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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-RCJ SUBFILE NO. C-125-C 3:73-CV-00128-RCJ-WGC **WALKER RIVER IRRIGATION DISTRICT'S OPPOSITION TO MINERAL COUNTY'S MOTION TO INTERVENE**
MINERAL COUNTY, Proposed Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, et al., Proposed Defendants.	

TABLE OF CONTENTS

		Page
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 - *Rickey Land & Cattle Co. v. Miller & Lux*	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

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

Page

Cases

Arakaki v. Cayetano
324 F.3d 1078 (9th Cir. 2003) 15

Arizona v. California
373 U.S. 546 (1963) 15

Cappaert v. United States
426 U.S. 128 (1976) 24

Donnelly v. Glickman
159 F.3d 405 (9th Cir. 1998) 14, 15, 19, 20, 23

Greene v. United States
996 F.2d 973 (9th Cir. 1993) 20

Lawerence v. Clark County
254 P.3d 606 (Nev. 2011) 16

Miller & Lux v. Rickey
127 F. 573 (D. Nev. 1904) 8, 9

Miller & Lux v. Rickey
146 F. 574 (D. Nev. 1906) 8, 9

Mineral County v. Nevada Department of Conservation & Natural Resources
20 P.3d 800 (Nev. 2001) 18

National Audubon Society v. Superior Court
658 P.2d 709 (Cal. 1983) 13, 14, 16, 17

Natural Resources Defense Council v. United States Nuclear Regulatory Commission
578 F.2d 1341 (10th Cir. 1978) 22

Nevada VTN v. General Insurance Co.
834 F.2d 770 (9th Cir. 1987) 26

Page

Pacific Livestock Company v. Thomas Rickey, et al.
No. 731, Final Decree (D. Nev. 1919) 9

Perry v. Schwarzenegger
630 F.3d 898 (9th Cir. 2011) 23

PPL Montana, LLC v. Montana
_____ U.S. _____, 132 S.Ct. 1215 (2012) 16

Rickey Land & Cattle Co. v. Miller & Lux
152 F. 11 (9th Cir. 1907) 9

Rickey Land & Cattle Company v Miller & Lux
218 U.S. 258 (1910) 9

Schlesinger v. Councilman
426 U.S. 738 (1975) 25

State v. Bunkowski
503 P.2d 1231 (Nev. 1972) 16

United States v. Alisal Water Corporation
370 F.3d 915, 919-920 (9th Cir. 2004) 19

United States v. New Mexico
438 U.S. 696 (1978) 15, 16

United States v. Walker River Irrigation District, et al.
11 F. Supp. 158 (D. Nev. 1935) 9, 10

United States v. Walker River Irrigation District
14 F. Supp. 11 (D. Nev. 1936) 10

United States v. Walker River Irrigation District
104 F.2d 334 (9th Cir. 1939) 10

Winters v. United States
207 U.S. 564 (1908) 10, 15

Page

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

I. INTRODUCTION.

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

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

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

A. Nevada - 1882 to the Present.

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

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

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

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

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

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

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

B. Walker Lake.

1. Introduction.

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

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

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

2. A Water Right for Walker Lake.

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

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

3. Acquisition of Existing Water Rights for Walker Lake.

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

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

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

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

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

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

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

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

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

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

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

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

II. PROCEDURAL BACKGROUND

A. The Walker River Decree

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

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

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

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

2. Litigation Brought By the United States.

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

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

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

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

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

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

B. History of Subproceeding C-125-B.

1. The Petition of the Walker River Irrigation District.

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

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

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

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

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

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

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

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

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

The Eighth through Eleventh Claims for Relief seek recognition of federal reserved rights for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain 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.

C. Mineral County's Motion and Amended Motion to Intervene.

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

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.

A. Introduction.

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

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

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

B. The Requirements for Intervention of Right.

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

> (a) *Intervention of Right*. On timely motion, the court must permit anyone to intervene who: … (2) claims an interest relating to the property or transaction 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…

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

> (1) it has a 'significantly protectable interest' relating to the property or transaction that is the subject of the action;
>
> (2) disposition of the action may, as a practical matter, impair or impede applicant's ability to protect that interest;
>
> (3) the application is timely; AND
>
> (4) the existing parties may not adequately represent the applicant's interest;

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

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

Mineral County cannot satisfy the first two requirements.[1] Assuming for the sake of argument, that Mineral County has a significantly protectable interest in a public trust claim for Walker Lake,[2] the public trust claim it seeks to assert through its proposed Amended Complaint has no relationship to the "property" or "transactions" which are the subject of Subproceeding C-125-B. In addition, the disposition of the Tribal and Federal Claims in Subproceeding C-125-B will not impair or impede Mineral County's ability to assert the claim in its proposed Amended Complaint. The difference between the nature and subject of the Tribal and Federal Claims, and the nature and subject of Mineral County's proposed Public Trust claim, are the reasons that Mineral County's Motion does not satisfy those two requirements.

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

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[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.

and effective as of the time the federal reservations are created. *Arizona*, 373 U.S. 599-600. The implied reservation of water doctrine applies to all federal reservations. *Id.* at 601.

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

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

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

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

based upon public trust values of Mono Lake. The Court justified the reconsideration on the theory that such rights, when they were granted, were "subject to the trust." *Audubon*, 658 P.2d

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

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

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

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[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.

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

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

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

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

[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.

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.

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

(1) the applicant asserts an interest that is protected under some law; and

(2) there is a "relationship" between applicant's legally protected interest and the plaintiff's claims.

Donnelly, 159 F.3d at 409.

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

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

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

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

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

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

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

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

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

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.

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

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

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.

Rule 24(b)(1) provides:

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

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

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

(1) it shares a common question of law or fact with the main action;

(2) the motion is timely; and

(3) the court has an independent basis for jurisdiction over the applicant's claims.

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

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

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

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

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

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

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

V. CONCLUSION.

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

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

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

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

Dated: December 14, 2012

WOODBURN AND WEDGE

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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:

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