

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
I. Introduction	1
A. Nevada - 1882 to the Present	1
B. Walker Lake	3
1. Introduction	3
2. A Water Right for Walker Lake	4
3. Acquisition of Existing Water Rights for Walker Lake	5
4. Economic and Environmental Benefits of Diversion and Use of Walker river Water	6
II. Procedural Background	8
A. The Walker River Decree	8
1. Early Litigation Concerning the Waters of the Walker River - <i>Rickey Land & Cattle Co. v. Miller & Lux</i>	8
2. Litigation Brought By the United States	9
B. History of Subproceeding C-125-B	10
1. The Petition of the Walker River Irrigation District	10
2. The Original Counterclaims in Subproceeding C-125-B	11
3. The Amended Counterclaims in Subproceeding C-125-B	11
C. Mineral County’s Motion and Amended Motion to Intervene	13
III. Mineral County’s Motion to Intervene Must Be Denied Because There Is No Relationship Between the Claim Which Mineral County Seeks to Assert and the Tribal and Federal Claims for Recognition of Additional Reserved Rights, and Because Their Disposition Cannot As a Practical Matter Impair or Impede the County’s Ability to Protect Its Claim	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A.	Introduction	13
B.	The Requirements for Intervention of Right	14
C.	The Court Must Deny Mineral County’s Intervention to Seek Reallocation of Existing Walker River Decree Water Rights Based Upon the Public Trust Doctrine Because There Is No Relationship Between That Alleged Claim and the Claims for Recognition of Federal Reserved Rights Being Asserted in Subproceeding C-125-B	19
D.	The Court Must Deny Mineral County’s Intervention to Seek Reallocation of Existing Water Rights Based Upon the Public Trust Doctrine Because Disposition of the Federal Reserved Claims Cannot, as a Practical Matter, Impair or Impede the County’s Ability to Protect That Claim	22
IV.	The Court Must Deny Mineral County’s Request for Permissive Intervention Pursuant to Fed. R. Civ. P. 24(b) Because the County’s Claim to Modify Existing Rights and the Claims to Recognize Federal Reserved Rights Have No Common Questions of Law or Fact, and Intervention Will Unduly Delay or Prejudice Other Parties’ Rights	23
V.	Conclusion	25

TABLE OF AUTHORITIES

1		
2		<u>Page</u>
3	<u>Cases</u>	
4	<i>Arakaki v. Cayetano</i>	
5	324 F.3d 1078 (9th Cir. 2003)	15
6	<i>Arizona v. California</i>	
7	373 U.S. 546 (1963)	15
8	<i>Cappaert v. United States</i>	
9	426 U.S. 128 (1976)	24
10	<i>Donnelly v. Glickman</i>	
11	159 F.3d 405 (9th Cir. 1998)	14, 15, 19, 20, 23
12	<i>Greene v. United States</i>	
13	996 F.2d 973 (9th Cir. 1993)	20
14	<i>Lawrence v. Clark County</i>	
15	254 P.3d 606 (Nev. 2011)	16
16	<i>Miller & Lux v. Rickey</i>	
17	127 F. 573 (D. Nev. 1904)	8, 9
18	<i>Miller & Lux v. Rickey</i>	
19	146 F. 574 (D. Nev. 1906)	8, 9
20	<i>Mineral County v. Nevada Department of Conservation & Natural Resources</i>	
21	20 P.3d 800 (Nev. 2001)	18
22	<i>National Audubon Society v. Superior Court</i>	
23	658 P.2d 709 (Cal. 1983)	13, 14, 16, 17
24	<i>Natural Resources Defense Council v. United States Nuclear Regulatory Commission</i>	
25	578 F.2d 1341 (10th Cir. 1978)	22
26	<i>Nevada VTN v. General Insurance Co.</i>	
27	834 F.2d 770 (9th Cir. 1987)	26
28		

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Pacific Livestock Company v. Thomas Rickey, et al.</i> No. 731, Final Decree (D. Nev. 1919)	9
<i>Perry v. Schwarzenegger</i> 630 F.3d 898 (9th Cir. 2011)	23
<i>PPL Montana, LLC v. Montana</i> _____, U.S. _____, 132 S.Ct. 1215 (2012)	16
<i>Rickey Land & Cattle Co. v. Miller & Lux</i> 152 F. 11 (9th Cir. 1907)	9
<i>Rickey Land & Cattle Company v Miller & Lux</i> 218 U.S. 258 (1910)	9
<i>Schlesinger v. Councilman</i> 426 U.S. 738 (1975)	25
<i>State v. Bunkowski</i> 503 P.2d 1231 (Nev. 1972)	16
<i>United States v. Alisal Water Corporation</i> 370 F.3d 915, 919-920 (9th Cir. 2004)	19
<i>United States v. New Mexico</i> 438 U.S. 696 (1978)	15, 16
<i>United States v. Walker River Irrigation District, et al.</i> 11 F. Supp. 158 (D. Nev. 1935)	9, 10
<i>United States v. Walker River Irrigation District</i> 14 F. Supp. 11 (D. Nev. 1936)	10
<i>United States v. Walker River Irrigation District</i> 104 F.2d 334 (9th Cir. 1939)	10
<i>Winters v. United States</i> 207 U.S. 564 (1908)	10, 15

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

Federal Rules of Procedure

Fed. R. Civ. P. 24 13-15,
23, 25

Treatises

5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1286 (2004) 25

J. Moore and J. Lucas, 7 *Moore’s Federal Practice*, Para. 60.31 (2d Ed. 1985) 26

1 **I. INTRODUCTION.**

2 On October 25, 1994, Mineral County filed a Notice of Motion and Motion for
3 Intervention and Petition to Intervene in Subproceeding C-125-B. C-125-B Doc. #s 31-32. It
4 sought then, and seeks now, to file a claim requiring a reallocation of existing vested rights to
5 use water from the Walker River so that more water will flow to Walker Lake.
6

7 Mineral County's Motion to Intervene in Subproceeding C-125-B must be considered in
8 light of the claims being made by the United States and Walker River Paiute Tribe (the
9 "Tribe") for recognition of water rights for the Walker River Indian Reservation, and the
10 United States for recognition of water rights for other federal reservations in the Walker River
11 Basin, based upon the federal implied reservation of water doctrine. It must also be considered
12 in light of the "claim" which Mineral County seeks to assert for the reallocation of existing
13 vested rights to use water from the Walker River and its tributaries based upon an alleged
14 Nevada public trust doctrine.
15

16 As is explained below, when the Motion to Intervene is so considered, it becomes
17 apparent that Mineral County is not entitled to intervene in Subproceeding C-125-B to assert
18 that claim, either of right or permissively. The claim which Mineral County seeks to assert
19 must be treated either as a motion to modify, or as an independent action to modify the Walker
20 River Decree. That is perhaps best demonstrated by the assertions Mineral County makes in
21 the introductory portion of its opening brief. *See* Mineral County Brief, C-125-C Doc. # 634 at
22 1-5. Although the assertions it makes there relate to matters to be considered if and when the
23 merits of its claim are considered, it is nonetheless important to place some context around
24 those assertions and around the Walker River Basin as a whole, and Walker Lake in particular.
25

26 **A. Nevada - 1882 to the Present.**

27 Mineral County compares Walker Lake in 1882 to Walker Lake in 2007. A comparison
28 of the condition of any similar natural resource as it existed in Nevada in 1882 to its condition

1 today is not appropriate. Certainly, Nevada today is different than Nevada in 1882. Nevada in
2 2050 will be different than Nevada today. Those differences standing alone, however, do not
3 suggest that Nevada or this Court has breached some public trust obligation. A few examples of
4 other changes which have occurred throughout Nevada during that same period of time
5 demonstrate that fact.

6
7 For example, in 1882, Pyramid Lake had a surface elevation of 3867 feet above sea level,
8 and its depth was about 360 feet. At that time, flows into it averaged about 698,000 acre feet per
9 year. See, G. Hardman & C. Venstrom, *A 100-Year Record of Truckee River Runoff Estimated*
10 *From Changes in Levels and Volumes of Pyramid and Winnemucca Lakes* at 73 (1941). In
11 addition, in 1882, Winnemucca Lake had a surface elevation estimated at 3855 feet above sea
12 level, and its depth was about 85 feet. *Id.* The water of each was saline and alkaline in nature, and
13 contained about 3,500 parts per million of solids in 1882. *Id.*

14 Today, Winnemucca Lake no longer exists. By 1971, Pyramid Lake's surface elevation
15 had declined to about 3,794 feet above sea level, its surface area had decreased by about 34,000
16 acres, and its salinity had increased to about 5,200 parts per million of solids. *Pyramid Lake Task*
17 *Force - Final Report* at 3 (1971). Today, for many reasons, some related to climate, some related
18 to federal regulation of diversions of water from the Truckee River Basin to the Carson River
19 Basin, and some related to acquisition of existing water rights for its benefit, but none related to a
20 reallocation of vested water rights based upon any public trust doctrine, Pyramid Lake is at an
21 elevation of approximately 3,800 feet above sea level and its salinity level has declined.

22 Historically, the Truckee and Carson Rivers supported expansive wetlands of 113,000
23 acres. As a result of the development of Western Nevada, those wetlands had been reduced to
24 about 15,000 acres by 1987. *United States Senate Report No. 101-555* at 16 (1990). In the 1800s,
25 Lahontan cutthroat trout flourished throughout the Truckee, Carson, Walker, Quinn and Humboldt
26 River Basins. *Recovery Plan for the Lahontan Cutthroat Trout - January 1995* at iii; 4-9. Today,
27 self-sustaining Lahontan cutthroat trout populations occur in 10.7 percent of their historic river
28 habitat and 0.4 percent of their historic lake habitat. *Id.* at 23.

1 The Las Vegas Valley presents another example. In the 1800s and the early part of the last
2 century, Las Vegas, “the meadows,” was a desert oasis. Prior to development in the Valley, it is
3 estimated that the aquifer system recharged and discharged between 25,000 and 35,000 acre feet
4 annually. By 1912, nearly 125 wells, 60 percent of which were flowing artesian wells, were
5 discharging nearly 15,000 acre feet per year. Between 1912 and 1944, groundwater levels in the
6 Valley declined at an average rate of about 1 foot per year. Between 1944 and 1963, some areas
7 of the Valley experienced declines of more than 90 feet. Portions of the Valley have subsided by
8 more than five feet. This subsidence has created numerous hazards and potentially harmful
9 environmental impacts. M. Povelko, et al., *Gambling With Water in the Desert*, U.S. Geological
10 Survey 50-57.
11

12 In short, Nevada could not have grown and prospered from a population of approximately
13 62,000 people in 1882 to approximately 2,700,000 people today without diversion of water for
14 beneficial use under Nevada’s water law from its streams and rivers and underground sources.
15 These diversions of necessity affect the condition of natural resources which have depended upon
16 those water sources.
17

18 **B. Walker Lake.**

19 **1. Introduction.**

20 Contrary to Mineral County’s assertion, the natural flow of water to Walker Lake has not
21 been cut off during the 20th Century. See C-125-C Doc. # 634 at 3, lns. 16-17. Without question,
22 that flow has been reduced for many reasons. The flow fluctuates depending upon precipitation in
23 the Walker River Basin. For example, the flow from the Walker River into Walker Lake in 1983,
24 a very wet year, was estimated at 575,870 acre feet. On the other hand, there may be no surface
25 flow from the Walker River into Walker Lake in very dry years. The average evaporation of water
26 from Walker Lake between 1939 and 1993 was reported to be 166,000 acre feet per year. S.
27
28

1 Sharpe, et al., *The Walker Basin Nevada and California: Physical Environment, Hydrology, and*
2 *Biology*, Pub. No. 41231 at 14 (May, 2008).

3 The Wabuska Gaging Station, located downstream of all diversions authorized under
4 Nevada and California law and the point of measurement for the Walker River Indian
5 Reservation's recognized water right of 26.25 cfs for 180 days (9,402.75 acre feet annually), has
6 recorded an average annual flow of 119,700 acre feet from 1902 to 2011. Various authors have
7 reached different conclusions about the estimated average annual inflow to Walker Lake from all
8 sources. Those estimates range from 143,000 acre feet from 1908 to 1965, to 90,000 acre feet
9 from 1939 to 1993, and 117,000 acre feet from 1995 to 2007. From October 1, 2010 to September
10 30, 2011, the elevation of Walker Lake had a net increase of 2.28 feet. The flow into Walker Lake
11 from the Walker River during that same period of time was 244,760 acre feet.
12

13 **2. A Water Right for Walker Lake.**

14
15 Moreover, efforts have been made to protect the flow of unappropriated water into Walker
16 Lake under Nevada's water law. On September 17, 1970, the Nevada Department of Wildlife
17 ("NDOW") filed Application No. 25792 to appropriate up to 8000 cfs of all "unappropriated
18 flood waters" in the "East Walker, West Walker Rivers, Walker River and tributaries" for fish,
19 game and recreation, and to support a more stable lake level at Walker Lake. On April 19,
20 1972, the Nevada State Engineer overruled all protests, and granted the application. A permit
21 was issued on May 26, 1972.
22

23 A certificate of appropriation was issued to NDOW under this permit for 795.2 cfs not
24 to exceed 575,870 acre feet per year with a priority of September 17, 1970. The appropriation
25 was quantified based upon flows into Walker Lake in 1983. The year 1983 produced the
26 largest recorded volume of inflow to Walker Lake. As a result of the issuance of this water
27 right to NDOW, all of the remaining unappropriated water from the Walker River in Nevada
28 has been appropriated for the benefit of Walker Lake.

1 **3. Acquisition of Existing Water Rights for Walker Lake.**

2 In addition, through a series of public laws, the United States has appropriated funds for
3 restoring and maintaining Walker Lake. Those laws include: (i) Section 2507, Farm and
4 Security Rural Investment Act of 2002, P.L. 107-171 (“Desert Terminal Lake I”), which
5 transferred \$200,000,000 from the Secretary of Agriculture to the Bureau of Reclamation to be
6 used “to provide water to at-risk natural desert terminal lakes”; (ii) Section 207 of P.L. 108-7
7 (“Desert Terminal Lakes II”), which identified the natural desert terminal lakes eligible for
8 benefits from the funding from Desert Terminal Lakes I as Pyramid, Summit and Walker Lakes in
9 Nevada, and authorized the Bureau of Reclamation to provide financial assistance to various
10 governmental and other organizations to carry out the purposes of Desert Terminal Lakes I; (iii)
11 Section 208 of the Energy and Water Development Appropriations Act of 2006, P.L. 109-103
12 (“Desert Terminal Lakes III”), which authorized the Secretary of the Interior to provide up to
13 \$70,000,000 of the desert terminal lakes funding to the University of Nevada System of Higher
14 Education (the “NSHE”) to do various things, including acquire “from willing sellers land, water
15 appurtenant to land, and related interests in the Walker River Basin, Nevada” for, among other
16 things, “environmental restoration in the Walker River Basin”; (iv) Section 2807 of P.L. 110-246
17 (“Desert Terminal Lakes IV”), which “replenished” the \$200,000,000 by transferring
18 \$175,000,000 from the Secretary of Agriculture to the Bureau of Reclamation in 2008 to be used
19 to lease water, or purchase land, water appurtenant to land and related interests in accordance with
20 Section 208(a)(1)(A) of Desert Terminal Lakes III; and (v) Sections 206 through 208 of P.L. 111-
21 851 (“Desert Terminal Lakes V”), which authorized the Bureau of Reclamation to provide
22 \$66,200,000 to National Fish and Wildlife Foundation (“NFWF”) for various purposes related to
23 Walker Lake, and authorized NFWF to replace the NSHE in connection with its activities under
24 Desert Terminal Lakes III.
25
26
27
28

1 To date, through the use of that funding, NFWF has acquired water rights recognized by
2 the Walker River Decree appurtenant to approximately 3,800 acres of land for the benefit of
3 Walker Lake. NFWF is in the process of pursuing the first of what will be several applications to
4 change those water rights under applicable law for use at Walker Lake. In addition, NFWF and
5 the Walker River Irrigation District ("District") have entered into an agreement to implement a
6 demonstration program involving the lease of stored water for the benefit of Walker Lake as
7 authorized by Desert Terminal Lakes V.
8

9 **4. Economic and Environmental Benefits of Diversion and Use of Walker**
10 **River Water.**

11 The development of water for irrigation uses within the Walker River Basin has also
12 resulted in significant economic and environmental benefits upstream of Walker Lake. The
13 District and its facilities are a prime example.

14 The lands within the District are the principal agricultural area in Lyon County, and are
15 the most productive agricultural area in Nevada. While containing only 2.1 percent of its total
16 land in farms, "Lyon County's...irrigated farmland [of which approximately 80,000 acres are
17 within the District] accounts for approximately 12 percent of all irrigated farmland in the state.
18 More importantly, Lyon County's 12 percent share of irrigated farmland produces a
19 disproportionate 18.3 percent of the state's farm marketings, attesting to the high agricultural
20 productivity of this region and its inherent suitability for agricultural pursuits." Horton, Gary
21 A., Nevada Division of Water Resources, *Walker River Chronology*,
22 <http://water.nv.gov/mapping/chronologies/walker/part1.cfm>.
23

24 Lyon County has enjoyed extensive and pervasive benefits from this agricultural
25 industry since the mid-1800s. *Id.* Farm marketings from the sale of Lyon County's agriculture
26 provide revenues of approximately \$40-60 million per year, "making it the most important
27 agricultural-producing county in the State of Nevada." *Id.* "Furthermore, due to the typical
28

1 export nature of many of these sales...a significant portion of the revenues from Lyon County's
2 farm marketings provide a healthy infusion of new capital and local spending for the County's
3 economy." *Id.* Also, studies undertaken by the Nevada Division of Water Planning have
4 shown that such agricultural economies are relatively insulated from external economic
5 influences, "thereby attesting to the profound and pervasive stabilizing influences afforded by a
6 county's farming sector." *Id.*

8 The economic benefits of agriculture to Lyon County are apparent even if only the
9 major sectors of crop and animal sales since 1997 are considered (leaving aside dairy sales,
10 etc.). The total market value of farm products sales in Lyon County in 2007 (the 2007 Census
11 of Agriculture is the most recent United States Department of Agriculture national census from
12 which data is available because the National Census of Agriculture is conducted every five
13 years, and 2012 is the next census year) exceeded \$62,000,000 in total crop sales and
14 \$28,950,000 in total animal sales. In 2002, in Lyon County, the market value of crop sales was
15 approximately \$36,000,000 and of animal sales was about \$37,000,000. In 1997, crop sales in
16 Lyon County were about \$29,000,000 and animal sales were approximately \$24,000,000.

18 A significant percentage of all of the white onions produced in the United States are
19 grown on lands within the District. Moreover, important new crops, including lettuce,
20 tomatoes, peppers, squash and broccoli, are now being successfully grown, processed and
21 distributed to grocers from within the District.

23 Although sometimes agriculture in this and other areas of Nevada comes under criticism
24 for its seemingly disproportionate use of water, what is less well known and recognized is that
25 in addition to the economic contributions detailed above, waters diverted for agriculture within
26 the District, in Smith and Mason Valleys "have, in fact, made important contributions towards
27 habitat creation and preservation in those areas." *Walker River Chronology*,
28 <http://water.nv.gov/mapping/chronologies/walker/part1.cfm>. The irrigated lands within the

1 District provide extensive habitat and food for eagles, geese, ducks, quail, wild turkeys, deer,
2 and many other birds and animals. The District's reservoirs, Bridgeport and Topaz, are prime
3 recreation areas in Mono County, California and Douglas County, Nevada. Bridgeport
4 Reservoir produces the food chain which makes the East Walker River in California and
5 Nevada a world class German brown trout fishery. Topaz Reservoir is home to a Douglas
6 County Park.

7
8 NDOW's Mason Valley Fish Hatchery and Wildlife Area is located within the District.
9 NDOW is the single largest water right holder in the District. The Wildlife Area obtains water
10 primarily from the Walker River via the District's water distribution system during the
11 irrigation season, with water for the Fish Hatchery and supplemental water for crop and
12 wetlands irrigation coming from numerous wells. Water level management, made possible by
13 the Wildlife Area's numerous water diversion supply sources, is probably the most important
14 technique in controlling undesirable vegetation and promoting desirable vegetation within the
15 wildlife area. The Wildlife Area contains a variety of habitat, from desert shrub lands to wet
16 meadows and riparian corridor. The Wildlife Area supports an abundance of fish and wildlife
17 that contribute significantly to the biological diversity of western Nevada. *See Nevada*
18 *Department of Wildlife Online Publications, Mason Valley Wildlife Area,*
19 *http://www.ndow.org/about/pubs/wma/wma_mason.pdf.* The Mason Valley Fish Hatchery
20 produces cutthroat, rainbow, cuttbow and brown trout for planting in streams, rivers and lakes
21 throughout Nevada.
22
23

24 **II. PROCEDURAL BACKGROUND**

25 **A. The Walker River Decree**

26 **1. Early Litigation Concerning the Waters of the Walker River -** 27 ***Rickey Land & Cattle Co. v. Miller & Lux.***

28 On June 10, 1902, Miller & Lux brought an action in the United States District Court
for the District of Nevada against Rickey and others to enjoin interference with its use of water

1 of the Walker River in Nevada. On October 15, 1904, Rickey Land & Cattle Co. began two
2 actions in a California state court against Miller & Lux to quiet its title and to establish its prior
3 right to waters on the East and West Forks of the Walker River. *See, Rickey Land & Cattle*
4 *Company v Miller & Lux*, 218 U.S. 258 (1910); *see also, Miller & Lux v. Rickey*, 127 F. 573
5 (D. Nev. 1904); *Miller & Lux v. Rickey*, 146 F. 574 (D. Nev. 1906); *Rickey Land & Cattle Co.*
6 *v. Miller & Lux*, 152 F. 11 (9th Cir. 1907).

7 In 1906, Miller & Lux and other defendants sought to enjoin the proceedings in the
8 California actions on the grounds that the United States District Court for the District of
9 Nevada had acquired prior jurisdiction. The Supreme Court of the United States agreed and
10 prosecution of the California actions was enjoined. *Rickey*, 218 U.S. 258. Ultimately, a decree
11 (the “Rickey Decree”) was entered by the United States District Court for the District of
12 Nevada in 1919. *See, Pacific Livestock Company v. Thomas Rickey, et al.*, No. 731, Final
13 Decree (D. Nev. 1919) (referred to herein as the “Rickey Decree”).

14 **2. Litigation Brought By the United States.**

15 The United States, the Tribe, and many other claimants to the waters of the Walker
16 River had not been joined as parties in the *Rickey* litigation, and their rights were not
17 determined by the Rickey Decree. Therefore, on July 3, 1924, the United States commenced
18 *United States of America v. Walker River Irrigation District, et al.*, in the United States District
19 Court for the District of Nevada, In Equity No. C-125. An amended complaint was filed on
20 March 19, 1926. Some 253 defendants, all appropriators and users of waters of the Walker
21 River, East Walker River, West Walker River and the tributaries thereof, were named as
22 defendants. *See, United States v. Walker River Irrigation District, et al.*, 11 F. Supp. 158, 159
23 (D. Nev. 1935).

24 That action included persons and entities who had been parties to or were successors to
25 parties to the *Rickey* litigation. It also included persons who had not been parties to the *Rickey*
26 litigation, although they clearly had established rights to waters of the Walker River prior to the
27 commencement of the *Rickey* litigation. Finally, it included persons who had acquired rights to
28

1 the waters of the Walker River after commencement of the *Rickey* litigation. *See*, Walker River
2 Decree at 10-50, 50-63A and 63A-70.

3 The United States alleged that because of its ownership of the Walker River Indian
4 Reservation, which had been reserved and set aside for the Tribe, it was the owner of 150 cubic
5 feet per second of waters of the Walker River and its tributaries. It sought to quiet title thereto
6 and to restrain defendants from interfering with the alleged right. 11 F. Supp. at 159. Issues
7 raised by the pleadings were referred to a special master who took testimony intermittently
8 from March 22, 1928 through December 30, 1932. Commencing May 22, 1933, hearings were
9 held before the court on exceptions to the report and findings of the special master. 11 F. Supp.
10 at 162.

11 The United States relied upon the ruling of the Supreme Court in *Winters v. United*
12 *States*, 207 U.S. 564 (1908). The trial court ruled that the United States' claim to water for the
13 Walker River Indian Reservation had to be adjudged, measured and administered in accordance
14 with the laws of appropriation as established by the State of Nevada. 11 F. Supp. at 167; *see*
15 *also, United States v. Walker River Irrigation District*, 14 F. Supp. 11 (D. Nev. 1936).

16 On April 15, 1936, the Walker River Decree was entered, and an appeal by the United
17 States followed to the Ninth Circuit Court of Appeals. That court held that the rule of law
18 established in *Winters v. United States* applied and that there had been an implied reservation of
19 water at the time the Reservation was set aside. The Court of Appeals accepted the original
20 report of the special master with respect to the quantity of water reserved. *See, United States v.*
21 *Walker River Irrigation District*, 104 F.2d 334, 339-40 (9th Cir. 1939). The Walker River
22 Decree was amended to conform to the mandate of the Court of Appeals on April 24, 1940. At
23 that point, the matter moved from its litigation phase to its administration phase.

24 **B. History of Subproceeding C-125-B.**

25 **1. The Petition of the Walker River Irrigation District.**

26 The history of Subproceeding C-125-B involving the claims of the United States and
27 Tribe for recognition of additional federal reserved water rights, and into which Mineral
28

1 County seeks to intervene, begins with the filing of a petition by the District on January 9,
2 1991 against the California State Water Resources Control Board and its members for
3 Declaratory and Injunctive Relief; Request for Order to Show Cause; or in the Alternative to
4 Change the Point of Diversion (the "District Petition"). The District Petition was designated
5 Subfile No. C-125-A.

6 The only named respondents to the District Petition were the California State Water
7 Resources Control Board and its individual members. The District Petition involved three
8 orders issued by the California State Water Resources Control Board with respect to its water
9 rights licenses for Bridgeport and Topaz Reservoirs. The District contended that those orders
10 were contrary to and inconsistent with the Walker River Decree, and sought a declaration from
11 the Court to that effect. It also sought a declaration that the respondents lacked the power to
12 enter and enforce orders which were contrary to, inconsistent with and interfered with the
13 administration of the Walker River Decree and which the District alleged interfered with the
14 jurisdiction of the Court administering the Walker River Decree. The District sought an
15 injunction permanently enjoining the Board and its members from enforcing those portions of
16 the orders which the Court found inconsistent with and contrary to the Walker River Decree or
17 interfere with the jurisdiction of the Court. That matter was eventually resolved by Stipulation
18 and Order on June 3, 1996.

19 **2. The Original Counterclaims in Subproceeding C-125-B.**

20 Before the District Petition was resolved, the Tribe in May, 1992, served an answer,
21 counterclaim and cross-claim in response to it. C-125-B Doc. # 1. The United States
22 subsequently filed a Motion for Leave to File Counterclaim. C-125-B Doc. # 3. The
23 Counterclaims sought recognition of a federal reserved right from the Walker River to store
24 water in Weber Reservoir for use on lands of the Walker River Indian Reservation, and of a
25 federal reserved water right from the Walker River for use on lands added to the Reservation in
26 1936. These rights are alleged to be in addition to the water right awarded to the United States
27 for the benefit of the Reservation by the Walker River Decree.
28

3. The Amended Counterclaims in Subproceeding C-125-B.

1 On July 31, 1997, the Tribe filed its First Amended Counterclaim (“Tribe’s First
2 Amended Counterclaim”). C-125-B Doc. # 58. In addition to seeking recognition of federal
3 reserved rights to the surface water as set forth in its Original Counterclaim, the Tribe’s First
4 Amended Counterclaim sought recognition of such rights to groundwater for the Reservation.
5 The Tribe’s claims to surface water for the Added Lands (land added to the Reservation in
6 1936) and for groundwater are based upon the federal implied reservation of water doctrine.
7 *See* C-125-B Doc. # 58 at paras. 2-3.

8 At or about the same time, the United States filed the First Amended Counterclaim of
9 the United States of America (“United States’ First Amended Counterclaim”). Doc. # 59. The
10 First, Second and Third Claims of the United States allege claims identical to the claims
11 asserted in the Tribe’s First Amended Counterclaim (the “Tribal Claims”). In addition to the
12 claims for the Walker River Indian Reservation, the United States’ First Amended
13 Counterclaim includes several additional claims for recognition of federal reserved rights to
14 surface water and groundwater for other federal lands in the Walker River Basin (the “Federal
15 Claims”).

16 The United States’ Fourth Claim for Relief seeks recognition of “federal reserved water
17 rights” to surface and groundwater for lands which form the Yerington Paiute Tribe
18 Reservation. C-125-B Doc. # 59. It also seeks a “declaration and confirmation” of water rights
19 held under state law. *Id.* at paras. 28-29. The Fifth Claim seeks recognition of “federal
20 reserved rights” to surface and groundwater for the Bridgeport Indian Colony, as well as rights
21 based upon California law. *Id.* at paras. 28-29. The Sixth Claim seeks recognition of “federal
22 reserved water rights” to surface and groundwater for the Garrison and Cluette Allotments, as
23 well as rights based upon California law. *Id.* at paras. 34-35. The Seventh Claim seeks
24 recognition of “federal reserved water rights” to surface and groundwater claims for 55
25 individual allotments. *Id.* at para. 39.

26 The Eighth through Eleventh Claims for Relief seek recognition of federal reserved
27 rights for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain
28 Warfare Training Center of the United States Marine Corps, and the Bureau of Land
Management. All involve surface and groundwater. *See* C-125-B Doc. # 59 at paras. 46; 51;
56-62; 65; 66; 70-73.

1 **C. Mineral County’s Motion and Amended Motion to Intervene.**

2 In October of 1994, Mineral County moved to intervene in Subproceeding C-125-B,
3 which involves the Tribal Claims and Federal Claims (C-125-B) described above. *See* C-125-B
4 Doc. #s 31; 32. Thereafter, the Court created this Subproceeding C-125-C for record keeping
5 purposes only, and also ordered Mineral County to file revised Intervention Documents, which
6 it ultimately did. C-125-B Doc. # 46.
7

8 **III. MINERAL COUNTY’S MOTION TO INTERVENE MUST BE DENIED**
9 **BECAUSE THERE IS NO RELATIONSHIP BETWEEN THE CLAIM WHICH**
10 **MINERAL COUNTY SEEKS TO ASSERT AND THE TRIBAL AND FEDERAL**
11 **CLAIMS FOR RECOGNITION OF ADDITIONAL RESERVED RIGHTS, AND**
12 **BECAUSE THEIR DISPOSITION CANNOT AS A PRACTICAL MATTER**
13 **IMPAIR OR IMPEDE THE COUNTY’S ABILITY TO PROTECT ITS CLAIM.**

14 **A. Introduction.**

15 Rule 24(c) of the Federal Rules requires that a motion to intervene be accompanied by
16 “a pleading that sets out the claim or defense for which intervention is sought.” Mineral
17 County does not seek to intervene to support or oppose the Tribal or Federal Claims. Mineral
18 County accompanied its Motion with a proposed “Amended Complaint in Intervention.” C-
19 125-C Doc. # 20. Through that proposed Amended Complaint, Mineral County seeks to assert
20 a claim for reallocation of the waters of the Walker River. The proposed Amended Complaint
21 seeks “an adjudication and reallocation of the waters of the Walker River to preserve minimum
22 levels in Walker Lake.” C-125-C Doc. # 20 at para. 13. To achieve that goal, Mineral County
23 asserts “the right to, at least, 127,000 acre feet of flows annually reserved from the Walker
24 River.” *Id.* at para. 15. The basis for the claim seems to be the decision of the California
25 Supreme Court in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983) and
26 the public trust doctrine as applied in that case.

27 The fact that Mineral County seeks to intervene for these purposes as distinguished
28 from intervention to support or oppose the Tribal and Federal Claims is critical to the Court’s

1 analysis of the Motion to Intervene. If Mineral County sought intervention here solely to
2 defend against the Tribal and Federal Claims, the analysis of its motion might be different, and
3 might lead to a different result. However, it does not seek intervention to defend against the
4 Tribal and Federal Claims. Instead, it seeks to file its own complaint which, in effect, asks the
5 Court to undertake an *Audubon* type modification of all water rights recognized in the Walker
6 River Decree in order to “preserve the minimum levels in Walker Lake, as a condition to the
7 water rights . . . of all upstream users -- such requirements of minimum levels of Walker Lake
8 to be a condition to each [water right] held by upstream . . . holders in California and Nevada.”
9
10 *See* C-125-C Doc. #20 at para. 13.

11 **B. The Requirements for Intervention of Right.**

12 Under the Federal Rules of Civil Procedure a party may intervene in an action as
13 follows:
14

15 (a) *Intervention of Right.* On timely motion, the court must permit anyone
16 to intervene who: . . . (2) claims an interest relating to the property or transaction
17 that is the subject matter of the action, and is so situated that disposing of the
action may as a practical matter impair or impede the movant’s ability to protect
its interest...

18 Fed. R. Civ. P. 24(a). Under this rule the Ninth Circuit Court of Appeals applies a four-part
19 test requiring an applicant seeking intervention as of right to show that:

- 20 (1) it has a ‘significantly protectable interest’ relating to the property or
21 transaction that is the subject of the action;
- 22 (2) disposition of the action may, as a practical matter, impair or impede
23 applicant’s ability to protect that interest;
- 24 (3) the application is timely; AND
- 25 (4) the existing parties may not adequately represent the applicant’s interest;
- 26

27 *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Courts are guided primarily by
28 practical and equitable considerations in determining whether intervention is appropriate.

1 *Donnelly*, 159 F.3d at 409. All four requirements of Fed. R. Civ. P. 24 must be satisfied by an
2 applicant intervenor or the intervention must be denied. *Arakaki v. Cayetano*, 324 F.3d 1078,
3 1083 (9th Cir. 2003).

4 Mineral County cannot satisfy the first two requirements.¹ Assuming for the sake of
5 argument, that Mineral County has a significantly protectable interest in a public trust claim for
6 Walker Lake,² the public trust claim it seeks to assert through its proposed Amended
7 Complaint has no relationship to the “property” or “transactions” which are the subject of
8 Subproceeding C-125-B. In addition, the disposition of the Tribal and Federal Claims in
9 Subproceeding C-125-B will not impair or impede Mineral County’s ability to assert the claim
10 in its proposed Amended Complaint. The difference between the nature and subject of the
11 Tribal and Federal Claims, and the nature and subject of Mineral County’s proposed Public
12 Trust claim, are the reasons that Mineral County’s Motion does not satisfy those two
13 requirements.
14
15

16 Federal implied reserved water rights are established by reason of the fact that land has
17 been reserved by the United States, and that the primary purpose of the reservation cannot be
18 fulfilled without water. *See, e.g., Winters v. United States*, 207 U.S. 564 (1908); *Arizona v.*
19 *California*, 373 U.S. 546 (1963); *United States v. New Mexico*, 438 U.S. 696 (1978). In
20 contrast to appropriative rights established under state law, which can only be perfected by
21 actually applying the water to beneficial use, implied federal reserved rights are fully perfected
22
23

24
25
26
27
28

¹ Although Mineral County’s Motion to Intervene in Subproceeding C-125-B may be timely in the sense that it was filed soon after the Tribal and Federal Claims were filed, the District does not concede that Mineral County is “timely” with respect to the claim it seeks to assert, and does not accept that Mineral County had no notice of the proceedings leading to the Walker River Decree.

² NDOW contends that a single county has no authority to assert such a claim. *See* NDOW’s Answering Brief, C-125-C Doc. # 646 at 17-19.

1 and effective as of the time the federal reservations are created. *Arizona*, 373 U.S. 599-600.

2 The implied reservation of water doctrine applies to all federal reservations. *Id.* at 601.

3 The priority date of a federal reserved right vests no later than the date of establishment
4 of the reservation. *United States v. New Mexico*, 438 U.S. 696, 705-11 (1978). The quantity of
5 a federal reserved water right does not depend upon beneficial use, but upon the amount of
6 water reasonably necessary to fulfill the primary purpose of the reservation. *New Mexico*, 438
7 U.S. at 700.

9 Mineral County asserts that “the public trust doctrine underpins and ultimately controls
10 the application of Nevada and California water law, as well as federal common law, and the
11 governmental management of water resources such as the Walker River and Walker Lake.”
12 Mineral County Brief at 4. The scope, extent and application of the public trust doctrine are
13 matters of state law. *PPL Montana, LLC v. Montana*, _____ U.S. _____, 132 S.Ct. 1215,
14 1234-1235 (2012). The doctrine is informed and shaped by state constitutions, by the extent to
15 which the legislative branch of government has exercised or abdicated its police power
16 authority over the public resource at issue, the nature of the public resource at issue, and the
17 peculiar facts and circumstances surrounding the resource in that state. The Nevada Supreme
18 Court has never addressed the issue in the context of Nevada’s laws related to the appropriation
19 and use of water.³

22 The most obtrusive example of application of the public trust doctrine in a water rights
23 context is *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal.
24 1983). There, the California Supreme Court authorized the reconsideration of water rights
25 previously granted to a single water right holder, Los Angeles Department of Water and Power,
26

27
28 ³ The two Nevada cases to which Mineral County refers, *State v. Bunkowski*, 503 P.2d 1231
(Nev. 1972) and *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011) involved issues related
to ownership of the beds and banks of “navigable” streams.

1 based upon public trust values of Mono Lake. The Court justified the reconsideration on the
2 theory that such rights, when they were granted, were “subject to the trust.” *Audubon*, 658 P.2d
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 at 721. Even in that situation, the California court recognized at the very outset of its opinion
2 that commerce, development, and in some cases, life itself, cannot exist in the arid west without
3 massive diversions of water out of streams and lakes for purposes unrelated to “navigation,
4 commerce, fishing, recreation or ecological use relating to the source stream.” *Id.* at 712.

5
6 Eleven years after the decision in *Audubon*, the California State Water Resources
7 Control Board, after compiling an extensive environmental impact report and conducting an
8 evidentiary hearing, issued an order amending the Department of Water and Power’s water
9 licenses restricting diversions in order to raise the level of Mono Lake and setting flow
10 requirements for tributary streams. M. Blumm and T. Schwartz, *Mono Lake and the Evolving*
11 *Public Trust in Western Water*, 37 Ariz. L. Rev. 701, 717 (1995). As a result of the State
12 Water Board decision, the Department of Water and Power’s diversions were reduced for the
13 next 20 years to about 15% of the original diversions. After a specific elevation at Mono Lake
14 is reached, diversions may increase, but still to only 37% of pre-1989 diversions. The Water
15 Board concluded that these restrictions would not produce water shortages in Los Angeles
16 because replacement water was available from a variety of other sources. *Id.* at 719.

17
18 Thus, the nature of a public trust claim will first involve how it applies in this context.
19 If it is found to apply, then consideration must be given to how and to what extent it should be
20 applied to existing water rights. That entire process, where there are hundreds of vested water
21 rights involved and no replacement water available, will be lengthy and complicated. It is an
22 entirely different process, involving different legal and factual issues, from one related to the
23 recognition of federal reserved water rights. Here, it is a process which seeks to modify
24 hundreds of existing and vested water rights recognized by the Walker River Decree entered
25 more than 70 years ago.⁴
26

27
28

⁴ For a number of reasons not relevant here, it is the District’s position that, under Nevada law, the Public Trust Doctrine cannot and should not require a reallocation of vested water rights.

1 Mineral County's proposed Amended Complaint in Intervention is then, in substance a
2 request to alter the Walker River Decree to include an as yet undefined and un-quantified
3 public trust based interest in flows to Walker Lake. It is unclear whether Mineral County
4 proposes the recognition of a specific "water right" to provide the relief it seeks, or whether it
5 seeks to add a Decree provision providing for and requiring flows to the Lake in certain
6 circumstances; but it is very clear that whatever the precise form, recognizing and providing for
7 Mineral County's alleged interest would require an alteration of the Walker River Decree.⁵

9 Mineral County erroneously perceives the Tribal Claims and the Federal Claims as
10 involving "the **reconsideration** of the allocation Walker River water provided for in the
11 Decree." Mineral County Brief at 2. The problem being, of course, they do **not**, and will in no
12 way involve "reconsideration" of any of the allocation of waters already provided for in the
13 Walker River Decree; they involve only a determination of the nature and extent of federal
14 reserved rights, and more specifically, to determine the scope of the transactions that
15 established the reservations in question to determine whether their establishment resulted in the
16 reservation of water rights and, if so, the extent of those water rights.

18 Although it may be correct as stated by the Nevada Supreme Court that the Decree
19 Court is the proper forum in which to address Mineral County's claims (C-125-C Doc. #634 at
20 9, Ins. 1-2; *see also, Mineral County v. Nevada Department of Conservation & Natural*
21 *Resources*, 20 P.3d 800 (Nev. 2001)), Mineral County, however, is not entitled to intervene in
22 Subproceeding C-125-B merely because that proceeding is presently before the Decree Court.⁶

25 ⁵ As is discussed *infra*, Mineral County's proposed Amended Complaint in Intervention must
26 be treated as either an independent action to modify, or as a motion to modify the Walker River
27 Decree.

28 ⁶ A threshold issue in Subproceeding C-125-B is whether the Decree Court has jurisdiction to
consider the Tribal and Federal Claims, or whether that proceeding should be treated as a
separate and independent action.

1 **C. The Court Must Deny Mineral County’s Intervention to Seek Reallocation**
2 **of Existing Walker River Decree Water Rights Based Upon the Public**
3 **Trust Doctrine Because There Is No Relationship Between That Alleged**
4 **Claim and the Claims for Recognition of Federal Reserved Rights Being**
5 **Asserted in Subproceeding C-125-B.**

6 In determining if an applicant for intervention has a “significantly protectable interest”
7 in an action, the Ninth Circuit applies a two part rule, finding such an interest where:

- 8 (1) the applicant asserts an interest that is protected under some law; and
9 (2) there is a “relationship” between applicant’s legally protected interest
10 and the plaintiff’s claims.

11 *Donnelly*, 159 F.3d at 409.

12 Mineral County asserts that it has a protectable interest in the waters of the Walker
13 River for the benefit of Walker Lake. C-125-C Doc. #634 at 11-12. As is discussed below, the
14 subject of Subproceeding C-125-B is not the waters of the Walker River *per se*, but instead is
15 whether water from that River was reserved when certain reservations were established.
16 Moreover, even if one were to assume that Subproceeding C-125-B involved a dispute about
17 the waters of the Walker River, there must be a relationship between the federal reserved
18 claims being asserted there, and the public trust claim which Mineral County seeks to assert
19 here. A claimed interest in “property” which may be impacted is not enough. The fact that
20 there may be less water available for Walker Lake if the federal reserved rights are recognized
21 to exist, does not justify intervention to assert a public trust claim because there is no
22 relationship between that claim and the federal reserved claims. *C.f.*, *United States v. Alisal*
23 *Water Corporation*, 370 F.3d 915, 919-920 (9th Cir. 2004) (potential diminishment in value of
24 property securing debt not sufficiently related to environmental enforcement action which may
25 reduce the value of that property).

26 Regardless of whether Mineral County has a public trust protected and based interest in
27 flows to Walker Lake, that purported interest has no relationship to the federal reserved rights
28

1 sought to be recognized in Subproceeding C-125-B. An applicant satisfies the “relationship”
2 requirement only if the resolution of the plaintiff’s claims will actually affect the applicant’s
3 claims. *Donnelly*, 159 F.3d at 410; *see also, Greene v. United States*, 996 F.2d 973, 976-978
4 (9th Cir. 1993) (holding that an applicant lacked a “significant protectable interest” in an action
5 when the resolution of the plaintiff’s claims would not affect the applicant directly).
6

7 Subproceeding C-125-B concerns only a determination as to whether or not certain
8 federal reserved rights have or have not existed since the date of each reservation in question,
9 because those rights were reserved as part of the original reservation, but have never been
10 formally recognized. It is in no way a “reconsideration” of the water rights allocations made in
11 the Walker River Decree. The precise subject of Subproceeding C-125-B is the transactions
12 that established the reservations in question, and the facts and circumstances surrounding their
13 establishment. This is because whether or not the claimed reserved rights exist depends
14 entirely upon whether or not the primary purpose of the reservation cannot be fulfilled without
15 water.
16

17 Assuming, arguendo that the Court determines that the establishment of the reservations
18 at issue included the claimed water rights, recognition of the existence of those reserved rights
19 will necessarily **not** involve any “reconsideration” of the “allocation” of the waters of the
20 Walker River already provided for in the Decree. If those reserved rights exist, they exist and
21 have existed since the reservations were established. It is true that if any such reserved rights
22 are recognized, the Court will administer them in priority with the rights already recognized in
23 the Decree. However, it will not and cannot, as a matter of law, reconsider the rights
24 previously adjudicated by the Walker River Decree.
25

26 No possible resolution reached in Subproceeding C-125-B can or will actually affect
27 Mineral County’s claim that existing vested water rights recognized by the Walker River
28 Decree must be modified based upon the public trust doctrine. If the Court determines that the

1 circumstances surrounding the establishment of the federal reservations involved did not result
2 in an implied reservation of water, then the status of the waters of the Walker River system will
3 remain unchanged, and Mineral County's claim to require modification of existing recognized
4 rights will not be impacted.

5
6 On the other hand, if the Court determines that the circumstances surrounding the
7 establishment of the federal reservations did result in an implied reservation of water, Mineral
8 County's claim to require modification of existing recognized water rights will likewise be
9 unaffected. If the alleged implied reserved water rights at issue in Subproceeding C-125-B
10 exist, they have existed since the date of reservation. The Subproceeding merely seeks
11 recognition of that existence. As noted above, water rights which are subject to the public trust
12 are subject to that trust from inception. Mineral County's public trust claim for modification of
13 rights subject to the trust will not be affected because, even if both the federal reserved rights
14 and Mineral County's public trust claims are determined to exist, those determinations will be a
15 recognition of existing interests, rather than the creation of new interests.
16

17 The reserved rights sought to be recognized in C-125-B and Mineral County's claim
18 that existing rights can be modified because they are subject to the trust, either already have the
19 same legal relationship to one another because both exist but have merely not been recognized,
20 or they have the same legal relationship to one another if either is determined to exist and the
21 other is determined not to exist. Because both claimed interests are for recognition of allegedly
22 pre-existing rights, whether one, both, or neither are determined to exist, their legal relationship
23 will not change because it has existed as long as the interests have existed. Thus, practically
24 and actually, Mineral County's claims that existing rights must be modified to meet the public
25 trust cannot be affected by recognition of any of the federal reserved rights no more than
26 recognition of Mineral County's claim would affect the existence of the claimed federal
27 reserved rights.
28

1 **D. The Court Must Deny Mineral County’s Intervention to Seek Reallocation**
2 **of Existing Water Rights Based Upon the Public Trust Doctrine Because**
3 **Disposition of the Federal Reserved Claims Cannot, as a Practical Matter,**
4 **Impair or Impede the County’s Ability to Protect That Claim.**

5 The first and second prongs of the intervention analysis are often considered together
6 because “the question of impairment is not separate from the question of existence of an
7 interest.” *Natural Resources Defense Council v. United States Nuclear Regulatory*
8 *Commission*, 578 F.2d 1341, 1354 (10th Cir. 1978). As explained above, whether or not the
9 claimed federal reserved rights are determined to exist cannot, as a practical matter, impair or
10 impede Mineral County’s claim that existing rights must be modified under the public trust. As
11 a matter of federal law, the reserved water rights at issue either have existed since the
12 establishment of the reservation of which they form a part, because the establishment impliedly
13 reserved those rights, or they do not, and have never existed because the establishment did not
14 include those rights. The same is true of Mineral County’s claim, if it is recognized, because it is
15 the public trust on which the claim is based and the claim has existed as long as the public trust.

16 The claimed interests, whether they exist or not, have a pre-existing legal relationship.
17 That pre-existing relationship means that Mineral County’s claim cannot, as a practical matter,
18 be impaired or impeded by any result in Subproceeding C-125-B because it cannot change that
19 legal relationship. Mineral County’s claim to seek modification of existing rights, and Mineral
20 County’s ability to protect that claim, cannot and will not, as a practical matter, be impaired or
21 impeded if Mineral County is denied intervention to assert its Amended Complaint because a
22 determination on the federal reserved rights in Subproceeding C-125-B will play no part in
23 determining the validity of Mineral County’s claim, much less impair or impede its ability to
24 protect it.
25
26
27
28

1 **IV. THE COURT MUST DENY MINERAL COUNTY'S REQUEST FOR**
2 **PERMISSIVE INTERVENTION PURSUANT TO FED. R. CIV. P. 24(b)**
3 **BECAUSE THE COUNTY'S CLAIM TO MODIFY EXISTING RIGHTS AND**
4 **THE CLAIMS TO RECOGNIZE FEDERAL RESERVED RIGHTS HAVE NO**
5 **COMMON QUESTIONS OF LAW OR FACT, AND INTERVENTION WILL**
6 **UNDULY DELAY OR PREJUDICE OTHER PARTIES' RIGHTS.**

7 Rule 24(b)(1) provides:

8 (b) *Permissive Intervention.* (1) On timely motion, the court may permit
9 anyone to intervene who:...(B) has a claim or defense that shares with the main
10 action a common question of law or fact...(3) In exercising its discretion the
11 court must consider whether the intervention will unduly delay or prejudice the
12 adjudication of the original parties' rights.

13 Fed. R. Civ. P. 24(b).

14 Under this rule, the Ninth Circuit sometimes applies a three part test, requiring an
15 applicant who seeks permissive intervention to show:

- 16 (1) it shares a common question of law or fact with the main action;
- 17 (2) the motion is timely; and
- 18 (3) the court has an independent basis for jurisdiction over the applicant's

19 claims.

20 *Donnelly*, 159 F.3d at 412. Sometimes the court considers a number of other factors, including
21 the legal position an applicant seeks to advance, and its relation to the merits of the case. *See*,
22 *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011). In exercising its discretion, a
23 district court must consider whether intervention will unduly delay the action or will unduly
24 prejudice existing parties. *Donnelly*, 159 F.3d at 409-410; *Perry*, 630 F.3d at 905.

25 There are no common questions of law or fact between claims seeking recognition of
26 federal reserved rights and Mineral County's claim to modify existing water rights under the
27 public trust doctrine. In Subproceeding C-125-B, the law at issue will be the federal law of the
28 implied reservation of water doctrine. The key facts at issue will be the fact, date and purpose

1 of each reservation, and the quantity of water needed to fulfill the purpose of each. *See, e.g.,*
2 *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

3 In connection with any claim brought by Mineral County to require modification of
4 existing rights based upon the public trust, the law at issue will be Nevada law. There will be a
5 myriad of factual questions related to whether, and if so, how, the existing rights to divert water
6 of hundreds of persons for the prosperity and habitability of Nevada, the most arid of the
7 United States, must be modified to mitigate harm to Walker Lake. The ongoing efforts to
8 benefit Walker Lake within the four corners of Nevada's water law through permanent and/or
9 temporary changes to existing water rights will have to be considered. These are but a few
10 examples.
11

12 Allowing Mineral County's intervention to assert its claim to modify existing water
13 rights would result in the Court and the parties litigating two separate and disparate actions in
14 one proceeding. That would cause undue delay and complication, and prejudice the parties.
15

16 After extensive briefing, on April 19, 2000, the Court entered the Case Management
17 Order ("CMO"). *See*, Subfile C-125-B, Doc. # 108. In the CMO, the Court recognized that the
18 case as a whole is simply too big and too complex to process on a reasonable basis without
19 bifurcation and other management. Doc. # 108 at 1-2. The CMO bifurcates the claims of the
20 Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all
21 of the other claims raised by the United States (the "Federal Claims"). Except as expressly
22 provided in the CMO, all discovery and other proceedings in the action are stayed. Doc. # 108
23 at 4, Ins. 20-24. The CMO requires the Tribe and United States to serve their amended
24 pleadings and related service documents on and thereby join numerous individuals and entities
25 who hold surface and underground water rights within the Walker River Basin. It groups these
26 individuals and entities into nine different categories. *Id.* at 5-6.
27
28

1 Although all of the proposed defendants in Mineral County's proposed Complaint in
2 Intervention should also be defendants in Subproceeding C-125-B, there are hundreds, if not
3 thousands, of defendants, most likely users of underground water, in Subproceeding C-125-B
4 who have no involvement at all with respect to the claim Mineral County seeks to assert. To
5 add the complexity of Mineral County's proposed Amended Complaint to that mix would only
6 serve to further complicate and delay its resolution, and for no good reason. A more clear
7 instance of when intervention should not be permitted because of a lack of common questions
8 of law and fact and the potential for undue delay and prejudice to existing parties could not
9 exist.
10

11 **V. CONCLUSION.**

12 For all of the foregoing reasons, Mineral County's Motion to Intervene in
13 Subproceeding C-125-B to assert a public trust claim for reallocation of existing vested rights
14 to the use of water from the Walker River as set forth in the Walker River Decree must be
15 denied. However, under the Federal Rules, a pleading may be judged by its substance, rather
16 than its form or label. *See*, 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1286
17 (2004); *see also*, *Schlesinger v. Councilman*, 426 U.S. 738, 742 n. 5 (1975) (motion for
18 temporary restraining order and preliminary injunction treated as a complaint).
19

20 As explained above, in substance, Mineral County seeks to modify the Walker River
21 Decree. It is seeking intervention to assert a public trust claim for maintenance of sufficient
22 inflows of water from the Walker River to Walker Lake to restore and maintain minimum lake
23 levels and water standards. Recognition of any such public trust claim would require
24 modification of the Walker River Decree. In its own words, Mineral County seeks "a
25 reallocation of the waters of the Walker River." C-125-C Doc. # 20. Any such "reallocation"
26 would necessarily require modification of the Walker River Decree. Consideration of whether
27 or not to modify a final decree requires either a motion to modify pursuant to Fed. R. Civ. P.
28

1 60, or an independent action in equity to modify it. Moreover, Courts have sometimes treated
2 an independent action as a Rule 60(b) motion, and vice-versa, as referenced in *Nevada VTN v.*
3 *General Insurance Co.*, 834 F.2d 770, 775 (9th Cir. 1987), and *J. Moore and J. Lucas*, 7
4 Moore's Federal Practice, Para. 60.31 (2d Ed. 1985).

5
6 Thus, Mineral County's proposed Amended Complaint in Intervention may be treated
7 as an independent action for relief from judgment, or as Rule 60(b) motion. Given that Mineral
8 County seeks the affirmative relief of modification of all of the water rights recognized by the
9 Walker River Decree, and alleges it was not a party to the action, it would seem that its
10 proposed Amended Complaint in Intervention should be treated as an independent action in
11 equity to modify the Walker River Decree.

12 Dated: December 14, 2012

13
14 WOODBURN AND WEDGE

15 By: /s/ Gordon H. DePaoli
16 Gordon H. DePaoli,
17 Dale E. Ferguson, Domenico R. DePaoli
18 6100 Neil Road, Suite 500
19 Reno, Nevada 89511
20 Attorneys for Walker River Irrigation District
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on December 14, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record via their email addresses; I further certify that on December 14, 2012, I caused a copy of the foregoing to be served on the following non CM/ECF participants by U.S. Mail, postage prepaid:

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

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

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

David Parraguirre
1700 Wendy Way
Reno, NV 89509

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

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

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

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

Desert Hill Dairy, LLC
402 N. Division St.
Carson City, NV 89703

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

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

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

Leo Drozdoff
Dir. of Cons. and Nat'l Resources
901 S. Stewart St., # 1003
Carson City, NV 89701

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

1 James Fousekis
2 2848 Garber St.
3 Berkeley, CA 94705

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

4 Richard Fulstone
5 F.M. Fulstone
6 2022 State Hwy. 208
7 P.O. Box 61
8 Smith, NV 89430

Gary A. Sheerin
Law Office of Agary A. Sheerin
177 W. Proctor St., Ste.
Carson City, NV 89703

9 Deborah Hartline
10 P.O. Box 1343
11 Quincy, CA 95971

Silverado, Inc.
c/o Scott Schakelton
4160 Long Knife Rd.
Reno, NV 89509

12 Margaret & Terry Hawkins
13 945 E. Main St., #168
14 Fernley, NV 89801

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

15 John Howard
16 JW Howard Attorneys
17 625 Broadway, Ste. 1206
18 San Diego, CA 92101

Garry Stone, Water Master
290 S. Arlington Ave.
Reno, NV 89501

19 R.C. Howard
20 Holland & Hart LLP
21 5441 Kietzke Ln., 2nd Flr.
22 Reno, NV 89511

Tom Talbot
Talbot Land & Livestock
1650 N. Sierra Hwy.
Bishop, CA 93514

23 Stan Hunewill
24 Hunewill Ranch
25 P.O. Box 368
26 Bridgeport, CA 93517

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

27 Robert Hunter
28 Western Nevada Agency
Bureau of Indian Affairs
3111 E. Washington St.
Carson City, NV 89701-4065

Twelves Famly Trust
c/o Roy Snyder, Trustee
4164 S. Syracuse
Denver, CO 80237

Brad M. Johnson
Peri & Peri
430 Hwy. 339
Yerington, NV 89447

Arthur B. Walsh
Los Angeles City Attorney's Ofc.
P.O. Box 51-111
111 N. Hope St., Suite 340
Los Angeles, CA 90051-0100

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

William Weaver
Sweetwater Ranch
2535 State Rd. 338
Wellington, NV 89444

/ s / Holly Dewar
Holly Dewar