

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
BEFORE THE HONORABLE ROBERT C. JONES, DISTRICT JUDGE

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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
WALKER RIVER PAIUTE TRIBE,	:	No. In Equity No. C-125-RCJ
	:	
Plaintiff-Intervenor,	:	Subfile Number: C-125-C
	:	
-vs-	:	3:73-CV-128-RCJ-WGC
	:	
WALKER RIVER IRRIGATION	:	October 27, 2014
DISTRICT, a corporation, et	:	
al.,	:	
	:	
Defendants.	:	
	:	

TRANSCRIPT OF MOTION HEARING

APPEARANCES:

FOR THE PLAINTIFF:	ANDREW "GUSS" GUARINO Assistant United States Attorney Denver, Colorado
	DAVID L. NEGRI Assistant United States Attorney Boise, Idaho

(Appearances continue on next page.)

Reported by:	Margaret E. Griener, CCR #3, FCRR Official Reporter 400 South Virginia Street Reno, Nevada 89501
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1 APPEARANCES (Continued):  
2  
3 FOR THE WALKER RIVER WES WILLIAMS, JR.  
4 PAIUTE TRIBE: Attorney at Law  
Schurz, Nevada  
5  
6 FOR WALKER RIVER GORDON H. DePAOLI and  
7 IRRIGATION DISTRICT: DALE E. FERGUSON  
Attorneys at Law  
8 Reno, Nevada  
9  
10 FOR MINERAL COUNTY: SIMEON HERSKOVITS  
11 Attorney at Law  
12 El Prado, New Mexico  
SEAN ROWE  
13 Mineral County District Attorney  
14 Hawthorne, Nevada  
15  
16 FOR MONO COUNTY: STACEY SIMON  
17 Attorney at Law  
18 Mammoth Lakes, California  
19  
20 FOR NEVADA DEPARTMENT BRYAN L. STOCKTON  
21 OF WILDLIFE: Deputy Attorney General  
22 Carson City, Nevada  
23  
24 FOR NATIONAL FISH AND DON SPRINGMEYER  
25 WILDLIFE FOUNDATION: Attorney at Law  
Reno, Nevada  
  
FOR CALIFORNIA STATE ERIN K. L. MAHANEY  
AGENCIES: Deputy Attorney General  
Sacramento, California  
  
FOR CIRCLE BAR N RANCH THERESE URE and MATTHEW CURTI  
AND MICA FARMS: Attorneys at Law  
Reno, Nevada

1 RENO, NEVADA, MONDAY, OCTOBER 27, 2014, 10:06 A.M.

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

6 We're here in one part of our ongoing Walker River  
7 case, C-125, and this is C-125-C, but it's involving, of  
8 course -- the participants are here for B as well.

9 Let me ask first for appearances, then we'll talk  
10 about procedure. Please.

11 MR. DePAOLI: Gordon DePaoli on behalf of the  
12 Walker River Irrigation District, your Honor.

13 MR. FERGUSON: Dale Ferguson on behalf of the  
14 Walker River Irrigation District.

15 MR. STOCKTON: Bryan Stockton, Nevada Department  
16 of Wildlife, State of Nevada.

17 MS. URE: Therese Ure and Matt Curti with  
18 Schroeder Law Office representing Circle Bar N Ranch and Mica  
19 Farms.

20 THE COURT: Thank you. Please.

21 MR. HERSKOVITS: Yes, good morning, your Honor.  
22 This is Simeon Herskovits representing Mineral County. Here  
23 with me are the Mineral County District Attorney Sean Rowe and  
24 his assistant DA.

25 THE COURT: Thank you.

1 MR. GUARINO: Good morning, your Honor. Guss  
2 Guarino for the United States. I'm also appearing with David  
3 Negri for the United States as well.

4 THE COURT: Thank you.

5 MR. WILLIAMS: Good morning. Wes Williams, Jr.,  
6 on behalf of the Walker River Paiute Tribe.

7 THE COURT: Thank you.

8 MR. SPRINGMEYER: Good morning. Don Springmeyer  
9 for the National Fish and Wildlife Foundation.

10 THE COURT: Thank you.

11 MS. SIMON: Good morning, your Honor. Stacey  
12 Simon on behalf of Mono County.

13 THE COURT: Thank you.

14 And on the telephone, please? Anyone on the  
15 telephone? No.

16 MS. MAHANEY: Erin Mahaney, State Water  
17 Resources Control Board.

18 THE COURT: Thank you.

19 All right. Now, we're here for oral argument on the  
20 motion to dismiss with respect to 125-C, but as you know,  
21 these matters are consolidated.

22 I've told you that I'm dealing with them together,  
23 and I've also told you that I probably would not rule just on  
24 one without ruling on the other. So I need to confirm my  
25 understanding of where we are on 125-B motions.

1           The last thing that I saw, of course, was the Ninth  
2       Circuit stayed the government's obligation to submit response,  
3       but the government has gone ahead and filed a response  
4       contrary to their own stay.

5           So is there a reply filed or is that matter on hold?  
6       What's the understanding?

7           MR. DePAOLI: Your Honor, there is a reply  
8       filed.

9           THE COURT: Good. So it's fully briefed.

10          MR. DePAOLI: Yes, your Honor.

11          THE COURT: Okay.

12          MR. GUARINO: Good morning, your Honor.

13          THE COURT: Good morning.

14          MR. GUARINO: Again, Guss Guarino, for the  
15       record, representing the United States.

16               With respect to the Ninth Circuit matter, the Court  
17       is correct that the Ninth Circuit stayed the United States'  
18       obligation to file. However, shortly after the Court granted  
19       the United States' motion to reconsider concerning the  
20       appearance of counsel, the Ninth Circuit lifted the stay --

21               THE COURT: Is there an order that lifted the  
22       stay?

23               MR. GUARINO: I believe that's correct. And  
24       so --

25               THE COURT: I didn't see that, so that's what

1 I'm seeking.

2 MR. GUARINO: Yes. And that's why, on the 17th  
3 of June, the United States, under signature of counsel, filed  
4 our response, and that response was exactly the same response  
5 that was lodged on the 30th to which opponents or movants and  
6 those associated with the movants replied.

7 THE COURT: Okay. We have not yet, however, set  
8 our argument on that matter.

9 MR. GUARINO: That's correct.

10 THE COURT: All right. I will instruct my  
11 deputy clerk to -- at your convenience, to set an oral  
12 argument date.

13 I'm going to receive your oral arguments here, but I  
14 will not take it under submission until on or after the date  
15 for oral argument in 125-B.

16 MR. GUARINO: Your Honor, with respect to that  
17 matter, in the Court's most recent orders the Court indicated  
18 that movants' motions to dismiss were dismissed without  
19 prejudice subject to --

20 THE COURT: Rebriefing --

21 MR. GUARINO: -- rebriefing --

22 THE COURT: -- with proper notice.

23 MR. GUARINO: -- with proper notice.

24 THE COURT: Okay.

25 MR. GUARINO: -- under the superseding order

1     that the Court just signed and put into place.

2                   THE COURT:   Right.   So are we doing oral  
3     argument today, or were the parties going to seek additional  
4     briefing opportunity and/or wait for any objections filed by  
5     newly-served persons?

6                   MR. GUARINO:   The way I know I had read the  
7     orders that the Court just recently described --

8                   THE COURT:   Adopted.

9                   MR. GUARINO:   -- we were not going to address  
10    the motion to dismiss on 125-B today, we were only going to  
11    address the motion to dismiss on 125-C.

12                  THE COURT:   That's correct.

13                  MR. GUARINO:   And subject to the refiling -- the  
14    refiling of the motions, and then the response --

15                  THE COURT:   In 125-B.

16                  MR. GUARINO:   In 125-B.

17                  THE COURT:   Okay.   So just for clarity, I'm  
18    going to receive the oral arguments, but I am not going to  
19    take it under submission until after the oral arguments on  
20    125-B, okay?

21                  That's consistent with my rationale previously.   I  
22    told you I didn't want to be whipsawed by the Ninth Circuit  
23    with inconsistent rulings on doctrinal matters, and so it's  
24    very likely that either in a same order, or in contemporaneous  
25    orders, I'll send it all up to the Ninth Circuit at one time.

1                   Consequently, Madam Clerk, this matter will not be  
2 under submission until after oral argument in 125-B.

3                   As you know, they're all one case, we've just  
4 simply -- Judge Reed, consistent with Judge Reed's  
5 designation, he did not sever the cases, he just simply  
6 required separate files, they are consolidated for purposes of  
7 trial as far as I'm concerned or even common issues of motions  
8 to dismiss.

9                   So I will take the oral arguments today just like  
10 I've previously taken the briefs, but it will not be under  
11 submission until after that oral argument.

12                  I may decide to rule separately, but that's a matter  
13 until after I see the briefing because we're talking about  
14 some of the same issues, until after I see the briefing on  
15 125-B.

16                  All right. What else preliminary?

17                  Let's hear the motions, please.

18                  And I've read the pleadings, except the 125-B  
19 pleadings, I have not read those, and, of course, you  
20 incorporated some of those in your final reply. So you don't  
21 need to be redundant, but that you may emphasize, if you will,  
22 and tell me where the real fires are, and then I'll address  
23 them, of course, in a final ruling.

24                  MR. DePAOLI: Yes, your Honor. Gordon DePaoli  
25 on behalf of the Walker River Irrigation District.



1           As your Honor knows, the motion that we filed was a  
2 motion to dismiss and, in the alternative, a motion to stay.

3           THE COURT: Certify and stay, or stay.

4           MR. DePAOLI: The motion to dismiss is simple.  
5 It's based on the proposition that if Mineral County is  
6 seeking a priority water right for Walker Lake under its  
7 amended complaint, which is, I think, one construction of it,  
8 that there's no jurisdiction in the Court because the Court  
9 does not have retained jurisdiction to hear it and because it  
10 doesn't arise under the laws, constitution, laws or treaties  
11 of the United States but, rather, is a matter of state law.

12           Mineral County in its response does not seem to  
13 dispute that the -- any claim it has is based on state law.  
14 However, it does argue if the claim is construed as a claim  
15 for a priority water right, that the Court has jurisdiction  
16 based upon its retained jurisdiction, and on that issue, the  
17 United States and the Tribe weigh in because the scope of the  
18 Court's jurisdiction bears on some of the claims that the  
19 United States has raised in the B subproceeding.

20           I think Mineral County should be taken at its word  
21 that it's not seeking a water right for Walker Lake, but,  
22 rather, is seeking to have the Court modify the decree under  
23 the Public Trust Doctrine, and we could leave the scope of the  
24 Court's jurisdiction, retained jurisdiction or exclusive  
25 jurisdiction, to the B proceeding although the United States

1 and the Tribe did file replies in this subproceeding C which  
2 raises some of their arguments that they make in B which I  
3 incorporated a reply by reference.

4 So I am prepared to address the extent of the  
5 Court's jurisdiction should Mineral County's claim be  
6 construed as one for a priority water right, and I will do so  
7 unless the Court wants to hear that later when we argue the B  
8 motions.

9 THE COURT: No, please.

10 MR. DePAOLI: With respect to the stay motion,  
11 the District's stay motion seeks a stay to get rulings on  
12 three questions of Nevada law, first and foremost being the  
13 relationship between Nevada's water law and the public trust  
14 doctrine, whether a county is authorized to bring a public  
15 trust claim and whether there are administrative remedies to  
16 exhaust.

17 On the jurisdictional issue, your Honor, the United  
18 States and the Tribe make an argument broader than that that  
19 Mineral County makes. The United States and the Tribe argue  
20 that this Court has jurisdiction to hear and determine all  
21 claims to water from the Walker River, whether based on state  
22 or federal law, simply by reason of the fact that it entered  
23 the decree, the Walker River Decree, in 1936 and 1940.

24 The United States takes it even a step further and  
25 argues that the Court has that exclusive jurisdiction over all

1 sources of water within the entire Walker River Basin.

2 I think that it's important to at least understand  
3 what I am talking about when I argue that the Court does not  
4 have the jurisdiction to determine and hear all claims to  
5 water from the Walker River, and that is related to state law  
6 claims and claims based upon appropriation.

7 Since 1905 in Nevada and 1914 in California, no one  
8 can obtain an appropriative water right without first going,  
9 in Nevada, to the Nevada State Engineer and, in California, to  
10 the California State Water Resources Control Board, and  
11 obtaining a permit.

12 THE COURT: And, of course, the decree did  
13 nothing to alter that. In fact, the decree recognized that  
14 the rights are created under state law and you'll follow the  
15 state law procedures for obtaining that right. Right?

16 MR. DePAOLI: Yes. Yes. And that's what I mean  
17 is the Court simply is not -- whether it has *in rem*  
18 jurisdiction or exclusive jurisdiction, it has not become the  
19 substitute for the state engineer in Nevada or the state board  
20 in California as to appropriative water rights.

21 THE COURT: And the decree recognized that.  
22 Even though there's a right to modify, the decree recognized  
23 we're relying on state law and state law structure and  
24 procedure as far as establishing a right, right?

25 MR. DePAOLI: Correct.

1           THE COURT: Now, let me ask you the devil's  
2 advocate question though that occurs to me.

3           As you've already recognized, there's two possible  
4 interpretations of what the public trust doctrine means. One  
5 is it's creating a new water right, and there I think I agree  
6 with you.

7           But another interpretation is it's not creating a  
8 new water right, it's simply recognizing the defeasible nature  
9 of the water rights granted previously.

10          In other words, the doctrine is only recognized more  
11 recently, the Nevada Supreme Court has recognized it here, and  
12 what it specifies is that it applies to every right previously  
13 granted by the state engineer.

14          In other words, if the state engineer -- maybe not  
15 obvious at the time, but if the state engineer granted a water  
16 right, an appropriative water right, way back when, and  
17 ignored the public trust limitation, that right is a  
18 defeasible right.

19          Just like I can grant you property until you die or  
20 until you no longer use the property for a school site. I can  
21 grant you, school district, the right to property until you're  
22 no longer using it for a school site, and then the title  
23 defeases, it comes back to me.

24          That, in essence, would be the argument, that  
25 they're not asking for a new water right, they're simply

1 asking for recognition that what the water district got was a  
2 defeasible title, a title that's subject to the public trust  
3 doctrine.

4 And, of course, maybe the argument -- one of the  
5 arguments you'll want to make is, boy, that opens it to the  
6 world. That means nothing is settled. That means every  
7 decree is not eligible for *res judicata* effect. That means  
8 *Nevada versus U.S.* was wrong, that what you got was a  
9 defeasible title unless and until the Walker Lake is impaired  
10 by a violation of the public trust.

11 So, in other words, the other interpretation which  
12 I'm asking you to explain to me, or to counter it, specifies  
13 not a request for a new water right but a defeasible title  
14 that was granted to the water district in the upstream users.

15 MR. DePAOLI: Your Honor, I think that is the  
16 other argument, that the water rights that were granted under  
17 state law can be limited in order to meet public trust  
18 requirements.

19 However, I think that that really is the issue that  
20 needs to be looked at under the -- if, in fact, the Nevada  
21 court says public trust doctrine applies to the use of water,  
22 then I think the question you pose about whether it's  
23 defeasible or not defeasible needs to be looked at in the  
24 analytical scheme that the Court adopted in the *Lawrence* case,  
25 and, that is, it's my position that the legislature intended

1     that the water rights not be defeasible, and that the --

2                   THE COURT:   Now, what in the *Lawrence* case tells  
3     me that?

4                   MR. DePAOLI:   Pardon?

5                   THE COURT:   What in the *Lawrence* case --

6                   MR. DePAOLI:   I don't think anything in the  
7     *Lawrence* case tells you that.

8                   THE COURT:   So *Lawrence* isn't going to instruct  
9     me on whether this is defeasible title or new water right.

10                  MR. DePAOLI:   I think what *Lawrence* will  
11     instruct on, if, in fact, the doctrine applies to the use of  
12     water, is the analytical scheme of did -- when you look at  
13     what the legislature did with Nevada's comprehensive water  
14     law, was it a dispensation of the use of the water for a  
15     public purpose, did the state receive fair consideration for  
16     the dispensation, whether the dispensation satisfies the  
17     special obligation to maintain the trust, and to what extent  
18     should deference be given to the legislature.

19                  And I think from our perspective --

20                  THE COURT:   On the second to last question, did  
21     the dispensation -- what was the question that you posed? Did  
22     the dispensation satisfy --

23                  MR. DePAOLI:   Yes.

24                  THE COURT:   -- a legislative declaration that  
25     the dispensation satisfy the trust obligation. Pose that

1 question to me. I don't quite understand it.

2 MR. DePAOLI: The third element in the *Lawrence*  
3 test for analyzing whether the legislative action is or is not  
4 consistent with the public trust doctrine was whether the  
5 dispensation here, the right to use water, satisfied the  
6 state's obligation to maintain the trust for use and enjoyment  
7 of future generations.

8 And that's where, from our perspective, I think when  
9 one looks at the whole of the water law, and in particular the  
10 parts of the water law --

11 THE COURT: You're going to have to support that  
12 argument a little bit for it to win with me because I don't  
13 understand -- when the public trust obligation isn't fully  
14 understood, let's say because -- when was the water law  
15 adopted? At federal government insistence, of course, they  
16 gave motivation to all of the states to adopt -- at least the  
17 western states, was that 1905 or 1915?

18 MR. DePAOLI: Initially in 1905, your Honor, and  
19 then in 1913 it was made much more comprehensive than the 1905  
20 statute.

21 THE COURT: Uh-huh, that's our Senator Newlands.

22 And the federal government provided motivation for  
23 states to adopt a structure, right?

24 MR. DePAOLI: I believe so, yes.

25 THE COURT: So what can you tell me, either in

1 the statute or in the legislative history, that says the  
2 legislature intended this to be a full dispensation  
3 accomplishing all of the objectives of the trust, especially  
4 when the legislature -- maybe they didn't understand that what  
5 they were doing was allowing overappropriation of a river  
6 stream that would in effect violate the public trust.

7 MR. DePAOLI: I think, your Honor, what the  
8 legislature -- and obviously it's not easy to put what a  
9 20th -- early 20th century legislature had in mind in the 21st  
10 century.

11 But, I think, importantly from the state's  
12 perspective, first and foremost, in order for this state to  
13 develop and move forward both then and now, there had to be a  
14 reliable water law on which persons could rely in their  
15 investment and in their development of the state, and --

16 THE COURT: Well, now you use the word rely, and  
17 that's a little more critical to the analysis than I think  
18 both of us have considered.

19 But you're going to have to support this argument a  
20 little more strongly from the legislation itself, from the  
21 overall view of the legislation, that this was intended to be  
22 a fulfillment, or at least a declaration of fulfillment, of  
23 the public trust doctrine.

24 Because what -- the problem that occurs to me is how  
25 is the legislature even aware of either overappropriation at



1 that time or that the scheme they were setting up was allowing  
2 overappropriation of a stream? How would they even have been  
3 aware of that such that they could have intended this to be a  
4 declaration of fulfillment of the public trust doctrine?

5 Do you see what my concern is?

6 MR. DePAOLI: I understand that, and I don't  
7 think it needs to be a declaration by the legislature that it  
8 fulfill the public trust.

9 I think what you have to look at is whether the law,  
10 as it was structured and as it was made with the intention of  
11 making water rights reliable, left open the way to meet the  
12 public trust, and I think -- our argument, your Honor,  
13 is that -- and it's apparent throughout the state --

14 THE COURT: Well, there's certainly a defect in  
15 that argument. I mean, if they left it open for a way to meet  
16 the obligation of the public trust, then they left it open to  
17 the state engineer to grant rights into the future which would  
18 violate the public trust.

19 In other words, assuming that there's a public trust  
20 obligation by the state -- I mean, one of the questions we  
21 haven't hit yet is standing, why in the world is Mineral  
22 County standing here instead of the state of Nevada. But  
23 we'll address that. That comes under the *parens patriae*  
24 authority and right of the county.

25 But my question now is, if the water law structure

1 intended to allow the state to honor the public trust, and  
2 they didn't, the state violated the public trust by damaging  
3 Walker Lake with the further granting of rights, the further  
4 honoring of rights, the lack of limitation on those rights,  
5 then that's a violation of the trust, and, clearly, the Court  
6 can't countenance that.

7           If the fact of the matter today is that the Walker  
8 Lake has suffered because of a violation of the trust pursuant  
9 to the water law authority that's given to the state, then how  
10 do I not say that that was defeasible title, that was a  
11 violation of the trust, the state of Nevada allowed the  
12 structure that would allow it?

13           MR. DePAOLI: I think, your Honor, you have to  
14 look at how the water law developed.

15           First, there were two aspects to it. Before 1905,  
16 Nevada law said the way you establish a water right is you put  
17 the water to beneficial use.

18           After 1905 --

19           THE COURT: You need an engineer's --

20           MR. DePAOLI: -- you had to apply to the state  
21 engineer.

22           THE COURT: Right.

23           MR. DePAOLI: And since 1905 the Nevada State  
24 Engineer has been required to consider the public interest in  
25 granting water rights.

1           The legislature in 1905 also said, and said again in  
2   1913 --

3           THE COURT:   So that's one thing you've given me.  
4   The statute itself requires the state engineer to consider the  
5   public interest.

6           MR. DePAOLI:   Public interest, yes.

7           THE COURT:   And gives the state engineer the  
8   authority to do so.   In other words, on behalf of the state,  
9   not on behalf of Mineral County or XYZ user who says I'm  
10   also -- a recreational user who says I'm also one with  
11   standing, the state said no, we're going to have an  
12   administrative tribunal, an administrative process with the  
13   authority and right to view the public interest.

14          That's -- I think that's one good argument.

15          MR. DePAOLI:   The other aspect, your Honor, is  
16   in that same legislation, the court -- the legislature said  
17   that this law shall not impair rights vested under,  
18   essentially, the Nevada common law.

19          And I think the important aspect, and this is  
20   happening not just --

21          THE COURT:   Repeat that again.

22          MR. DePAOLI:   The legislature, when it enacted  
23   the law in 1905 and again in 1913, specifically --

24          THE COURT:   And it has a clause that says --

25          MR. DePAOLI:   Specifically says that rights in

1 existence at the time of the enactment of the law will not be  
2 impaired by the provisions of this statute.

3 And the Nevada courts have essentially held that the  
4 rights established under the common law are -- were protected  
5 against any impairment by the statutory water law.

6 THE COURT: Now you're hitting on a very  
7 critical issue that hopefully both sides will address and  
8 that's the reliance factor. And, as we know, there's no  
9 federal common law, we're talking about state statutory and  
10 common law.

11 MR. DePAOLI: Yes.

12 THE COURT: And the state statute itself says  
13 there will be no impairment of vested rights.

14 Do we have any Supreme Court authority that tells us  
15 if now a court or a user or a legislature wants to impair that  
16 vested right, it can only do it prospectively, it can't do it  
17 retroactively?

18 MR. DePAOLI: There are some cases that -- not  
19 in this context, your Honor, but there are some that dealt  
20 with the issue of the extent to which the doctrine of  
21 forfeiture applied to rights established under the Nevada  
22 common law versus back when that case was decided, the  
23 forfeiture provision --

24 THE COURT: Forfeiture is a matter of  
25 defeasibility, isn't it?

1 MR. DePAOLI: Yes, your Honor.

2 THE COURT: In other words, you have the title,  
3 and you can rely on that title, but the title has a defeasance  
4 provision. You can forfeit it, or you can abandon it. It's  
5 part and parcel of the title, it's right in the title.

6 And, of course, that's what they're arguing the  
7 public trust doctrine is, too, it's a defeasance clause right  
8 in the grant from the state engineer.

9 But what you're telling me is I have no basis to so  
10 rule, or even if I think I do, I need the state -- Nevada  
11 State Supreme Court's decision on whether it's defeasible  
12 title or whether it's seeking a new water right.

13 MR. DePAOLI: Whether -- and whether the law as  
14 it's written meets those tests.

15 And the one part of the water law that I think is  
16 extremely important in this context, your Honor, is the  
17 ability that the legislature included in the law to change  
18 existing water rights established for irrigation to other uses  
19 that meet 21st century needs, and that is what is being used  
20 not just on the Walker River, but on the Truckee River, on the  
21 Carson River --

22 THE COURT: Right.

23 MR. DePAOLI: -- to meet these kinds of values  
24 today --

25 THE COURT: For example, the state and the --

1     what is it, I'm sorry, the society, are buying up water  
2     rights.

3                     MR. DePAOLI:   Yes, your Honor.

4                     THE COURT:   And they want to change the use.

5                     Of course, at the time these water rights --  
6     probably when they were granted, the state law didn't provide  
7     for an in-stream use but now it does.

8                     MR. DePAOLI:   Yes.

9                     THE COURT:   Now, we recognize that use as a  
10    potential beneficial use.

11                    So that's a question not for today, I don't think,  
12    but that's a question for another day.  And I don't see any  
13    reason why the law wouldn't allow that, especially Nevada  
14    common law, unless it's in derogation of a priority water  
15    right upstream or downstream, whatever, a priority over and  
16    above the one that they want to change use and/or diversion  
17    point.  But that's an argument for another day, right?

18                    MR. DePAOLI:   Yes, and there's actually a state  
19    engineer decision that's pending in the main case related to  
20    that in the C-125.

21                    THE COURT:   That's right.

22                    Well, I did have one more question, then I ought to  
23    let you finish your argument, and that's this reliance factor.

24                    The statute says no change intended for vested  
25    rights.  That provision certainly applies to pre-1905

1 recognized rights. Does it also apply to post-1905 state  
2 engineer granted rights, that same statutory provision?

3 MR. DePAOLI: No. The way it was written, your  
4 Honor, and I don't have it with me, it essentially said rights  
5 initiated under law prior to 1905 shall not be impaired by the  
6 provisions of this statute.

7 THE COURT: No intent --

8 MR. DePAOLI: It doesn't say --

9 THE COURT: Uh-huh. And I'll ask my question in  
10 a moment, but what's striking a bell with me is I've had this  
11 issue with respect to grazing rights.

12 You know, we've all -- water rights are state,  
13 grazing rights are federal. And when the federal government  
14 took it back in 1934 or so, included in the statute is a  
15 similar clause, no vested right is intended to be impaired.  
16 That's right in the Grazing Act. This is a similar provision  
17 under legislative enactment.

18 But what prevents the state legislature from saying,  
19 hey, now, 2014, we intend to impair, we want to impair,  
20 because now there's an emergency need. Washoe doesn't have  
21 enough water for urban needs. Hawthorne doesn't have enough  
22 water for its urban needs. And so we must impair those  
23 expectations that previously existed, we intend to limit by  
24 50 percent all granted priority rights.

25 What prevents the legislature from doing that?

1                   MR. DePAOLI: Well, probably nothing prevents  
2 the legislature from doing that. The question would be  
3 whether or not, if they did that, would that in some way or  
4 another be some sort of a taking for which compensation would  
5 be required, your Honor.

6                   THE COURT: Now, the California Supreme Court  
7 said it's not a taking, right?

8                   MR. DePAOLI: The California Supreme Court in  
9 the *Audubon* case essentially indicated that the right could be  
10 effected in order to meet a public trust --

11                  THE COURT: Because it's defeasible title.

12                  MR. DePAOLI: Right. But the California Supreme  
13 Court expressly said that there was no requirement that the  
14 water right be defeased, so to speak, in order to meet the  
15 public trust.

16                  It acknowledged directly that we can't live in the  
17 west without diverting water and making use of water in ways  
18 that are clearly going to harm the natural system. It left  
19 for the state board ultimately, in that case, to decide to  
20 what extent, if any, there would be an effect on that water  
21 right.

22                  THE COURT: So what's the key analytical steps  
23 for me to decide whether there's a taking or not?

24                  If the state -- they wrote the law, and if the state  
25 decides today they want to impair those rights by 50 percent



1 because the people of Hawthorne are running out of water, and  
2 that seems to them, the state legislature, to be more  
3 important than the agricultural use, what, what makes that a  
4 taking versus not a taking?

5 MR. DePAOLI: Well, it -- I think it would come  
6 down to what the legislature granted in the first instance,  
7 your Honor.

8 If the legislature granted a right that was  
9 defeasible, then the legislature could argue that there is no  
10 taking or simply exercising our regulatory authority.

11 THE COURT: I think that's a terrific point. In  
12 other words, at some point in time the Nevada legislature,  
13 upon Nevada's incorporation, upon its recognition as a state,  
14 was given the right to grant titles.

15 As we all know, heaven forbid, the United States  
16 kept 80 plus percent of the land, but they gave, in the  
17 legislation, right to so many acres or subsequent designation  
18 of acreage for the state of Nevada to grant title and patent.

19 And so the state did, it granted patent rights, and  
20 you and I own our own homes and the land underneath our home  
21 by virtue of those patent grants.

22 What makes it a taking if the state of Nevada were  
23 now, in 2014, to say, Mr. DePaoli, the title to your house has  
24 a defeasibility provision. If we need it for a county  
25 courthouse, it's defeasible. Is that a taking? And why is

1     that a taking versus a nontaking?

2                   MR. DePAOLI:   It's a taking because the initial  
3     grant to me did not include any such --

4                   THE COURT:   There was no such reservation.

5                   MR. DePAOLI:   -- reservation.

6                   THE COURT:   So that's normal property law.  
7     That's what I learned in law school.

8                   And that's why, of course, the state has  
9     reservations for the mineral rights, the oil that exists  
10    underneath your house, I'm sure there's barrels of it, or the  
11    gold.  That's why the state included those reservations in  
12    their grants.

13                   So is there any analogy to that system in the water  
14    system in legislation that says this will be a taking?

15                   MR. DePAOLI:   I think so, your Honor.

16                   I think for the reasons that I expressed, that the  
17    legislature, when it granted the right to use water, it did  
18    not include any provisions that said at some point in time we  
19    will take this back or take part of it back, and, in addition,  
20    did not do as some states have done, which have said that the  
21    highest use of water is for purposes of domestic use, drinking  
22    use, which allows in California, for example, the governor of  
23    that state in a year like this one to say I'm going to curtail  
24    use of water rights for other purposes as necessary to meet --

25                   THE COURT:   There are higher beneficial uses

1 under their legislation.

2 MR. DePAOLI: Higher beneficial uses, yes.

3 THE COURT: But not in ours.

4 MR. DePAOLI: Not in ours.

5 THE COURT: Okay. As you can see, I've been  
6 talking to myself a little bit, but these are concerns that  
7 are in my head swimming around, but you've helped me.

8 Let me let you now complete whatever argument you  
9 want to make on the motion.

10 MR. DePAOLI: Your Honor, I was going to -- and  
11 I'm not sure exactly where we are on the priority water right.

12 THE COURT: Before I interrupted you, you were  
13 talking about the three areas that the Nevada Supreme Court  
14 needed to tell us about.

15 MR. DePAOLI: Yes, your Honor.

16 The second area is the issue of whether or not a  
17 single county like Mineral has the authority to raise or bring  
18 a public trust -- public trust claim.

19 And on that one, Mineral County --

20 THE COURT: Why not?

21 MR. DePAOLI: Well, here's why. First of all,  
22 Mineral County --

23 THE COURT: Aren't they just like any other  
24 third party that would be recognized for standing purposes?

25 MR. DePAOLI: I would say no. They're not a

1 member of the public, they are a political subdivision of the  
2 state with authority provided by statute and limited by  
3 statute, and the --

4 THE COURT: So we have *parens patriae* rights  
5 over their citizens' rights and whether they can be defeated  
6 or not, just like the government has some definite *parens*  
7 *patriae* rights over the tribal rights.

8 Doesn't the county -- the county has the right to  
9 enforce childcare laws. It has the right to terminate  
10 parental rights because of abuse of children. Doesn't it have  
11 the right to protect the rights of its citizens of the  
12 subdivision for their recreational uses on Walker Lake?

13 MR. DePAOLI: I think not, your Honor, for the  
14 reason that, one, there's no express statutory authority that  
15 says they have that right.

16 Two, the public trust is not for any particular  
17 political subdivision. If it exists, it exists for the  
18 benefit of the state and for the entire state, citizenry of  
19 the state.

20 And I think the Walker River Basin is a good example  
21 of the issues you run into in suggesting that a single county  
22 has the right to bring a claim to protect some part of a  
23 public trust resource that's within its boundaries.

24 Here we've got in Nevada three counties through  
25 which this resource flows, each of which has similar benefits

1 to recreation economics as Mineral County is claiming in its  
2 assertion of the public trust.

3 THE COURT: I'm taking your thought one step  
4 further which the state needs to answer, or Mineral County  
5 needs to answer for us.

6 How in the world, then, can they assert public trust  
7 on behalf of California citizens, or how can they ask this  
8 Court to impair California public trust obligations? How can  
9 they ask me to impair the rights that are granted on the other  
10 side of the border?

11 MR. DePAOLI: Or in contrast to that, how can  
12 Mineral County ask the Court to impair the water right for the  
13 Walker River Indian Reservation which is within Mineral County  
14 and which has located on it citizens of Mineral County.

15 THE COURT: Okay.

16 MR. DePAOLI: The third question, your Honor,  
17 and this one relates to the exhaustion of administrative  
18 remedies, and I agree with Mineral County that if there is  
19 going to be any modification to water rights in this decree  
20 based on public trust doctrine under Nevada law, that it's  
21 going to have to be this Court that makes those modifications.

22 However, there are water rights in the decree that  
23 were granted by the Nevada State Engineer over which this  
24 Court has said in its decree the state engineer had the  
25 ability to take final action.

1           So in the broader scope of things under Nevada law,  
2           and if Nevada is going to embrace the public trust doctrine  
3           for purposes of defeasing some part of a water right, that  
4           Court may well determine that when a water right was initiated  
5           before the state engineer, the first step in that process  
6           needs to be with the state engineer, and so that is the third  
7           issue that I think a Nevada court ought to address.

8           THE COURT: Very good. Anything else?

9           MR. DePAOLI: Nothing more on that, your Honor.

10           I was going to talk about the Court's -- the  
11           jurisdiction to -- what is meant by the jurisdiction to modify  
12           the decree, but if your Honor doesn't -- we can -- that's  
13           going to be an issue that also comes up in the B case so we  
14           can argue it all then or --

15           THE COURT: Okay. I'll leave it to you.

16           MR. DePAOLI: Thank you.

17           THE COURT: Thank you.

18           All right. Mineral County.

19           MR. HERSKOVITS: Good morning, your Honor.

20           THE COURT: Good morning.

21           MR. HERSKOVITS: I don't want to waste the  
22           Court's time by repeating arguments that we've already set  
23           forward in our brief in opposition to the motion to dismiss.

24           I do want to perhaps just underscore --

25           THE COURT: Please, don't be reluctant to

1 reiterate an argument that answers some of the questions you  
2 can see that the Court has.

3 MR. HERSKOVITS: Yes. Thank you, your Honor.

4 Well, first and foremost, I guess I should address  
5 that it is our position that the Court did retain jurisdiction  
6 in the decree to consider new water rights as well as  
7 modifications and corrections to the decree.

8 And, in fact, our argument is, in fact, that  
9 implicit in modifying and correcting the decree has to be the  
10 Court's ability to consider whether there are water rights  
11 that ought to have been addressed or recognized --

12 THE COURT: But the decree recognizes that water  
13 rights exist under Nevada law, right?

14 MR. HERSKOVITS: It does. It recognizes that  
15 water rights are --

16 THE COURT: So while the decree asserts a  
17 continuing jurisdiction over modifications, in the same breath  
18 it also recognizes that new water rights are subject to Nevada  
19 law, correct?

20 MR. HERSKOVITS: It does, your Honor, but it  
21 also purports to exert --

22 THE COURT: Are you arguing that I willy-nilly  
23 am the new legislature and authority over water rights? If  
24 you want a new water right, you just come to me, you don't  
25 have to go to the state engineer. Are you saying that the

1 decree says that?

2 MR. HERSKOVITS: No, no, your Honor. But it's  
3 been a reading of the decree that it asserts control over the  
4 surface waters of the Walker River system as a whole. So  
5 within that confined geographic or hydrologic scope --

6 THE COURT: So Judge Jones now is God over  
7 Walker River, not the state engineer, I'm the one who approves  
8 new water rights, who approves any request to change, who  
9 approves diversion points or new uses; it's Judge Jones.

10 MR. HERSKOVITS: Well, your Honor, the way the  
11 decree is set up or structured, ultimately the decree court  
12 does have final authority on all change applications --

13 THE COURT: Certainly.

14 MR. HERSKOVITS: -- on all those applications.  
15 They do, however --

16 THE COURT: That's certainly true. That's why  
17 I'm a forum at a minimum for appeals from the state engineer.

18 But you're saying I have original jurisdiction to  
19 entertain new water rights, change priority rights. If I want  
20 to, I can add a beneficial use and make it higher than an  
21 agricultural use like California has done. I have the right  
22 to do that under that language.

23 MR. HERSKOVITS: No, your Honor. We would not  
24 go that far as to say the Court has the authority to initially  
25 create a new water right and then --



1 THE COURT: So how far would you go then?

2 MR. HERSKOVITS: Well, because we believe the  
3 public trust doctrine actually was implicit at the creation --  
4 or inherent at the creation of the state, that there was  
5 already a doctrine that controlled the ability of the state to  
6 commit the water resources of the state in a way that would  
7 be --

8 THE COURT: So you agree that if what the Court  
9 construes your request to be that is a new water right --

10 MR. HERSKOVITS: No, no, your Honor.

11 THE COURT: No, no, I know you're not arguing  
12 that, but if I should so construe it, you're conceding, you're  
13 agreeing the Court doesn't retain jurisdiction to do that.  
14 It's only if I should construe the public trust doctrine to be  
15 a defeasance clause on the prior grants.

16 MR. HERSKOVITS: Well, that is our view of the  
17 public trust doctrine, your Honor.

18 THE COURT: Sure.

19 MR. HERSKOVITS: But if the Court were -- or  
20 despite the fact that it's in fact not what we are requesting,  
21 or not the nature of our claim, if the Court were to construe  
22 the public trust doctrine claim as a claim for a new water  
23 right, it's our position that the Court would at least have  
24 jurisdiction to rule on whether or not such water right was  
25 appropriate or required under Nevada law --

1 THE COURT: Well, let's get to it now, that --

2 MR. HERSKOVITS: -- on the Walker River system.

3 THE COURT: -- core question. To be quite  
4 explicit, you're asking me for 127,000 what, acre feet?

5 MR. HERSKOVITS: No, your Honor.

6 THE COURT: You're asking me for a minimum flow  
7 of what?

8 MR. HERSKOVITS: We are asking for a minimum  
9 flow to the lake that is somewhere in the range of 50 to  
10 55,000 acre feet above the average annual flows into the lake  
11 over the current and historic period which is the 127,000 acre  
12 feet.

13 THE COURT: Right. So you want the Court to  
14 declare a total of 127,000, quite explicit, you want me to  
15 declare this flow must go into Walker Lake, right?

16 MR. HERSKOVITS: I think the number is more than  
17 that.

18 THE COURT: Why isn't that a new -- it's more  
19 than that.

20 MR. HERSKOVITS: Yeah.

21 THE COURT: What is it? And it's not nebulous,  
22 there's a specific number to it, right?

23 MR. HERSKOVITS: There is, your Honor, but --

24 THE COURT: It's not just whatever the jury or  
25 the judge says, you're asking for specific relief. What is

1 the relief you're asking?

2 MR. HERSKOVITS: You mean numerically?

3 THE COURT: Yeah.

4 MR. HERSKOVITS: Well, I believe the estimate  
5 currently is that -- and Mr. DePaoli may have to correct me on  
6 this, is that, as things stand now, there's an average annual  
7 inflow to the lake of -- is it 90 or a hundred thousand?

8 MR. DePAOLI: Somewhere in the 90 range.

9 MR. HERSKOVITS: Somewhere in the range of  
10 90,000 acre feet per year flowing into the lake.

11 THE COURT: Right.

12 MR. HERSKOVITS: And our request would be for  
13 what is approximately maybe 50 to 55,000 additional acre feet.

14 THE COURT: Right.

15 MR. HERSKOVITS: So in reality we're talking  
16 about, let's say, a guarantee of an average flow, not every  
17 year, but an average flow of a hundred and forty-five thousand  
18 acre feet of water --

19 THE COURT: Right.

20 MR. HERSKOVITS: -- to the lake.

21 The reason that's --

22 THE COURT: Now, you're hitting on an area --  
23 and I'm sorry to keep using the word, but you know that with  
24 respect to drought conditions I am not God, right? You know  
25 that. You know I can't create more water. You know that,

1 don't you?

2 MR. HERSKOVITS: Of course, your Honor.

3 THE COURT: It's a rhetorical question.

4 So aren't you really asking for a water right with  
5 priority?

6 MR. HERSKOVITS: Oh, no.

7 THE COURT: You're asking for a specific amount.  
8 You're asking for all of those who have prior rights,  
9 including the Tribe, and any additional rights which I declare  
10 for them, you're asking that they give way to a specific  
11 number of flow that has to pass into Walker Lake. Why isn't  
12 that a water right?

13 MR. HERSKOVITS: Well, your Honor, it's not  
14 really a water right at all, it's a constraint on the system,  
15 a natural requirement of the system such as other natural  
16 constraints or requirements in the system that our position is  
17 the state --

18 THE COURT: Can you understand --

19 MR. HERSKOVITS: -- has a trust obligation --

20 THE COURT: -- why my brow is furrowed?

21 I mean, it's a natural constraint on the system.  
22 You understand that the system produces varying amounts over  
23 different years.

24 In fact, for the last ten years it's producing far  
25 less. Everybody up and down the river is crying the blues.

1 Over in California, in the central valley, they're crying, and  
2 the state can do nothing to help them.

3 I can't produce a maximum annual flow. I don't have  
4 the power to do it.

5 So what you're asking for is not a natural  
6 constraint of the system, because Humboldt Sink is a sink,  
7 it's no longer a lake. Lahontan Lake no longer exists.

8 I'm not saying that it's foregone that Walker Lake  
9 will disappear, I'm not saying that. Heaven forbid, it would  
10 be contrary to my own self-interest.

11 But what you're asking for is a specific natural  
12 restraint on the river which I have no ability to create.

13 If what you're really looking for is desalination,  
14 better wildlife, then ask the Tribe to let all of that land go  
15 back to wetlands. Produce a desalination plant that will take  
16 out the solids out of the water. Create better -- or do a  
17 system like they've done over in the Great Salt Lake or other  
18 areas, they've put up a big berm and, using hydrology, they  
19 created a system that segregates the high salt into certain  
20 areas.

21 You can't ask me -- unless you're asking for a  
22 priority new water right, you can't ask me to give you a  
23 minimum flow into the lake. I have no power to do that.

24 So you can see why my brow is furrowed. I just  
25 don't understand why you're saying this is some vague right or

1 a defeasible right that impairs the prior grants, and it's not  
2 in fact, with a specific number attached, a new water right.

3 MR. HERSKOVITS: Well, your Honor, if my choice  
4 of words has been confusing, we do not believe that it is a  
5 water right that is at issue here.

6 We believe that it's an obligation that the state  
7 had as a fiduciary to present and future generations of  
8 Nevadans to maintain the integrity of the water resource in  
9 question, the greater system and the lake, which is a key part  
10 of it and undeniably a navigable water body of great value  
11 recreationally, aesthetically, economically, to Mineral County  
12 and to others in the state.

13 And so with that obligation in mind, what the  
14 state's duty under the public trust doctrine is, and what we  
15 are asking the Court to enforce is the water rights in the  
16 basin that have been granted, and that have been ratified or  
17 confirmed under the decree, be modified in such a way as to  
18 adjust down the amount of appropriative rights in order to  
19 allow --

20 THE COURT: Well, you can tell I'm just not  
21 buying it. I don't get it. I don't understand your argument.  
22 I don't understand how I have the authority or power to do  
23 that.

24 As far as I can tell, you're asking for just what  
25 you said, a specific limitation on priority rights in favor of

1 the lake. I'd love to do that, but I don't think I have the  
2 power to do that. I don't think naturally I have the power to  
3 do that.

4 So I just -- I just -- I'm not understanding your  
5 argument that this is some kind of vague obligation and not a  
6 new water right. I just don't understand the argument.

7 Honestly, I'm speaking to you sincerely. I'm not  
8 making fun of your argument, I'm telling you truthfully and  
9 sincerely I don't get it.

10 MR. HERSKOVITS: Well, your Honor, if I may just  
11 try to address it a little further.

12 Our position is that the state did not have the  
13 authority to grant the amount of water rights that were  
14 granted in the Walker River system that amounted to an  
15 overappropriation from the perspective of maintaining some  
16 level of more adequate inflow to Walker Lake.

17 It's our position that it's clear from the history  
18 and the factual information available to really everyone, but  
19 certainly also to the Court, that had the state considered its  
20 public trust duties to this resource and to the future  
21 generations of Nevadans who would value it or want to rely on  
22 it and use it, that it should have restricted the amount of  
23 water rights granted in the Walker River Basin and that then  
24 the Court took up and confirmed through the decree.

25 I would also add that it's our position that the

1 public trust doctrine imposes on all appropriative water  
2 rights in Nevada a contingent or defeasible condition, if you  
3 will, as you've pointed out, or at least raised the  
4 possibility of, namely that the ownership of water in Nevada  
5 under the constitution and under Nevada statutory law is in  
6 the public, and it's the government's, the state's duty to act  
7 as a trustee and maintain over the longer term the broadest  
8 and greatest public interest values of those resources.

9 As a result of that ownership --

10 THE COURT: Now, to be sure in your argument  
11 that this is a defeasible right, not a new right being granted  
12 to Mineral County --

13 MR. HERSKOVITS: No, your Honor.

14 THE COURT: -- you're arguing that this is a  
15 defeasible prior grant. It's defeasible because it was in  
16 violation of the public trust doctrine.

17 But you're saying that, in any event, when it was  
18 granted, right in the title of the deed, if you will, is a  
19 provision, implicit to be sure, that it's defeasible if you're  
20 impairing Walker Lake.

21 You're making that same argument with respect --  
22 now, the federal government says on behalf of the Tribe,  
23 previously when we set up the reservation and additionally  
24 when we granted additional reservation lands, the title to the  
25 water that they also implicitly conveyed, is similarly



1 defeasible by the public trust doctrine, right?

2 MR. HERSKOVITS: Well, we've been arguing that  
3 under Nevada --

4 THE COURT: Or are there just particular  
5 priority users upstream that you want to hit?

6 MR. HERSKOVITS: Well, your Honor, what we've  
7 argued is that as a matter of Nevada law, Nevada water rights  
8 are subject -- Nevada state water rights, including the ones  
9 recognized under the decree, are conditioned by or defeasible  
10 under the public trust doctrine of Nevada law --

11 THE COURT: So at least you're recognizing that  
12 I have no authority to defease, if you will, or to limit the  
13 water rights upstream of the border. In other words, I have  
14 no right, no jurisdiction under Nevada public trust doctrine  
15 to limit, take away, defease, any upstream user or beneficial  
16 user or reservoir above the border.

17 MR. HERSKOVITS: Well, your Honor --

18 THE COURT: Yes or no?

19 MR. HERSKOVITS: No, in that the California  
20 courts have also recognized the public trust doctrine's  
21 applicability, and we would maintain, and I believe have, that  
22 the public trust doctrine applies --

23 THE COURT: So the public trust obligation over  
24 Walker Lake, which exists wholly in the state of Nevada, I  
25 have the authority to limit California users and the

1 California state because of violation by the Nevada State  
2 Engineer of the public trust over Walker Lake.

3 MR. HERSKOVITS: Well, your Honor, if I may,  
4 under California law, the public trust doctrine requires that  
5 the public trust, as it pertains to the Walker River system,  
6 be protected, be recognized.

7 So in California, as in Nevada, the Court would have  
8 authority to enforce the public trust obligations on prior  
9 water rights of all sorts created since the creation of those  
10 two states.

11 THE COURT: This is a pretty amazing argument,  
12 sir.

13 Why does Mineral County have the right to stand here  
14 and tell me the state of Nevada or California's water board  
15 has violated the public trust of the users of Walker Lake in  
16 Nevada?

17 MR. HERSKOVITS: Well, under both Nevada and  
18 California law, the courts have broadly held that any person  
19 or any third party --

20 THE COURT: So why do you have any standing to  
21 stand here and make that complaint on behalf of your citizens?

22 You don't represent the California users. You don't  
23 represent those with public trust rights, beneficial rights,  
24 like the citizens of California or Nevada in the other two  
25 counties. Why should I recognize you?

1 MR. HERSKOVITS: Well, the county has the same  
2 right as any third person would have, a private citizen --

3 THE COURT: Why do you say that? You're not a  
4 private person. You're not a person for Section 1983 person  
5 definitions. Why do you say that? You're a defined-by-law  
6 entity. You're a subdivision of the state of Nevada.

7 MR. HERSKOVITS: Well, your Honor --

8 THE COURT: You're not the Department of  
9 Wildlife for the state of Nevada. You're not the governor's  
10 office. Who are you relative to the public trust doctrine on  
11 behalf of all citizens of the state of Nevada, let alone  
12 California?

13 MR. HERSKOVITS: The county does have *parens*  
14 *patriae* responsibilities and duties to all of its residents  
15 who are citizens of the state of Nevada. And it has also --

16 THE COURT: Over their public trust rights,  
17 public trust water rights?

18 MR. HERSKOVITS: Well, I think it does have  
19 standing to represent or to argue and raise a claim on behalf  
20 of --

21 THE COURT: So if the state of Nevada were  
22 violating the public trust doctrine in granting boating  
23 licenses or fishing licenses, would Mineral County have  
24 standing to complain and sue the state of Nevada, you're  
25 granting fishing licenses in excess of what's good for the

1 public interest for the Walker Lake and the citizens of our  
2 county? Do you have standing to bring such a suit?

3 MR. HERSKOVITS: Well, your Honor, I don't know  
4 whether fishing licenses or boating licenses could be viewed  
5 as impairing the public trust --

6 THE COURT: Why not?

7 MR. HERSKOVITS: -- since those are uses that  
8 are protected by the public trust.

9 THE COURT: Why not? One of the public trust  
10 purposes that you've asserted for Walker Lake is the  
11 recreational fishing rights, right?

12 Would you have the authority to sue the state of  
13 Nevada? You're granting too many fishing licenses on Walker  
14 Lake and you're thereby violating the public trust.

15 MR. HERSKOVITS: I think the county would have  
16 the right to assert a claim on behalf of its residents and  
17 arguably on the public at large since every member of the  
18 public --

19 THE COURT: Okay. Pretty bold argument.

20 MR. HERSKOVITS: -- has that right to raise a  
21 claim in court for a violation of the public trust doctrine.

22 THE COURT: Okay. I think I've got that  
23 position.

24 MR. HERSKOVITS: And I think that the statutory  
25 authority, and even obligation, imposed on the duty to protect

1 and advance the general welfare or public welfare of county  
2 citizens or residents in part supports the county's obligation  
3 and standing to assert such a claim.

4 THE COURT: So what you're citing is the general  
5 right under subdivision statutory creation to protect the  
6 general welfare of your citizens, which is a pretty broad  
7 right. So if it includes the right to assert their interest  
8 in the level of the lake or its salinity levels, it certainly  
9 includes the right to tell the state to grant or not grant  
10 fishing licenses.

11 MR. HERSKOVITS: Well, I don't think that that  
12 would be --

13 THE COURT: Or the air that comes over the  
14 border from California, including the fires.

15 MR. HERSKOVITS: I don't understand the last  
16 point, your Honor.

17 THE COURT: Well, my last point is pretty  
18 simple. You're asserting a very, very broad right.

19 You're saying under the general welfare  
20 authorization of the state statute which authorizes the  
21 subdivision, general welfare, it includes the right to stand  
22 up and have standing in court on behalf of your citizens for  
23 every violation of a right by the state or sister states.

24 MR. HERSKOVITS: I think there's also support  
25 for this in the case law, your Honor. In California,

1 certainly, the *Mono Lake* case, the *National Audubon* case,  
2 holds very, very broadly that any entity or person can assert  
3 a public trust claim, and Nevada law also has --

4 THE COURT: Yes, it does, any person.

5 MR. HERSKOVITS: I think it supports also  
6 entities made up of multiple people asserting claims, and I  
7 don't think there's anything in Nevada law at all that  
8 constrains or contradicts a county's ability to do that in  
9 fulfillment of its *parens patriae* responsibility to the  
10 residents of the county.

11 THE COURT: Okay.

12 MR. HERSKOVITS: And I think there are, you  
13 know, certainly Nevada cases to that effect, not specifically  
14 on this point, but that generally hold broadly that counties  
15 and other entities have authority to assert claims on behalf  
16 of their residents.

17 THE COURT: Okay.

18 MR. HERSKOVITS: Well, we've gotten off the  
19 subject of a water right versus a doctrine or policy that  
20 requires modification of the decree.

21 And, your Honor, Mr. DePaoli is correct that our  
22 claim is one that rests on the argument and, I think, the law  
23 that exists that establishes the public trust doctrine as a  
24 constraint on appropriative water rights that are granted by  
25 the state of Nevada.

1           And so under that reading it certainly is not a  
2     request for a new water right with a priority, it is a request  
3     for an enforcement of the trust duty that this state has  
4     failed to fulfill to restrict or to draw back from the full  
5     amount of rights appropriated or granted on the system in  
6     order to fulfill the obligation to maintain some level of  
7     reasonable inflow to Walker Lake for its health and its  
8     utility.

9           So that is certainly the nature of our claim, and I  
10    think that the Court has jurisdiction under the decree to  
11    consider that sort of doctrine or element of Nevada law in  
12    considering whether and how to modify or correct the decree  
13    from its current terms.

14          Now, Mr. DePaoli and the Walker River Irrigation  
15    District have argued in the alternative, and, in fact, really  
16    put more emphasis on the notion that assuming the Court has  
17    jurisdiction over that sort of a claim, or that the public  
18    trust claim of Mineral County construe that way, that the  
19    Court should abstain from exercising further jurisdiction or  
20    should stay further proceedings on this claim and should  
21    instead refer the question or have the question taken up by  
22    the Nevada Supreme Court.

23          As the Court undoubtedly knows, and we mentioned in  
24    our brief, Mineral County, because this case seemed to be  
25    stalled in the late '90s, did attempt to go to the Nevada

1 Supreme Court for -- and filed a petition for writ of mandamus  
2 seeking relief from the state supreme court and asking the  
3 supreme court of Nevada to address the meaning and nature of  
4 the public trust doctrine in Nevada law.

5 THE COURT: I'm aware of this issue and the  
6 argument.

7 MR. HERSKOVITS: Right.

8 It's our position that at that time there was no  
9 controlling law establishing and clearly stating that the  
10 public trust doctrine existed or had been adopted in Nevada  
11 and was applicable to water and certain trust lands as well.

12 *Lawrence* -- the *Lawrence* decision, in our opinion,  
13 clearly changes the state of law in Nevada. And the fact that  
14 the *Lawrence* opinion approvingly cited and referenced and, in  
15 a number of instances, in effect relied on Justice Rose's  
16 concurrence in the *Mineral County versus Nevada* case, in the  
17 current situation we would hold, and I have argued to the  
18 Court, that there really now is a clear body of law, limited,  
19 but it's clear enough that the public trust doctrine does  
20 apply in Nevada.

21 And enough has been stated about its origins and the  
22 way in which it should be used and applied and, in a given  
23 instance, a resource and a legislative action that is alleged  
24 to have committed the resource, are to be analyzed by a court  
25 in determining whether or not that violates the public trust



1 and needs to be revisited or corrected in some manner.

2 So we don't actually believe this case is one in  
3 which the Court has to certify the question to the Nevada  
4 Supreme Court for an answer because we believe that the Nevada  
5 Supreme Court and the court's sister jurisdictions have  
6 established enough concerning the nature of the public trust  
7 doctrine, how it's applied, what sort of analysis a court  
8 would use in taking legislative action or the existence of  
9 water rights or other private rights created under state  
10 legislation and analyzing whether they need to be either --

11 THE COURT: I get that. So both courts have  
12 given me enough so that I can read the tea leaves.

13 MR. HERSKOVITS: Yes, that's our position.

14 And with regard to the standing of the county, I  
15 think we've already addressed that, but I think there is  
16 enough in the law of Nevada and California and some other  
17 states to support the county's standing or authority or  
18 ability to assert a claim under the public trust doctrine for  
19 the benefit of its residents, and we would argue that the case  
20 law actually says it can be done for the benefit of the public  
21 at large by anyone -- or I guess I would say any corporate or  
22 political entity would be possible.

23 Now, I think that the district in its reply brief  
24 points to an instance of a state agency arrogating to itself  
25 away from the state government without any authorization sole

1 authority or sole power to sort of usurp public trust  
2 determinations or decisions that have to be made.

3 That's not at all the situation where a county  
4 raises a claim that does not sit as the adjudicator or the  
5 decider of whether or not that claim has merit, how it should  
6 be applied.

7 For Mineral County to assert a claim under the  
8 public trust doctrine, and for other counties such as the ones  
9 that Mr. DePaoli has mentioned, and private individuals to  
10 then receive notice and be able to participate in that  
11 litigation just as they would any other, doesn't somehow  
12 represent an inappropriate usurpation by Mineral County of the  
13 power to enforce or determine the public trust doctrine. It's  
14 a power or authority to raise a claim and seek relief from the  
15 Court, in this instance, or, in other situations, the courts  
16 of the state.

17 So our position is that the county has the authority  
18 or authorization to raise this claim whether in state court or  
19 federal court, and I don't think that's an issue that is  
20 really so ambiguous or unsettled that the Court needs to seek  
21 guidance from the supreme court of Nevada on that point  
22 either.

23 And, finally, with regard to exhaustion, in a number  
24 of cases in Nevada and also in sister jurisdictions, the  
25 challenge -- the challenge has been raised that rights granted

1 or procedures under the state water law prevent resort to the  
2 courts for something like a public trust claim or another  
3 claim to defend the interests of the state and its ownership  
4 in water even after appropriative rights have been granted.

5 And it seems to me that the case law clearly  
6 establishes that exhaustion of administrative remedies is not  
7 necessarily required for a public trust claim.

8 And particularly in Nevada I would point out that  
9 there is no procedure, there is no mechanism that recognizes  
10 the public trust as a claim that can be raised with the state  
11 engineer. There's no procedure that naturally allows this  
12 claim to be raised by Mineral County before the state engineer  
13 with regard to the entire basin.

14 And, indeed, you have to recall as well, your Honor,  
15 that the claim is premised on and, in fact, is the result of a  
16 long, long history of both failure to recognize and enforce  
17 the public trust by the state, including the state engineer.  
18 And once the claim was raised or issues were raised about  
19 Walker Lake which then led to the filing of this lawsuit, the  
20 state refused to recognize and accept that there was a public  
21 trust obligation to do anything at all with regard to the  
22 Walker River system and Walker Lake.

23 So I don't think the argument that somehow there's  
24 an imaginary administrative remedy that should be exhausted --

25 THE COURT: And do you have anything to say

1 about the takings issue?

2 I mean, how do I explain to an upstream agricultural  
3 user who now will only be allowed to take half of what they  
4 could take before, or an urban water system like Yerington,  
5 you now only can take half so that we can deliver what's  
6 required under the public trust doctrine to Walker Lake? How  
7 do I explain to them in layman's terms there's no takings  
8 here.

9 MR. HERSKOVITS: Well, your Honor, may I say  
10 that I think there are actually two ways of looking at that  
11 question. There are probably many ways, but there are two  
12 that have validity.

13 One is to say that it was clear from the outset that  
14 ownership of the water was always held and to be held  
15 ultimately, in an ultimate sense, by the state of Nevada for  
16 the benefit of Nevadans, future as well as present, and for  
17 purposes that the state may deem required its use, and  
18 therefore --

19 THE COURT: You're not arguing the right --

20 MR. HERSKOVITS: -- the right that was granted  
21 was contingent --

22 THE COURT: -- to use is not a property right,  
23 are you?

24 MR. HERSKOVITS: No, your Honor, and I will get  
25 to what I think is an important -- well, the nature of the

1 property right may be that it is of less value because it is  
2 defeasible or contingent and that that was clear --

3 THE COURT: Sure. Any property right --

4 MR. HERSKOVITS: -- when it was granted --

5 THE COURT: -- can be defeasible. That was  
6 clear when it was granted --

7 MR. HERSKOVITS: Yes.

8 THE COURT: -- that it was defeasible if the  
9 state engineer made a mistake.

10 MR. HERSKOVITS: Yes, or even before the state  
11 engineer, if it had been permitted or if it had been allowed  
12 to become --

13 THE COURT: So if the federal government made a  
14 mistake in designating 160 -- was it 160- or 140-acre maximum  
15 allotments, they really should have been 500 acres in order to  
16 make it farming feasible, or it should have been half that in  
17 order to allow more comers, that the title that they got  
18 really was defeasible, there's no taking.

19 MR. HERSKOVITS: Well, your Honor, we're not  
20 making an assertion about other types of title or land --

21 THE COURT: I know, you're just talking about  
22 water right.

23 MR. HERSKOVITS: And -- not a water right but  
24 the trust or fiduciary duty that the state had.

25 THE COURT: I think I've got it all, sir.

1 MR. HERSKOVITS: Can I say one more thing, your  
2 Honor?

3 THE COURT: One more thing, please.

4 MR. HERSKOVITS: Yes. It would not necessarily  
5 be our position that if, as a result of a public trust  
6 violation and a need to correct the violation or remedy it,  
7 any property right, including a water right, however limited  
8 or contingent or defeasible it may be, if that is being  
9 removed from a private property right owner by the state, by  
10 any sovereign, then it should be subject to the takings clause  
11 or to compensation. So --

12 THE COURT: But not if Mineral County does it.

13 MR. HERSKOVITS: Your Honor, our position would  
14 be that it may be that the public trust --

15 THE COURT: I mean, the Wilderness Society has  
16 taken the position that, by gum, we've waited long enough,  
17 this river is suffering damage, we're going to raise money and  
18 spend it and buy the water rights and just do what we should  
19 have done from the outset. But not so Mineral County.

20 MR. HERSKOVITS: Well, your Honor, our  
21 position --

22 THE COURT: There's no taking because it's  
23 Mineral County.

24 MR. HERSKOVITS: No, your Honor. Our position  
25 would be that if there's a taking, then the state, which is

1 the sovereign government that failed to fulfill --

2 THE COURT: Has to pay.

3 MR. HERSKOVITS: -- or meet its public trust  
4 obligation, would have the obligation to obtain the funding,  
5 raise the funds necessary to correct that problem.

6 THE COURT: That's fair enough. Nevada will pay  
7 the bill.

8 Okay. Let me hear from the federal government. Did  
9 you want to add anything on the jurisdiction issue?

10 And, more importantly to the point, my question is  
11 are you -- by failure to respond, are you conceding that  
12 Mineral County has the right to defease, to the extent  
13 necessary, whatever rights previously declared under the  
14 decree or whatever new rights you may obtain by declaration  
15 from this Court in the future?

16 MR. GUARINO: Your Honor, I don't -- with  
17 respect to the motion that was filed by Mineral County,  
18 Mineral County raised the issue concerning a motion to dismiss  
19 in an alternative argument to the extent -- and raised it in  
20 the nature of, to the extent that Mineral County is asserting  
21 a water right, that water right, that claim should be  
22 dismissed because this Court shouldn't have jurisdiction.

23 THE COURT: Right.

24 MR. GUARINO: I think what we've heard very  
25 clearly from Mr. Herskovits and Mineral County today is that

1 under their complaint and why they're in Court today is not to  
2 assert, and they are not asserting --

3 THE COURT: A water right.

4 MR. GUARINO: -- a water right.

5 THE COURT: Yeah, they're very clear --

6 MR. GUARINO: Very clear.

7 THE COURT: What they're saying is that the  
8 previous rights granted are defeasible by a provision right in  
9 the title, even if it's implicit in the grant of the water  
10 right, and that's the public trust doctrine.

11 So are you conceding that point?

12 In other words, if the Court so construes it, all  
13 water rights up and down this river previously declared or  
14 sought to be declared in the modification now filed by any  
15 party, that they're defeasible, are you conceding the point  
16 that your rights, the Tribe's rights are also therefore, of  
17 course, defeasible?

18 MR. GUARINO: I would raise the point, your  
19 Honor, that Mineral County has made very clear under Nevada  
20 law the public trust doctrine applies.

21 The rights associated with the claims asserted by  
22 the United States on behalf of the Walker River Tribe arise  
23 under federal law. Nobody has briefed or addressed the extent  
24 to which a state law doctrine might impede or impair or affect  
25 a federal law -- not federal law, but a federal right as



1 raised.

2 Now, certainly --

3 THE COURT: Okay. I'm going to take that as a  
4 concession, and I figure I'm licensed to use it in any written  
5 decisions, that to the extent that they obtained this right  
6 under state law, not a right, a defeasibility declaration on  
7 the prior grants, that to the extent your grant, the grant of  
8 water rights either to the federal government anew or to the  
9 Tribe, federal government on behalf of the Tribe, to the  
10 extent those rights are ruled or dictated by state law, not  
11 federal law, that that's a concession on your part that it is  
12 therefore defeasible.

13 MR. GUARINO: To the extent state law affects  
14 state law rights, the United States stands as a state -- as  
15 essentially, with some exception as to forfeiture and  
16 abandonment as for all government property, but with the  
17 extent to how state law affects a water right, we've taken no  
18 position and advance no position in our briefing in addition  
19 to anything else that has been presented to the Court.

20 But, really, your Honor, I think the point here is  
21 that these matters, that matter that the Court is talking  
22 about really hasn't been presented to the Court because the  
23 motion that has been raised was a motion to dismiss in the  
24 alternative.

25 It has been clear from the briefing from Mineral

1 County that such issue that would support the alternative of  
2 WRID does not exist here because they're not asserting a water  
3 right.

4 THE COURT: That's fine that you say the issue  
5 hasn't been presented, but, in my mind, it has. Because if  
6 your right, newly declared, is a state right, property right,  
7 then I take your position, your lack of a response, as a  
8 concession that the defeasibility sought by Mineral County is  
9 correct.

10 MR. GUARINO: The -- as I understand --

11 THE COURT: Applies to your right as well.

12 MR. GUARINO: As I understand, to the extent  
13 that the public trust doctrine applies to state law,  
14 state-based water rights, it applies to all state-based water  
15 rights whenever created, whether it was pre -- post or  
16 subsequent to 1905 when the legislature in Nevada has passed a  
17 more -- a revised or updated version of the water code, and  
18 then it applies to all water rights established under state  
19 law.

20 THE COURT: Okay. Now, I have to ask the  
21 question then. I understand -- you don't have to answer it  
22 finally, and you can brief it further if you feel the need to,  
23 perforatory to our further argument, but how does the Tribe's  
24 right to water arise at all?

25 Let's say in the initial treaty. The initial treaty

1 was 1857?

2 MR. GUARINO: 1859, I believe.

3 THE COURT: 1859.

4 MR. GUARINO: Original reservation under  
5 executive order as recognized by --

6 THE COURT: And the state of Nevada was not  
7 created until 1864, so in the original treaty first -- let's  
8 do it in twofold fashion. In the original treaty first, what  
9 water right implicitly -- under what law does the water right  
10 arise, implicitly to be sure, in the original reservation  
11 treaty?

12 MR. GUARINO: Yes, your Honor. And as the  
13 Court's aware, the reservation for the -- we're talking about  
14 just the Walker River Tribe. Of course, there were other  
15 Indian groups and allotments and colonies in the basin itself.

16 But for the Walker River Tribe, the water right  
17 associated with and asserted for the Walker River Tribe is one  
18 under the federal reserved water rights doctrine as first  
19 established by the *Winters* case and carried through in federal  
20 common law moving forward.

21 It is one of the few areas --

22 THE COURT: So it's a federal right --

23 MR. GUARINO: It is, yes.

24 THE COURT: -- granted by virtue of the  
25 ownership of the land by the federal government.

1           In other words, prior to the creation of the state,  
2           certainly prior to the creation of the territory, the federal  
3           government had all rights. They had the right to the oil, had  
4           the right to the sagebrush, had the right to the grazing  
5           rights, had the right to license or not license the taking of  
6           deer, and it certainly had the water rights and the land  
7           title.

8           MR. GUARINO: To be more precise on this issue,  
9           your Honor, the federal government has the inherent power to  
10          make such a reservation implicitly. It did so in this case in  
11          1859 --

12          THE COURT: Right.

13          MR. GUARINO: -- when it took the act to reserve  
14          the land.

15          THE COURT: Okay. Let's ask the second question  
16          then.

17          Now, the new grant to the Tribe was when, 1930 --

18          MR. GUARINO: Six.

19          THE COURT: 1936. This is a new grant.

20          MR. GUARINO: Yes.

21          THE COURT: This is after all of the land -- you  
22          still had title to that land, of course.

23          MR. GUARINO: We did.

24          THE COURT: But in the Newlands legislation, and  
25          in other legislation, the federal government, in fact,

1 encouraged the states to set up water right systems, statutory  
2 systems and, in most cases, administrate them so that we don't  
3 have to have a court decree in every case, subject to court  
4 review, of course, but it's an administrative office, state  
5 engineer, and the federal government encouraged it.

6 And some of the states like Nevada very early on  
7 said, okay, we'll set up a water right grant source, and it's  
8 through an administrative agency, and we have to take into  
9 account the public interest. We can't overappropriate, of  
10 course, but we have the right to say stop, hold everything, no  
11 more rights because the water is gone.

12 So, in other words, the federal government  
13 encouraged it, and the state of Nevada took the invitation and  
14 set up the system.

15 So what right, water right, under what authority is  
16 given in the grant of lands, federal lands to be sure, in  
17 1936?

18 MR. GUARINO: Your Honor, with regards to what  
19 the Court has just described -- what the Court has just  
20 described as federal government encouragement on the states, I  
21 am simply unfamiliar with that, and that's well beyond the  
22 briefing that's occurred before the Court.

23 THE COURT: You're familiar with the Newlands  
24 legislation, aren't you?

25 MR. GUARINO: But -- yes, your Honor. If the

1 Court is referring to the Newlands legislation as associated  
2 with the act of Congress to --

3 THE COURT: And it gave benefits to all states  
4 who would set up water right boards or tribunals.

5 MR. GUARINO: No -- I'm sorry, then I'm  
6 unfamiliar with the Newlands legislation that the Court is  
7 raising at this point.

8 THE COURT: Okay.

9 MR. GUARINO: So what I --

10 THE COURT: What water right under what  
11 authority is granted in 1936?

12 What you're saying, what I can discern you're saying  
13 is, that along with keeping the title to 87 percent of the  
14 lands from the state of Nevada --

15 MR. GUARINO: Okay.

16 THE COURT: -- we also kept all rights that  
17 pertain to that title including the right to grant water use.

18 So even though the water originates in the state of  
19 California, by virtue of us keeping title to the land that we  
20 later granted to the Tribe, we kept not only the oil rights  
21 underneath, the gold rights underneath, we kept the water, the  
22 right to use of the water, remember, a usufructuary right, not  
23 an ownership right, a usufructuary right, we kept that right  
24 to the lands we kept even if it's use of water that originates  
25 in California. That's what your position is.

1 MR. GUARINO: Your Honor, with respect to the  
2 lands added in 1936, the act of Congress to reserve the lands  
3 on behalf of the Walker River Tribe impliedly also reserved  
4 the water necessary for the Walker River Tribe to --

5 THE COURT: Reserved what water?

6 MR. GUARINO: Whatever water was  
7 unappropriated --

8 THE COURT: The rainfall?

9 MR. GUARINO: Whatever water was unappropriated  
10 at the time to ensure that the reserved land was a permanent  
11 home for the Walker River Tribe, whatever that amount of water  
12 need be.

13 The United States at the time reserved  
14 unappropriated waters. That's what the United States reserved  
15 at the time through its act of creating an extension on to the  
16 reservation that served for that land.

17 THE COURT: And where there is a state system to  
18 grant water rights, can you reserve water in derogation of the  
19 public trust doctrine and obligations of the state of Nevada?

20 MR. GUARINO: The federal -- the federal  
21 reserved water right that is reserved from the unappropriated  
22 waters might be subject -- this is unbriefed, your Honor, and  
23 the parameters to which I'm frankly -- I do not --

24 THE COURT: That's why Mr. DePaoli is saying we  
25 need the Nevada Supreme Court to tell us.

1                   MR. GUARINO: With respect to how it might --  
2                   how it might or might not affect a right reserved under  
3                   federal law, either in 1936 or beforehand, is unclear  
4                   depending upon the circumstances under which that  
5                   specific reservation might have been made.

6                   THE COURT: Again, I don't understand your  
7                   argument because I don't understand how you can retain -- you,  
8                   the federal government, can retain a usufructuary right where  
9                   the federal government has acknowledged and encouraged, and  
10                  the state, in fact, has adopted a water right grant and  
11                  recognition system. I don't understand how you can do that.

12                  MR. GUARINO: If I might just address that just  
13                  briefly, your Honor, it is based upon the federal implied  
14                  reserved water right doctrine that the federal government has  
15                  the inherent authority, inherent ability to reserve  
16                  unappropriated waters.

17                  If the waters have already been appropriated --

18                  THE COURT: Okay. I got that. It doesn't make  
19                  sense to me, but that's fine. Let's go on to the issues that  
20                  you want respond to.

21                  MR. GUARINO: With respect to the motion that's  
22                  before the Court, your Honor, as I've said, the matter that  
23                  the United States briefed in its brief in 128 associated with  
24                  the Mineral County claim was based upon the premise as  
25                  presented by WRID which was that a water right was being



1 claimed by Mineral County. That has not -- very clearly that  
2 is not the position of Mineral County.

3 Of course, under 125-B, the Walker River Irrigation  
4 District was asserting that the United States didn't have --  
5 the claim by the United States for a state-law-based water  
6 right should be dismissed because such could not be considered  
7 under the decree. That's not what's before the Court in the  
8 125-C position.

9 And with respect to whether or not this Court should  
10 stay or not stay the consideration of the public trust  
11 doctrine, its scope, its applicability, the United States made  
12 no representations to the Court and took no position. But  
13 only to the extent that Walker River Irrigation District was  
14 raising a challenge to a potential water right, the United  
15 States took a position.

16 But given the position of the parties right now, I  
17 think it's very clear that the United States -- the United  
18 States -- the briefing that the United States presented to the  
19 Court associated with the Mineral County claim does not apply  
20 to the Mineral County claim because it's not what Mineral  
21 County is claiming. They're claiming something very different  
22 from what the United States claims, whether it's under federal  
23 law or state law, for a water right. That's not what Mineral  
24 County is claiming.

25 They're claiming a state-law-based water right -- a

1 state-law-based doctrine that could impact and arguably, from  
2 their point of view, as I understand their argument, does  
3 impact water rights as decreed by this Court and recognized  
4 under state law.

5 THE COURT: Okay. Very good. Thank you.

6 I think I've got it. I think I understand -- you  
7 folks can see where my questions and where my doubts are. I  
8 think I've clearly broadcast that. I hope it wasn't in a  
9 sarcastic fashion. It's just my manner of speaking when I  
10 have questions. They were all very sincere questions, and you  
11 can see -- they were not intended to be autocratic or  
12 belittling, they honestly weren't. You can see where I have  
13 doubts about your arguments.

14 And I'm not inviting further briefs, but if you feel  
15 the need to provide more support to answer my questions, you  
16 might do good to get a transcript and to further provide  
17 answers.

18 I'm not asking for extensive briefs at all, please.

19 If you feel the need at all to answer my question  
20 with authority only, not so much argument, you may do so by  
21 making a request as normal under the rules, here's additional  
22 authority that we want to provide for the Court's  
23 consideration.

24 This matter specifically is not under submission  
25 until the date of the oral argument on the 125-B motion at

1 which time I'll take this under submission as well the 125-B  
2 motion.

3 What date would you like to set for that?

4 MR. GUARINO: Your Honor, if we --

5 THE COURT: Because we have to do notice and  
6 we've got to do briefing.

7 MR. GUARINO: And also, your Honor, under the  
8 Court's most recent orders associated the superseding order,  
9 the United States is going to be sending out the Court's  
10 superseding order to those that we -- those who have been made  
11 parties to this case throughout the basin as the Court has  
12 ordered.

13 The United States is working on that right now and  
14 has 30 days to complete that task. We'll complete that task  
15 within 30 days.

16 THE COURT: Okay.

17 MR. GUARINO: Subsequent to that 30 days, the  
18 folks who receive that notice have 60 days to respond to that  
19 notice.

20 THE COURT: Okay.

21 MR. GUARINO: So that's 90 days out. And from  
22 that point, I believe -- the Court's instructions --

23 THE COURT: They have to refile.

24 MR. GUARINO: They have to refile.

25 THE COURT: So at least a 60-day period in the

1 briefing. So we're talking at least six months.

2 I think we ought to go ahead and set the date, to be  
3 honest with you, on your motion, anticipated motion, unless  
4 you're telling me you're not going to file it.

5 We should give you a tentative date. It's not in  
6 black ink on my calendar, but it's a tentative date for  
7 argument on your motions to dismiss, newly filed as required  
8 by the new order, and it will give you a date to work towards  
9 in your noticing and in preparation of your motions, and it  
10 ought to be at least six months out if not a little longer.  
11 You tell me.

12 MR. DePAOLI: Your Honor, in terms of a hearing,  
13 six months out?

14 THE COURT: Right. It will give you a date to  
15 work towards, the noticing, the objection time and then  
16 finally your briefing time when that starts.

17 MR. GUARINO: Brief, response, reply.

18 MR. DePAOLI: That would be fine.

19 THE COURT: And write it in in just pencil,  
20 Madam Clerk.

21 MR. DePAOLI: When we refile, are we going to  
22 refile and have a whole new briefing schedule, your Honor, or  
23 would we just -- are you looking for to us refile --

24 THE COURT: You have to -- my understanding of  
25 the order Judge Cobb proposed and I adopted was that you are

1 required to refile your motion so that all properly-noticed  
2 parties get notice of it with respect to dismissal on the  
3 125-B.

4 MR. DePAOLI: Your Honor, that's -- we --  
5 although we didn't have the superseding order at the time, we  
6 did give notice, all of us gave notice of everything we filed  
7 in the B case as if --

8 THE COURT: So you believe even under the  
9 superseding order it's already been properly briefed.

10 MR. DePAOLI: I believe so, your Honor.

11 THE COURT: The government is nodding no, unless  
12 they want to say, in spite of the stay, we feel like we've  
13 said it all in our briefs. You've just got to send them out  
14 to everybody so that everybody has a chance to object.

15 MR. GUARINO: Your Honor, with respect to the  
16 superseding order, when the Court issued the order just  
17 recently I wasn't expecting the Court to dismiss -- I'll be  
18 quite honest, I wasn't expecting the Court to dismiss the  
19 Walker River Irrigation District's motion without prejudice  
20 and ask us to proceed again.

21 THE COURT: But I did that.

22 MR. GUARINO: I thought -- you did that.

23 THE COURT: Right.

24 MR. GUARINO: We were proceeding, I believe,  
25 over the last year --

1                   THE COURT: I think technically you should  
2 refile it, sir.

3                   MR. GUARINO: Okay.

4                   THE COURT: Since the order as it stands says  
5 it's denied without prejudice to a full and complete noticing  
6 of the list.

7                   So refile it, please, and tell us, this is the new  
8 filing, and everybody has properly served notice of it so they  
9 have a chance to object and the time is running.

10                  And give us a date, Madam Clerk, in about six  
11 months. It's a tentative date in pencil. If you want to move  
12 it up, feel like you can move it up, please do so. If not,  
13 then, of course, I'll set it back.

14                  What date?

15                  THE CLERK: Your Honor, Monday, May 4th, 2015,  
16 at 10:00 a.m.

17                  THE COURT: Okay. First part of May. And, of  
18 course, you can move it up if you feel you want to get it on  
19 calendar earlier than that.

20                  This matter is not under submission until that date  
21 or such earlier date as we set oral argument in 125-B.

22                  Thank you. The arguments have been very helpful.

23                  I'm sorry, Mr. Springmeyer, I didn't call upon you.  
24 Did you want to add to our fun fair here?

25                  MR. SPRINGMEYER: I did not want to add to this,

1 your Honor, but rather to bring something on the Court's radar  
2 screen.

3 THE COURT: Please.

4 MR. SPRINGMEYER: Which was that I filed on  
5 behalf of NFWF about eight months ago a request for the Court  
6 to review and confirm the state engineer ruling on our first  
7 transfer.

8 THE COURT: That's right.

9 MR. SPRINGMEYER: And I'm hoping --

10 THE COURT: And that was again for an in-stream  
11 use, change of use.

12 MR. SPRINGMEYER: Correct, your Honor.

13 THE COURT: So change of diversion point -- it's  
14 really change of use.

15 MR. SPRINGMEYER: Yes.

16 THE COURT: Okay.

17 MR. SPRINGMEYER: It's not diverting it at the  
18 same place where it was being diverted.

19 THE COURT: Right, it's to leave it in the  
20 stream.

21 MR. SPRINGMEYER: Correct, your Honor.

22 THE COURT: And the state engineer has approved  
23 that --

24 MR. SPRINGMEYER: Correct, your Honor.

25 THE COURT: -- consistent with current Nevada

1 law. And you filed a motion, and did you get any objections?

2 MR. SPRINGMEYER: We have parties who filed to  
3 appear supporting and several who filed objecting.

4 THE COURT: Okay. So let's set an oral argument  
5 date, and let's hear the objections, and I can even give you  
6 an oral ruling to be followed by a written ruling right then  
7 and there.

8 MR. SPRINGMEYER: I think all the parties would  
9 probably appreciate at least the filing of simultaneous briefs  
10 in advance of the hearing.

11 THE COURT: Do you need briefs or -- you feel  
12 like you need briefs.

13 MR. SPRINGMEYER: Well, yes, your Honor, I think  
14 that would be --

15 THE COURT: Let's do it. How far down can we do  
16 the argument, 30 days, 60 days?

17 MR. SPRINGMEYER: How about if we had  
18 simultaneous briefs 30 days, argument 60 days.

19 THE COURT: Let's do that. Give us a date for  
20 the simultaneous briefs, Madam Clerk. That doesn't require an  
21 argument or a calendar. And then 60 days for the argument.

22 Do you want right for replies? Maybe you should.

23 Simultaneous briefs in 30 days. If you really feel  
24 the need for a reply, don't just burden the Court because I've  
25 got lots of reading time, but let's say -- let's say within



1 seven days, seven days for a reply if you feel the need.

2 MR. SPRINGMEYER: Very good. Thank you, your  
3 Honor.

4 THE COURT: And a 60-day date, please.

5 THE CLERK: Your Honor, 60 days puts us into the  
6 beginning of January.

7 THE COURT: Okay.

8 THE CLERK: January 5th, 2015, at 10:00 a.m.

9 THE COURT: January 5th. Is that okay?

10 MR. SPRINGMEYER: Thank you, your Honor.

11 THE COURT: And so 30 days hence, today is the  
12 27th, so November -- so the 27th, Thanksgiving? November 28th  
13 we do have a delightful holiday, don't we, on the 28th, so you  
14 can't file anything, but you can do it electronically.

15 MR. SPRINGMEYER: Technically we could e-file  
16 it, your Honor.

17 THE COURT: And seven days later deadline for  
18 any replies.

19 MR. SPRINGMEYER: Thank you, your Honor.

20 THE COURT: Thank you, sir.

21 MR. DePAOLI: Your Honor, may I raise one more  
22 matter of similar nature?

23 THE COURT: Sure.

24 MR. DePAOLI: The California State Water  
25 Resources Control Board approved some temporary changes to

1 stored water rights for a leasing program potentially for the  
2 benefit of Walker Lake.

3 THE COURT: And you objected.

4 MR. DePAOLI: No, we did not, they were our  
5 temporary changes, your Honor.

6 THE COURT: Oh, okay.

7 MR. DePAOLI: And we have on file with the Court  
8 in the main action also the state board's report to the Court  
9 as special master in the district's petition for a temporary  
10 modification of the decree --

11 THE COURT: Did anybody object?

12 MR. DePAOLI: The only objection thus far has  
13 been from the Tribe and the United States, your Honor, and it  
14 may be that that can be worked out with a conversation.

15 THE COURT: Okay. And does the Tribe and the  
16 United States want an oral argument or a briefing opportunity,  
17 or am I to just simply rule on the basis of their application?

18 MR. GUARINO: Your Honor, I am sorry, I was  
19 having -- concerning the matter that the Court just --

20 THE COURT: What are we talking about? We're  
21 talking about the California board's approval of change in the  
22 reservoir, the storage rights, temporary, and Mr. DePaoli had  
23 understood that the government may or may not have objection  
24 to that.

25 Do you want an opportunity to respond with an

1 objection and an oral argument to follow, or are you satisfied  
2 with just the application from the California board and can I  
3 rule on that?

4 Did you want an opportunity to object or are you  
5 satisfied with their application?

6 MR. WILLIAMS: Your Honor, Wes Williams, Jr., on  
7 behalf of the Tribe.

8 I believe -- I'm trying to recall, I haven't looked  
9 at this in a while.

10 The Tribe's interest was that WRID's application and  
11 California's order didn't say how water would affect the  
12 reservation, and that's one issue I wanted to bring up before  
13 the Court in that there needed to be some system set up to  
14 deal with that issue.

15 THE COURT: Okay. Then my suggestion is that  
16 within the next week you consult with the California board and  
17 Mr. DePaoli, the water district, and you ask for appropriate  
18 changes to their request or clarifications, and at the end of  
19 a week, if you're not happy with what they presented, then  
20 file an objection and Madam Clerk will set it for oral  
21 argument.

22 And the normal briefing rules apply. You'll file an  
23 objection which will invoke the oral argument date and they'll  
24 have, under our local rules, appropriate response time and you  
25 can reply.

1 MR. WILLIAMS: Thank you.

2 THE COURT: So that's how to get it on calendar,  
3 Mr. DePaoli.

4 MS. URE: Judge Jones, I'm Therese Ure, and I  
5 just wanted to make sure that in the case that Mr. Springmeyer  
6 was discussing that there will be an order that comes out  
7 because I know that not all of the parties in that case are  
8 the same parties that are here in court today. So I just  
9 wanted to --

10 THE COURT: We do need a resulting order, and I  
11 think that's what he's asking for.

12 MS. URE: Right.

13 MR. SPRINGMEYER: And I was intending to do a --  
14 file a notice that recites those things as well.

15 THE COURT: Terrific.

16 MS. URE: Thank you.

17 THE COURT: Thank you very much for your help  
18 today. I appreciate it. That will conclude the hearing.

19 -o0o-

20

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

23 /s/Margaret E. Griener 11/7/2014  
24 Margaret E. Griener, CCR #3, FCRR  
Official Reporter

25

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