

1 Simeon M. Herskovits, Nevada Bar No. 11155
Advocates for Community and Environment
2 P.O. Box 1075
El Prado, New Mexico 87529
3 Phone: (575) 758-7202
Fax: (575) 758-7203
4 Email: simeon@communityandenvironment.net

5 Sean A. Rowe, Nevada Bar No. 10977
Mineral County District Attorney
6 P.O. Box 1210
Hawthorne, Nevada 89415
7 Phone: (775) 945-3636
8 Fax: (775) 945-0740
Email: srowe@mineralcountynv.org

9 *Attorneys for Mineral County*

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF NEVADA**

13 UNITED STATES OF AMERICA,)

14 Plaintiff,)

15 WALKER RIVER PAIUTE TRIBE,)

16 Plaintiff-Intervenor,)

17 vs.)

18 WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)

19 Defendants.)

20 _____)
21 MINERAL COUNTY,)

22 Proposed-Plaintiff-Intervenor,)

23 vs.)

24 WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)

25 Proposed Defendants.)

26 _____)

IN EQUITY NO. C-125-RCJ-WGC
Subproceeding: C-125-C

3:73-CV-00128-RCJ-WGC

MINERAL COUNTY
OPENING BRIEF IN SUPPORT
OF INTERVENTION

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I.

INTRODUCTION

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4 Mineral County filed its Motion for Intervention and Petition to Intervene in 1994 to
5 address the chronic overappropriation and overconsumption of water from the Walker River and
6 its tributaries that has resulted in persistently inadequate inflows from the Walker River into
7 Walker Lake. The inadequacy of inflows from the Walker River to Walker Lake has caused the
8 dramatic lowering of the water level and degradation of water quality in Walker Lake,
9 devastating Walker Lake's fisheries and ecosystem and the Lake's ability to serve as a vital stop
10 for migratory birds on the Pacific Flyway, as it always has since before human memory. The
11 severity and continued worsening of the damage to Walker Lake due the inadequacy of inflows
12 from the Walker River has caused the near total loss of the Lake's environmental, economic,
13 recreational, and aesthetic values to Mineral County and the public at large of a rare desert
14 terminus lake that is one of Nevada's and the broader western United State's rare, precious
15 public water resources.

16
17 Mineral County was never made a party to or provided with notice of the original decree
18 proceedings in this Court to determine the allocation of appropriative water rights from the
19 Walker River and its tributaries. The Walker River Decree fails to make any provision for
20 inflows to Walker Lake. Mineral County maintains that this omission constitutes a failure to
21 fulfill the obligation under the public trust doctrine to provide for Walker Lake's continued
22 health and the maintenance of Walker Lake's important environmental, economic, recreational,
23 and aesthetic values for the benefit of current and future generations. In the absence of Mineral
24 County's participation, no other person or entity in the history of the Walker River Decree
25 proceedings has advocated on behalf of Walker Lake's needs or raised the obligation to meet
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1 those needs that is imposed by the public trust doctrine on the Decree Court and the State of
2 Nevada, as the sovereigns exercising jurisdiction over this interstate stream system in a fiduciary
3 role under the public trust doctrine.

4 Thus, the neglect of Walker Lake's needs by all other involved parties forced Mineral
5 County to move for intervention in this case. When Mineral County received notice of the
6 renewed activity in the Walker River Decree proceedings and the reconsideration of the
7 allocation of Walker River water provided for in the Decree due to the commencement of the C-
8 125-B subproceeding, the County took swift action to prepare and filed its intervention papers in
9 a timely fashion. For the reasons set forth more fully below, Mineral County respectfully urges
10 the Court to permit the County to intervene in these proceedings as of right pursuant to Federal
11 Rule of Civil Procedure 24(a)(2). In the alternative, Mineral County respectfully requests that
12 the Court allow it to intervene permissively pursuant to Federal Rule of Civil Procedure
13 24(b)(1)(B).
14
15

16 Walker Lake is a rare desert terminal lake located entirely within Mineral County,
17 Nevada. By far its primary source of water is inflow from the Walker River. Dr. Saxon E.
18 Sharpe, Dr. Mary E. Cablk, & Dr. James M. Thomas, Desert Research Institute, *The Walker*
19 *Basin, Nevada and California: Physical Environment, Hydrology, and Biology, Publication No.*
20 *41231*, at 13-14 (May 2008); *see also* Memorandum of Points and Authorities in Support of
21 Mineral County's Proposed Petition to Intervene, Affidavit of Kelvin J. Buchanan (Oct. 25,
22 1994) (Doc. No. 3)¹. The only additional inflow into Walker Lake consists of relatively minor
23 amounts of local groundwater, local surface water runoff, and precipitation on the Lake surface.
24

25
26 ¹ Unless otherwise noted, all document no. references are to C-125-C documents.

1 Sharpe, et al., at 13-14. Walker Lake is referred to as a “terminal” lake because it has no known
2 outflow other than surface evaporation. *Id.*

3 Historically, Walker Lake has supported a balance of algae, zooplankton, small
4 crustaceans, insects, and four native fish species: the tui chub, Lahontan cutthroat trout, speckled
5 dace, and Tahoe sucker. *Id.* at 36. The Lahontan cutthroat trout is listed as threatened under the
6 federal Endangered Species Act. 40 Fed. Reg. 29,864 (1975). The tui chub is identified as a
7 “subspecies of concern” by the American Fisheries Society. Walker Lake also has provided
8 important, scarce habitat for a variety of migratory birds, including American white pelicans,
9 common loons, snowy plovers, long-billed curlews, double crested cormorants, gulls, herons,
10 terns, grebes, avocets, and many others. *See* Sharpe, et al., at 27, 32, & 39. Walker Lake has
11 long supported the economy of Mineral County as a fishery and recreation area. Maintenance of
12 a healthy fishery and recreation area at Walker Lake is critical to Mineral County’s tax base and
13 economy.
14

15
16 As upstream appropriations of water from the Walker River and its tributaries increased
17 over the 20th Century, the natural flow of water into Walker Lake was effectively cut off. As a
18 result, the Lake’s level dropped from an elevation of 4,083 feet above mean sea level (msl) in
19 1882 to a level of 3,934 msl in December of 2007. Sharpe, et al., at 1. This drop in elevation
20 resulted in a decrease in lake volume from approximately 9.0 to 1.7 million acre-feet. As water
21 volume decreased, salinity and total dissolved solids in the Lake increased. This impact to water
22 quality has severely degraded the entire ecosystem of Walker Lake, resulting in a devastating
23 loss of biodiversity. What had been a healthy put, grow, and take Lahontan cutthroat trout
24 population, that was maintained by stocking after dams on the River prevented natural spawning,
25 has been rendered at best moribund by the degraded water quality in the Lake. Even the Lake’s
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1 tui chub fishery now is threatened with extinction because salinity in the Lake has risen to a level
2 that precludes successful reproduction. Although spawning activity occurred as of 2005, viable
3 eggs and larvae were not observed. *Id.* Thus, the tragic effect of upstream overappropriation has
4 been to strangle the Lake, devastate its once-thriving fisheries, eliminate the once-spectacular
5 flocks of migratory birds that depended on the Lake, and, perhaps most importantly, drive away
6 the many Nevadans and other Americans who used Walker Lake for recreational enjoyment and
7 economically productive activities.
8

9 Allowing so precious a public water resource – one of only two sizeable natural lakes
10 contained in the State of Nevada – to be destroyed through excessive upstream appropriation
11 violates the government’s public trust obligation to maintain the health of Walker Lake for the
12 benefit of the public. Under any reading of the public trust doctrine a vital, navigable body of
13 water like Walker Lake that has supported and naturally would continue to support thriving
14 fisheries and wildlife and a local economy must be safeguarded for the benefit of the public at
15 large and future generations.

16 The public trust doctrine underpins and ultimately controls the application of Nevada and
17 California water law, as well as federal common law, and the governmental management of
18 water resources such as the Walker River and Walker Lake. Had the doctrine properly been
19 considered and applied in the historic allocation and management of the waters of the Walker
20 River and its tributaries, it would have led to a balanced approach that protected the health and
21 viability of Walker Lake as the priceless recreational, economic, scenic, and environmental
22 resource it rightfully is, while allowing reasonable amounts of water to be appropriated upstream
23 for productive agricultural uses. Unfortunately, past government officials and the Decree Court
24 itself failed to consider the need to maintain the health of the entire Walker River system or to
25 appreciate the devastating effects that permitting excessive water appropriations from the Walker
26 River and its tributaries would have on Walker Lake.
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These circumstances forced Mineral County to file its Motion for Intervention in order to represent the interests of Walker Lake and ensure that sufficient inflow from the River reaches the Lake to restore and maintain the Lake’s public trust values and uses, including fisheries, recreation, and wildlife. Because Mineral County’s motion satisfies the requirements of Fed. R. Civ. P. 24(a), the County is entitled to intervene as of right to protect the interests of Walker Lake and the public. As explained below, Mineral County’s Motion for Intervention was timely, Mineral County has a significant protectable interest in the preservation of Walker Lake, the disposition of this case will preclude Mineral County from protecting that interest, and no other present party to the litigation adequately represents Mineral County’s interest. Thus, Mineral County must be permitted to intervene as of right in this action. In addition, Mineral County satisfies the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

II.

PROCEDURAL BACKGROUND

Subproceeding C-125-C is part of litigation over water rights in the Walker River system that commenced in 1924, when upstream users prevented water from reaching the Walker River Paiute Reservation. This conduct prompted the United States to sue to determine a water right for the Reservation and the relative rights to water of parties in Nevada and California. On April 14, 1936, the United States District Court for the District of Nevada issued Decree C-125. See *United States v. Walker River Irrigation Dist.*, 11 F. Supp. 158 (D. Nev. 1935); *United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10 (D. Nev. 1936). The Decree was amended on April 24, 1940, to conform with the court’s decision in *United States v. Walker River Irrigation Dist.*, 104 F.2d. 334 (9th Cir. 1939).

1 This Court retained jurisdiction “for the purpose of changing the duty of water or for
2 correcting or modifying this decree; also for regulatory purposes. . . .” Walker River Decree at
3 XIV, pp. 72-73. Pursuant to the Decree, the United States District Court has appointed a federal
4 water master to oversee the distribution of waters in the Walker River and its tributaries in
5 accordance with the Decree. Over the years, the Court has exercised ongoing authority over and
6 supervision of these proceedings, including approving rules to implement the Decree, addressing
7 requests to amend the Decree, and appointing Water Masters and the U.S. Board of Water
8 Commissioners. In addition, it has designated three subproceedings, including C-125-C.
9

10 On October 25, 1994, Mineral County filed a Notice of Motion and Motion for
11 Intervention and a Petition to Intervene in the C-125-B subproceeding² of the C-125 litigation.
12 (C-125-B Doc. Nos. 31-32). On January 3, 1995, the Court created subfile C-125-C, or 3:73-
13 CV-128. Minutes of the Court, at 1 (C-125-C Doc. No. 1). On February 9, 1995, the Court
14 ordered Mineral County to file revised Intervention Documents and to serve these Intervention
15 Documents on all claimants to the waters of the Walker River and its tributaries pursuant to
16 Federal Rule of Civil Procedure 4. Order Requiring Service of and Establishing Briefing
17 Schedule Regarding the Motion to Intervene of Mineral County, ¶¶ 2, 3 (Doc. No. 19). Mineral
18 County filed its Amended Complaint in Intervention, (Doc. No. 20), Amended Memorandum of
19 Points and Authorities in Support of Mineral County’s Amended Complaint in Intervention,
20 (Doc. No. 21), and Motion for Preliminary Injunction; Memorandum of Points and Authorities;
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25 ² The Claim in C-125-B for additional water for the Walker River Paiute Reservation could
26 result in a reallocation of the waters of the Walker River, which necessarily will involve a
27 reexamination of the amount of water that appropriately is considered available for
28 appropriation, and by extension, what amount of inflow from the River into Walker Lake must

1 Affidavit of Kelvin J. Buchanan; and Affidavit of Gary L. Vinyard, Ph.D. (Doc. No. 22), on
2 March 10, 1995. Over the ensuing years Mineral County completed service on the vast majority
3 of proposed defendants. Mineral County is currently in the final stages of Rule 4 service and the
4 deadline for completion of service is set for March 1, 2013. Order Relating to Completion of
5 Service, at 4 (Aug. 2, 2012) (Doc. No. 605). In view of the nearness of completion of Rule 4
6 service and the length of time that has elapsed since Mineral County filed its Motion for
7 Intervention, the Court has ordered that briefing proceed at this time on Mineral County's
8 Motion for Intervention. Order Setting Briefing Schedule for Mineral County's Motion for
9 Intervention and Amended Complaint in Intervention (Oct. 9, 2012) (Doc. No. 626).

11 **III.**

12 **ARGUMENT**

13 **A. MINERAL COUNTY IS ENTITLED TO INTERVENE IN THIS ACTION AS OF**
14 **RIGHT PURSUANT TO FED. R. CIV. P. 24(A)**

15 Mineral County's motion for intervention and accompanying claim for the preservation
16 of Walker Lake clearly meets the requirements of Fed. R. Civ. P. 24(a)(2) governing intervention
17 as of right, and thus Mineral County is entitled to intervene in this action. Mineral County's
18 participation in this action is critical to the preservation of Walker Lake, a treasure that belongs
19 to the public, which has been severely damaged and is gravely threatened by upstream
20 overappropriation on the Walker River system. Absent Mineral County's intervention on behalf
21 of the Lake, it is likely that it will cease to survive as a resource for the people of Nevada who
22 historically have depended on the Lake for a variety of economically and recreationally
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26 be ensured to satisfy the public trust duty to protect and maintain the Lake's environmental,
27 economic, recreational, and aesthetic values and uses for the public, including future generations.
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1 beneficial uses, including fishing, boating, and bird watching. Moreover, Mineral County's
2 economic well-being is directly dependent on the health of Walker Lake. Thus, Mineral
3 County's intervention in this action is of vital importance on multiple levels.

4 "Rule 24 traditionally has received a liberal construction in favor of applicants for
5 intervention," *Washington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684
6 F.2d 627, 630 (9th Cir. 1982), and provides that: "[o]n timely motion, the court must permit
7 anyone to intervene who:
8

9 (2) claims an interest relating to the property or transaction that is the subject of the
10 action, and is so situated that disposing of the action may as a practical matter impair
11 or impede the movant's ability to protect its interest, unless existing parties
adequately represent that interest.

12 Fed. R. Civ. P. 24(a). The Ninth Circuit applies a four part test to determine whether the
13 elements of Rule 24(a)(2) are met: "(1) the motion must be timely; (2) the applicant must claim
14 a 'significantly protectable' interest relating to the property or transaction which is the subject of
15 the action; (3) the applicant must be so situated that the disposition of the action may as a
16 practical matter impair or impede its ability to protect that interest; and (4) the applicant's
17 interest must be inadequately represented by the parties to the action." *See, e.g., Wilderness*
18 *Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011).

19 Mineral County filed a timely motion for intervention claiming a significant interest in
20 the subject matter of the Walker River litigation, the waters of the Walker River and its
21 tributaries, for the preservation of Walker Lake. If Mineral County is not allowed to intervene in
22 the Walker River Decree proceedings in this Court, the County will be left without any forum in
23 which to protect that interest. Indeed, when the County attempted to protect its interest in state
24 court, the Nevada Supreme Court denied the County's petition on the ground that Mineral
25 County's public trust claim on behalf of Walker Lake already was properly pending in the
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1 Walker River Decree Court and that this Court is the proper forum in which to address Mineral
2 County's claim for the benefit of Walker Lake. *Mineral County v. Nevada Dep't of*
3 *Conservation & Natural Res.*, 20 P.3d 800, 806-807 (Nev. 2001). Moreover, none of the
4 existing parties adequately represents Mineral County's interest, and Mineral County's claim is
5 based on the fact that neither the State of Nevada, which is a party to this action, nor the Decree
6 Court, has fulfilled its public trust duty to protect the health of Walker Lake.
7

8 **1. Mineral County's Motion for Intervention Was Timely Filed**

9 Because the Court has an ongoing, perpetual, public trust duty to maintain adequate water
10 levels in Walker Lake, *see infra* at 13-15, the public trust may be asserted at any time. *See State*
11 *v. Bunkowski*, 503 P.2d 1231, 1238 (Nev. 1972) (holding that "the public rights in public waters
12 cannot be alienated or made subject to easements except by legislative action; neither can the
13 state's right in public waters be prescribed against nor can these rights be impaired by an estoppel
14 growing out of a mere failure to object to encroachment"). Moreover, Mineral County's Motion
15 for Intervention meets the Ninth Circuit's test for timeliness. In evaluating the timeliness of a
16 motion for intervention, the Court evaluates three factors: (1) the stage of the proceeding at
17 which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for
18 and length of the delay." *County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986), *cert.*
19 *denied*, 480 U.S. 946 (1987) (citing *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)).
20
21

22 **a. Mineral County Filed Its Motion for Intervention at the
23 Appropriate Stage in This Proceeding**

24 Given the Court's ongoing public trust duty to maintain water levels in Walker Lake, it
25 follows that a public trust claim may be asserted at any time. Moreover, at the time when
26 Mineral County filed its motion for intervention service had scarcely even commenced in the C-
27 125-B subproceeding and the Court was anticipating such filings. *See* Stipulation and Order for
28

1 Enlargement of Time (May 23, 1994) (C-125-B Doc. No. 25) (extending the deadline for
2 completion of service in C-125-B until November 25, 1994). Even now, service is not yet
3 complete, answers have not been filed, and discovery has not commenced in the C-125-B
4 subproceeding, nor has the Court reached any of the merits of this litigation. Thus, Mineral
5 County filed its Motion for Intervention during the time period contemplated by the Court for
6 such filings, and intervention is appropriate at this preliminary stage of proceedings. *See Mille*
7 *Lacs Band of Indians v. State of Minn.*, 989 F.2d 994, 999 (8th Cir. 1993) (granting intervention
8 at preliminary stage of proceedings even after substantial time had passed since the
9 commencement of the suit).

11 **b. Intervention Would Not Prejudice Other Parties To This**
12 **Litigation**

13 Because service is not yet complete in the C-125-B subproceeding, and because service
14 in the C-125-C subproceeding is virtually complete, intervention by Mineral County will not
15 cause any delay in the proceedings. Moreover, the parties will remain essentially in the same
16 position as if Mineral County intervened at the outset of the case. *See U.S. ex rel. McGough v.*
17 *Covington Tech.*, 967 F.2d 1391, 1395 (9th Cir. 1992) (citing *United States v. Oregon*, 745 F.2d
18 550, 552 (9th Cir. 1984) (allowing intervention in part because party had failed to show that the
19 passage of time had added to the possible prejudice)). Accordingly, Mineral County's
20 intervention will not prejudice any other party to this litigation.

22 **c. Mineral County Did Not Delay Filing for Intervention**

23 As noted above, Mineral County never received notice of the original Walker River
24 Decree proceedings, and was not a party to those proceedings. Once Mineral County received
25 notice of the C-125-B subproceeding seeking modification of the Decree's allocation of the
26 waters of the Walker River and its tributaries, Mineral County did not delay filing for
27

1 intervention. See Memorandum of Points and Authorities in Support of Mineral County's
2 Proposed Petition to Intervene, Affidavit of Herman F. Staat, at 3 (Doc. No. 3). Upon learning
3 of the litigation, Mineral County's board of county commissioners met as soon as practicable and
4 filed its Motion for Intervention and Proposed Petition to Intervene on October 25, 1994, less
5 than sixty days after receiving notice of the litigation and meeting as a commission. See Notice
6 of Motion and Motion of Mineral County of Nevada for Intervention (Oct. 25, 1994) (C-125-B
7 Doc No. 31; C-125-C Doc. No. 2); Mineral County's Proposed Petition to Intervene (Oct. 25,
8 1994) (C-125-B Doc. No. 32; C-125-C Doc. No. 3). Thus, there was no delay on Mineral
9 County's part in filing its Motion for Intervention and raising its public trust claim on behalf of
10 Walker Lake. Accordingly, Mineral County's Motion for Intervention was timely filed, and
11 Mineral County is entitled to intervene as of right.
12

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14 **2. Mineral County Has A Significant Protectable Interest In the Preservation of
Walker Lake Entitling the County to Intervention as of Right**

15 Mineral County clearly has a significant protectable interest in the waters of the Walker
16 River and its tributaries and the adequacy of inflows from that stream system into Walker Lake
17 to sustain Walker Lake's important environmental, economic, recreational, and aesthetic public
18 trust values. This interest, and the health of Walker Lake have been and will be directly
19 impacted by the pending C-125 litigation. "Whether an applicant for intervention demonstrates
20 sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable
21 interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir.1993), *aff'd*, 64
22 F.3d 1266 (9th Cir.1995). However, the proposed intervenor must demonstrate a "significantly
23 protectable interest" to warrant intervention. *Forest Conservation Council v. U.S. Forest Serv.*,
24 66 F.3d 1489, 1493 (9th Cir. 1995) (internal quotation marks omitted). "To demonstrate this
25 interest, a prospective intervenor must establish that "the interest is protectable under some law,
26 and that there is a relationship between the legally protected interest and the claims at issue."
27

1 *Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478, 1484 (9th Cir. 1993), *abrogated on other grounds by*
2 *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *see also United States v.*
3 *City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002); *California ex rel. Lockyer v. United*
4 *States*, 450 F.3d 436, 440-442 (9th Cir. 2006). “If an action involves a dispute about a particular
5 property or fund, and a movant claims a direct, substantial, and legally protectable right to this
6 property or fund, the existence of a sufficient interest is apparent.” 6 Moore’s Federal Practice §
7 24.03[2][a] (3d ed. 2012) (citing *NL Indus. v. Sec’y of Interior*, 777 F.2d 433, 435 (9th Cir.
8 1985)).

9 “[T]he interest test directs courts to make a practical, threshold inquiry, and is primarily a
10 practical guide to disposing of lawsuits by involving as many apparently concerned persons as is
11 compatible with efficiency and due process.” *United States v. City of Los Angeles*, 288 F.3d 391, 398
12 (9th Cir. 2002) (citing *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir.1980) (internal quotation
13 marks omitted). Accordingly, “[t]he interest requirement may be judged by a more lenient
14 standard if the case involves a public interest question or is brought by a public interest group.”
15 6 Moore’s Federal Practice § 24.03[2][c] (3d ed. 2012). Indeed, where the public interest is
16 involved, non-legally protected interests can qualify for intervention as of right. *See Cascade*
17 *Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967); *see also Yniguez v.*
18 *Arizona*, 939 F.2d 727, 735 (9th Cir. 1991).

19 Here, Mineral County, its residents, and the general public clearly have a significant
20 interest in the waters of the Walker River and its tributaries, an interest that has been recognized
21 by the Nevada Supreme Court. *See Mineral County v. Nevada Dep’t of Conservation & Natural*
22 *Res.*, 20 P.3d at 808 (Rose, J., concurring); *see also Lawrence v. Clark County*, 254 P.3d 606,
23 611 (Nev. 2011) (agreeing with Justice Rose’s concurring opinion in *Mineral County v. Nevada*
24 *Dep’t of Conservation & Natural Res.*). Mineral County claims a direct, substantial, and legally
25 protectable interest in the health and viability of Walker Lake, which interest is protected by law
26 as described in greater detail below. The historic overappropriation of the waters of the Walker
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1 River and its tributaries, the pending C-125 litigation, and the potential resulting reallocation of
2 Walker River water has and likely will significantly impact this interest.

3 **a. Mineral County Is Entitled to Intervene Because the County's**
4 **Interest in the Preservation of Walker Lake is Protected Under the**
5 **Public Trust Doctrine**

6 Mineral County has moved to intervene in this litigation to assert a public trust claim for
7 maintenance of sufficient inflows of water from the Walker River to Walker Lake to restore and
8 maintain minimum lake levels and water quality standards in Walker Lake to sustain healthy
9 Lahontan cutthroat trout and tui chub fisheries and the associated environmental, economic,
10 recreational, and aesthetic public trust values that Walker Lake possesses and has provided to
11 Mineral County, its residents, and the public at large. Mineral County's interest in the
12 restoration and maintenance of Walker Lake's public trust values and uses constitutes a legally
13 protectable right entitling Mineral County to intervene.

14 The public trust doctrine holds that water resources such as Walker Lake and the Walker
15 River and its tributaries are inherently the property of the public at large, including future
16 generations. “[T]he public trust is more than an affirmation of state power to use public
17 property for public purposes. It is an affirmation of the duty of the state to protect the people's
18 common heritage of streams, lakes, marshlands and tidelands, surrendering that right of
19 protection only in rare cases when the abandonment of that right is consistent with the purposes
20 of the trust.’ Our dwindling natural resources deserve no less.” *Mineral County v. Nevada Dep’t*
21 *of Conservation & Natural Res.*, 20 P.3d at 808-09 (Rose, J., concurring) (quoting *Illinois*
22 *Central R.R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892)); accord *Lawrence v. Clark*
23 *County*, 254 P.3d at 611. Because of the inherent public ownership of such waters, the public
24 trust doctrine also imposes a permanent affirmative duty on the government to hold those water
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1 resources in trust for the public and act as trustee to protect the public's long-term interests in
2 those waters.

3 As the United States Supreme Court explained over a century ago, the public's interest in
4 these waters is perpetual in nature and therefore the state, as the trustee (or guardian) of the
5 public's rights in these waters, can never abdicate or lose ultimate control over them. *Illinois*
6 *Central*, 146 U.S. at 453. Neither may an officer or agency, or anyone standing in the shoes of
7 the sovereign, abdicate, or sign away, the state's fiduciary responsibilities to protect the public's
8 long-term interests in these water resources. Thus, the public trust doctrine imposes on the
9 sovereign an ongoing, perpetual, duty to maintain the health of Walker Lake, *see Lawrence v.*
10 *Clark County*, 254 P.3d at 609 (citing *Illinois Central*, 146 U.S. at 453); *Nat'l Audubon Soc'y v.*
11 *Superior Court of Alpine County*, 658 P.2d 709, 723 (Cal. 1983), and property rights, including
12 water rights, are subject to and may be limited by the requirements of the public trust doctrine,
13 *Lawrence v. Clark County*, 254 P.3d at 611 (citing *Mineral County v. Nevada Dep't of*
14 *Conservation & Natural Res.*, 20 P.3d. at 808 (Rose, J., concurring)). In this case, the Decree
15 Court exercises continuing equitable jurisdiction to administer the Walker River Decree and, in
16 effect, stands in the shoes of the sovereign charged with the same perpetual public trust duty as
17 the State of Nevada and the State of California would have with regard to the Walker River, its
18 tributaries, and Walker Lake. *See Illinois Central*, 146 U.S. at 452-53; *Lawrence v. Clark*
19 *County*, 254 P.3d at 611 (citing *Mineral County v. Nevada Dep't of Conservation & Natural*
20 *Res.*, 20 P.3d at 808-09 (Rose, J., concurring) (discussing the vital role of the Court in preserving
21 the public trust)); *Nat'l Audubon*, 658 P.2d at 712, 723, 727-28. In exercising its jurisdiction and
22 fulfilling its obligation to allocate water resources in the public interest, the Court is not confined
23 by past allocation decisions which may be incorrect in light of current knowledge or inconsistent
24 with current needs. *Nat'l Audubon*, 658 P.2d at 728. The Court has the power and an
25 affirmative obligation to reconsider past allocation decisions whether or not those decisions were
26 made after due consideration of their effect on the public trust. *Id.* Likewise, pursuant to the
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1 public trust doctrine, the public's rights in public waters cannot be alienated or impaired by
2 estoppel growing out of past failure to object to encroachment. *See Bunkowski*, 503 P.2d at
3 1238.

4 Mineral County maintains that the Decree Court and the State of Nevada have failed to
5 fulfill their public trust duties with regard to the Walker River, its tributaries, and Walker Lake
6 by permitting the overappropriation of the waters of the Walker River and its tributaries to such
7 an extent as to cause the substantial impairment, decline, degradation and loss of Walker Lake,
8 its fisheries, wildlife habitat, and related environmental, economic, recreational, and aesthetic
9 values. Because the health and wellbeing of Mineral County and its residents is inextricably tied
10 to and dependent on the health of Walker Lake, and the health of Walker Lake is directly
11 dependent on the adequacy of inflows from the Walker River, Mineral County clearly has a
12 significant protectable interest in the subject matter of the pending Walker River Decree
13 litigation.
14

15 **b. Mineral County Is Entitled to Intervene Based on Its Interest in**
16 **Walker River Water Rights Held in Trust by the Nevada**
17 **Department of Wildlife for the Benefit of Walker Lake**

18 In 1993, the State of Nevada issued Certificate No. 10860 for 795.2 cfs to the Nevada
19 Department of Fish and Game (now the Department of Wildlife) for maintenance of lake levels
20 to support public use for recreation, and improve water quality and quantity to sustain and help
21 prevent the loss of the fishery in Walker Lake. This certificate is a property right held in trust by
22 the Nevada Department of Wildlife for the people of Nevada. "It has been recognized that
23 'interests in property are the most elementary type of right that Rule 24(a) is designed to
24 protect.'" 7C Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice &*
25 *Procedure* § 1908.1 (3d ed. 2007) (citing *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124 (5th
26 Cir.), *cert. denied*, 400 U.S. 878 (1970)). Mineral County has a significant interest in Certificate
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1 No. 10860, because it is held in trust for the benefit of the public by the State of Nevada, the
2 State of Nevada has not fulfilled its duty to exercise its rights under Certificate No. 10860 so as
3 to ensure adequate inflows from the Walker River to Walker Lake in order to protect and
4 maintain Walker Lake's important public trust values. Where the sovereign is unwilling to
5 represent the public, anyone with standing who can adequately represent the public's interest
6 may be allowed to do so. *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 860 (9th
7 Cir. 1983) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). This certificate clearly is a
8 protectable interest involved in and directly impacted by the Walker River litigation. The
9 disposition of the Walker River litigation is likely to substantially affect the availability of water
10 under Certificate 10860 to meet the public trust needs of Walker Lake. Mineral County therefore
11 requests intervention to enforce the water rights permitted under Certificate No. 10860 for the
12 purpose of protecting Walker Lake's public trust values and uses.
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15 **c. Mineral County Is Entitled to Intervene Because County Property**
16 **Values, the County Tax Base, and County Tax Revenues Depend**
17 **on the Health of Walker Lake**

18 Mineral County's tax base is directly tied to the property values around Walker Lake.
19 The devaluation of property values in Mineral County as a result of the loss of Walker Lake, its
20 fisheries, and the Lake's other recreational values and uses has reduced and will continue to
21 reduce the tax base and budget of Mineral County, which is dependent on property tax revenues.
22 *See Memorandum of Points and Authorities in Support of Mineral County's Proposed Petition to*
23 *Intervene, Affidavit of Marlene Bunch (Doc. No. 3).* In addition, the severe degradation of
24 Walker Lake's recreational and related economic uses has led to a significant decline in sales tax
25 revenues that also are a component of Mineral County's budget. These taxing and regulatory
26 interests are inherently ripe for protection by intervention as a practical means for a political
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1 subdivision to protect its financial and administrative affairs. *See Scotts Valley Band of Pomo*
2 *Indians of the Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 927-28 (9th Cir. 1990)
3 (City of Chico, California granted intervention as of right to protect land that was proposed to be
4 removed from the municipality's jurisdiction and tax base); *see also Wyandotte Nation v. City of*
5 *Kansas City, Kansas*, 200 F. Supp. 2d 1279 (D. Kan. 2002) (State had a sufficient interest in
6 property to merit intervention in Indian tribe's suit to quiet title where state had taxation interest,
7 among other governmental interests). Accordingly, Mineral County also requests intervention in
8 order to protect its tax base and revenues.
9

10 **d. Mineral County is Entitled to Intervene Because the County Has a**
11 **Significant Protectable Interest in the Recreation, Wildlife**
12 **Habitat, Aesthetic and Other Economic Concerns Associated with**
13 **Walker Lake that Support Mineral County**

14 Mineral County also has a significant protectable interest in the recreation, wildlife
15 habitat, aesthetic, and related economic values and uses of Walker Lake that support the quality
16 of life and economy of Mineral County. The Ninth Circuit Court of Appeals has held that non-
17 economic interests of a state and county in the environmental health of state lands adjacent to a
18 national forest were significantly protectable interests relating to the property or transaction that
19 was the subject of an environmental organization's action seeking an injunction of all activities
20 on those lands pending compliance with NEPA and NFMA. *Forest Conservation Council v.*
21 *U.S. Forest Serv.*, 66 F.3d 1489, 1497 (9th Cir. 1995); *see also Sagebrush Rebellion, Inc. v.*
22 *Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983) (holding public interest groups' non-economic
23 interest in protecting birds and bird habitat to be a significant protectable interest supporting
24 intervention as of right). Likewise, the province of Ontario was permitted to intervene as of right
25 in an environmental action involving a landfill in Niagara Falls, New York, based on the fact that
26 the province had a significant interest in potential contamination of the region. *United States v.*
27

1 *Hooker Chem. & Plastics Corp.*, 101 F.R.D. 444 (D.C. N.Y. 1984). The severe lowering and
2 degradation of Walker Lake due to the inadequacy of inflows from the Walker River raise
3 similar concerns for surrounding Mineral County residents with regard to the environmental
4 health of the Lake and the immediately surrounding area and with regard to increased windborne
5 lake sediment from the increasing amount of the lake bed that is being exposed.

6
7 Further, in addition to Mineral County's other economic interests in the health of Walker
8 Lake, recreational boating, fishing, and birding all have been directly impacted by lowered lake
9 levels and increased salinity at Walker Lake. A substantial percentage of Mineral County
10 businesses depend on Walker Lake and its available recreation. *See* Memorandum of Points and
11 Authorities in Support of Mineral County's Proposed Petition to Intervene, Affidavit of Louis
12 Thompson (Doc. No. 3); *see also id.*, Affidavit of Marlene Bunch. These business sectors of the
13 Mineral County economy already have suffered significant decreases in revenues because of the
14 damage to Walker Lake caused by the loss of inflow from the Walker River. *See supra*,
15 Affidavits of Bunch and Thompson. Mineral County requests intervention to protect these
16 values that support Mineral County and its economy.

17
18 **3. Absent Intervention, the Disposition of This Action Would, as a Practical**
19 **Matter, Prohibit Mineral County From Protecting Its Interest in the Health**
20 **of Walker Lake**

21 If Mineral County is not permitted to intervene in this action, the County will be left
22 unable to protect its interest in the health of Walker Lake. The Advisory Committee Notes for
23 Fed. R. Civ. P. 24(a) state that "[i]f an absentee would be substantially affected in a practical
24 sense by the determination made in an action, he should, as a general rule, be entitled to
25 intervene." Fed. R. Civ. P. 24(a) advisory committee's notes; *see also Sw. Ctr. for Biological*
26 *Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citing Fed. R. Civ. P. 24(a) advisory
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1 committee's notes); see *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir.
2 1995) (citing *NRDC v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1342 (10th Cir. 1978)
3 (noting that Rule 24 refers to impairment as a practical matter, and thus, the court is not limited
4 to consequences of a strictly legal nature)). Once a significant protectable interest is found,
5 courts in the Ninth Circuit have had "little difficulty" concluding that the disposition of the cause
6 could, as a practical matter, affect that interest. See *Citizens for Balanced Use v. Montana*
7 *Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citing *California ex rel. Lockyer v. United*
8 *States*, 450 F.3d 436, 442 (9th Cir. 2006) (citing *Sw. Ctr. for Biological Diversity v. Berg*, 268
9 F.3d 810).
10

11 In this case, if intervention is not permitted Mineral County will have no forum in which
12 to prosecute its public trust claim on behalf of Walker Lake and the public. Indeed, when the
13 County attempted to assert a public trust claim on behalf of the Lake in Nevada State court, the
14 Nevada Supreme Court denied Mineral County's petition on the ground that Mineral County's
15 public trust claim already was properly pending in this Court, which the Nevada Supreme Court
16 held was the more appropriate forum for that claim. *Mineral County v. Nevada Dep't of*
17 *Conservation & Natural Res.*, 20 P.3d at 806-807. Additionally, the disposition of this case
18 absent Mineral County's involvement likely would result in the continued overappropriation of
19 waters from the Walker River and its tributaries so as to perpetuate and exacerbate the already
20 dire condition of Walker Lake, threatening to destroy all of its public trust values and uses.
21 Thus, the disposition of this action absent intervention by Mineral County will impede Mineral
22 County's ability to protect its interest in the preservation of Walker Lake, and Mineral County is
23 entitled to intervene as of right.
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1 **4. Mineral County Is Not Adequately Represented by any of the Present Parties**
2 **to This Litigation**

3 Mineral County also is entitled to intervene as of right to protect its interests because the
4 County's and the public's interest in the health of Walker Lake is not adequately represented by
5 any other present party to this litigation. "Whether a party may intervene turns, in part, upon a
6 comparison of the adequacy of representation primarily by comparing the interests of the
7 proposed intervenor with the current parties to the action." *Sierra Club v. Robertson*, 960 F.2d
8 83, 86 (8th Cir. 1992). "In assessing the adequacy of . . . representation, we consider several
9 factors, including whether [another party] will undoubtedly make all of the intervenor's
10 arguments, whether [another party] is capable of and willing to make such arguments, and
11 whether the intervenor offers a necessary element to the proceedings that would be neglected."
12 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (citing *County of Fresno v.*
13 *Andrus*, 622 F.2d at 438-39); *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977)).

14 "The requirement of the Rule is satisfied if the applicant shows that representation of his
15 interest 'may be' inadequate; and the burden of making that showing should be treated as
16 minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). Thus,
17 in *Sagebrush Rebellion, Inc. v. Watt*, even where it appeared that the United States Attorney was
18 diligently defending the Secretary of the Interior, the Court permitted the Audubon Society to
19 intervene on the side of the defendants in a case filed against the Secretary of Interior by
20 Sagebrush Rebellion, Inc., because the Audubon Society was able to show that representation
21 might have been inadequate. 713 F.2d 525, 528 (9th Cir. 1983). "The easiest case is that in
22 which the absentee has an interest that may, as a practical matter, be harmed by disposition of the
23 action and the absentee's interest is not represented at all." 7C Charles Alan Wright, Arthur R.
24 Miller, & Mary K. Kane, *Federal Practice & Procedure* § 1909 (3d ed. 2007); *see also NL Indus.*
25 *v. Sec'y of Interior*, 777 F.2d 433.

26 As indicated previously, no party other than Mineral County ever has advocated on
27 behalf of Walker Lake or demonstrated any genuine intention of doing so in the future. To the

1 contrary, most if not all of the parties have positions that are in opposition to allocating sufficient
2 water to sustain Walker Lake's health. In fact, Mineral County's public trust claim is based in
3 large part on the failure of the State of Nevada, which is a party to this action, as well as the
4 Decree Court, to fulfill their public trust duties to protect the health of Walker Lake. The fact
5 that the State of Nevada cannot be relied on to adequately represent Mineral County's interest in
6 the health of Walker Lake is reflected in the fact that the State of Nevada cited only its concern
7 for protection of the Mason Valley Wildlife Management Area as a reason for its intervention.
8 *See* State of Nevada Motion for Intervention, at 3 (C-125-A Doc. No. 12-2).

9
10 Mineral County's interest in the health of Walker Lake is distinct from any other party's
11 interest in the Lake because Mineral County's economy and the quality of life of Mineral County
12 residents are directly and heavily dependent on the health of Walker Lake. Moreover, Mineral
13 County can offer intimate knowledge of Walker Lake that differs from the information likely to
14 be offered by any current party to this litigation. The County has invested significant resources
15 in order to gain a comprehensive understanding of the biology, geology, hydrology, and history
16 of Walker Lake. Mineral County therefore requests intervention to protect Walker Lake
17 because, absent intervention by the County, no other party will advocate effectively on the
18 Lake's behalf or on behalf of the residents of Mineral County.
19

20 Because Mineral County's Motion for Intervention clearly satisfies the requirements of
21 Fed. R. Civ. P. 24(a), the County is entitled to intervene as of right to protect the interests of
22 Walker Lake and the public. Mineral County's motion was timely, Mineral County claims a
23 significant protectable interest in the preservation of Walker Lake, the disposition of this case
24 will preclude Mineral County from protecting that interest, and no other present party to the
25 litigation adequately represents Mineral County's interest. Accordingly, Mineral County
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1 respectfully urges the Court to grant the County’s Motion for Intervention as of right in this
2 action.

3 **B. MINERAL COUNTY ALSO MEETS THE REQUIREMENTS OF PERMISSIVE**
4 **INTERVENTION PURSUANT TO FED. R. CIV. P. 24(B)(1)(B)**

5 In addition to being entitled to intervene as of right, Mineral County also meets the
6 requirements for permissive intervention. Rule 24(b)(1)(B) provides that “[o]n timely motion,
7 the court may permit anyone to intervene who: has a claim or defense that shares with the main
8 action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B).

9 Mineral County’s motion is not only timely, as demonstrated above, it also shares
10 numerous questions of law and fact with the pending litigation. As described above, the interest
11 Mineral County seeks to protect is dependent on the very subject of the pending Walker River
12 Decree litigation, the allocation of appropriative rights to the waters of the Walker River and its
13 tributaries. Any decision concerning the distribution of these waters directly impacts Walker
14 Lake. Indeed, the health of Walker Lake and the management of the Walker River and its
15 tributaries are inextricably intertwined. Moreover, intervention by Mineral County will not
16 unduly delay the proceedings or prejudice any party, as explained in more detail above. *See* Fed.
17 R. Civ. P. 24(b)(3).
18

19 In addition to the factors outlined in the rule itself, in deciding whether to grant
20 intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B), courts generally consider whether the
21 proposed intervenor’s “input is likely to make a significant and useful contribution to the
22 development of the underlying factual and legal issues.” 6 Moore’s Federal Practice
23 § 24.10[2][b] (3d ed. 2012). As noted above, Mineral County can offer intimate knowledge of
24 and information about Walker Lake that differs significantly from the information likely to be
25 offered by any current party to this litigation, and Mineral County’s input will help to “fully
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1 present to the Court all of the facts in this case.” *General Motors Corp. v. Burns*, 50 F.R.D. 401,
2 405 (D. Haw. 1970) (granting intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B) and noting
3 that a state auto trade association’s members had unique knowledge of the Hawaii automobile
4 industry). Moreover, the State of Nevada, despite its public trust duties, has failed to advance
5 the public trust doctrine in this case. Thus, Mineral County clearly is likely to make a significant
6 and useful contribution to the development of the underlying factual and legal issues in this case.
7

8 Accordingly, if the Court does not grant Mineral County’s Motion for Intervention as of
9 right, the County respectfully requests that the Court permit Mineral County to intervene
10 pursuant to Fed. R. Civ. P. 24(b)(1)(B).

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IV.

CONCLUSION

For the reasons set forth above, Mineral County respectfully requests that the Court grant its Motion for Intervention and Amended Complaint in Intervention and issue an order to proceed with briefing on the merits of Mineral County's claims.

Respectfully submitted this 31st day of October, 2012,

/s/ SIMEON M. HERSKOVITS

Simeon M. Herskovits, Nevada Bar No. 11155
Advocates for Community and Environment
P.O. Box 1075
El Prado, New Mexico 87529
Phone: (575) 758-7202
Fax: (575) 758-7203
Email: simeon@communityandenvironment.net

/s/ SEAN A. ROWE

Sean A. Rowe, Nevada Bar No. 10977
Mineral County District Attorney
P.O. Box 1210
Hawthorne, Nevada 89415
Phone: (775) 945-3636
Fax: (775) 945-0740
Email: srowe@mineralcountynv.org

Attorneys for Mineral County

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2012, I electronically filed the foregoing **MINERAL COUNTY OPENING BRIEF IN SUPPORT OF INTERVENTION** 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 on this 31st day of October, 2012, I caused a copy of the forgoing to be served on the following non CM/ECF participants by U.S. Mail, postage prepaid:

Athena Brown, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
311 E. Washington Street
Carson City, NV 89701-4065

District Attorney for Lyon County
31 South Main Street
Yerington, NV 89447

Leo Drozdoff
Dept. of Conservation & Natural Res.
State of Nevada
901 S. Stewart St.
Suite 1003
Carson City, NV 89701

William J. Shaw
Brooke & Shaw, Ltd
P.O. Box 2860
Minden, NV 89423

Jason King, State Engineer
Division of Water Resources
State of Nevada
901 S. Stewart St., Suite 202
Carson City, NV 89701

Rachel Tholke Trust
c/o Dawn Cooper, Trustee
P.O. Box 97
Coleville, CA 96107

Arthur B. Walsh
Los Angeles City Attorney's Office
PO Box 51-111
111 North Hope Street, Suite 340
Los Angeles, CA 90054

Norman C. Annett
Annett's Mono Village
Twin Lakes Enterprises
P.O. Box 455
Bridgeport, CA 93517

William Quinn
Office of the Field Solicitor
Department of the Interior
401 W. Washington St., SPC 44
Phoenix, AZ 85003

Silverado, Inc.
c/o Scott Shackelton
4160 Long Knife Road
Reno, NV 89509

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George M. Keele
1692 County Road, Ste. A
Minden, NV 89423

David Parraguirre
1700 Wendy Way
Reno, NV 89509

Deborah Hartline
P.O. Box 1343
Quincy, CA 95971

Margaret & Terry Hawkins
945 E. Main Street, #168
Fernley, NV 89801

Tom Talbot
TALBOT LAND & LIVESTOCK
1650 North Sierra Highway
Bishop, CA 93514

Kenneth Spooner
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

Richard Fulstone
F.M. Fulstone
2022 Nevada State Highway No. 208
P.O. Box 61
Smith, NV 89430

Twelves Family Trust
c/o Roy Snyder, Trustee
4164 South Syracuse
Denver, CO 80237

Wesley Beverlin
Malissa Hathaway McKeith
Lewis, Brisbois, Bisgaard, & Smith LCP
221 N. Figueroa St., Suite 1200
Los Angeles, CA 90012

Beverly Sceirine
P.O. Box 249
Yerington, NV 89447

David Sceirine
P.O. Box 1013
Yerington, NV 89447

Joe Sceirine
P.O. Box 1013
Yerington, NV 89447

Stan Hunewill
Hunewill Ranch
P.O. Box 368
Bridgeport, CA 93517

William Weaver
Sweetwater Ranch
2535 State Road 338
Wellington, NV 89444

Robert Hunter
Western Nevada Agency
Bureau of Indian Affairs
311 E. Washington Street
Carson City, NV 89701-4065

Garry Stone
Water Master
290 South Arlington Ave
Reno, NV 89501

R.A. Pelayo
5336 Awbury 7 Ave
Las Vegas, NV 89110

Desert Hills Dairy, LLC
402 N. Division Street
Carson City, NV 89703

1 R.C. Howard
Hale, Lane, Peek, Dennison & Howard
2 P.O. Box 3237
3 Reno NV 89505

James Fousekis
2848 Garber Street
Berkeley, CA 94705

4 Gary A. Sheerin,
Law Office Of Gary A. Sheerin
5 177 W. Proctor Street, Suite B
6 Carson City, NV 89703

John Howard
JW Howard Attorneys
625 Broadway, Suite 1206
San Diego, CA 92101

7 Brad M. Johnson
8 Peri & Peri
430 Highway 339
9 Yerington, NV 89447

Clear View Ranch, LLC
402 N. Division Street
Carson City, NV 89703

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11 /s/ Noel Simmons
12 Noel Simmons

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