intends to assert.

14 I'm not intending to argue that that doesn't somehow
15 get heard before this Court, it simply should not be heard as
16 a counterclaim or cross-claim in the B subproceeding, your
17 Honor. Thank you.

18 THE COURT: Thank you. Further?

19 MS. ADAMS: Good afternoon, your Honor. Marta
20 Adams for the Nevada Department of Wildlife.

21 I don't have too many additions to what Mr. DePaoli
22 argued.

23 As the Court may have noted, the Department of
24 Wildlife did not object to permissive intervention of Mineral
25 County, and, in fact, has a predilection similar to your

1 Honor's in that it seems right that the county should be
2 before this Court.

3 Now, whether it's properly before the Court in terms
4 of this motion to intervene in the Tribe's and the United
5 States' counterclaims, I am not addressing that, but I do
6 believe that this Court, in administration of the water, is
7 the proper forum to take up the claim.

8 Obviously, we're not getting into the public trust
9 elements of Mineral County's petition, but, as the Court will
10 note from our filing, we believe that the public trust enures
11 not only as a question of state law, but is actually the
12 state's responsibility.

13 Mr. Herskovits disparages the efforts that the
14 Department of Wildlife has made on the lake's behalf.
15 However, for purposes of this entire case, the subdockets
16 included, the State of Nevada, through the Department of
17 Wildlife, did enter this case based on its water rights,
18 decreed water rights, for the Mason Valley Refuge and also its
19 state-issued permit for the fishery in Walker Lake itself.

20 THE COURT: Right. I don't think he was so much
21 disparaging the state's efforts as he was saying we, Mineral
22 County, have some distinguishable motivations and therefore as
23 a basis for allowing us to intervene as well.

24 MS. ADAMS: Right. And, certainly, I'm not
25 going to take issue with Mineral County's unique interest in

1 this case, but would state here, and certainly will argue
2 later, that it only makes sense for the state to administer a
3 public trust because we obviously have another Nevada county
4 in this matter who may see the public trust quite differently.

5 I don't think I have a whole lot to add to this,
6 but, again, the NDOW laments the condition of Walker Lake and
7 is certainly doing our part to work with the National Fish and
8 Wildlife Foundation to facilitate water going to the lake and
9 certainly historically has done its part in that regard as
10 well.

11 So I don't have a whole lot to argue to this, but --

12 THE COURT: Okay.

13 MS. ADAMS: Okay. Thank you.

14 THE COURT: And reply.

15 MR. HERSKOVITS: Yes. Thank you again, your
16 Honor. This is Simeon Herskovits on behalf of Mineral County
17 once more.

18 I think I can be quite brief in this reply.

19 Mr. DePaoli makes, in essence, I think, two primary
20 objections to the granting of our motion for intervention, and
21 I think both of them are misplaced and, respectfully, just
22 mistaken.

23 I think his sort of formalistic approach to the idea
24 that a claim that is properly asserted in this court and
25 within the overall confines of the single case, the C-125

1 proceeding that really embraces both our claim and the claims
2 of the Tribe and the United States agencies --

3 THE COURT: Basically what we're talking about
4 is B and C still remain separate files. So, for example,
5 points and authorities in support of your petition in C would
6 be filed there, also your responses to motions to dismiss your
7 petition.

8 But your opposition, or affirmance, of the Tribe's
9 petition in B, and other federal claims in B, would be filed
10 in that file. It's still one case, but basically we still
11 keep that distinguishing filing system so that we know which
12 particular petitions we're talking about.

13 MR. HERSKOVITS: Yes, your Honor. That's my
14 understanding of what you were suggesting would be the
15 management or the approach to management of the case and the
16 two subproceedings, and that is exactly what has been the
17 practice up until this point under Judge Reed, and it makes
18 perfect sense.

19 It is true that the claim that Mineral County
20 asserts is a different claim, and there are different legal
21 bases for that claim than the Walker River Paiute Tribe and
22 the United States federal agencies individual claims, and that
23 is nothing exceptional, and it's also not necessarily anything
24 particularly different from different types of counterclaims
25 or cross-claims that might be asserted by parties in various

1 proceedings and by intervenors in various proceedings.

2 In fact, it's clearly the case, that intervenors,
3 particularly intervenors of right, have an appropriate right
4 to raise additional issues or claims in a case if they're
5 appropriately brought forward in the proceeding. They don't
6 have to be specifically tailored only to the claims already
7 asserted by the plaintiff when the intervenor comes into the
8 case.

9 So I think that the argument that intervention
10 should be denied and the exact same claim should be brought to
11 the Court to be managed and resolved by the Court within the
12 confines of the C-125 general proceeding, maybe a new subfile
13 would be created, I think it really only would serve to burden
14 and obstruct progress in the efficient resolution or
15 disposition of the county's public trust claim.

16 I also would say that Mr. DePaoli overstates, quite
17 frankly, I think, the differences or his characterization as
18 the facts and law being completely unrelated and dissimilar in
19 these cases.

20 I think the fact of the matter is, as the Nevada
21 Supreme Court seemed clearly to have recognized, and as --
22 notwithstanding what he has said here, both the State of
23 Nevada and the Walker River Irrigation District did maintain
24 before the supreme court, the resolution of Mineral County's
25 public trust claim is essentially inextricable from the

1 disposition of -- or the decision how to manage and go forward
2 with the enforcement of or the treatment of existing water
3 rights.

4 So both with regard to the new claims being asserted
5 by the Tribe and the United States, and the existing water
6 rights claims under the decree or otherwise, they are affected
7 inevitably by the public trust claim of Mineral County.

8 And, by the same token, the disposition of the
9 resolution of new claims for water rights, whether they're
10 characterized as federal reserved water rights under the
11 Winters Doctrine for the Tribe, or other reserved water rights
12 of the federal agencies, there is an interplay and there is
13 some aspect of considering the existence of state water
14 rights, the relative priority of rights and the overall
15 capacity or constraints that are properly held to apply to
16 this system, the Walker River system as a whole.

17 So I don't think it accurate at all to describe
18 these as entirely separate and unrelated types of claims or
19 issues, and I think that that is consistent with the record.
20 It's consistent, in my reading at least, with both what with
21 filings before the Nevada Supreme Court said --

22 THE COURT: Okay.

23 MR. HERSKOVITS: -- the supreme court's ruling
24 and Judge Reed --

25 THE COURT: Okay. Taking that just a step

1 further, and trying to explore a little bit the underlying
2 theory of your case, how does your right arise and what is the
3 priority of it?

4 It arises upon the existence of the territory and/or
5 the state four years later, a couple of years later, and the
6 fact that you are entrusted then now as the new governing
7 entity over prior federal lands or lands that were acquired by
8 way of treaty from others.

9 You now hold in trust any and all incidents of
10 ownership and administration that come to you from the federal
11 government. Is that the basis of your trust doctrine?

12 MR. HERSKOVITS: Well, roughly speaking, your
13 Honor, I think that is.

14 I think that as we read the law, the public trust
15 doctrine, or the public trust duty and obligation that applies
16 to the sovereign who governs or manages this water resource,
17 is paramount to and precedes appropriative water rights that
18 are permitted or that were vested before the creation of the
19 water code in Nevada.

20 THE COURT: So, in other words, even if Nevada
21 law at the time, or soon thereafter, did not contemplate *in*
22 *situ*, without a withdrawal source, recognition of rights,
23 rights in the river itself, or for recreation in a natural,
24 long-existing lake, or fisheries, a natural fishery that
25 existed in that lake.

1 Even if Nevada law at the time, or shortly
2 thereafter when it was holding in trust, nevertheless -- and
3 it was in the process of granting recognized water rights to
4 all those up and down the river during that period of time, it
5 nevertheless held in trust those obligations for such usage
6 and such protection all during the early years of its trust or
7 trustee placement.

8 Is that consistent with what you're telling me?

9 MR. HERSKOVITS: Well, yes, your Honor, although
10 I would add that I think that the trust duties and obligations
11 were in effect and did apply to either the state sovereigns
12 that control the different portions of the Walker River Basin,
13 or --

14 THE COURT: Well, I'm trying to explore why in
15 the world you're bringing a trust theory. Because Nevada law
16 now recognizes that you can get -- and federal law, that you
17 can get *in situ*, you don't have a source, have to have a
18 source of removal of the water. You can get *in situ*
19 recognition, right?

20 So why are you bringing a trust theory? Why don't
21 you just make application from history day one and preceding
22 history day one of the State of Nevada's involvement, this was
23 a natural lake, it was a natural fishery, and there were usage
24 of waters from day one and before, and therefore we ask you,
25 Court, simply to require the State Engineer to recognize the

1 right and to declare a priority way back when? Why aren't you
2 bringing that theory rather than a trust theory?

3 MR. HERSKOVITS: Well, your Honor, let me try
4 and answer that in a couple of ways.

5 One is that, in effect, we did bring essentially
6 that kind of a claim or theory before the state supreme court
7 because the state supreme court would be the appropriate
8 court, I think, if it were simply a matter of the State
9 Engineer needing to enforce state water rights.

10 But because this is an interstate stream in this
11 court, I don't believe --

12 THE COURT: And the supreme court recognized
13 that there was a proceeding here.

14 MR. HERSKOVITS: Right.

15 THE COURT: And this was the best forum for the
16 answering of the question anyway. That's why they said no, we
17 think the federal court is the best place to answer that
18 question.

19 MR. HERSKOVITS: Well, there are two things.

20 First, in terms of framing the case as an
21 application for some kind of a new right, or some right with a
22 priority --

23 THE COURT: Well, I can see that you're not
24 going to directly answer my question, so let me put it to you
25 as the devil's advocate.

1 You want to avoid the *in rem* conclusion of *res*
2 *judicata*. You want to avoid the prospect that you could not
3 obtain a right at this late date, or a declaration of a right
4 at this late date, therefore you're pursuing constructive
5 trust -- or not constructive trust, but the public trust
6 doctrine.

7 MR. HERSKOVITS: Your Honor, that's not the
8 motivation for filing the case as a public trust doctrine
9 claim. I think it's actually an understanding that this is an
10 obligation or a constraint on the system that is outside of,
11 or paramount to, the entire priority hierarchy in the system,
12 and also I would --

13 THE COURT: Assuming I accept your answer, or
14 what I really think is maybe a nonanswer, let me again be the
15 devil's advocate on your trust doctrine.

16 If it's true, as what I'm thinking, the Court had *in*
17 *rem* jurisdiction back in 1936, and certainly the whole world
18 was bound with respect to the water course that the Court was
19 decreeing, the State of Nevada was bound, too, and the State
20 of Nevada was bound with respect to its public trust. It was
21 bound by that decree.

22 Now, it's true that you may be free to claim those
23 rights, but they could not be claimed in derogation of rights
24 that have already been declared with a priority date declared
25 in the decree.

1 So even assuming you're claiming the trust doctrine,
2 you, State of Nevada, and you, Mineral County, by virtue of
3 your party position relative to State Engineer proceedings,
4 you were certainly parties or on notice that upstream users
5 were being granted permits, both groundwater permits, but,
6 more importantly, surface water permits.

7 And, of course, I don't want this to be a
8 disparagement of your position because I recognize you're
9 saying some more recent events is what has really caused the
10 problem for Walker Lake. I realize that. In fact, in the
11 original petition in '95, '94, you're saying that the board,
12 the California board's recent regulations and restrictions are
13 creating a large problem for you.

14 Nevertheless, I don't know how, even with the public
15 trust doctrine, you can defend yourself against a claim that
16 that original decree is binding upon you.

17 MR. HERSKOVITS: Well, your Honor, I think if we
18 are going to address and brief and argue jurisdictional
19 questions and *res judicata* questions at another time, I would
20 prefer to go into those --

21 THE COURT: We are at another time.

22 MR. HERSKOVITS: -- in-depth and in detail.

23 But respectfully, of course, Mineral County
24 disagrees with the understanding the Court has just
25 articulated for a couple of reasons.

1 One, I think it's a simple fact in the record that
2 neither Mineral County nor the State of Nevada actually were
3 parties, and Mineral County did not receive any kind of notice
4 of the original decree litigation.

5 And I think it's fair, and I was going to point this
6 out earlier --

7 THE COURT: But Mineral County was a user -- you
8 know, I don't want to argue the point finally with you today
9 because, like you say, it's another day. But Mineral County
10 was a user, you were in existence at the time of the decree,
11 right?

12 MR. HERSKOVITS: Mineral County was certainly in
13 existence. I don't think --

14 THE COURT: You were enjoying the same benefits
15 that you cite in your petition for intervention. You were
16 enjoying the same benefits, the taxation rights that existed
17 at the time of the original decree?

18 MR. HERSKOVITS: Yes, that is correct, your
19 Honor.

20 THE COURT: So I just think you're bound. You
21 may not be the only one arguing against this, the State of
22 Nevada, for example, Wildlife.

23 You know, there's lots of new avenues to protect
24 rights in the river including the Endangered Species Act. The
25 implication -- nasty implication that I'm giving that this was

1 and is an *in rem* proceeding with respect to this side of the
2 border is that any and all parties, any and all parties that
3 have endangered species claims affecting the river should now
4 stand up or forever hold their peace.

5 I can't say that with respect to a future endangered
6 species, one that's declared hereafter, of course, but any
7 that exist now, to the extent this is an *in rem* proceeding,
8 now is the time to stand up and file not only a B and C, but a
9 D, E and F.

10 If they want to be heard otherwise, as far as I'm
11 concerned, they'll be bound. Even if they're a French
12 organization or anybody else. This is an *in rem* proceeding
13 with respect to this side of the border on the water course
14 and the surface rights, not on the groundwater rights, but on
15 the surface rights.

16 So that has some very broad implications. I think
17 that I am dealing with the world over this water course from
18 the border down to the lake. That's my present impression.

19 And, again, I'm not -- that is one of the reasons
20 I'm granting the motion to intervene, but I'm not making final
21 ruling on that, I'm reserving your opportunity to talk about,
22 but the main reasons I would be granting your petition in B,
23 your motion to intervene in B -- I think you've got a right to
24 file it in C anyway.

25 MR. HERSKOVITS: It's the other way -- oh, in C,

1 I understand.

2 THE COURT: But in B you've got the right to
3 intervene because your rights, regardless of Mr. DePaoli's
4 arguments, are going to be affected when I grant the B
5 petition.

6 MR. HERSKOVITS: Yes.

7 THE COURT: And you'll either want to affirm
8 their rights or oppose them in certain respects because there
9 is an effect upon you.

10 And I think -- so undoubtedly your rights, certainly
11 even under the public trust doctrine, will be affected by what
12 happens in B, and therefore I think I have to grant your
13 motion.

14 But I also think for a second reason, that this side
15 of the border, because it is and was an *in rem*, proceeding as
16 well as *in personam*, I also have to grant your right to
17 intervene because those issues will come up in B, let alone in
18 C, and you have to be heard on those questions when they come
19 up.

20 So those would be the two major reasons I would be
21 granting your motion.

22 MR. HERSKOVITS: Well, your Honor, of course, we
23 agree with that.

24 THE COURT: Yeah, maybe not with the
25 jurisdiction issues.

1 MR. HERSKOVITS: Well, I appreciate your
2 explanation of at least your current perspective or
3 inclination --

4 THE COURT: Right.

5 MR. HERSKOVITS: -- with regard to jurisdiction,
6 and I don't consider that an invitation to engage in further
7 argument on that issue right now.

8 THE COURT: That's right.

9 MR. HERSKOVITS: And I am finished except I
10 would just point out that -- well, I think we've argued it in
11 our brief, and it seems like, your Honor, that the Court is
12 inclined to agree with us.

13 I think the state -- basically the track record here
14 just simply doesn't back up an argument that it provides
15 adequate representation of the same interests or claims
16 that --

17 THE COURT: Right. You're not disparaging their
18 representation, but you're just saying you have different
19 interests.

20 MR. HERSKOVITS: Yes. And I understand why
21 Ms. Adams characterized it as disparagement. I think from the
22 county's perspective, the state simply has not aggressively or
23 effectively defended or protected the rights or --

24 THE COURT: They do have every motivation to
25 protect Walker Lake and especially the stream flowing into it

1 and the fishery rights. They're with you on that one. But no
2 doubt about it they have some broader interests, including
3 upstream and upstream of Mineral County. So no doubt about
4 it, they have some broader interests as well just like the
5 government does with regard to the Tribe --

6 MR. HERSKOVITS: Yes.

7 THE COURT: -- that I pointed out to counsel
8 last time.

9 Okay. So I'm going to grant this petition. I'll
10 ask you for a simple order. I've given my reasons here on the
11 record. There will need to be a transcript of this proceeding
12 docketed into the file, please, both B and C.

13 And I've given my reasons. They are for the four
14 reasons, assessment of motions to intervene contained in the
15 moving parties' papers, and they're for the two substantial
16 reasons that I've given here, one, because your rights are
17 substantially affected by whatever we do in B, and because I
18 believe this to be an *in rem* proceeding, and to that extent,
19 and to the extent we're arguing those issues in B, your rights
20 in C will be substantially affected as well, therefore I must
21 grant the motion to intervene.

22 And I'll call, please, for just a simple order that
23 grants the motion to be docketed in all of those separate
24 files.

25 What other matters should we address today?

1 MR. HERSKOVITS: There are none that I have to
2 present to the Court, your Honor.

3 THE COURT: Okay. Please, Mr. DePaoli.

4 MR. DePAOLI: Your Honor, Gordon DePaoli on
5 behalf of the district.

6 A question that I have in my mind is that once that
7 order is entered -- and my understanding with intervention is
8 that at that point the proposed amended complaint in
9 intervention would be filed.

10 And I guess the question I would have is we will
11 need to make it clear whether folks and, if so, what folks
12 need to respond to that complaint and when and all that sort
13 of thing.

14 THE COURT: Very good point.

15 Now, B is the tribes, right? C is this motion in
16 intervention the way Judge Reed delineated it, right?

17 MR. DePAOLI: Yes, your Honor.

18 THE COURT: So that complaint should be filed in
19 C. I'm allowing you to intervene for purposes of filing that
20 complaint in C, but I'm also allowing you to intervene in B so
21 that in any and all positions relative to the Tribe's right
22 you have the ability to stand up.

23 With regard to service, my view is, to the extent
24 that Mineral County's rights, if recognized and granted by
25 this Court, would affect all upstream users, including some of

1 the groundwater users to the same extent that Judge Reed
2 identified them for the Tribe's use, that they should serve
3 the same people.

4 We will make it as easy as possible, but -- through
5 website, through other -- the service through the means that
6 we've already established, we'll make it much easier than
7 personal service.

8 You'll be able to serve those same people, for
9 example, that have entered appearances on the website who want
10 to be served by mail, or who want to be served simply by the
11 website. You'll be able to use those same abilities,
12 processes to do your service.

13 And I am expanding the order that applied to B to C
14 as well. Both discovery, website, service, I'm expanding it
15 to C as well as B. That's the primary implication of granting
16 the motion.

17 And in answer to your question, they'll have to go
18 through the same processes and services visited upon the Tribe
19 themselves, but hopefully it will be a lot easier and a lot
20 less costly at this late date.

21 What else? Do we need to clarify that further?

22 MR. DePAOLI: Well, I guess when that service
23 takes place, will parties be notified that they must respond
24 to that complaint with an answer, your Honor, within 20 days
25 or -- that's kind of the question that I'm thinking we need to

1 address so that everyone knows what they should do or not do.

2 THE COURT: It is by way of complaint, and just
3 using it to normal cases where we have cross-claims and new
4 third-party defendants, they're required to file an answer,
5 aren't they?

6 MR. HERSKOVITS: Your Honor --

7 THE COURT: Judge Reed, of course, held off the
8 requirement. There is no requirement that anybody even answer
9 the Tribe's complaint yet, is there?

10 MR. HERSKOVITS: No, that's correct, your Honor.

11 And even in the C case Judge Reed entered an order
12 requiring people or defendants who were served to enter
13 appearances but not to file any answer to the complaint or any
14 response to the motion until further direction from the Court.

15 THE COURT: Now, this is for another day, but
16 shouldn't I ultimately abrogate the need for defendants in any
17 of these cases to answer?

18 I am requiring them to enter appearance. And, of
19 course, to the extent they don't enter appearance, we do need
20 dates certain, by dates certain, I will deem them to be
21 subject to the Court's jurisdiction. And I've already
22 implicated that -- implied that with respect to the Tribe's
23 petition.

24 Those who don't respond, I think my *in rem* attitude
25 covers them. In other words, those that don't respond, or who

1 could argue at some later date we were never validly served
2 under federal or state service rules, I think we do need to
3 have a final service required by publication that makes it
4 very clear that anybody who might hereafter claim that due
5 process -- under due process they were not served, that they
6 were served for *in rem* purposes.

7 I can't apply that so far to the California side or
8 upstream beyond who has already been served as part of this
9 lawsuit, but I can with respect to the water stream and the
10 watersheds below the border.

11 So I think the *in rem* theory covers the rest.

12 So it's for another day, but be thinking about that.
13 Shouldn't I abrogate altogether an obligation that these
14 thousands of people answer, and, if they don't answer, they
15 default.

16 I think what I do, rather, is give them the right to
17 appear, and I make it very clear to them that if they don't
18 appear, either by mail or website or e-mail service, they will
19 be bound regardless. Then I've satisfied the ends of due
20 process.

21 So be thinking about that one, and answer -- I don't
22 think I can answer the question yet. Judge Reed put it off,
23 he did not require an answer at this juncture, but one way to
24 satisfy it is to abrogate the need.

25 We just say these are the people that clearly have

1 appeared, these are the people that haven't. As to those that
2 haven't, I have *in rem* jurisdiction over their rights in the
3 river, but otherwise I don't have *in personam* jurisdiction
4 over them, and I'm not going to take default against them.
5 Think about that one.

6 What else needs to be clarified today?

7 Okay. We're on kind of a new course, but hopefully
8 we can deal with it.

9 MR. HERSKOVITS: Your Honor, I do actually have
10 one last question. Again, this is Simeon Herskovits for
11 Mineral County.

12 And it's just -- I want to make sure, my sense from
13 what you said earlier is that you'd prefer me to keep the
14 proposed order for the ruling on the motion for intervention
15 very simple. The --

16 THE COURT: Simple. My reasons are here on the
17 record.

18 MR. HERSKOVITS: These separate issues can be
19 addressed with both your Honor and Magistrate Judge Cobb in
20 crafting a modified or new case management order applying it
21 to the C as well as the B case.

22 THE COURT: Yeah. I just want you to give me a
23 simple order that grants the motion.

24 MR. HERSKOVITS: Yes, your Honor, I'll do that.

25 THE COURT: Thank you, folks.

1 The government doesn't have anything to say?

2 MR. GUARINO: No, your Honor, thank you.

3 THE COURT: Awesome. Okay. Thank you so much.

4 I appreciate your attention today.

5 MR. HERSKOVITS: Thank you, your Honor.

6 -o0o-

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8 I certify that the foregoing is a correct
9 transcript from the record of proceedings
in the above-entitled matter.

10 /s/Margaret E. Griener 11/1/2013
11 Margaret E. Griener, CCR #3, RDR
Official Reporter

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<p>C-125 [2] - 24:25, 26:12 C-125-B [1] - 1:5 C-125-C [1] - 1:6 C-125-RCJ [1] - 1:5 calendar [2] - 4:8, 9:4 CALIFORNIA [2] - 2:10, 3:6 California [24] - 2:11, 2:18, 3:7, 6:10, 6:11, 6:15, 6:16, 6:18, 12:16, 14:8, 14:19, 14:25, 15:3, 15:7, 15:14, 15:16, 15:17, 17:8, 17:20, 19:24, 22:1, 32:12, 41:7 cannot [1] - 20:21 capacity [1] - 27:15 Carson [2] - 2:8, 2:24 case [34] - 7:3, 7:15, 7:16, 7:18, 8:16, 9:25, 10:25, 11:9, 13:6, 13:18, 13:24, 14:1, 14:11, 16:13, 16:17, 19:12, 19:15, 19:24, 22:3, 23:15, 23:17, 24:1, 24:25, 25:10, 25:15, 26:2, 26:4, 26:8, 28:2, 30:20, 31:8, 40:11, 42:20, 42:21 cases [3] - 26:19, 40:3, 40:17 categories [1] - 15:8 caused [1] - 32:9 CCR [2] - 1:23, 43:10 centered [1] - 8:18 certain [3] - 35:8, 40:20 certainly [9] - 12:1, 23:24, 24:1, 24:7, 24:9, 31:17, 32:4, 33:12, 35:10 certify [1] - 43:8 cetera [1] - 8:6 change [1] - 19:16 changed [1] - 7:3 characterization [1] - 26:17 characterized [2] - 27:10, 36:21 CHIEF [1] - 1:2 chooses [1] - 18:14 CIRCLE [1] - 3:9 Circle [1] - 5:21 Circuit [1] - 16:13 cite [1] - 33:15 City [2] - 2:8, 2:24</p>	<p>claim [39] - 10:12, 10:20, 12:13, 13:2, 18:20, 18:23, 19:3, 19:5, 19:20, 20:12, 20:15, 20:20, 20:25, 21:5, 21:9, 21:14, 21:15, 21:24, 21:25, 22:4, 22:6, 22:12, 22:16, 23:7, 24:24, 25:1, 25:19, 25:20, 25:21, 26:10, 26:15, 26:25, 27:7, 30:6, 31:9, 31:22, 32:15, 41:4 claimants [2] - 10:12, 10:16 claimed [2] - 20:15, 31:23 claiming [1] - 32:1 claims [24] - 10:18, 16:2, 16:3, 16:8, 18:21, 18:24, 19:2, 20:3, 20:9, 20:11, 25:1, 25:9, 25:22, 25:25, 26:4, 26:6, 27:4, 27:6, 27:9, 27:18, 34:3, 36:15, 40:3 clarification [1] - 11:11 clarified [1] - 42:6 clarify [1] - 39:21 clear [5] - 13:19, 16:10, 38:11, 41:4, 41:17 clearly [8] - 11:12, 15:2, 17:20, 22:10, 26:2, 26:21, 41:25 climb [1] - 12:5 Cobb [2] - 7:20, 42:19 code [1] - 28:19 Colorado [1] - 1:17 comments [1] - 12:6 COMMISSIONERS [1] - 2:8 Commissioners [1] - 6:5 commissioners [1] - 18:15 complaint [10] - 10:10, 12:25, 38:8, 38:12, 38:18, 38:20, 39:24, 40:2, 40:9, 40:13 complete [1] - 9:13 completely [1] - 26:18 complicated [1] - 20:7 concerned [3] - 8:8, 17:1, 34:11 conclusion [1] - 31:1 condition [1] - 24:6</p>	<p>conference [1] - 11:13 confines [2] - 24:25, 26:12 consider [1] - 36:6 consideration [1] - 20:4 considered [2] - 17:7, 18:25 considering [1] - 27:13 consistent [3] - 27:19, 27:20, 29:8 constitutions [1] - 19:22 constraint [1] - 31:10 constraints [1] - 27:15 constructive [2] - 31:4, 31:5 construed [1] - 14:7 consumers [1] - 15:23 contained [1] - 37:14 contemplate [1] - 28:21 contemporaneous [1] - 11:3 contending [2] - 13:11, 19:18 context [3] - 12:12, 19:24, 21:22 continue [1] - 1:22 Continued [2] - 2:1, 3:1 continued [1] - 2:25 contradictory [1] - 7:25 Control [1] - 6:19 control [1] - 29:12 CONTROL [1] - 2:10 converting [2] - 11:16, 11:17 corporation [1] - 1:9 correct [5] - 13:17, 19:19, 33:18, 40:10, 43:8 corresponds [1] - 13:23 costly [1] - 39:20 coterminous [2] - 11:3, 11:10 counsel [2] - 4:16, 37:7 counterclaim [2] - 12:12, 22:16 counterclaims [2] - 23:5, 25:24 COUNTY [3] - 2:12, 2:17, 2:20 county [2] - 23:1, 24:3 County [33] - 4:17, 4:18, 5:10, 6:2, 8:9,</p>	<p>8:24, 9:8, 9:11, 15:20, 18:12, 18:14, 18:20, 18:22, 19:3, 19:18, 21:4, 21:24, 22:4, 22:13, 22:25, 23:22, 24:16, 25:19, 27:7, 32:2, 32:23, 33:2, 33:3, 33:7, 33:9, 33:12, 37:3, 42:11 county's [2] - 26:15, 36:22 County's [20] - 4:8, 6:23, 8:14, 9:23, 10:3, 10:10, 12:10, 16:2, 18:6, 20:12, 20:14, 20:20, 20:25, 21:9, 21:14, 22:6, 23:9, 23:25, 26:24, 38:24 couple [3] - 28:5, 30:4, 32:25 course [21] - 4:8, 7:18, 8:2, 8:11, 9:5, 9:6, 9:22, 11:15, 14:24, 17:22, 18:4, 31:18, 32:7, 32:23, 34:6, 34:13, 34:17, 35:22, 40:7, 40:19, 42:7 Court [26] - 10:9, 12:9, 12:10, 13:5, 14:3, 14:18, 19:25, 22:10, 22:15, 22:23, 23:2, 23:3, 23:6, 23:9, 26:11, 26:21, 27:21, 29:25, 31:16, 31:18, 32:24, 36:11, 38:2, 38:25, 40:14 court [15] - 6:24, 13:6, 13:8, 13:13, 13:15, 14:7, 22:10, 24:24, 26:24, 30:6, 30:7, 30:8, 30:11, 30:12, 30:17 COURT [74] - 1:1, 4:4, 4:19, 4:22, 4:25, 5:3, 5:8, 5:11, 5:14, 5:18, 5:22, 5:25, 6:3, 6:6, 6:13, 6:17, 6:20, 9:19, 10:19, 11:14, 11:22, 12:1, 12:7, 12:15, 12:19, 12:22, 13:12, 13:15, 13:23, 15:5, 15:9, 15:12, 15:21, 16:5, 16:12, 17:12, 17:15, 18:3, 18:9, 22:18, 23:20, 24:12, 24:14, 25:3, 27:22, 27:25, 28:20, 29:14, 30:12, 30:15,</p>	<p>30:23, 31:13, 32:21, 33:7, 33:14, 33:20, 35:2, 35:7, 35:24, 36:4, 36:8, 36:17, 36:24, 37:7, 38:3, 38:14, 38:18, 40:2, 40:7, 40:15, 42:16, 42:22, 42:25, 43:3 court's [3] - 13:7, 13:20, 27:23 Court's [2] - 9:14, 40:21 courtroom [2] - 4:13, 5:17 covers [2] - 40:25, 41:11 crafting [1] - 42:20 created [1] - 26:13 creating [1] - 32:13 creation [1] - 28:18 cross [4] - 12:13, 22:16, 25:25, 40:3 cross-claim [2] - 12:13, 22:16 cross-claims [2] - 25:25, 40:3 current [2] - 10:2, 36:2</p>
				D
				<p>Dale [1] - 5:6 DALE [1] - 2:5 date [7] - 19:10, 31:3, 31:4, 31:24, 39:20, 41:1 dates [2] - 40:20 DAVID [1] - 1:18 David [1] - 5:1 days [1] - 39:24 deal [1] - 42:8 dealing [1] - 34:17 decision [3] - 13:8, 14:18, 27:1 decisions [1] - 14:7 declaration [1] - 31:3 declare [1] - 30:1 declared [3] - 31:24, 34:6 decree [13] - 10:15, 13:15, 15:4, 21:7, 22:10, 27:6, 31:21, 31:25, 32:16, 33:4, 33:10, 33:17 Decree [2] - 12:25, 19:17 decreed [1] - 23:18 decreeing [1] - 31:19 deem [1] - 40:20 deemed [2] - 19:9, 20:22</p>

<p>default [2] - 41:15, 42:4</p> <p>defeat [2] - 20:24, 21:14</p> <p>defend [1] - 32:15</p> <p>defendant [1] - 18:15</p> <p>Defendants [1] - 1:11</p> <p>defendants [5] - 12:14, 22:2, 40:4, 40:12, 40:16</p> <p>defended [1] - 36:23</p> <p>delay [2] - 22:5, 22:6</p> <p>delineated [1] - 38:16</p> <p>denied [1] - 26:10</p> <p>Denver [1] - 1:17</p> <p>DePaoli [30] - 2:4, 5:5, 5:6, 12:3, 12:4, 12:8, 12:17, 12:21, 12:23, 13:14, 13:17, 15:2, 15:7, 15:10, 15:13, 15:25, 16:7, 17:3, 17:13, 17:24, 18:8, 18:11, 22:21, 24:19, 26:16, 38:3, 38:4, 38:17, 39:22</p> <p>DePaoli's [1] - 35:3</p> <p>Department [5] - 5:16, 22:20, 22:23, 23:14, 23:16</p> <p>DEPARTMENT [1] - 2:23</p> <p>depth [1] - 32:22</p> <p>Deputies [1] - 2:23</p> <p>Deputy [2] - 2:10, 3:7</p> <p>derogation [1] - 31:23</p> <p>describe [1] - 27:17</p> <p>detail [2] - 18:1, 32:22</p> <p>detailed [1] - 14:6</p> <p>determination [1] - 16:1</p> <p>determine [2] - 13:8, 22:11</p> <p>determined [2] - 16:5, 16:7</p> <p>devil's [2] - 30:25, 31:15</p> <p>differences [1] - 26:17</p> <p>different [15] - 7:15, 8:21, 9:6, 19:2, 20:8, 21:22, 22:8, 25:20, 25:24, 29:12, 36:18</p> <p>differently [1] - 24:4</p> <p>direction [2] - 7:4, 40:14</p> <p>directly [1] - 30:24</p> <p>disagree [3] - 10:8, 10:19, 18:22</p> <p>disagreement [1] - 10:24</p> <p>disagrees [1] - 32:24</p>	<p>discovery [1] - 39:14</p> <p>dismiss [5] - 7:6, 8:17, 18:5, 18:6, 25:6</p> <p>dismissal [1] - 7:22</p> <p>disparagement [2] - 32:8, 36:21</p> <p>disparages [1] - 23:13</p> <p>disparaging [2] - 23:21, 36:17</p> <p>disposition [3] - 26:15, 27:1, 27:8</p> <p>dissimilar [1] - 26:18</p> <p>distinction [1] - 15:22</p> <p>distinguish [1] - 15:22</p> <p>distinguishable [1] - 23:22</p> <p>distinguishing [1] - 25:11</p> <p>District [5] - 2:15, 4:7, 4:17, 5:7, 26:23</p> <p>district [5] - 11:2, 12:4, 12:15, 13:3, 38:5</p> <p>DISTRICT [5] - 1:1, 1:1, 1:2, 1:9, 2:5</p> <p>docketed [2] - 37:12, 37:23</p> <p>doctrine [12] - 19:25, 20:17, 20:21, 21:2, 28:11, 28:15, 31:6, 31:8, 31:15, 32:1, 32:15, 35:11</p> <p>Doctrine [1] - 27:11</p> <p>domestic [3] - 15:14, 16:10</p> <p>Don [1] - 5:24</p> <p>DON [1] - 3:12</p> <p>done [1] - 24:9</p> <p>dormant [2] - 15:16, 15:18</p> <p>doubt [4] - 8:9, 16:23, 37:2, 37:3</p> <p>down [4] - 16:22, 16:23, 29:4, 34:18</p> <p>due [4] - 14:16, 41:4, 41:5, 41:19</p> <p>during [2] - 29:4, 29:6</p> <p>duties [1] - 29:10</p> <p>duty [1] - 28:15</p>	<p>effectively [1] - 36:23</p> <p>efficacy [1] - 8:12</p> <p>efficient [1] - 26:14</p> <p>effort [1] - 19:15</p> <p>efforts [2] - 23:13, 23:21</p> <p>either [6] - 12:24, 15:19, 20:16, 29:11, 35:7, 41:18</p> <p>El [1] - 2:13</p> <p>elements [1] - 23:9</p> <p>embraces [1] - 25:1</p> <p>emphasize [1] - 13:13</p> <p>end [1] - 12:9</p> <p>Endangered [1] - 33:24</p> <p>endangered [2] - 34:3, 34:5</p> <p>ends [1] - 41:19</p> <p>enforce [1] - 30:9</p> <p>enforcement [1] - 27:2</p> <p>engage [1] - 36:6</p> <p>Engineer [4] - 13:18, 29:25, 30:9, 32:3</p> <p>enjoying [2] - 33:14, 33:16</p> <p>enter [4] - 23:17, 40:12, 40:18, 40:19</p> <p>entered [3] - 38:7, 39:9, 40:11</p> <p>entire [2] - 23:15, 31:11</p> <p>entirely [3] - 18:18, 21:21, 27:18</p> <p>entitled [1] - 43:9</p> <p>entity [1] - 28:7</p> <p>entrusted [1] - 28:6</p> <p>enures [1] - 23:10</p> <p>Equity [1] - 1:5</p> <p>ERIN [1] - 2:10</p> <p>Erin [1] - 6:18</p> <p>especially [2] - 7:1, 36:25</p> <p>essence [2] - 15:18, 24:19</p> <p>essentially [3] - 20:17, 26:25, 30:5</p> <p>established [2] - 20:19, 39:6</p> <p>et [2] - 1:9, 8:6</p> <p>events [1] - 32:9</p> <p>exact [1] - 26:10</p> <p>exactly [1] - 25:16</p> <p>example [6] - 18:5, 19:23, 21:3, 25:4, 33:22, 39:9</p> <p>except [1] - 36:9</p> <p>exceptional [1] - 25:23</p>	<p>exist [6] - 19:9, 19:10, 19:13, 19:14, 20:22, 34:7</p> <p>existed [3] - 20:16, 28:25, 33:16</p> <p>existence [5] - 20:23, 27:13, 28:4, 33:10, 33:13</p> <p>existing [8] - 13:1, 13:9, 20:6, 20:19, 22:11, 27:2, 27:5, 28:24</p> <p>exists [1] - 20:15</p> <p>expanding [2] - 39:13, 39:14</p> <p>explanation [1] - 36:2</p> <p>explore [2] - 28:1, 29:14</p> <p>extent [8] - 16:20, 17:18, 34:7, 37:18, 37:19, 38:23, 39:1, 40:19</p>	<p>25:11, 31:8, 38:19</p> <p>filings [1] - 27:21</p> <p>final [3] - 9:20, 34:20, 41:3</p> <p>finally [1] - 33:8</p> <p>fine [1] - 9:19</p> <p>finished [1] - 36:9</p> <p>first [2] - 9:8, 30:20</p> <p>FISH [1] - 3:12</p> <p>Fish [2] - 5:24, 24:7</p> <p>fisheries [1] - 28:24</p> <p>fishery [4] - 23:19, 28:24, 29:23, 37:1</p> <p>flip [1] - 20:23</p> <p>flowing [3] - 16:22, 16:23, 36:25</p> <p>folks [3] - 38:11, 42:25</p> <p>FOR [13] - 1:15, 2:2, 2:4, 2:7, 2:10, 2:12, 2:17, 2:20, 2:23, 3:3, 3:6, 3:9, 3:12</p> <p>foregoing [1] - 43:8</p> <p>Forest [2] - 8:24, 9:23</p> <p>forever [1] - 34:4</p> <p>formalistic [1] - 24:23</p> <p>forum [3] - 13:8, 23:7, 30:15</p> <p>forward [2] - 26:5, 27:1</p> <p>FOUNDATION [1] - 3:12</p> <p>Foundation [2] - 5:24, 24:8</p> <p>four [2] - 28:5, 37:13</p> <p>framing [1] - 30:20</p> <p>Francisco [1] - 3:7</p> <p>frankly [1] - 26:17</p> <p>free [1] - 31:22</p> <p>French [1] - 34:11</p> <p>fully [1] - 19:10</p> <p>futility [1] - 8:13</p> <p>future [1] - 34:5</p>
F				
<p>facilitate [1] - 24:8</p> <p>fact [9] - 7:18, 10:9, 21:4, 22:25, 26:2, 26:20, 28:6, 32:10, 33:1</p> <p>facts [4] - 20:8, 21:22, 22:8, 26:18</p> <p>factual [1] - 19:5</p> <p>fair [1] - 33:5</p> <p>fairly [1] - 12:5</p> <p>far [4] - 8:8, 17:1, 34:10, 41:7</p> <p>FARM [1] - 3:3</p> <p>Farms [2] - 5:13, 5:21</p> <p>FARMS [1] - 3:9</p> <p>fashion [5] - 10:4, 13:10, 18:14, 19:16, 21:1</p> <p>federal [14] - 6:24, 18:24, 19:5, 20:15, 21:9, 25:9, 25:22, 27:10, 27:12, 28:7, 28:10, 29:16, 30:17, 41:2</p> <p>FERGUSON [1] - 2:5</p> <p>Ferguson [1] - 5:6</p> <p>file [8] - 7:14, 25:10, 34:8, 34:24, 37:12, 40:4, 40:13</p> <p>filed [5] - 4:9, 25:6, 25:9, 38:9, 38:18</p> <p>files [8] - 7:10, 7:12, 7:17, 8:16, 8:20, 11:8, 25:4, 37:24</p> <p>filing [5] - 7:13, 23:10,</p>				
G				
<p>general [2] - 9:22, 26:12</p> <p>General [3] - 2:10, 2:23, 3:7</p> <p>General's [2] - 6:11, 6:15</p> <p>generally [1] - 4:10</p> <p>GEORGE [1] - 2:20</p> <p>George [2] - 5:10, 16:14</p> <p>given [5] - 9:17, 10:23, 37:10, 37:13, 37:16</p> <p>GORDON [1] - 2:4</p> <p>Gordon [3] - 5:6, 12:4, 38:4</p>				

<p>governing [1] - 28:6 government [4] - 11:1, 28:11, 37:5, 43:1 governs [1] - 28:16 grant [9] - 8:3, 8:11, 12:10, 18:10, 35:4, 35:12, 35:16, 37:9, 37:21 granted [4] - 10:21, 20:2, 32:5, 38:24 granting [7] - 16:21, 24:20, 29:3, 34:20, 34:22, 35:21, 39:15 grants [2] - 37:23, 42:23 Griener [3] - 1:23, 43:10, 43:10 groundwater [26] - 8:6, 8:22, 8:23, 10:1, 10:21, 12:18, 14:25, 15:5, 15:8, 15:15, 15:17, 15:18, 16:8, 16:14, 16:19, 17:4, 17:5, 17:7, 17:10, 17:14, 21:24, 21:25, 32:5, 34:14, 39:1 groundwaters [1] - 16:24 groups [1] - 9:1 GUARINO [3] - 1:15, 4:23, 43:2 Guarino [2] - 4:23, 4:25 guess [3] - 17:2, 38:10, 39:22 Guss [1] - 4:23 GUSS [1] - 1:15</p>	<p>HERSKOVITS [36] - 2:12, 4:15, 9:9, 10:5, 11:11, 11:21, 11:23, 12:2, 24:15, 25:13, 27:23, 28:12, 29:9, 30:3, 30:14, 30:19, 31:7, 32:17, 32:22, 33:12, 33:18, 34:25, 35:6, 35:22, 36:1, 36:5, 36:9, 36:20, 37:6, 38:1, 40:6, 40:10, 42:9, 42:18, 42:24, 43:5 hierarchy [1] - 31:11 high [1] - 12:5 historically [1] - 24:9 history [3] - 6:25, 29:21, 29:22 hold [2] - 28:9, 34:4 holders [2] - 10:15, 10:17 holding [1] - 29:2 Honor [48] - 4:16, 5:1, 5:5, 5:9, 5:15, 5:19, 5:23, 6:9, 9:10, 9:12, 10:5, 11:12, 11:24, 12:3, 12:5, 12:21, 13:18, 15:8, 16:1, 18:1, 18:2, 18:11, 18:19, 19:1, 19:4, 22:17, 22:19, 24:16, 25:13, 28:13, 29:9, 30:3, 31:7, 32:17, 33:19, 35:22, 36:11, 38:2, 38:4, 38:17, 39:24, 40:6, 40:10, 42:9, 42:19, 42:24, 43:2, 43:5 Honor's [1] - 23:1 HONORABLE [1] - 1:2 hoped [1] - 12:8 hopefully [2] - 39:19, 42:7 household [2] - 15:24, 16:19 hundreds [1] - 20:6</p>	<p>34:16 implied [3] - 19:4, 19:9, 40:22 importantly [1] - 32:6 imposed [1] - 11:19 impression [1] - 34:18 in-depth [1] - 32:22 incidents [1] - 28:9 inclination [1] - 36:3 inclined [2] - 9:15, 36:12 included [1] - 23:16 including [5] - 7:5, 14:25, 33:24, 37:2, 38:25 inconsistent [2] - 13:4, 13:5 indeed [1] - 18:14 Indian [1] - 21:6 indicated [1] - 7:2 indicating [1] - 18:1 individual [1] - 25:22 industrial [1] - 15:11 inevitably [1] - 27:7 inextricable [1] - 26:25 informed [1] - 19:21 initial [3] - 7:5, 7:11, 7:21 intend [1] - 11:6 intended [1] - 7:20 intending [1] - 22:14 intends [1] - 22:13 interest [2] - 22:3, 23:25 interests [5] - 8:10, 36:15, 36:19, 37:2, 37:4 interference [1] - 13:20 interplay [1] - 27:12 interpret [1] - 12:11 interstate [1] - 30:10 intervene [18] - 4:9, 6:23, 7:9, 8:4, 8:12, 9:5, 18:10, 23:4, 23:23, 34:20, 34:23, 35:3, 35:17, 37:14, 37:21, 38:19, 38:20 Intervenor [1] - 1:7 intervenor [1] - 26:7 intervenors [3] - 26:1, 26:2, 26:3 intervention [13] - 10:7, 10:11, 12:11, 20:10, 21:16, 22:24, 24:20, 26:9, 33:15, 38:7, 38:9, 38:16, 42:14 invitation [1] - 36:6</p>	<p>involve [3] - 20:3, 20:5, 20:7 involved [3] - 10:6, 17:8, 19:18 involvement [1] - 29:22 involving [1] - 21:21 IRRIGATION [2] - 1:9, 2:5 irrigation [2] - 12:4, 15:10 Irrigation [3] - 4:7, 5:7, 26:23 issue [5] - 18:21, 19:12, 20:18, 23:25, 36:7 issued [2] - 18:4, 23:19 issues [16] - 7:5, 8:18, 8:19, 8:21, 8:22, 17:25, 18:7, 19:5, 20:4, 20:8, 26:4, 27:19, 35:17, 35:25, 37:19, 42:18 itself [2] - 23:19, 28:23</p>	<p>K KAREN [1] - 2:7 Karen [1] - 6:4 keep [2] - 25:11, 42:13 kind [5] - 30:6, 30:21, 33:3, 39:25, 42:7 knows [2] - 19:4, 40:1</p>
<p>H hand [2] - 19:20, 21:12 handle [1] - 7:21 handled [2] - 18:18, 21:19 HARRY [1] - 3:3 Harry [1] - 5:12 Hawthorne [1] - 2:15 heard [4] - 22:15, 34:10, 35:18 HEARING [1] - 1:13 hearing [3] - 7:20, 10:20, 10:25 held [3] - 27:15, 29:5, 40:7 hereafter [2] - 34:6, 41:4 Herskovits [5] - 4:16, 9:10, 23:13, 24:16, 42:10</p>	<p>I Idaho [1] - 1:19 idea [1] - 24:23 identified [1] - 39:2 impact [2] - 17:13, 20:24 impaired [1] - 18:23 impeded [1] - 18:23 implicated [1] - 40:22 implication [3] - 33:25, 39:15 implications [1] -</p>	<p>J JIM [1] - 3:14 JONES [1] - 1:2 Jones [1] - 4:6 Jr [1] - 4:21 JR [1] - 2:2 JUDGE [1] - 1:2 Judge [18] - 4:6, 7:4, 7:9, 7:20, 9:21, 14:10, 14:24, 15:22, 16:14, 17:22, 25:17, 27:24, 38:16, 39:1, 40:7, 40:11, 41:22, 42:19 judges [1] - 6:24 judgment [2] - 18:19, 20:13 judicata [2] - 31:2, 32:19 juncture [1] - 41:23 jurisdiction [25] - 7:5, 7:22, 8:5, 8:13, 8:18, 8:22, 10:18, 13:20, 13:24, 14:3, 14:8, 14:13, 14:20, 14:21, 14:23, 16:14, 17:23, 18:6, 31:17, 35:25, 36:5, 40:21, 42:2, 42:3 jurisdictional [1] - 32:18</p>	<p>L Lake [6] - 13:2, 13:10, 23:19, 24:6, 32:10, 36:25 lake [5] - 24:8, 28:24, 28:25, 29:23, 34:18 lake's [1] - 23:14 Lakes [1] - 2:18 laments [1] - 24:6 land [1] - 15:17 lands [2] - 28:7 large [3] - 17:7, 17:14, 32:13 last [9] - 10:20, 10:25, 11:13, 13:25, 14:6, 14:15, 15:21, 37:8, 42:10 late [3] - 31:3, 31:4, 39:20 Law [9] - 2:2, 2:5, 2:8, 2:13, 2:17, 2:20, 3:3, 3:9, 3:12 law [15] - 5:20, 12:10, 19:5, 19:21, 19:22, 20:4, 21:22, 22:8, 23:11, 26:18, 28:14, 28:21, 29:1, 29:15, 29:16 lawsuit [1] - 41:9 lead [1] - 4:16 least [5] - 17:21, 18:19, 21:23, 27:20, 36:2 legal [3] - 20:8, 20:14, 25:20 lengthy [1] - 20:7 less [1] - 39:20 likely [1] - 9:2 limited [1] - 21:15 litigation [3] - 9:7, 9:25, 33:4 long-existing [1] - 28:24 looking [2] - 16:1, 16:3 LYON [1] - 2:20 Lyon [1] - 5:10</p>	

<p>M</p> <p>Magistrate [1] - 42:19</p> <p>Mahaney [1] - 6:18</p> <p>MAHANAY [2] - 2:10, 6:18</p> <p>mail [3] - 39:10, 41:18</p> <p>main [1] - 34:22</p> <p>maintain [1] - 26:23</p> <p>major [1] - 35:20</p> <p>Mammoth [1] - 2:18</p> <p>manage [1] - 27:1</p> <p>managed [1] - 26:11</p> <p>management [4] - 7:3, 25:15, 42:20</p> <p>manages [1] - 28:16</p> <p>Margaret [2] - 1:23, 43:10</p> <p>MARTA [1] - 2:23</p> <p>Marta [2] - 5:15, 22:19</p> <p>Mason [1] - 23:18</p> <p>MASTER [1] - 3:14</p> <p>Master [1] - 6:5</p> <p>matter [8] - 4:12, 19:2, 19:3, 21:20, 24:4, 26:20, 30:8, 43:9</p> <p>matters [2] - 7:5, 37:25</p> <p>mean [1] - 14:13</p> <p>means [2] - 14:12, 39:5</p> <p>meet [4] - 13:1, 13:10, 21:1, 22:12</p> <p>merit [1] - 8:18</p> <p>merit-centered [1] - 8:18</p> <p>merits [6] - 7:21, 7:23, 8:4, 8:5, 8:13</p> <p>met [1] - 14:16</p> <p>method [1] - 11:17</p> <p>Mexico [1] - 2:13</p> <p>Mica [1] - 5:21</p> <p>MICA [1] - 3:9</p> <p>Michael [1] - 6:10</p> <p>MICHAEL [1] - 3:6</p> <p>might [2] - 25:25, 41:4</p> <p>mind [2] - 16:3, 38:6</p> <p>MINERAL [1] - 2:12</p> <p>Mineral [51] - 4:8, 4:16, 4:18, 6:22, 8:9, 8:13, 8:24, 9:8, 9:11, 9:22, 10:3, 10:10, 12:10, 15:20, 16:2, 18:6, 18:12, 18:14, 18:20, 18:22, 19:3, 19:18, 20:12, 20:14, 20:20, 20:25, 21:4, 21:8, 21:14, 21:23, 22:4, 22:6, 22:13, 22:24, 23:9, 23:21,</p>	<p>23:25, 24:16, 25:19, 26:24, 27:7, 32:2, 32:23, 33:2, 33:3, 33:7, 33:9, 33:12, 37:3, 38:24, 42:11</p> <p>misplaced [1] - 24:21</p> <p>mistaken [2] - 21:23, 24:22</p> <p>modified [3] - 13:9, 22:12, 42:20</p> <p>modify [1] - 12:25</p> <p>MONDAY [1] - 4:1</p> <p>Mono [1] - 6:2</p> <p>MONO [1] - 2:17</p> <p>most [1] - 19:23</p> <p>MOTION [1] - 1:13</p> <p>motion [24] - 4:8, 6:23, 7:1, 8:1, 8:4, 8:12, 9:5, 10:10, 12:25, 18:6, 18:10, 23:4, 24:20, 34:20, 34:23, 35:13, 35:21, 37:21, 37:23, 38:15, 39:16, 40:14, 42:14, 42:23</p> <p>motions [5] - 7:6, 8:17, 18:5, 25:6, 37:14</p> <p>motivation [2] - 31:8, 36:24</p> <p>motivations [1] - 23:22</p> <p>mountain [1] - 12:5</p> <p>moving [2] - 7:18, 37:15</p> <p>MR [66] - 4:15, 4:20, 4:23, 5:1, 5:4, 5:5, 5:9, 5:12, 5:23, 6:9, 9:9, 10:5, 11:11, 11:21, 11:23, 12:2, 12:3, 12:8, 12:17, 12:21, 12:23, 13:14, 13:17, 15:2, 15:7, 15:10, 15:13, 15:25, 16:7, 17:3, 17:13, 17:24, 18:8, 18:11, 24:15, 25:13, 27:23, 28:12, 29:9, 30:3, 30:14, 30:19, 31:7, 32:17, 32:22, 33:12, 33:18, 34:25, 35:6, 35:22, 36:1, 36:5, 36:9, 36:20, 37:6, 38:1, 38:4, 38:17, 39:22, 40:6, 40:10, 42:9, 42:18, 42:24, 43:2, 43:5</p> <p>MS [9] - 5:15, 5:19, 6:1, 6:4, 6:14, 6:18, 22:19, 23:24, 24:13</p>	<p>municipal [1] - 15:11</p> <p>must [4] - 8:3, 8:7, 37:20, 39:23</p> <p>N</p> <p>name [1] - 5:19</p> <p>named [1] - 14:15</p> <p>nasty [1] - 33:25</p> <p>NATIONAL [1] - 3:12</p> <p>National [2] - 5:24, 24:7</p> <p>natural [4] - 28:23, 28:24, 29:23</p> <p>NDOW [1] - 24:6</p> <p>necessarily [1] - 25:23</p> <p>need [13] - 4:11, 7:6, 13:9, 18:17, 37:11, 38:11, 38:12, 39:21, 39:25, 40:16, 40:19, 41:2, 41:24</p> <p>needing [1] - 30:9</p> <p>needs [1] - 42:6</p> <p>Negri [1] - 5:1</p> <p>NEGRI [3] - 1:18, 5:1, 5:4</p> <p>Nevada [31] - 1:24, 2:3, 2:6, 2:8, 2:15, 2:21, 2:24, 3:4, 3:10, 3:13, 5:16, 13:5, 14:2, 14:5, 14:12, 16:25, 22:20, 23:16, 24:3, 26:20, 26:23, 27:21, 28:19, 28:20, 29:1, 29:15, 31:19, 31:20, 32:2, 33:2, 33:22</p> <p>NEVADA [3] - 1:1, 2:23, 4:1</p> <p>Nevada's [1] - 29:22</p> <p>never [2] - 10:17, 41:1</p> <p>nevertheless [3] - 29:2, 29:5, 32:14</p> <p>Neville [1] - 6:10</p> <p>NEVILLE [3] - 3:6, 6:9, 6:10</p> <p>New [1] - 2:13</p> <p>new [9] - 26:12, 27:4, 27:9, 28:6, 30:21, 33:23, 40:3, 42:7, 42:20</p> <p>next [2] - 1:22, 2:25</p> <p>Ninth [1] - 16:13</p> <p>nonanswer [1] - 31:14</p> <p>none [2] - 15:19, 38:1</p> <p>normal [2] - 7:6, 40:3</p> <p>north [1] - 17:18</p> <p>note [2] - 4:13, 23:10</p> <p>noted [2] - 7:11, 22:23</p> <p>nothing [1] - 25:23</p>	<p>notice [2] - 32:4, 33:3</p> <p>notified [1] - 39:23</p> <p>notwithstanding [1] - 26:22</p> <p>number [1] - 14:9</p> <p>O</p> <p>object [1] - 22:24</p> <p>objections [1] - 24:20</p> <p>obligation [6] - 10:3, 11:4, 13:10, 28:15, 31:10, 41:13</p> <p>obligations [4] - 10:22, 11:7, 29:5, 29:10</p> <p>obstruct [1] - 26:14</p> <p>obtain [1] - 31:3</p> <p>obtrusive [1] - 19:23</p> <p>obviously [3] - 10:21, 23:8, 24:3</p> <p>OF [4] - 1:1, 1:4, 1:13, 2:7</p> <p>office [3] - 5:20, 6:11, 6:15</p> <p>Official [2] - 1:23, 43:11</p> <p>often [1] - 18:25</p> <p>once [3] - 9:10, 24:17, 38:6</p> <p>one [25] - 7:14, 7:16, 7:18, 8:16, 9:21, 10:5, 16:8, 21:3, 22:3, 25:10, 29:21, 29:22, 29:24, 30:5, 33:1, 33:21, 34:6, 34:19, 37:1, 37:16, 41:21, 41:23, 42:5, 42:10</p> <p>ones [2] - 21:10</p> <p>open [1] - 18:7</p> <p>opinion [2] - 18:2, 18:3</p> <p>opportunity [2] - 17:25, 34:21</p> <p>oppose [1] - 35:8</p> <p>opposition [2] - 11:22, 25:8</p> <p>order [11] - 7:3, 7:10, 9:2, 37:10, 37:22, 38:7, 39:13, 40:11, 42:14, 42:20, 42:23</p> <p>orders [2] - 10:9, 10:11</p> <p>organization [1] - 34:12</p> <p>original [6] - 7:4, 7:9, 32:11, 32:16, 33:4, 33:17</p> <p>originating [1] - 15:4</p>	<p>otherwise [7] - 7:22, 8:3, 9:6, 13:11, 27:6, 34:10, 42:3</p> <p>ought [3] - 12:23, 21:14, 22:9</p> <p>outcome [2] - 18:24, 22:4</p> <p>outlined [1] - 9:13</p> <p>outset [1] - 12:6</p> <p>outside [1] - 31:10</p> <p>overall [2] - 24:25, 27:14</p> <p>overlies [1] - 15:17</p> <p>overstates [1] - 26:16</p> <p>ownership [1] - 28:10</p> <p>P</p> <p>P.M [1] - 4:1</p> <p>page [2] - 1:22, 2:25</p> <p>Paiute [2] - 4:21, 25:21</p> <p>PAIUTE [2] - 1:6, 2:2</p> <p>papers [1] - 37:15</p> <p>paramount [2] - 28:17, 31:11</p> <p>part [6] - 10:21, 11:6, 19:17, 24:7, 24:9, 41:8</p> <p>participate [1] - 18:13</p> <p>particular [5] - 7:11, 8:1, 12:15, 12:17, 25:12</p> <p>particularly [2] - 25:24, 26:3</p> <p>parties [17] - 7:13, 9:24, 11:5, 11:6, 12:20, 14:6, 14:17, 17:22, 20:6, 25:25, 32:4, 33:3, 34:2, 39:23</p> <p>parties' [2] - 16:6, 37:15</p> <p>PARTNERSHIP [1] - 3:3</p> <p>party [5] - 14:15, 20:1, 22:3, 32:3, 40:4</p> <p>past [1] - 6:25</p> <p>peace [1] - 34:4</p> <p>people [9] - 14:17, 15:19, 16:18, 39:3, 39:8, 40:12, 41:14, 41:25, 42:1</p> <p>perfect [1] - 25:18</p> <p>perfected [1] - 19:10</p> <p>perhaps [3] - 9:16, 9:17, 21:3</p> <p>period [1] - 29:4</p> <p>permissive [2] - 21:16, 22:24</p>
---	---	--	--	--

<p>permit [1] - 23:19</p> <p>permits [3] - 32:5, 32:6</p> <p>permitted [1] - 28:18</p> <p>personal [1] - 39:7</p> <p>personam [11] - 14:3, 14:4, 14:12, 14:20, 14:23, 17:18, 17:19, 17:21, 17:23, 35:16, 42:3</p> <p>perspective [2] - 36:2, 36:22</p> <p>persuade [1] - 9:5</p> <p>persuaded [1] - 8:3</p> <p>persuasion [1] - 8:2</p> <p>persuasively [1] - 21:17</p> <p>pertains [1] - 7:7</p> <p>PETERSON [2] - 2:7, 6:4</p> <p>Peterson [1] - 6:4</p> <p>petition [19] - 4:9, 4:10, 7:8, 8:10, 8:14, 8:24, 10:3, 11:20, 18:6, 23:9, 25:5, 25:7, 25:9, 32:11, 33:15, 34:22, 35:5, 37:9, 40:23</p> <p>petitioners [1] - 14:2</p> <p>petitions [3] - 7:23, 9:23, 25:12</p> <p>place [2] - 30:17, 39:23</p> <p>placement [1] - 29:7</p> <p>plaintiff [2] - 1:5, 26:7</p> <p>Plaintiff [1] - 1:7</p> <p>PLAINTIFF [1] - 1:15</p> <p>Plaintiff-Intervenor [1] - 1:7</p> <p>pleadings [2] - 9:1, 11:17</p> <p>point [9] - 10:6, 10:9, 17:24, 25:17, 33:5, 33:8, 36:10, 38:8, 38:14</p> <p>pointed [1] - 37:7</p> <p>points [2] - 9:15, 25:5</p> <p>portions [1] - 29:12</p> <p>position [6] - 13:3, 13:4, 13:7, 19:1, 32:3, 32:8</p> <p>positions [2] - 9:3, 38:21</p> <p>possible [1] - 39:4</p> <p>potential [1] - 10:1</p> <p>potentially [2] - 17:7, 20:5</p> <p>practical [1] - 21:8</p> <p>practice [1] - 25:17</p> <p>Prado [1] - 2:13</p>	<p>pre [1] - 20:19</p> <p>pre-existing [1] - 20:19</p> <p>precedes [1] - 28:17</p> <p>preceding [1] - 29:21</p> <p>predilection [6] - 6:25, 7:19, 8:1, 9:14, 14:1, 22:25</p> <p>predilections [1] - 13:25</p> <p>prefer [2] - 32:20, 42:13</p> <p>prejudice [2] - 7:13, 7:17</p> <p>present [5] - 14:11, 16:17, 18:3, 34:18, 38:2</p> <p>previously [3] - 7:2, 11:19, 12:20</p> <p>primarily [1] - 14:20</p> <p>primary [3] - 19:7, 24:19, 39:15</p> <p>priority [8] - 10:23, 17:11, 27:14, 28:3, 30:1, 30:22, 31:11, 31:24</p> <p>problem [2] - 32:10, 32:13</p> <p>proceed [3] - 9:3, 18:13, 21:19</p> <p>proceeding [12] - 18:16, 21:20, 25:1, 26:5, 26:12, 30:13, 34:1, 34:7, 34:12, 35:15, 37:11, 37:18</p> <p>proceedings [7] - 10:11, 18:18, 21:21, 26:1, 32:3, 43:8</p> <p>process [7] - 4:12, 14:16, 20:5, 29:3, 41:5, 41:20</p> <p>processes [2] - 39:12, 39:18</p> <p>progress [1] - 26:14</p> <p>proper [2] - 13:8, 23:7</p> <p>properly [3] - 23:3, 24:24, 27:15</p> <p>proposed [2] - 38:8, 42:14</p> <p>prospect [1] - 31:2</p> <p>protect [2] - 33:23, 36:25</p> <p>protected [1] - 36:23</p> <p>protection [1] - 29:6</p> <p>provides [1] - 36:14</p> <p>public [29] - 13:1, 13:10, 18:20, 19:20, 19:25, 20:12, 20:14, 20:17, 20:20, 20:25, 21:1, 21:5, 21:9,</p>	<p>21:15, 22:12, 23:8, 23:10, 24:3, 24:4, 26:15, 26:25, 27:7, 28:14, 28:15, 31:5, 31:8, 31:20, 32:14, 35:11</p> <p>publication [1] - 41:3</p> <p>purpose [1] - 19:7</p> <p>purposes [4] - 15:10, 23:15, 38:19, 41:6</p> <p>pursuing [1] - 31:4</p> <p>put [2] - 30:24, 41:22</p> <p style="text-align: center;">Q</p> <p>quantity [1] - 19:14</p> <p>questions [4] - 8:25, 32:19, 35:18</p> <p>quite [3] - 24:4, 24:18, 26:16</p> <p style="text-align: center;">R</p> <p>raise [1] - 26:4</p> <p>Ranch [1] - 5:21</p> <p>RANCH [1] - 3:9</p> <p>rather [2] - 30:2, 41:16</p> <p>rationale [2] - 13:12, 13:14</p> <p>RDR [2] - 1:23, 43:10</p> <p>re [1] - 16:13</p> <p>re-echoing [1] - 16:13</p> <p>read [1] - 28:14</p> <p>reading [1] - 27:20</p> <p>realistic [1] - 16:12</p> <p>realize [1] - 32:10</p> <p>really [5] - 10:15, 25:1, 26:13, 31:14, 32:9</p> <p>reason [9] - 7:12, 11:1, 14:9, 17:6, 18:17, 19:1, 20:13, 22:7, 35:14</p> <p>reasons [9] - 32:25, 34:19, 34:22, 35:20, 37:10, 37:13, 37:14, 37:16, 42:16</p> <p>receive [2] - 6:24, 33:3</p> <p>recent [3] - 16:13, 32:9, 32:12</p> <p>recognition [3] - 21:13, 28:22, 29:19</p> <p>recognize [3] - 13:11, 29:25, 32:8</p> <p>recognized [9] - 19:14, 19:17, 21:6, 21:10, 21:11, 26:21, 29:3, 30:12, 38:24</p> <p>recognizes [1] - 29:16</p> <p>recognizing [1] - 10:22</p>	<p>reconsider [1] - 19:15</p> <p>reconsidered [1] - 20:1</p> <p>record [9] - 4:11, 4:12, 4:14, 27:19, 33:1, 36:13, 37:11, 42:17, 43:8</p> <p>recreation [1] - 28:23</p> <p>Reed [11] - 14:10, 14:24, 15:22, 17:22, 25:17, 27:24, 38:16, 39:1, 40:7, 40:11, 41:22</p> <p>Reed's [3] - 7:4, 7:9, 9:21</p> <p>refers [1] - 15:16</p> <p>Refuge [1] - 23:18</p> <p>regard [6] - 9:22, 24:9, 27:4, 36:5, 37:5, 38:23</p> <p>regardless [2] - 35:3, 41:19</p> <p>regulated [3] - 17:11, 21:1, 21:14</p> <p>regulations [1] - 32:12</p> <p>related [2] - 17:8, 17:21</p> <p>relation [1] - 7:8</p> <p>relationship [3] - 18:19, 20:10, 20:14</p> <p>relative [3] - 27:14, 32:3, 38:21</p> <p>rem [18] - 14:3, 14:4, 14:7, 14:12, 14:21, 17:17, 31:1, 31:17, 34:1, 34:7, 34:12, 35:15, 37:18, 40:24, 41:6, 41:11, 42:2</p> <p>remain [2] - 18:7, 25:4</p> <p>reminder [2] - 8:15, 9:21</p> <p>removal [1] - 29:18</p> <p>RENO [1] - 4:1</p> <p>Reno [6] - 1:24, 2:6, 2:21, 3:4, 3:10, 3:13</p> <p>reply [3] - 9:20, 24:14, 24:18</p> <p>Reported [1] - 1:23</p> <p>Reporter [2] - 1:23, 43:11</p> <p>representation [2] - 36:15, 36:18</p> <p>representing [3] - 5:20, 6:11, 6:16</p> <p>request [4] - 7:9, 8:8, 8:25, 12:24</p> <p>requested [1] - 13:17</p> <p>require [8] - 15:5, 15:13, 15:14, 15:22, 15:24, 20:25, 29:25,</p>	<p>41:23</p> <p>required [11] - 7:14, 14:10, 14:24, 15:2, 15:7, 16:20, 17:6, 17:23, 19:7, 40:4, 41:3</p> <p>requirement [3] - 20:10, 40:8</p> <p>requirements [2] - 11:18, 14:16</p> <p>requires [1] - 12:10</p> <p>requiring [2] - 40:12, 40:18</p> <p>res [2] - 31:1, 32:19</p> <p>Reservation [1] - 21:6</p> <p>reservation [2] - 19:6, 19:11</p> <p>reservations [1] - 20:18</p> <p>reserve [1] - 11:24</p> <p>reserved [8] - 19:4, 19:9, 20:15, 20:21, 20:24, 21:9, 27:10, 27:11</p> <p>reserving [1] - 34:21</p> <p>resolution [5] - 7:21, 20:11, 26:14, 26:24, 27:9</p> <p>resolved [1] - 26:11</p> <p>resource [1] - 28:16</p> <p>Resources [1] - 6:19</p> <p>respect [11] - 11:19, 14:2, 14:5, 14:19, 31:18, 31:20, 34:1, 34:5, 34:13, 40:22, 41:9</p> <p>respectfully [5] - 10:8, 10:19, 18:22, 24:21, 32:23</p> <p>respects [1] - 35:8</p> <p>respond [5] - 11:25, 38:12, 39:23, 40:24, 40:25</p> <p>response [2] - 9:19, 40:14</p> <p>responses [1] - 25:6</p> <p>responsibility [1] - 23:12</p> <p>rest [1] - 41:11</p> <p>restrictions [1] - 32:12</p> <p>result [1] - 20:21</p> <p>results [1] - 7:25</p> <p>resupply [1] - 16:16</p> <p>reviewing [1] - 7:9</p> <p>rights [60] - 10:1, 10:13, 10:17, 10:23, 13:1, 13:9, 13:16, 13:19, 13:21, 15:4, 15:16, 15:23, 16:6, 16:15, 16:21, 17:4,</p>
--	---	---	--	--

<p>17:5, 19:9, 19:16, 19:23, 20:1, 20:6, 20:15, 20:16, 20:21, 20:24, 21:1, 21:9, 21:13, 22:11, 23:17, 23:18, 27:3, 27:6, 27:9, 27:10, 27:11, 27:14, 28:17, 28:22, 28:23, 29:3, 30:9, 31:23, 33:16, 33:24, 34:14, 34:15, 35:3, 35:8, 35:10, 36:23, 37:1, 37:16, 37:19, 38:24, 42:2</p> <p>riparian [2] - 15:16, 15:23</p> <p>RIVER [4] - 1:6, 1:9, 2:2, 2:4</p> <p>River [12] - 4:7, 4:21, 5:6, 10:14, 12:25, 16:24, 19:17, 21:6, 25:21, 26:23, 27:16, 29:12</p> <p>river [7] - 14:14, 16:23, 28:23, 29:4, 33:24, 34:3, 42:3</p> <p>ROBERT [1] - 1:2</p> <p>roughly [1] - 28:12</p> <p>round [1] - 18:5</p> <p>rounds [1] - 7:15</p> <p>ROWE [1] - 2:14</p> <p>Rowe [1] - 4:17</p> <p>rules [1] - 41:2</p> <p>ruling [5] - 8:12, 18:4, 27:23, 34:21, 42:14</p>	<p>September [1] - 1:9</p> <p>serve [5] - 11:4, 14:10, 26:13, 39:2, 39:8</p> <p>served [18] - 9:24, 10:4, 14:4, 14:24, 14:25, 15:4, 15:6, 15:19, 15:24, 17:18, 17:23, 39:10, 40:12, 41:1, 41:5, 41:6, 41:8</p> <p>service [17] - 9:22, 10:3, 11:2, 11:7, 11:9, 11:15, 11:17, 15:13, 38:23, 39:5, 39:7, 39:12, 39:14, 39:22, 41:2, 41:3, 41:18</p> <p>Service's [2] - 8:25, 9:23</p> <p>services [1] - 39:18</p> <p>set [2] - 19:6, 20:8</p> <p>several [1] - 22:2</p> <p>shaped [1] - 19:21</p> <p>SHAW [1] - 3:14</p> <p>shortly [1] - 29:1</p> <p>side [12] - 14:5, 14:8, 14:13, 14:19, 14:25, 17:6, 17:17, 20:23, 34:1, 34:13, 35:14, 41:7</p> <p>Simeon [4] - 4:16, 9:10, 24:16, 42:10</p> <p>SIMEON [1] - 2:12</p> <p>similar [2] - 15:15, 22:25</p> <p>SIMON [2] - 2:17, 6:1</p> <p>Simon [1] - 6:1</p> <p>simple [6] - 33:1, 37:10, 37:22, 42:15, 42:16, 42:23</p> <p>simply [10] - 19:12, 19:17, 19:19, 22:5, 22:15, 29:25, 30:8, 36:14, 36:22, 39:10</p> <p>single [7] - 7:15, 7:18, 17:11, 20:1, 21:20, 24:25</p> <p>situ [3] - 28:22, 29:17, 29:18</p> <p>solidly [1] - 17:16</p> <p>soon [1] - 28:21</p> <p>sort [2] - 24:23, 38:12</p> <p>sounds [1] - 9:14</p> <p>source [7] - 16:16, 16:20, 16:24, 17:11, 28:22, 29:17, 29:18</p> <p>South [1] - 1:24</p> <p>sovereign [1] - 28:16</p> <p>sovereigns [1] - 29:11</p> <p>speaking [1] - 28:12</p>	<p>Species [1] - 33:24</p> <p>species [2] - 34:3, 34:6</p> <p>specifically [3] - 4:7, 14:15, 26:6</p> <p>Springmeyer [1] - 5:24</p> <p>SPRINGMEYER [2] - 3:12, 5:23</p> <p>Stacy [1] - 6:1</p> <p>STACY [1] - 2:17</p> <p>stand [3] - 34:4, 34:8, 38:22</p> <p>standing [1] - 8:7</p> <p>standpoint [1] - 21:8</p> <p>start [2] - 4:13, 12:8</p> <p>state [20] - 6:11, 6:16, 6:24, 19:21, 19:22, 20:4, 23:11, 23:19, 24:1, 24:2, 27:13, 28:5, 29:11, 30:6, 30:7, 30:9, 36:13, 36:22, 41:2</p> <p>STATE [2] - 2:10, 3:6</p> <p>State [13] - 6:19, 13:18, 23:16, 26:22, 29:22, 29:25, 30:8, 31:19, 32:2, 32:3, 33:2, 33:21</p> <p>state's [3] - 10:22, 23:12, 23:21</p> <p>state-issued [1] - 23:19</p> <p>statement [1] - 7:12</p> <p>STATES [2] - 1:1, 1:4</p> <p>States [12] - 1:16, 1:18, 4:6, 4:24, 5:2, 12:13, 15:20, 16:9, 17:9, 25:2, 25:22, 27:5</p> <p>States' [1] - 23:5</p> <p>status [4] - 7:20, 8:7, 10:2, 11:13</p> <p>stay [1] - 22:9</p> <p>step [2] - 13:18, 27:25</p> <p>still [6] - 7:7, 7:14, 8:16, 25:4, 25:10</p> <p>STOCKTON [1] - 2:23</p> <p>Stockton [1] - 5:17</p> <p>stream [3] - 30:10, 36:25, 41:9</p> <p>Street [1] - 1:24</p> <p>strictly [1] - 16:1</p> <p>subdockets [1] - 23:15</p> <p>subfile [1] - 26:12</p> <p>subject [7] - 8:2, 8:8, 11:7, 19:2, 19:3, 20:2, 40:21</p> <p>Subproceeding [3] -</p>	<p>18:13, 18:21, 22:6</p> <p>subproceeding [2] - 12:14, 22:16</p> <p>subproceedings [1] - 25:16</p> <p>Subproceedings [1] - 1:5</p> <p>substantial [1] - 37:15</p> <p>substantially [2] - 37:17, 37:20</p> <p>suggested [2] - 6:22, 11:1</p> <p>suggesting [2] - 18:12, 25:14</p> <p>supplies [2] - 17:10</p> <p>supply [3] - 16:15, 16:24, 17:11</p> <p>support [1] - 25:5</p> <p>Supreme [4] - 13:5, 19:25, 26:21, 27:21</p> <p>supreme [8] - 13:6, 13:7, 13:12, 26:24, 27:23, 30:6, 30:7, 30:12</p> <p>surface [11] - 10:1, 10:13, 10:16, 10:17, 15:3, 17:1, 17:9, 17:10, 32:6, 34:14, 34:15</p> <p>SUSAN [1] - 1:16</p> <p>suspicion [1] - 17:2</p> <p>SWAINSTON [3] - 3:3, 5:12</p> <p>Swainston [2] - 5:12</p> <p>system [7] - 10:14, 14:13, 25:11, 27:16, 31:10, 31:11</p>	<p>17:12, 17:15, 18:3, 18:9, 22:18, 23:20, 24:12, 24:14, 25:3, 27:22, 27:25, 28:20, 29:14, 30:12, 30:15, 30:23, 31:13, 32:21, 33:7, 33:14, 33:20, 35:2, 35:7, 35:24, 36:4, 36:8, 36:17, 36:24, 37:7, 38:3, 38:14, 38:18, 40:2, 40:7, 40:15, 42:16, 42:22, 42:25, 43:3</p> <p>themselves [1] - 39:19</p> <p>theory [8] - 20:2, 28:2, 29:15, 29:20, 30:2, 30:6, 41:11</p> <p>thereafter [2] - 28:21, 29:2</p> <p>therefore [7] - 7:16, 11:6, 23:22, 29:24, 31:4, 35:12, 37:20</p> <p>Therese [1] - 5:20</p> <p>THERESE [1] - 3:9</p> <p>they've [1] - 17:18</p> <p>thinking [4] - 31:16, 39:25, 41:12, 41:21</p> <p>third [1] - 40:4</p> <p>third-party [1] - 40:4</p> <p>thousand [1] - 22:2</p> <p>thousands [2] - 12:18, 41:14</p> <p>timely [1] - 8:9</p> <p>today [6] - 4:17, 9:4, 33:8, 37:25, 42:6, 43:4</p> <p>together [2] - 18:25, 21:19</p> <p>token [1] - 27:8</p> <p>took [1] - 13:4</p> <p>total [1] - 7:11</p> <p>track [1] - 36:13</p> <p>TRANSCRIPT [1] - 1:13</p> <p>transcript [2] - 37:11, 43:8</p> <p>treated [1] - 12:24</p> <p>treatment [1] - 27:2</p> <p>treaty [1] - 28:8</p> <p>Tribal [2] - 18:24, 22:3</p> <p>Tribe [19] - 4:21, 11:2, 11:19, 12:12, 15:20, 16:3, 16:8, 16:21, 17:1, 17:4, 17:9, 20:8, 20:11, 25:2, 25:21, 27:5, 27:11, 37:5, 39:18</p> <p>TRIBE [2] - 1:6, 2:2</p> <p>Tribe's [12] - 4:10, 8:10, 8:24, 9:23,</p>
<p>S</p> <p>Sacramento [1] - 2:11</p> <p>San [1] - 3:7</p> <p>satisfied [2] - 20:11, 41:19</p> <p>satisfy [1] - 41:24</p> <p>SCHNEIDER [1] - 1:16</p> <p>Schroeder [1] - 5:20</p> <p>Schurz [1] - 2:3</p> <p>Sean [1] - 4:17</p> <p>SEAN [1] - 2:14</p> <p>seated [1] - 4:4</p> <p>second [1] - 35:14</p> <p>see [2] - 24:4, 30:23</p> <p>seeks [2] - 18:20, 21:4</p> <p>sense [5] - 9:17, 15:15, 24:2, 25:18, 42:12</p> <p>separate [10] - 7:17, 8:19, 9:1, 18:18, 21:21, 22:9, 25:4, 27:18, 37:23, 42:18</p> <p>SEPTEMBER [1] - 4:1</p>				
			<p>T</p> <p>tailored [1] - 26:6</p> <p>tapped [1] - 16:21</p> <p>tapping [1] - 16:19</p> <p>taxation [1] - 33:16</p> <p>technically [1] - 9:24</p> <p>telephone [1] - 6:8</p> <p>terms [2] - 23:3, 30:20</p> <p>territory [1] - 28:4</p> <p>THE [77] - 1:2, 1:15, 2:2, 2:10, 4:4, 4:19, 4:22, 4:25, 5:3, 5:8, 5:11, 5:14, 5:18, 5:22, 5:25, 6:3, 6:6, 6:13, 6:17, 6:20, 9:19, 10:19, 11:14, 11:22, 12:1, 12:7, 12:15, 12:19, 12:22, 13:12, 13:15, 13:23, 15:5, 15:9, 15:12, 15:21, 16:5, 16:12,</p>	

<p>11:3, 16:2, 23:4, 25:8, 38:21, 39:2, 40:9, 40:22 tribes [1] - 38:15 Truckee [2] - 16:15, 16:16 true [3] - 25:19, 31:16, 31:22 trust [43] - 13:1, 13:10, 18:20, 19:20, 19:25, 20:3, 20:12, 20:14, 20:17, 20:20, 20:25, 21:1, 21:5, 21:9, 21:15, 22:12, 23:8, 23:10, 24:3, 24:4, 26:15, 26:25, 27:7, 28:9, 28:11, 28:14, 28:15, 29:2, 29:5, 29:6, 29:10, 29:15, 29:20, 30:2, 31:5, 31:8, 31:15, 31:20, 32:1, 32:15, 35:11 trustee [1] - 29:7 try [1] - 30:3 trying [3] - 21:21, 28:1, 29:14 two [9] - 15:7, 16:7, 18:25, 21:21, 24:19, 25:16, 30:19, 35:20, 37:15 types [2] - 25:24, 27:18</p>	<p>16:25, 23:7, 25:17, 29:4, 34:4, 34:8, 35:17, 35:19, 36:14, 38:22 update [1] - 17:15 upstream [10] - 8:23, 14:8, 14:24, 16:10, 17:5, 32:4, 37:3, 38:25, 41:8 Ure [1] - 5:20 URE [2] - 3:9, 5:19 usage [2] - 29:5, 29:23 user [2] - 33:7, 33:10 users [27] - 8:6, 8:22, 8:23, 10:1, 10:22, 12:18, 14:2, 14:5, 14:8, 14:12, 14:25, 15:3, 15:5, 15:8, 15:10, 15:11, 15:14, 15:24, 17:7, 17:14, 21:24, 21:25, 32:4, 38:25, 39:1</p>	<p>17:9, 19:4, 19:7, 19:8, 19:16, 19:23, 20:1, 20:6, 23:6, 23:17, 23:18, 24:8, 27:2, 27:5, 27:9, 27:10, 27:11, 27:13, 28:16, 28:17, 28:19, 29:3, 29:18, 30:9, 31:18, 32:6, 34:13, 34:17, 41:9 waters [3] - 10:13, 10:16, 29:24 watershed [1] - 14:22 watersheds [1] - 41:10 ways [1] - 30:4 website [7] - 11:16, 11:18, 39:5, 39:9, 39:11, 39:14, 41:18 welcome [2] - 4:5, 6:6 Wes [1] - 4:20 WES [1] - 2:2 west [1] - 17:19 whole [4] - 24:5, 24:11, 27:16, 31:17 WIGGINS [1] - 3:3 Wildlife [8] - 5:16, 5:24, 22:20, 22:24, 23:14, 23:17, 24:8, 33:22 WILDLIFE [2] - 2:23, 3:12 WILLIAMS [2] - 2:2, 4:20 Williams [2] - 4:20, 4:22 Winters [1] - 27:11 withdrawal [1] - 28:22 wonder [1] - 9:17 words [4] - 12:19, 16:22, 28:20, 40:25 world [3] - 29:15, 31:17, 34:17 worthy [1] - 16:13</p>
<p>U</p>	<p>V</p>	
<p>U.S [4] - 2:7, 6:4, 20:9, 20:11 ultimate [1] - 7:23 ultimately [1] - 40:16 under [9] - 16:13, 19:25, 20:20, 25:17, 27:6, 27:10, 35:11, 41:2, 41:5 underlying [1] - 28:1 understood [1] - 11:12 undoubtedly [1] - 35:10 unique [1] - 23:25 UNITED [2] - 1:1, 1:4 United [13] - 1:16, 1:18, 4:6, 4:24, 5:2, 12:12, 15:19, 16:9, 17:9, 23:4, 25:2, 25:22, 27:5 unlikely [2] - 16:16, 16:19 unrelated [2] - 26:18, 27:18 up [13] - 7:24, 16:18,</p>	<p>validly [1] - 41:1 Valley [2] - 16:11, 23:18 valley [1] - 16:18 various [3] - 7:23, 25:25, 26:1 versus [1] - 4:7 vested [1] - 28:18 view [7] - 9:6, 10:25, 13:24, 14:1, 14:11, 14:20, 38:23 Virginia [1] - 1:24 virtue [1] - 32:2 visited [1] - 39:18 vs [1] - 1:8</p>	
	<p>W</p>	
	<p>Walker [19] - 4:7, 4:21, 5:6, 10:13, 12:25, 13:2, 13:10, 16:20, 16:24, 19:17, 21:6, 23:19, 24:6, 25:21, 26:23, 27:16, 29:12, 32:10, 36:25 WALKER [4] - 1:6, 1:9, 2:2, 2:4 Water [3] - 6:5, 6:19 WATER [3] - 2:8, 2:10, 3:14 water [42] - 10:13, 10:16, 11:2, 12:15, 13:1, 13:9, 13:19, 13:20, 14:13, 15:2, 15:3, 15:16, 16:22,</p>	
	<p>Y</p>	
	<p>years [3] - 28:5, 29:6 yourself [1] - 32:15</p>	