**NINTH CIRCUIT COURT OF APPEALS**

**United States v. United States**  
Board of Water Commissioners  
NV  
Energy & Natural Resources  4872  
State agency rulings regarding enforcement of Walker River Decree entitled to deference (Bybee, J.)

**United States v. Walker River Irrigation District**  
NV  
Energy & Natural Resources  4887  
Parties improperly denied opportunity to brief issue of res judicata prior to dismissal on res judicata grounds (Tashima, J.)

**CALIFORNIA COURTS OF APPEAL**

**Professional Collection Consultants v. Lujan**  
C.A. 1st  
Creditors' & Debtors' Rights  4895  
Cardmember agreement’s choice-of-law provision governed collection of credit card debt (Tucher, J.)

**Raines v. Coastal Pacific Food Distributors, Inc.**  
C.A. 3rd  
Employment Litigation  4899  
PAGA claim for failure to provide or maintain accurate wage statements does not require proof of injury (Duarte, J.)

**Nielsen Contracting, Inc. v. Applied Underwriters, Inc.**  
C.A. 4th  4905  
Order modifying opinion

---

**California Forms Books**

- Business Litigation
- Employment Law
- Insurance Defense
- Medical Malpractice
- Products Liability

**Tried. Trusted. True.**  
Available online, on CD, and in print.

Download sample forms FREE at: [http://at.law.com/books](http://at.law.com/books)
SUMMARIES

Creditors’ and Debtors’ Rights

Cardmember agreement’s choice-of-law provision governed collection of credit card debt (Tucher, J.)

Professional Collection Consultants v. Lujan

C.A. 1st; May 22, 2018; A147922

The First Appellate District affirmed in part a judgment. In the published portion of its opinion, the court held that a lawsuit to collect on credit card debt was governed by the choice-of-law provision in the cardholder agreement which, in this case, designated Delaware law as controlling.

Professional Collection Consultants (PCC) filed suit to collect a debt owed by San Francisco resident Robert Lujan on a credit card issued by Chase Bank USA, N.A. Lujan’s credit card account with Chase was governed by a cardmember agreement with a choice-of-law provision stating that “federal law and the law of Delaware” govern the agreement. The last activity on Lujan’s card was in late 2007. PCC filed suit in June 2011. Lujan moved for summary judgment, arguing that under Delaware’s three-year statute of limitations, PCC’s complaint was time-barred. The trial court granted the motion, finding that Delaware law applied.

PCC appealed, arguing that it did not sue for breach of the cardmember account, but instead alleged an open book account for money due and an account stated in writing. Accordingly the Delaware choice-of-law provision was not triggered, and its lawsuit was governed by California’s four-year statute of limitations.

The court of appeal affirmed, holding that the trial court properly applied Delaware law. The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled. Here, the gravamen of PCC’s complaint was Lujan’s failure to pay monies owed to Chase for use of a credit card issued in accordance with Chase’s cardmember agreement. PCC could not extend the three-year statute of limitations applicable to such a breach of contract claim by pleading common counts instead.

Employment Litigation

PAGA claim for failure to provide or maintain accurate wage statements does not require proof of injury (Duarte, J.)

Raines v. Coastal Pacific Food Distributors, Inc.

C.A. 3rd; May 22, 2018; C083117

The Third Appellate District affirmed in part and reversed in part a judgment. The court held that a PAGA claim for civil penalties based on an employer’s failure to provide or maintain accurate wage statements does not require a showing of injury.

Terri Raines sued former employer Coastal Pacific Food Distributors, Inc. Among other claims, she sought penalties, both individually and in a representative capacity under the Private Attorneys General Act of 2004 (PAGA), for Coastal Pacific’s alleged failure to provide and maintain accurate wage statements as required by Labor Code §226(a). The wage statements at issue included both the number of overtime hours worked by the employee and the employee’s total overtime pay, but failed to include the overtime hourly rate of pay.

The trial court granted summary adjudication in favor of Coastal Pacific, finding that the hourly overtime rate could readily be determined from the wage statement by using simple math. There was thus no injury, and without an injury, Raines’ individual and PAGA claims under §§226(e) and 226(a), respectively, both failed.

The court of appeal affirmed in part and reversed in part, holding that Raines failed to establish the injury required for the recovery of statutory penalties on her individual §226(a) claim. As the trial court found, an employee’s hourly overtime rate could be promptly and easily determined from the information on the wage statement by using simple arithmetic. That a pencil and paper or a calculator might be required to perform the calculation did not render it unreasonably complex. The trial court erred, however, in finding that the lack of injury also barred Raines’ PAGA claim. PAGA is concerned with collecting civil penalties for the violation of §226(a), not the damages or statutory penalties provided for in §226(e). The requirements for a 226(e) claim thus do not apply to a PAGA claim for a violation of 226(a). The absence of injury does not mean the absence of a violation. Section 226(3) specifically provides for civil penalties for any failure to provide or maintain the wage statements required under §226(a), without reference to injury. The court accordingly reversed the trial court judgment as to Raines’ PAGA claim.

Energy and Natural Resources

State agency rulings regarding enforcement of Walker River Decree entitled to deference (Bybee, J.)

United States v. United States Board of Water Commissioners

9th Cir.; May 22, 2018; 15-16316

The court of appeals reversed a district court judgment and remanded. The court held that the district court erred in de-
The court held that the district court erred in dismissing the
mandated with directions for reassignment to a different judge.

9th Cir.; May 22, 2018; 15-16478

District United States v. Walker River Irrigation (Tashima, J.)

parties’ counterclaims on res judicata grounds after specifically instructing them not to brief that issue.

In 1924, the United States filed suit in Nevada federal
court to establish water rights in the Walker River Basin on
behalf of the Walker River Paiute Tribe. The court entered a
decree awarding water rights to the Tribe and various other
claimants. The court later amended the original decree and
retained jurisdiction to modify it. In 1992, the Tribe filed
counterclaims asserting new water rights. The district court
ordered the Tribe and the United States to name as counter-
defendants all water rights claimants in the Walker River Ba-
sin and to serve them with summons and the counterclaims.
In 2013, after service was substantially complete, the court
ordered briefing on Rule 12(b) issues related to jurisdiction
and expressly ordered the litigants not to address other issues,
such as res judicata, which were to be addressed at a later
date. Nonetheless, in May 2015, without briefing or argu-
ment on the issue, the court sua sponte dismissed all of the
Tribe’s and the United States’ counterclaims on res judicata
or jurisdictional grounds.

The Tribe and the United States appealed. The United
States further requested that, on remand, the case be reas-
going to a different district judge, arguing that District
Judge Robert Jones’ bias against the federal government and
its attorneys was a matter of public record. That bias was
most recently expressed in Judge Jones’ statement that he
was “developing a policy” of “disallowing” or “debarring”
U.S. attorneys “because of concerns about their adherence to
‘ethical standards.’”

The court of appeals reversed the district court order and
remanded, holding that the district court had continuing ju-
sisdiction over the counterclaims and erred in dismissing
the claims on res judicata or jurisdictional grounds without
giving the parties an opportunity to brief the issue. Further,
because the counterclaims are not a new action, traditional
claim preclusion and issue preclusion do not apply. Instead,
the counterclaims are subject to the general principles of fi-
nality and repose, absent changed circumstances or unfore-
seen issues not previously litigated. The court further grant-
ed the government’s request for reassignment, reluctantly
concluding that because Judge Jones’ statements about U.S.
attorneys were coupled with his unprecedented sua sponte
dismissal of the government’s counterclaims, reassignment
is necessary.

Energy and Natural Resources

Parties improperly denied opportunity to brief issue of
res judicata prior to dismissal on res judicata grounds
(Tashima, J.)

United States v. Walker River Irrigation District

9th Cir.; May 22, 2018; 15-16478

The court of appeals reversed a district court order and re-
manded with directions for reassignment to a different judge.
The court held that the district court erred in dismissing the

In response to concerns over the rapidly dwindling volume
of one of the few remaining lakes in northwestern Nevada,
the National Fish and Wildlife Foundation initiated a volun-
tary water rights leasing program to convey water from Walk-
er River downstream to Walker Lake as part of the federal
Walker Basin Restoration Program. Local farmers objected,
claiming injury to their water rights. After state agencies in
both California and Nevada approved the NFWF program,
over the farmers’ objections, they brought their complaints
to the district court, which had maintained in rem jurisdiction
over the waters of Walker River since 1902 in accordance
with the Walker River Decree of 1936.

The district court rejected the state agency rulings, finding
that the proposed program would injure the farmers’ water
rights.

The court of appeals reversed, holding that the district
court erred in rejecting the state agencies’ rulings that the
program would not cause any cognizable injury to the farm-
er’s water rights. Both California and Nevada recognize
the “no-injury” rule that is part of the 1936 Decree, which
rule prevents appropriators from making certain water-right
changes that would harm other appropriators. Both state
agencies accordingly took that rule into account in finding
no cognizable injury. The district court erred in failing to
defy the state agencies’ findings, which were presumed
correct. Further, to the extent the district court made its own
findings of fact, those findings were clearly erroneous. As the
state agencies found, NFWF’s promise to limit its in-stream
use to the historic consumptive use portion of its claims pre-
cluded any possibility of injury to other rightsholders. The
district court erred further in interpreting an export restriction
in the Decree, barring the delivery of water “outside of” the
Walker River Basin, as prohibiting the delivery of water to
Walker Lake because the lake is “outside” the Basin. Even
if the term “basin” could be deemed ambiguous, the record
supported the conclusion of both state agencies that Walker
Lake is within, and not outside of, the Walker River Basin.
FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 4872

UNITED STATES OF AMERICA, 
Plaintiff,

WALKER RIVER PAIUTE TRIBE, 
Intervenor-Plaintiff,

NATIONAL FISH AND WILDLIFE 
FOUNDATION, Petitioner,

MINERAL COUNTY, Intervenor-Plaintiff,

and

NEVADA STATE ENGINEER, 
Respondent-Appellant,

v.

UNITED STATES BOARD OF WATER 
COMMISSIONERS, Participant-Appellee,

BACKTRACK, LLC; BALE COUNTER, 
INC.; GARY M. BERRINGTON; 
BERRINGTON CUSTOM HAY 
HAULING & TRANS., INC.; DAMIAN, 
LTD.; PETER A. FENILI; GDA 
DEGREE, INC.; GARY G. GARMS; 
GARY J. GARMS; KARI D. GARMS; 
TONI GARMS; GARMSLAND 
LIMITED, LLC; HIGH SIERRA 
GARLIC; JACKAROO, LLC;

SETTELMEYER-ROSSE RANCH 
MANAGEMENT, LLC; SIX-N-RANCH, 
INC.; STRAGGLER, LLC, Objectors- 
Appellees,

and

NEVADA DEPARTMENT OF 
WILDLIFE; CALIFORNIA STATE 
WATER RESOURCES CONTROL 
BOARD; MONO COUNTY, 
CALIFORNIA; LYON COUNTY, 
NEVADA, Respondents,

WALKER LAKE WORKING GROUP; 
WALKER RIVER IRRIGATION 
DISTRICT, Defendants.

No. 15-16316

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15-16317

Full Text Opinion

UNITED STATES OF AMERICA,
Plaintiff,

WALKER RIVER PAIUTE TRIBE,
Intervenor-Plaintiff,

NATIONAL FISH AND WILDLIFE FOUNDATION, Petitioner,

MINERAL COUNTY, Intervenor-Plaintiff,

and

NEVADA DEPARTMENT OF WILDLIFE, Respondent-Appellant,

v.

UNITED STATES BOARD OF WATER COMMISSIONERS, Participant-Appellee,

BACKTRACK, LLC; BALE COUNTER, INC.; GARY M. BERRINGTON;
BERRINGTON CUSTOM HAY HAULING & TRANS., INC.; DAMIAN, LTD.; PETER A. FENILI; GDA
DEGREE, INC.; GARY G. GARMS; GARY J. GARMS; KARI D. GARMS;
TONI GARMS; GARMSLAND LIMITED, LLC; HIGH SIERRA GARLIC;
JACKAROO, LLC;

SETTELMEYER-ROSSE RANCH MANAGEMENT, LLC; SIX-N-RANCH, INC.; STRAGGLER, LLC, Objectors-
Appellees,

and

NEVADA DEPARTMENT OF WILDLIFE; CALIFORNIA STATE WATER RESOURCES CONTROL BOARD;
MONO COUNTY, CALIFORNIA; LYON COUNTY, NEVADA, Respondents,

WALKER LAKE WORKING GROUP; WALKER RIVER IRRIGATION DISTRICT, Defendants.

No. 15-16317

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Full Text Opinion

UNITED STATES OF AMERICA,
Plaintiff,
WALKER RIVER PAIUTE TRIBE, Intervenor-Plaintiff,
MINERAL COUNTY, Intervenor-Plaintiff,
and
NATIONAL FISH AND WILDLIFE FOUNDATION, Petitioner-Appellant,
v.
UNITED STATES BOARD OF WATER COMMISSIONERS, Participant-Appellee,
BACKTRACK, LLC; BALE COUNTER, INC.; GARY M. BERRINGTON;
BERRINGTON CUSTOM HAY HAULING & TRANS., INC.; DAMIAN, LTD.; PETER A. FENILI; GDA
DEGREE, INC.; GARY G. GARMS; GARY J. GARMS; KARI D. GARMS;
TONI GARMS; GARMSLAND LIMITED, LLC; HIGH SIERRA
GARLIC; JACKAROO, LLC;
SETTELMEYER-ROSSE RANCH MANAGEMENT, LLC; SIX-N-RANCH, INC.; STRAGGLER, LLC, Objectors-
Appellees,
and
NEVADA STATE ENGINEER; NEVADA DEPARTMENT OF WILDLIFE;
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD;
MONO COUNTY, CALIFORNIA; LYON COUNTY, NEVADA, Respondents,
WALKER LAKE WORKING GROUP;
WALKER RIVER IRRIGATION DISTRICT, Defendants.

No. 15-16319
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:73-cv-00125-RCJ-WGC

UNITED STATES OF AMERICA,
Plaintiff,
WALKER RIVER PAIUTE TRIBE, Intervenor-Plaintiff,
NATIONAL FISH AND WILDLIFE FOUNDATION, Petitioner,
MINERAL COUNTY, Intervenor-Plaintiff,
and
WALKER RIVER IRRIGATION DISTRICT, Defendant-Appellant,
v.
UNITED STATES BOARD OF WATER COMMISSIONERS, Participant-Appellee,
BACKTRACK, LLC; BALE COUNTER, INC.; GARY M. BERRINGTON;
BERRINGTON CUSTOM HAY HAULING & TRANS., INC.; DAMIAN, LTD.; PETER A. FENILI; GDA
DEGREE, INC.; GARY G. GARMS; GARY J. GARMS; KARI D. GARMS;
TONI GARMS; GARMSLAND LIMITED, LLC; HIGH SIERRA
GARLIC; JACKAROO, LLC;
SETTELMEYER-ROSSE RANCH MANAGEMENT, LLC; SIX-N-RANCH, INC.; STRAGGLER, LLC, Objectors-
Appellees,
and
NEVADA STATE ENGINEER; NEVADA DEPARTMENT OF WILDLIFE;
MONO COUNTY, CALIFORNIA; LYON COUNTY, NEVADA, Respondents,
WALKER LAKE WORKING GROUP,
Defendant.

No. 15-16321
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:73-cv-00125-RCJ-WGC
INC.; GARY M. BERRINGTON; BERRINGTON CUSTOM HAY HAULING & TRANS., INC.; DAMIAN, LTD.; PETER A. FENILI; GDA DEGREE, INC.; GARY G. GARMS; GARY J. GARMS; KARI D. GARMS; TONI GARMS; GARMSLAND LIMITED, LLC; HIGH SIERRA GARLIC; JACKAROO, LLC; SETTELMEYER-ROSSE RANCH MANAGEMENT, LLC; SIX-N-RANCH, INC.; STRAGGLER, LLC, Objectors-Appellees,

and

NEVADA STATE ENGINEER; NEVADA DEPARTMENT OF WILDLIFE; MONO COUNTY, CALIFORNIA; LYON COUNTY, NEVADA, Respondents,

WALKER RIVER IRRIGATION DISTRICT, Defendant.

No. 15-16323
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:73-cv-00125-RCJ-WGC

UNITED STATES OF AMERICA,
Plaintiff,

NATIONAL FISH AND WILDLIFE FOUNDATION, Petitioner,

MINERAL COUNTY, Intervenor-Plaintiff,

and

WALKER RIVER PAIUTE TRIBE, Intervenor-Plaintiff-Appellant,

v.

UNITED STATES BOARD OF WATER COMMISSIONERS, Participant-Appellee,
BACKTRACK, LLC; BALE COUNTER, INC.; GARY M. BERRINGTON; BERRINGTON CUSTOM HAY HAULING & TRANS., INC.; DAMIAN, LTD.; PETER A. FENILI; GDA DEGREE, INC.; GARY G. GARMS; GARY J. GARMS; KARI D. GARMS; TONI GARMS; GARMSLAND LIMITED, LLC; HIGH SIERRA GARLIC; JACKAROO, LLC;

SETTELMEYER-ROSSE RANCH MANAGEMENT, LLC; SIX-N-RANCH, INC.; STRAGGLER, LLC, Objectors-Appellees,

and

NEVADA DEPARTMENT OF WILDLIFE; NEVADA STATE ENGINEER; CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; MONO COUNTY, CALIFORNIA; LYON COUNTY, NEVADA, Respondents,

WALKER LAKE WORKING GROUP; WALKER RIVER IRRIGATION DISTRICT; JOSEPH LANDOLT; BEVERLY LANDOLT, Defendants.

No. 15-16489
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:73-cv-00125-RCJ-WGC

Appeal from the United States District Court for the District of Nevada
Robert Clive Jones, District Judge, Presiding
Argued and Submitted August 30, 2017
Pasadena, California
Filed May 22, 2018
Opinion by Judge Bybee

COUNSEL

Don Springmeyer (argued) and Christopher Mixson, Wolf Rifkin Shapiro Schulman & Rabkin LLP, Las Vegas, Nevada; Jamie Morin, Mentor Law Group PLLC, Seattle, Washington; for Petitioner-Appellant National Fish and Wildlife Foundation.

Micheline Noel Nadeau Fairbank (argued) and Bryan L. Stockton, Senior Deputy Attorneys General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Carson City, Nevada; for Respondent-Appellant State of Nevada.

Gordon DePaoli (argued) and Dale E. Ferguson, Woodburn and Wedge, Reno, Nevada, for Defendant-Appellant Walker River Irrigation District.

Simeon Herskovits (argued), Advocates for Community & Environment, El Prado, New Mexico; Sean A. Rowe, Mineral County District Attorney, Hawthorne, Nevada; for Defendant-Appellant Walker Lake Working Group.


Jan Zabriskie, Deputy Attorney General; Annadel A. Almendras and Tracy L. Winsor, Supervising Deputy Attorneys General; Robert W. Byrne, Senior Assistant Attorney General; Office of the Attorney General, Sacramento, California; for Amicus Curiae California State Water Resources Control Board.

OPINION

BYBEE, Circuit Judge:

Water was plentiful when the first settlers arrived in northwestern Nevada ten thousand years ago. Massive Lake Lahontan spread from the Sierra Nevada to the Carson Sink, the Black Rock Desert, and as far as California and Oregon. “The world,” they said, “was all water!” Lake Lahontan has slowly vanished over the years, and now survives only in the form of a few desert lakes, including the subject of this case, Walker Lake, the terminus of the Walker River.

Walker Lake has suffered since the 1860s, when the River’s waters were first diverted for agriculture, and the Lake’s volume has plummeted precipitously in recent years. In response, federal, state, tribal, local, and private organizations and authorities have banded together to save the Lake. The federal program at issue in this case is a voluntary water rights leasing program managed by the National Fish and Wildlife Foundation (“NFWF”) to convey water from Walker River downstream to the Lake as part of the federal Walker Basin Restoration Program. Like duck stamps and emissions markets, NFWF’s program proposes to employ free market forces to restore a natural balance between the competing demands of agriculture and conservation.

The Nevada State Engineer and the California State Water Resources Control Board approved change applications for NFWF’s program over the objections of farmers (“the Farmers”) who claim injury to their water rights. The Farmers brought their complaints to the district court which, as the Decree court, has maintained in rem jurisdiction over the waters of Walker River since 1902 in accordance with the Walker River Decree of 1936. The Decree court rejected the state agency rulings, and found that the program, as proposed, would injure the Farmers’ water rights.

We examine two questions. First, did the Decree court properly reject the state agency rulings—that NFWF’s program would not cause any cognizable injury to the Farmer’s water rights—based on its de novo review of the Walker River Decree? Second, does the export restriction of the Walker River Decree prohibit delivering water to Walker Lake because it is “outside of” the Walker River Basin? We answer both questions in the negative, reverse the judgment of the Decree court, and remand for approval of the change applications.

I. FACTS AND PROCEDURAL HISTORY

A. The River and the Lake

The Walker River consists of two forks that begin in California and end in Nevada. The West Walker River springs from the Emigrant Wilderness of Stanislaus National Forest, and flows through Topaz Lake and north into Nevada’s Smith and Mason Valleys. The East Walker River springs from the Hoover Wilderness, passes through Bridgeport Reservoir and into Nevada east of the Wovoka Wilderness and Bald Mountain, before streaming into Mason Valley. The forks join by Yerington and flow north to Wabuska, before turning south-easterly through the land of the Walker River Paiute Tribe (“the Tribe”). See United States v. Walker River Irrigation Dist., 11 F. Supp 158, 161 (D. Nev. 1935). From there, the River flows through Weber Reservoir and Schurz, and into Walker Lake. See id. at 160–62.

Walker Lake is about 13 miles long by 5 miles wide, tucked against the east side of the Wassuk Range in Mineral County, Nevada. It is one of the last few puddle remnants of ancient Lake Lahontan. For centuries, the Lake served an important ecological role as fishery for the native Lahontan Cutthroat Trout—the state fish of Nevada—and as home and resting grounds for hundreds of species, including fish, insects, migratory birds, and wild horses. Human life at the Lake is quite ancient as well, dating back to the spearheads


2. NEVADA: A GUIDE TO THE SILVER STATE 218 (Nev. State Historical Soc’y, Inc. 1940) (“In the steadfast intensity of its color and the beauty of its setting Walker Lake is one of the most impressive lakes in the West. As deeply and opaquely blue as the Mediterranean, under bright sunlight it looks like a field of heavy liquid of unfathomable depth. . . The lake, impressive in its wild setting, has been the subject of numerous tall tales and people are occasionally met who swear that they have glimpsed the fabulous monster supposed to live in its blue depths.”)

in Mastodon bones and the petroglyphs carved by the Lake’s northern shores.4

By the early 1860s, miners looked to the mountains of the Walker River Basin, seeking the same silver bonanzas unearthed in the Comstock Lode near Lake Tahoe. Following expanded mining operations, innovators in irrigation technology arrived to make the desert bloom. They succeeded. The Smith and Mason Valleys soon became the picturesque and fertile agricultural region they are today. More than half of the valley farmland is dedicated to alfalfa, Nevada’s cash crop.

As agriculture boomed, water flows to Walker Lake diminished. See DRI Report, supra note 3, at 7. Between 1882 and 2007, the Lake’s volume plummeted from nine million to two million acre feet and its salinity rose from 2,500 mg/L total dissolved solids (TDS) to 16,000 mg/L TDS.5 Just a few years later in 2013, salinity exceeded 20,000 mg/L TDS.6 Lahontan cutthroat trout die in such a saline environment; they and many other Lake residents have vanished. With the death of its aquatic life, migratory birds have begun to abandon the Lake. Even the midges, side swimmers, and damselflies have disappeared from the Lake on a search for a more hospitable habitat.7 A scum now lines the Lake’s receding shores.

B. The Decree and River Administration

The action before us was filed in 1924, but traces its history even further back, to 1902, when two cattle kings realized that the Walker River Basin wasn’t big enough for the two of them. Miller & Lux, the sprawling ranching enterprise owned by Henry Miller, the “Cattle King of California,” filed a quiet title action in Nevada district court against 150 defendants, including arch-rival Rickey Land & Cattle Co. owned by Thomas Rickey, the “Cattle King of the West.” Miller & Lux sought a declaration of appropriative water rights to a flow of 943.29 cubic-feet per second (cfs) of the Walker River for use on its Nevada lands. Miller & Lux v. Rickey, 127 F. 573, 575–76 (C.C.D. Nev. 1902). Rickey in turn sued Miller in California state court, seeking his own appropriative rights to a flow of 2,079 cfs for use on his California lands. For years the parties disputed the Nevada district court’s jurisdiction over California water rights, pleading deficiencies, and application of the now-extinct local action doctrine.

The Nevada district court granted an antisuit injunction in Miller’s favor, and we affirmed. Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11, 22 (9th Cir. 1907). Because any given usufructory right to a flow has an inherent connection to all other such rights in the same stream, appropriative rights are conclusively established only by reference to all other competing rights. We held that this naturally requires exclusive jurisdiction over the entire res of the Walker River. Id. at 14–19. The Supreme Court agreed. Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910) (Holmes, J.). After a decade of factfinding and hearings, the district court issued a final decree settling the rights to the River. Pac. Livestock Co. v. Thomas Rickey, In Equity No. 731, Final Decree (D. Nev. 1919) (“the Rickey Decree”). Under the Rickey Decree, the district court retained ancillary jurisdiction to resolve future disputes over rights to Walker River.

The Walker River Irrigation District (“WRID”) was established in 1919. It built two reservoirs in 1919 and 1921: Topaz on the West Walker River, and Bridgeport on the East Walker River.8 In 1924 the United States filed an action—In Equity No. C-125—to quiet title to water rights to the Walker River as trustee for the Tribe. After another decade of service of process, the appointment of two Special Masters, factfinding, and hearings, the court issued a final Decree on April 14, 1936, amended in 1940 in ways not relevant here.

Article I of the Decree recognizes the implied reserved rights of the United States as trustee to the Tribe. See Winters v. United States, 207 U.S. 564, 576–78 (1908). Article II recognizes in their entirety the rights established in the 1919 Rickey Decree. Articles III–VII and IX provide for the flow and storage rights of new private parties. Article VIII recognizes WRID’s storage rights in the Topaz and Bridgeport reservoirs with respective priority dates of 1919 and 1921, and the attendant authority to distribute the water stored there. Article X permits rightsholders to change the manner, means, place or purpose of use, or the point of diversion in the manner provided by law “so far as they may do so without injury to the rights of other parties hereto, as the same are fixed hereby.” Articles XI–XII provide that no party may relegate a claim to water rights in the Walker River Basin, in the Nevada District Court or any other court, that was litigated in the original case as of April 14, 1936. Article XIII permits rightsholders to rotate their use of water, i.e., collectively or individually rotate water usage for improved efficiency, so long as no other rights are thereby injured. Article XIV establishes the district court’s continued jurisdiction “for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user,” but stipulates that “no water shall be sold or delivered outside of the basin of the Walker River . . . .” Article XV permits the Decree court to designate a water master, which it did in 1937 by creating the U.S. Board of Water Commissioners (“the Water


6. Erik Borgen, et al., Desert Research Institute, Ecosystem Economics, Desert Research Institute, A SIMULATION MODEL FOR EVALUATING WATER ACQUISITIONS TO REDUCE TOTAL DISSOLVED SOLIDS IN WALKER LAKE 6 (2014), http://goo.gl/CWgQRg (indicating TDS levels of 21,800 mg/L in Walker Lake in January 2014).


Commissioners”)—a six-member board overseen by a Water Master who apportions and distributes the River’s waters. Finally, Article XVI sets the irrigation season, which is today set at March 1 to October 31. By establishing its continued jurisdiction over the action and the river, the district court became the “Decree court.”

C. The Walker Basin Restoration Program

In 2002, Congress began to allocate funds for desert terminal lake conservation. In 2009, it established the Walker Basin Restoration Program “for the primary purpose of restoring and maintaining Walker Lake.” Pub. L. No. 111-85, §§ 207–08, 123 Stat. 2845, 2858–60 (2009); 16 U.S.C. § 3839bb-6. The Program is designed as a voluntary water rights acquisition, trading, and leasing scheme to be jointly administered by NFWF and WRID. Under the program, NFWF leases or purchases flow and storage rights from willing sellers, and uses those rights to convey water downstream to the Lake. NFWF negotiated the program details with the Tribe and WRID. WRID thereafter adopted a regulation permitting rightsholders along the River to participate in the program by leasing their claims for in-stream use.

NFWF purchased a number of claims with priority dates from 1874 to 1906, which cumulatively provide for 7.745 cfs. In an effort to avoid injury to other rightsholders, NFWF entered into stipulations with WRID, Lyon County, the Tribe, the U.S. Department of the Interior Bureau of Indian Affairs, and several private rightsholders. Per these stipulations, NFWF agreed that program water would be limited to the consumptive use portion of its decreed claims: 4.122 cfs out of 7.745 cfs.

The consumptive use portion of a water right reflects the amount of water that is actually used and consumed by agriculture. When an upstream user appropriates water for irrigation, some portion of the water—the non-consumptive use portion—is not consumed by the crop and returns as runoff to the river, and for another rightsholder’s use downstream. For example, if Farmer A calls for a constant flow of 10 cfs, some variable non-consumptive portion returns to the river, say 4 cfs; the difference (6 cfs) is Farmer A’s consumptive use portion. The 4 cfs that returns to the river is then available for Farmer B’s use. Effectively, Farmer A has the right to call for 10 cfs, but is consuming only 6 cfs. The consumptive and non-consumptive use portions of any given water right will vary depending on crop type, volume of irrigation water, and environmental factors. In this example, if Farmer A seeks to change the claim’s use by removing the entirety of the 10 cfs from the river, Farmer B’s right is injured through deprivation of the non-consumptive 4 cfs runoff. Determining whether a change to Farmer A’s use will injure Farmer B’s right thus requires determining how the change will affect the disposition of the non-consumptive portion of Farmer A’s water right.

Here, NFWF acquired the rights to call for 7.745 cfs. NFWF’s hydrologists calculated a historic consumptive use portion at a flow rate of 4.122 cfs. The difference, 3.623 cfs, is the river runoff that was historically available to downstream rightsholders. So as not to injure these downstream claims, NFWF stipulated that it would call for program water only in the flow amount of 4.122 cfs over the course of the irrigation season, that is, approximately 53 percent of its total appropriated rights to 7.745 cfs. NFWF further stipulated that the non-consumptive use portion of its claims—a flow of 3.623 cfs—would be administered by the Water Commissioners “in [their] discretion . . . to avoid conflict with and injury to existing water rights . . . and to mitigate hydrologic system losses.”

D. State Agency Rulings

Under Article X of the Decree, as well as the 1953 Rules and Regulations and the 1996 Administrative Rules and Regulations, both of which were approved by the Decree court, change applications—meaning any proposed changes in purpose or place of use—must first be presented to the state agencies for their approval. Applicants with Nevada water rights submit applications with the Nevada State Engineer, and applicants with California water rights submit applications to the California State Water Resources Control Board (“the California Control Board”).

1. The Nevada Ruling

In 2011, NFWF applied with the Nevada State Engineer for approval of two changes to its claims to a cumulative 7.745 cfs. First, NFWF requested changing the place of use to “within the Walker River from the Weir Diversion Structure through the USGS Wabuska Gauge, then through Weber Reservoir into and including Walker Lake.” The previous rightsholders had diverted the flow from the Weir Diversion Structure into the West Hyland Ditch, downstream from Yerington. Second, NFWF requested changing the purpose of use from irrigation to wildlife purposes. See NEV. REV. STAT. § 533.023. Effectively, NFWF sought approval not to remove the water obtained through exercise of its water rights, so that water acquired from prior rightsholders may flow, as it naturally would, into Walker Lake. Appropriative rights in Nevada may be applied for a beneficial use in-stream, regardless of whether the water flows to areas not

9. These claims are identified as Decree Claims No. 23, 23-A, 35, 44, 67, and 89.

10. See Administrative Rules & Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and its Tributaries and Regarding Compliance with California Fish and Game Code Section 5937 and Other Provisions of California Law (as amended through June 3, 1996) (“1996 Administrative Rules & Regulations”).

11. The California Control Board only has authority over water rights established after 1914, when the Board was created. See Nat. Res. Def. Council v. Kempthorne, 621 F. Supp. 2d 954, 963 (E.D. Cal. 2009). In 1990, the Decree court appointed the Board as a Special Master, thus authorizing the Board to make findings and recommendations as to pre-1914 claims. See Fed. R. Civ. P. 53(b).
owned by the rightsholder. NEV. REV. STAT. § 533.040(2); State Bd. of Agric. v. Morros, 104 Nev. 706, 766 (1988).

The Water Commissioners and a group of private parties (“the Farmers”) objected to both change applications. The objecting Farmers hold so-called New Land Stored Water Rights. That is, they operate farms on acres lacking associated decreed claims, and instead have contractual arrangements with WRID. They pay assessments to WRID, which provides them with surplus reservoir water from Topaz and Bridgeport. In other words, these are nondecreed rights to reservoir water, not appropriative flow or storage rights.

The Water Commissioners and Farmers pressed two arguments. First, they argued that the changes would impermissibly injure their New Land Stored Water Rights. NFWF expects to call continuously for water during the irrigation season when in priority, whereas the farmers who previously owned the claims would on certain days occasionally not call for water, such as on harvesting days, which permitted the flow claims to be redirected by the Water Master for reservoir storage. As such, the Farmers argued that a continuous call would impermissibly injure their rights, because it would ultimately decrease the amount of reservoir water later available to meet their irrigation needs. Second, they argued that Walker Lake lies outside of the Walker River Basin. Thus, directing water to the Lake would violate Article XIV of the Decree: “[N]o water shall be sold or delivered outside of the basin of the Walker River.”

The Nevada State Engineer, following public hearings, rejected both arguments and granted NFWF’s application. With respect to the question of injury, the Nevada State Engineer found that under NFWF’s consumptive use stipulation, no party would suffer injury. The State Engineer considered NFWF in the position of “an irrigator who has a decreed right to call for water on March 1st for the duration of the irrigation season,” and “as the holder of claims senior in priority to new lands storage rights, [NFWF] has the right to seek a change in the manner and place of use.” The State Engineer rejected any possibility that injury could occur under NFWF’s stipulations, because it had dedicated the non-consumptive portion of its decreed rights to the Water Commissioners to remedy any injury or hydrological efficiency loss caused by a continuous call of the consumptive use portion of its decreed appropriative rights. The State Engineer’s ruling adopted and incorporated the consumptive use stipulations in their entirety. Finally, the Engineer concluded that “Walker Lake is included in the Walker River basin.”

### 2. The California Ruling

Likewise, WRID applied to the California Control Board to temporarily change the place and purpose of use of its decreed storage rights for Topaz and Bridgeport. This change would allow WRID to distribute 25,000 acre-feet of stored water per season to Walker Lake to meet the in-stream water calls made by rightsholders within WRID who participate in the program. The temporary changes were intended to give WRID the time and flexibility to run the program for a trial season while preparing its application for permanent changes.

The California Control Board reviewed WRID’s temporary one-year change application under California Water Code § 1727. As relevant here, a party applying for a temporary change must show that:

> [t]he proposed temporary change would not injure any legal user of the water, during any potential hydrologic condition that the board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows.

CAL. WATER CODE § 1727(b). See also CAL. WATER CODE §1707(b)(2) (changes may not “unreasonably affect any legal user of water”).

The California Control Board overruled the objections of the Water Commissioners and the Farmers. It found that WRID had carried its burden because “petitioners do not request any changes in the diversion of water to storage; instead they only request changes in the place and purpose of use upon release from storage.” By contrast, the Water Commissioners and Farmers had failed to demonstrate “any right, under contract or otherwise, to the stored water that will be injured by the proposed temporary change.” As the California Control Board explained, under California law, changes to the purpose or place for which WRID releases reservoir water under its control cannot give rise to an injury, because WRID—not the Farmers—holds the statutory and decreed right to distribute this water to legal appropriative users. See Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 60–61 (Cal. 1939) (noting that a downstream user has no right to a continued release of artificial flow). Accordingly, the California Control Board concluded:

> It is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water user claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right. . . . None of the commenters have demonstrated any right, under contract or otherwise, to the stored water that will be injured by the proposed temporary change.

Like the Nevada State Engineer, the California Control Board rejected the argument that Walker Lake is not part of the Walker River Basin, noting that the Lake sits within the same hydrological drainage basin as the River.

On motion for reconsideration, the California Control Board affirmed its decision with an amendment noting that “a stored water transfer . . . is not limited to the consumptive use portion of the water right,” because “a downstream wa-
ter user who does not have a right to stored water cannot be injured by changes in releases of the stored water.” See CAL. WATER CODE § 1725 (permitting transfers of amounts that have been “consumptively used or stored”).

E. Decree Court Ruling

The Decree court rejected the Nevada State Engineer’s and California Control Board’s rulings, refused to grant the change applications, and remanded to the state agencies. First, the court found that the stipulated program water quantity would injure New Land Stored Water Rights, because NFWF would not mimic the historical consumptive use watering patterns of prior users who had occasionally suspended calls for water on harvesting days. The court reasoned that even if NFWF was limited to the historical use amount at any given time, it is likely to call for that amount on every day during the irrigation season, whereas its predecessors-in-interest did not in practice call for water during harvests and certain other periods, so the overall effect of the change will likely be to reduce the amount of water available for storage.

The Decree court found that, although NFWF had properly limited program water to the consumptive use portion of its flow on a per second basis, NFWF would continuously call for its claims to be serviced, and thus would consume more water per season as compared to its predecessors-in-interest. The court explained:

A limit on the rate of consumption per second during days of use does not suffice to satisfy the no injury rule if the total amount of consumption per year is nevertheless increased. Where NFWF will in practice consume water at the same rate as its predecessors-in-interest but on more days throughout the year, its greater number of days of consumption per year could result in increased consumption per year (and therefore less available storage water available for junior users). . . . [T]he no injury rule prohibits NFWF from consuming more water per second or per year than its predecessors-in-interest.

The court remanded to the Nevada State Engineer to determine the average number of days per year that each of NFWF’s predecessors-in-interest historically called on their respective claims and to limit approval of the change applications accordingly.

As to the California Control Board’s ruling concerning changes to WRID’s storage rights, the Decree court found that changes to such rights must also be limited to the consumptive use portion of the rights. In this regard, the court held that the Farmers’ rights are injured where a change application effectively reduces the amount of stored water available to the users of those stored water rights. The California Control Board had determined that because the amount of storage water in the change would be limited to water that would have otherwise been consumed or stored by WRID, no injury would occur. The Decree court rejected this finding, and remanded for the same historical consumptive use calculations it had required with regard to the Nevada State Engineer’s ruling. Specifically, the Decree court set out a four-part procedure requiring the California Control Board to: (1) identify each separate “piece” of program water temporarily sold to WRID; (2) multiply those pieces by the respective portions of those pieces historically attributable to consumptive use; (3) calculate the sum of the consumptive use pieces; and (4) limit the change applications accordingly.

The Decree court also rejected both the Nevada and California change applications on the grounds that in-stream delivery of program water to Walker Lake would violate the Decree’s export restriction, which prohibits delivering water “outside of the basin of the Walker River.” The court found that the “basin” comprises only agricultural lands and waters named in the Decree. The court concluded, however, that despite this, NFWF could still effectively send water to the Lake by simply sending it to the most terminal point of the River.

These appeals followed. Appellants are NFWF, WRID, the Nevada State Engineer, the Nevada Department of Wildlife, Mineral County, and the Walker Lake Working Group. Appellees are the Water Commissioners and the Farmers. The United States and the California Control Board appear as amici.

II. JURISDICTION, CHOICE OF LAW, AND STANDARD OF REVIEW

A. Jurisdiction

The Water Commissioners argue that, because the Decree court merely remanded the change applications, did not fully adjudicate the issues, and did not intend that its order be its final act in the matter, we lack jurisdiction under 28 U.S.C. § 1291. Remand orders do not generally constitute appealable “final decisions” under 28 U.S.C. § 1291. Alsea Valley All. v. Dep’t of Commerce, 358 F.3d 1181, 1184 (9th Cir. 2004); see also Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994).

But a remand order may be considered final where “(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.” Collord v. U.S. Dep’t of the Interior, 154 F.3d 933, 935 (9th Cir. 1998). These are not “strict prerequisites,” but merely “considerations.” Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1175 (9th Cir. 2011).

As to the first Collord consideration, the district court resolved both questions at issue here: whether an injury can accrue on these facts under the Walker River Decree, and
whether Walker Lake is “outside of the basin.” As to the second Collord consideration, the Nevada State Engineer and the California Control Board would be compelled to apply the district court’s injury standard, which could as a practical matter upset property rights elsewhere in the Walker River Basin. The State Engineer explains that such a remand would involve “a wasted proceeding [and] an unnecessary burden to the State of Nevada’s resources, and force the [ ] Engineer to apply the district court’s erroneous interpretation of Nevada water law.” The State Engineer’s concerns are credible: the remand order calls for a type of historical calculation that would possibly require developing new methodologies for measuring consumptive use. The third Collord consideration is met where the agency is a party to the appeal. Alsea, 358 F.3d at 1184 (9th Cir. 2004). Otherwise, agencies “face the unique prospect of being deprived of review altogether.” Id.

The third consideration is met here, as the Nevada State Engineer appears as a party in these proceedings as Respondent-Appellant. Although the California Control Board is not a party to this appeal, it appears here as an amicus and has fully briefed the issues.

Beyond the Collord test, remand orders are sufficiently “final” under § 1291, where the relief sought by appellants cannot possibly be achieved through the district court’s direction. Sierra Forest, 646 F.3d at 1174. Such “meaningless remand[s]” are anathema to judicial economy. Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala, 80 F.3d 379, 384 (9th Cir. 1996). In the absence of appellate review, the Nevada State Engineer and California Control Board may be unable to grant any change applications that request delivering water to Walker Lake, which the district court held to be outside of the basin.

The remand order is sufficiently final for our review under 28 U.S.C. § 1291.

B. Choice of Law

The Water Commissioners ask us to apply federal water law. But there is no federal water law. Fundamental principles of federalism vest control of water rights in the states. See California v. United States, 438 U.S. 645, 677–79 (1978); United States v. Alpine Land & Reservoir Co., 503 F.Supp 877, 885 (D. Nev. 1980). Decreed rights are administered under applicable state law. See United States v. Walker Riv er Irrigation Dist., 11 F.Supp. 158, 165–68 (D. Nev. 1935) (“The rights of the government, in its use of the waters of the Walker river and its tributaries for purposes of irrigation, like the rights of all other diverters in the Walker River basin, are to be adjudged, measured, and administered in accordance with the laws of appropriation as established by the state of Nevada.”); see also Montana v. Wyoming, 563 U.S. 386, 377 n.5, 378 (2011); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163–64 n.2 (1935); United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983) (“[S]tate law will control the distribution of water rights to the extent that there is no preempting federal directive.”). Under the Decree, change applications are to be treated “in the manner provided by law.” The Decree presupposes state law in its entirety as to both substance and procedure. See United States v. Orr Water Ditch Co., 914 F.2d 1302, 1307–08 (9th Cir. 1990).

C. Standard of Review

1. Review of the Decree Court

We review the Decree court’s legal conclusions and interpretations of the Decree de novo. United States v. Orr Water Ditch Co., 256 F.3d 935, 945 (9th Cir. 2001); Orr Water Ditch, 914 F.2d at 1307. Our review of mixed questions of law and fact depends on the nature of the issue. “A mixed question asks whether ‘the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.’” U.S. Bank Nat’l Ass’n v. Village at LakeRidge, LLC, 583 U.S. __ (2018) (slip op., at 7) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289, n. 19 (1982)). “When an ‘issue falls somewhere between a pristine legal standard and a simple historical fact,’ the standard of review often reflects which ‘judicial actor is better positioned’ to make the decision.” Id., slip op. at 8 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)). In reviewing change application to water rights, the Decree court’s activities are primarily legal—the evidence and facts underlying the change applications are elicited and marshaled in proceedings before the respective state agencies. The Decree court then reviews those agencies’ rulings with at least some deference to questions of fact and law, as discussed below. We will review de novo the Decree court’s review of the state agencies. Where the Decree court has entered its own findings of fact, we review those for clear error.

2. Deference to State Agencies

The parties dispute whether and to what degree the Decree court was required to defer to the state agency findings and rulings in their adjudication of change applications. As we have previously explained, the Decree court applies state water law. When it does so, the Decree court must afford the same level of deference state courts would afford the state agencies. See Orr Water Ditch, 914 F.2d at 1307–08.

Under Nevada law, the “decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the decision.” NEV. REV. STAT. § 533.450(10); see State Eng’r v. Morris, 819 P.2d 203, 205 (Nev. 1991) (“[D] ecisions of the State Engineer are presumed to be correct upon judicial review.”). With respect to findings of fact, the Nevada Supreme Court has stated that “neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer’s decision.” Id. (citation omitted). As to matters of law, the State Engineer’s interpretation
of legal questions and Nevada statutes is “persuasive,” but not controlling. Orr Water Ditch, 256 F.3d at 945; State v. Morros, 766 P.2d 263, 266 (Nev. 1988).

California courts also exercise deferential review and must consider:

(1) whether the [Board] has proceeded without, or in excess of jurisdiction; (2) whether there was a fair trial; and (3) whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [Board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.


The Farmers and Water Commissioners argue that because the Decree court appointed the California Control Board as Special Master under FED. R. CIV. P. 53(b) in 1990, the Decree court may review all aspects of the Board’s rulings de novo and that the Decree court’s 1996 Administrative Rules and Regulations so provide. See FED. R. CIV. P. 53(f)(3)–(4); 1996 Administrative Rules & Regulations § 7.9; see also id. § 7.10 (“In reviewing any report of the Water Resources Control Board, the court . . . shall not be limited by the ‘clearly erroneous’ standard.”). As we have previously explained, supra note 11, the Decree court appointed the California Control Board as a Special Master over pre-1914 appropriative rights, over which the Board lacks statutory authority. WRID’s storage rights did not arise until the construction of the reservoirs in 1919 and 1921, and thus the California Control Board had authority to rule on WRID’s change applications. Here, the Board issued its Order and Modified Order in its role as state agency and submitted a report to the Decree court in its role as Special Master. Insofar as the California Control Board exercised lawful agency authority under California law in adjudicating change applications to WRID’s post-1914 water rights, the Decree court should have afforded the Board the same degree of deference that California courts do.12

III. ANALYSIS

Appellants claim two errors. First, they argue that NFWF’s promise to limit its in-stream use to the historic consumptive use portion of its claims precludes any possibility of injury to other rightsholders. Second, they argue that the court erred by interpreting the Decree’s export restriction as a prohibition on delivering water to the Lake. We address each in turn.

A. Injury

Article X of the Decree states:

Any of the said parties shall be entitled to change the manner, means, place or purpose of use or the point of diversion of the said waters or any thereof in the manner provided by law, so far as they may do so without injury to the rights of other parties hereto, as the same are fixed hereby.

This “no-injury” provision in the Decree recognizes the duty of each appropriator to manage its water use so as to avoid injury to other appropriators, including junior appropriators. The Nevada State Engineer and the California Control Board both concluded that because NFWF agreed to limit program use to the consumptive use portion of its claims precludes any possibility of injury to other rightsholders. The Nevada State Engineer and the California Control Board in injury to other rightsholders, including junior appropriators. The Nevada State Engineer and the California Control Board both concluded that because NFWF agreed to limit program water to the consumptive use portion of the claims, there is no material change in its usage and no other rightsholders will be injured. The Decree court rejected this conclusion. We conclude that the Decree court failed to defer to the findings and conclusions of the state agencies. To the extent the Decree court entered its own findings, we conclude that those findings are clear error.

1. Principles

Almost all states employ one of three water rights regimes: a regime of riparian rights common in the East, a regime of rights acquired by prior appropriation common in the West, or a hybrid system such as in California. While riparian rights inhere in the land appurtenant to the waterway, vary in quantity based on flow, remain vested even if unused, and are subject to reasonable use, appropriative rights are untethered from land ownership, are acquired and maintained by active beneficial diversion of water, provide for a fixed flow of water, and are tiered as senior and junior rights based on chronological claim priority. As the Supreme Court explained,

The right to water by prior appropriation . . . is limited in every case, in quantity and quality, by the uses for which the appropriation is made. . . . The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes.

12. On remand, the Decree court may wish to consider whether the 1996 Administrative Rules and Regulations need to be clarified to conform to this opinion and to Nevada and California law.
What diminution of quantity . . . will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied.


In Nevada, as elsewhere, a water right is the “right to divert water . . . for beneficial use from a natural spring or stream.” *Application of Filippini*, 202 P.2d 535, 537 ( Nev. 1949). Perfecting and maintaining appropriative water rights require an act of diversion—or, as here, an act of so-called non-diversion—and beneficial use of the water. *See, e.g., Prosole v. Steamboat Canal Co.*, 140 P. 720, 722 ( Nev. 1914) (superseded by statute on other grounds); *Strait v. Brown*, 16 Nev. 317, 324 (1881); *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866); see also *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (“The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.”). As with senior and subordinated debt, a senior appropriative right, i.e., the right with an earlier priority date, is superior to all junior rights. When there is insufficient water to fill all claims, the senior right is satisfied before others. *David H. Getches*, WATER LAW 77–80 (4th ed. 2009).

The no-injury rule of Article X of the Decree is a codification of a basic principle of prior appropriation:

*[T]he no-injury rule prevents appropriators from making certain water-right changes that would harm other appropriators . . . . Because each new appropriator is entitled to the stream as it exists when he finds it, the general rule is that “if a change in these conditions is made by [a senior] appropriator, which interferes with the flow of the water to the material injury of [the junior appropriator’s] rights, he may justly complain.”

*Montana*, 563 U.S. at 378 (alterations in original) (quoting 2 C. Kinney, LAW OF IRRIGATION AND WATER RIGHTS § 803, at 1404 (2d ed. 1912)); see also *Wyoming v. Colorado*, 298 U.S. 573, 584 (1936) (“[T]he use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators.”).

Alleged injuries are analyzed on a case-by-case basis with a primary focus on the particular equities at issue. *Atchison*, 87 U.S. at 514–15.

Nevada has codified its no-injury rule. NEV. REV. STAT. § 533.370 (requiring an injury analysis in change application adjudications to determine whether the proposed use or change conflicts with [other] existing water rights and prohibiting changes that will “adversely affect the cost of water for other holders of water rights in the district”). In determining whether a proposed change application causes injury, [the State Engineer may consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change in the place of diversion, manner of use or place of use [causes injury]. The provisions of this section [m]ust not be applied by the State Engineer in a manner that is inconsistent with any applicable federal or state decree concerning consumptive use.

NEV. REV. STAT. § 533.3703(1). Cf. *Pyramid Lake Paiute Tribe of Indians v. Nev. Dept’ of Wildlife*, 724 F.3d 1181, 1185 n.4 (9th Cir. 2013) (“[C]hange in manner of use applications from use for irrigation to any other use . . . shall be allowed only for the net consumptive use of the water as determined by this Decree.”) (quoting Administrative Provision VII of Alpine Decree).13

California law similarly recognizes the no-injury rule and takes into account the effect of consumptive use. The California Control Board “shall approve a temporary change if it determines that a preponderance of the evidence shows” that the “proposed temporary change would not injure any legal user of the water” or “unreasonably affect fish, wildlife, or other in-stream beneficial uses.” CAL. WATER CODE § 1727(b); see also CAL. WATER CODE § 1726(e) (“[T]he proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change.”). “[I]n determining whether the petitioned changes to the licenses of the irrigation districts would cause ‘substantial injury’ to or would ‘unreasonably affect’ riparian and appropriative users in the [water at issue],” the California Control Board should focus “on the effect of those changes on the rights of those users.” *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d at 243. “[A] person who claims injury from a change in the terms of a permit to appropriate water must show the change will interfere with his or her right to use the water, whatever the source of that right may be.” *Id.* at 293. California law protects the continuation of a river’s natural flow against a change in use by another appropriator, but does not assure the release of stored water, as such water constitutes an artificial supply and flow.

13. The Orr Ditch decree court’s definition of injury is also consistent with these principles:

An “injury” to a Decreed water right is not shown merely by establishing a shortage of water because an owner of a water right can be shorted water without violating the Orr Ditch Decree. Similarly, alterations of historical flows do not, of themselves, establish injury. Rather, an injury occurs when the owner receives less water than the amount to which the owner is legally entitled, which determination requires consideration not only of the amount of the water duty, but also its priority, and certain other conditions affecting the river system. *Orr Water Ditch*, 2014 WL 4832052, at *7 (D. Nev. Sept. 30, 2014); see also *United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 801 (9th Cir. 2017) (“Possible injury should be analyzed by comparing the impact of a proposed change against a baseline of existing conditions.”) (citation and quotation omitted).
As we have previously explained, when water is withdrawn from a river system for irrigation, some of that water will return to the system through drainage. The consumptive use portion of a water right reflects the amount of water that a farmer’s crops actually consume. The rest of the water, the non-consumptive use portion, drains as runoff to the river or otherwise remains in the basin’s hydroecosystem for subsequent use by downstream users. See Alpine Land & Reservoir Co., 697 F.2d at 857 n.4. Consumptive use is not a measure of how farmers call for water, but rather the “quantity of water actually consumed by crop growth.” Pyramid Lake Paiute Tribe of Indians, 724 F.3d at 1185. When rightsholders change the purpose or place of use of a water right, they must consider how that change will affect fellow appropriators. Suddenly drawing more water from the river for a new and unannounced purpose can diminish one’s downstream neighbor’s rights to the runoff. The nonconsumptive portion of an appropriation must be considered, because a junior rightsholder “is entitled to the stream as it exists when he finds it.” Montana, 563 U.S. at 378 (quoting 2 KINNEY § 803, at 1404); see GETCHES, WATER LAW at 178.

2. Application

When NFWF acquired decreed appropriative rights with priorities from 1874 to 1906, it acquired the right to a flow of 7,745 cfs. But NFWF’s prior appropriators did not consume all 7,745 cfs. Their consumptive use was only 4,122 cfs, the remaining 3,623 cfs finding its way back to the Walker River as runoff. NFWF agreed, consistent with the historic use of the prior rightsholders, to divide its right into a consumptive use portion of 4,122 cfs to be used as program water, and the remaining non-consumptive use portion of 3,623 cfs to be used to mitigate hydrological system loss.

The Nevada State Engineer and the California Control Board approved NFWF’s and WRID’s proposed change applications, but the Decree court refused to approve the changes. According to the court, NFWF’s changes would “injure other users with decreed rights.” The court acknowledged that NFWF would take only “the former consumptive use amount,” but found that NFWF was “likely to call for that amount on every day during the irrigation season, whereas its predecessors-in-interest did not in practice call for water during harvests and certain other periods.” Specifically, the court was referring to the historical harvest days identified in the evidence submitted to the Nevada State Engineer, indicating a total of four alfalfa harvest days in the Mason Valley beginning around June 3 each year. In the Decree court’s view, because “the no injury rule prohibits NFWF from consuming more water per second or per year than its predecessors-in-interest did,” “the overall effect of the change will likely be to reduce the amount of water available for storage.” The Decree court was concerned that, although NFWF’s flow rate was consistent with historic usage, the total amount of water to be taken by NFWF would exceed the water historically called for by its predecessors-in-interest:

The Court finds that under the no injury rule, the changes must be limited not only to the prior consumptive use per second, but also to the prior total amount of consumptive use per year. A limit on the rate of consumption per second during days of use does not suffice to satisfy the no injury rule if the total amount of consumption per year is nevertheless increased. Where NFWF will in practice consume water at the same rate as its predecessors-in-interest but on more days throughout the years, its greater number of days of consumption per year results in increased consumption per year (and therefore less available storage water available for junior users).

Water can be calculated as a flow or as a volume. Appropriative flow rights under the Decree are calculated in cubic-feet per second (cfs), while annual consumptive use is calculated as a volume in acre-feet per acre per irrigation season (afa). See BECK & KELLEY, 1-1 WATERS AND WATER RIGHTS § 1.02 (2017). The Net Irrigation Water Requirement (NIWR) of alfalfa in the Mason Valley is 3.1 afa. See J.L. Huntington & R.G. Allen, Nevada Department of Conservation & Natural Resources, EVAPOTRANSPIRATION AND NET IRRIGATION WATER REQUIREMENTS FOR NEVADA 215 (2010) (“NIWR Report”). The NIWR is synonymous with consumptive use per year. This figure means that over the course of an irrigation season, one acre of alfalfa in the Mason Valley will consume 3.1 acre-feet of irrigation water—anything beyond that is runoff. NFWF’s stipulations contained three provisions pertinent here. First, NFWF stipulated to an annual consumptive use volume of 3.1 acre-feet of water per acre (afa), which is the total consumptive requirement for an acre of alfalfa, the crop grown by NFWF’s predecessors-in-interest. Second, out of NFWF’s total rights to 7,745 cfs, only 4,122 cfs—the consumptive use portion of the flow—would be used as program water. Third, the remaining portion of its rights—the nonconsumptive use portion of 3,623 cfs—would be at the Water Commissioners’ disposal to mitigate any possible injury to

14. The U.S. Geological Survey (USGS) defines consumptive use as “the part of water withdrawn that is evaporated, transpired, incorporated into products or crops, consumed by humans or livestock, or otherwise not available for immediate use.” USGS, WATER USE TERMINOLOGY, https://water.usgs.gov/watuse/wuglossary.html.

15. The NIWR of 3.1 afa was derived from mean evapotranspiration values from 1965–2007. Id. at 68, 215.
other water rights, including the storage rights belonging to WRID.

The Nevada State Engineer received testimony on the consumptive use as measured per second (cfs) and annually (afa). And, specifically, that testimony addressed whether NFWF’s proposed use accounted for the harvest days of its predecessors-in-interest. The Nevada State Engineer credited the testimony of hydrologist Dr. Greg Pohll, who stated that the 3.1 afa in the NIWR included both “variable start dates for irrigation in Mason and Smith Valleys, and individual simulated cuttings as part of the calculations.” Similarly, the Engineer heard from David Yards, Director of the Walker Basin Restoration Program, who “reiterated Dr. Pohll’s testimony that the consumption figures of 3.10 acre-feet per acre accounted for variable weather situations, [evapotranspiration], and regular cuttings.”16 The Nevada State Engineer found that “Dr. Pohll’s interpretation of the methodology of the NIWR is correct, and that the NIWR consumptive use figure of 3.10 acre-feet per acre in the Walker River Basin for alfalfa takes into account a variable irrigation start date and multiple simulated cuttings during the irrigation season.”

The Nevada State Engineer found that the Commissioners’ and the Farmers’ arguments “concerning impacts to new land storage rights are addressed within the calculation of the 3.10 acre-feet per acre consumptive use amount.”

The Decree court deferred to the findings of the Nevada Engineer, whose findings are presumed correct. Nev. Rev. Stat. § 533.450(9)–(10); Alpine Land & Reservoir Co., 919 F. Supp. at 1474; Morris, 819 P.2d at 205. Once we consider the record before the Nevada State Engineer, the Decree court’s concerns are unfounded, and the Nevada State Engineer properly found that “a transfer [to NFWF] limited to the consumption portion . . . would avoid conflict and injury to other existing water rights.” Because these findings are supported by substantial evidence and the State Engineer applied the correct legal rule, the Engineer’s conclusions are entitled to deference. It was error for the Decree court to reject those conclusions.

To the extent the Decree court made its own findings of fact, those findings are clearly erroneous. The Decree court found that there was a difference between NFWF’s proposed per second consumption rate (cfs) and its annual consumptive volume (afa). The Nevada State Engineer concluded there was not, and the math bears this out. NFWF’s stipulated flow of 4.122 cfs, if called for continuously over the irrigation season, does not exceed the annual consumptive use volume of 3.1 afa. They are identical. We convert the stipulated flow and consumptive use volume into total acre-feet of water per irrigation season, and compare. To determine the total volume of water delivered to Walker Lake if the stipulated cfs is continuously called for, we multiply the stipulated flow (4.122 cfs) by seconds in a day (86,400 s), and then by days in the irrigation season (245 d),17 which produces 87,254,496 cubic-feet or 2,003.091 acre-feet.18 To determine the total volume of irrigated water previously consumed per irrigation season in acre-feet, we multiply the total acreage of farmland whose decreed claims NFWF acquired (646.160 acres), by the consumptive use by each acre (3.1 afa). That produces a volume of 2,003.096 acre-feet of water. If NFWF were to call for a continuous flow of its maximum diversion rate of 4.122 cfs during the entire irrigation season, the total amount of program water will be 0.005 acre-feet less than that consumptively used by its predecessors-in-interest, which appears to be a rounding error. Whether we calculate the program water as a rate (cfs) or as a volume (afa), the quantities are the same. The Decree court erred in when it concluded that the Nevada State Engineer had not accounted for the harvest days.

The Decree court’s rejection of the California Control Board’s ruling was also error. WRID holds combined licenses to store between 71,310 and 76,060 acre-feet of water annually. It requested permission to use up to 25,000 acre-feet of water stored at the Bridgeport and Topaz Reservoirs for in-stream use at Walker Lake. The California Control Board approved the temporary permit, finding that the amount of storage water in the transfer would be limited to water that would otherwise be consumed or stored by WRID, and thus no injury would occur. The Board found that the Farmers objecting to WRID’s proposed change did not have “any right under contract or otherwise, to the stored water,” and thus could not be injured by the proposed change in use. According to the Board, stored water is considered an artificial flow, and a downstream user has no right to the discharge of stored water.

The Decree court rejected the Board’s conclusions and substituted its own conclusion that WRID’s temporary permit to release stored water would injure “junior storage right[s]” because WRID was “reduc[ing] stored water that would otherwise be available to a user with storage rights.” The court concluded that WRID’s proposal thus ran afoul of the “no injury rule.” The court’s reliance on injury to “junior storage right holders” is misplaced, both as a matter of the Decree and California law. The Decree’s “no injury” rule refers to

---

16. The NIWR itself accounts for variable irrigation start dates:

Defining the length of the growing season, time to effective full cover, and harvest dates are all important aspects of estimating [actual evapotranspiration] and the NIWR. . . .

Calibration of [Cumulative Growing Degree Days], [the thirty-day moving average of mean daily air temperature], percent time from effective full cover to harvest days, and days after effective full cover to harvest, for simulating green-up, planting, and harvest dates outlined in Table 4, which lists the results and specific information used in the calibration. NIWR Report at 42–44.

17. The irrigation season is 245 days from March 1 to October 31. See Decree Art. XVI, amended (1940); Walker River Irrigation District, RULES AND REGULATIONS GOVERNING THE DISTRIBUTION AND USE OF WATER § 9.1, http://www.wrid.us/WRID/rulesandregs.

18. One acre-foot equals 43,560 cubic-feet. 87,254,496 divided by 43,560 equals 2,003.091.
“injury to the rights of other parties hereto, as the same are fixed thereby.” Art. X (emphasis added). The no injury rule does not extend to persons who do not have decreed rights. Under Section VIII of the Decree, WRID is declared to be “the owner of the flow and use of the flood waters of East Walker River and its tributaries for storage in Bridgeport Reservoir”; it likewise is the owner of the flood waters of the West Walker River for storage in the Topaz Reservoir. Any permits issued to WRID by the California Control Board are “subject to vested prior rights” and stored water must be distributed “to the lands in the District entitled thereto, in accordance with their respective rights.” Accordingly, the Decree gives WRID distribution rights over the stored water, which it must exercise consistent with the Decree and Nevada law. The Decree recognizes appropriative and storage rights in numerous private parties throughout the Walker River Basin, but it gives WRID alone the right to store and distribute the waters of Topaz and Bridgeport.

California’s no injury rule is codified in various sections of California’s Water Code, each of which prohibits injury to a “legal user of water.” CAL. WATER CODE §§ 1701(b) (2), 1725, 1727(b)(1) (emphasis added). But under California law, “appropriators have no right to water stored by the irrigation districts.” State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 244. “When [ ] stored water is released to customers, it is not part of the river’s natural flow and does not count towards the appropriators current allocation of river water.” Id.; see also Stevens, 9 P.2d at 61 (“The producer of an artificial flow is for the most part under no obligation to lower claimants to continue to maintain it. . . . [L]ower users will not have acquired a right against him, either by appropriation or prescription, to continued augmentation of the natural volume of the stream”); Lindblom v. Round Valley Water Co., 173 P. 994, 997 (Cal. 1918) (holding that an appropriator “cannot require [a reservoir owner] to discharge any water into the stream during those months in which there would be no flow if no dam had ever been built.”).

We know of no principle in California law that recognizes “storage rights” in a reservoir, outside of the reservoir owner. Insofar as the Farmers complaining here hold no decreed rights to the waters WRID is storing, they cannot claim any legal injury caused by changes to how and where WRID distributes flow to the rightsholders of decreed, appropriative rights. As the California Control Board explained “[i]t is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water use claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right.” The Control Board found that “[n] one of the [objectors] have demonstrated any right, under contract or otherwise, to the stored water that will be injured by the proposed temporary change,” and that the “[l]andowners in [WRID] will continue to be allocated their portion of the stored water.” It thus concluded that “[o]nce the water is diverted to storage in a manner consistent with water right priorities, water stored in Topaz and Bridgeport Reservoirs is previously stored water to which the [objectors] have not demonstrated any legal interest.” In sum, the Control Board found that the proposed changes “would not injure any legal use of the water.” That finding is consistent with the Decree and in accord with California law, and it was error for the Decree court to refuse to approve the California Control Board’s Report approving WRID’s change application.

B. The Basin

Under Article XIV of the Decree, “no water shall be sold or delivered outside of the basin of the Walker River.” The Water Commissioners argue, and the Decree court held, that delivering river water to Walker Lake would violate this export restriction, because the Lake is “outside of the basin of the Walker River.” The court’s interpretation rested on several grounds: that there are no decreed rights to appropriate water from the Lake; that the Decree does not mention the Lake, but rather mentions other lakes as tributaries to the River; and that the Decree concerns appropriative rights only to the River and its tributaries, but not the Lake. On this basis the court held that “basin,” as used in the export restriction, unambiguously refers only to those agricultural lands that beneficially use the River’s waters and those waters that are mentioned by name in the Decree, but not the Lake itself. By contrast, both the Nevada State Engineer and the California Control Board found that Walker Lake was within the Walker River Basin.

The Walker River Decree is a partially stipulated decree, and so we interpret its provisions in a manner consistent with the entirety of the decree, and without the aid of extrinsic materials unless the provisions are ambiguous. Wackerman Dairy, Inc. v. Wilson, 7 F.3d 891, 897 n.13 (9th Cir. 1993). Provisions are ambiguous where they are subject to two or more reasonable interpretations. See Frei ex rel. Frei v. Goodsell, 305 P.3d 70, 73–74 (Nev. 2013); State v. Cont’l Ins. Co., 281 P.3d 1004, 1004 (Cal. 2012).

The district court correctly noted that the export restriction ensures that the basin’s waters remain in the basin for beneficial use by appropriative rightsholders. Such a protectionist measure appears elsewhere in water law as a mechanism to preserve water resources for local use. See, e.g., COLO. REV. STAT. § 37-81-101 (prohibiting the export of river waters outside Colorado to ensure “adequate supplies of water necessary to insure the continued health, welfare, and safety of all its citizens”).

We do not think there is any ambiguity in the phrase “basin of the Walker River.” Consider the plain hydrological, geomorphic, geographic, and everyday meaning of the word “basin.” A “basin,” as we commonly use that word, is simply the geographic area that is coextensive with a river system’s hydrological drainage. The Decree court itself used the term “basin” according to this plain hydrological and geographic meaning, when it opened its Order by observing that the Walker River Basin is approximately 4,050 square miles.

Walker Lake is the owner of the flow and use of the flood waters of East Walker River and its tributaries for storage in Bridgeport Reservoir; it likewise is the owner of the flood waters of the West Walker River for storage in the Topaz Reservoir. Any permits issued to WRID by the California Control Board are “subject to vested prior rights” and stored water must be distributed “to the lands in the District entitled thereto, in accordance with their respective rights.” Accordingly, the Decree gives WRID distribution rights over the stored water, which it must exercise consistent with the Decree and Nevada law. The Decree recognizes appropriative and storage rights in numerous private parties throughout the Walker River Basin, but it gives WRID alone the right to store and distribute the waters of Topaz and Bridgeport.

California’s no injury rule is codified in various sections of California’s Water Code, each of which prohibits injury to a “legal user of water.” CAL. WATER CODE §§ 1701(b) (2), 1725, 1727(b)(1) (emphasis added). But under California law, “appropriators have no right to water stored by the irrigation districts.” State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 244. “When [ ] stored water is released to customers, it is not part of the river’s natural flow and does not count towards the appropriators current allocation of river water.” Id.; see also Stevens, 9 P.2d at 61 (“The producer of an artificial flow is for the most part under no obligation to lower claimants to continue to maintain it. . . . [L]ower users will not have acquired a right against him, either by appropriation or prescription, to continued augmentation of the natural volume of the stream”); Lindblom v. Round Valley Water Co., 173 P. 994, 997 (Cal. 1918) (holding that an appropriator “cannot require [a reservoir owner] to discharge any water into the stream during those months in which there would be no flow if no dam had ever been built.”).

We know of no principle in California law that recognizes “storage rights” in a reservoir, outside of the reservoir owner. Insofar as the Farmers complaining here hold no decreed rights to the waters WRID is storing, they cannot claim any legal injury caused by changes to how and where WRID distributes flow to the rightsholders of decreed, appropriative rights. As the California Control Board explained “[i]t is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water use claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right.” The Control Board found that “[n] one of the [objectors] have demonstrated any right, under contract or otherwise, to the stored water that will be injured by the proposed temporary change,” and that the “[l]andowners in [WRID] will continue to be allocated their portion of the stored water.” It thus concluded that “[o]nce the water is diverted to storage in a manner consistent with water right
“from its origins in the southwestern elevations of the Sierra Nevada Mountains to its terminus, Walker Lake.”

Even if the term “basin” were ambiguous, interested extrinsic sources support the interpretation urged by NFWF and found by the Nevada State Engineer and the California Control Board. The State of Nevada refers to the Walker River Basin, including Walker Lake, as “Hydrographic Region No. 9.” The USGS calls it “Accounting Unit 160503,” composed of hydrological sub-units East Walker, West Walker, Walker, and Walker Lake. And the USGS’s Nevada Water Science Center places the Lake at “the lowest point in the basin.” Additionally, the Nevada Supreme Court views the Lake as part of the Walker River system and subject to the Decree court’s jurisdiction. The Decree court itself once noted that the Basin includes “sub-basin[] . . . 110B,” which the State of Nevada titled the “Lake Subarea.” Congress understood no differently when it enacted the legislation to save Walker Lake under the aptly titled Walker Basin Restoration Program. Pub. L. No. 111-85, §§ 207–08, 123 Stat. 2845, 2858–60 (2009).

The Commissioners point to a 1935 opinion of the Decree court, in which Judge St. Sure described his happy “tour of the Walker River basin” and referred to his visit to “the valleys, meadows, the Walker Indian Reservation, the storage reservoirs, a site of a proposed reservoir, and points of diversion of waters for irrigation,” but omitted any reference to the Lake. United States v. Walker River Irr. Dist., 11 F. Supp. 158, 162 (D. Nev. 1935). They also point to statements made by counsel in the 1930s, in which they mentioned the Basin, but not the Lake. We give little weight to these anecdotal statements. The Decree’s export restriction is not structured as an inclusionary list of those places to which water may be sent. That Walker Lake itself—an obvious and dominant physical feature in the Basin—was not mentioned by the court or counsel means little in light of the Decree’s text and purpose. The Commissioners’ interpretation flies in the face of history and logic and that ancient and simple maxim *aqua currit et debet currere ut currere solebat ex jure naturae*: water runs and ought to run as it is accustomed to run, according to the law of nature. Wholey v. Caldwell, 41 P. 31, 32 (Cal. 1895); Lux v. Haggin, 4 P. 919, 920 (Cal. 1884); Lobdell, 2 Nev. at 276. We conclude that Walker Lake is part of the Walker River Basin. As a consequence, dedicating water from the Walker River to Walker Lake does not violate the Decree’s prohibition on delivering water “outside of the basin of the Walker River.”

**IV. CONCLUSION**

The judgment of the Decree court is reversed. We vacate the opinion below and remand with instructions to grant the Petition to Confirm Nevada State Engineer Ruling No. 6271 of March 20, 2014, grant the Petition to Confirm California State Water Resources Control Board Report of May 29, 2014, and modify the Decree accordingly as necessary. **REVERSED and REMANDED.**

---

22. Mineral County, 20 P.3d at 805–06.
UNITED STATES OF AMERICA, Plaintiff-Appellant,
and
WALKER RIVER PAIUTE TRIBE, Intervenor-Plaintiff,
v.

No. 15-16478
United States Court of Appeals for the Ninth Circuit
D.C. No. CV 73-0127 RCJ
Subproceeding: C-125-B

UNITED STATES OF AMERICA,
Plaintiff,
and
WALKER RIVER PAIUTE TRIBE, Intervenor-Plaintiff-Appellant,
v.
This case is but one among a group of related actions in a long-running and complex dispute over water rights in the Walker River Basin. This case began in 1924 when the United States filed suit in Nevada federal court to establish water rights in the Walker River Basin on behalf of the Walker River Paiute Tribe (“Tribe”). In 1936, the court entered a decree awarding water rights to the Tribe and various other claimants. In 1940, after remand from the Ninth Circuit, the district court amended the original decree and retained jurisdiction to modify it.¹

The issues we confront in these appeals stem from the counterclaims filed by the Tribe in 1992 (and later by the United States) asserting new water rights.php

¹. Following the convention of the parties, we refer to the amended decree as the Decree or the 1936 Decree.
Clive Jones ordered briefing on Rule 12(b) issues related to jurisdiction and expressly ordered the litigants not to address other issues, such as res judicata, which were to be addressed at a later date. Nonetheless, in May 2015, without briefing or argument on the issue, the district court sua sponte dismissed all of the Tribe’s and the United States’ counterclaims on res judicata or jurisdictional grounds. The Tribe and the United States appeal.

We hold that the district court had continuing jurisdiction over the counterclaims and that it erred in dismissing the claims on res judicata or jurisdictional grounds without giving the parties an opportunity to brief the issue. Accordingly, we reverse and remand. On remand, we also order the reassignment of this case to another district judge.

I. FACTS AND PROCEDURAL BACKGROUND

A. The Walker River and the Reservation

The Walker River originates in the Sierra Nevada Mountains in Mono County, California, and terminates at Walker Lake in Mineral County, Nevada. The river is comprised of two forks: the East Walker River and West Walker River. The two forks merge near Yerington, Nevada, where the river then flows through the Walker River Paiute Reservation (“Reservation”). The river continues another twenty-one miles south before draining into Walker Lake. The Walker River Basin covers approximately 4000 square miles. The Reservation dates to November 29, 1859, and was established for the benefit of the Tribe. The initial Reservation encompassed 320,000 acres of land located southeast of Reno, Nevada, in the Walker River Basin.

B. First Federal Proceeding

At the turn of the twentieth century, conflicting claims to water rights arose among residents of the Walker River Basin. In 1902, Miller & Lux Corporation, a cattle and land company, filed suit in federal court seeking adjudication of its water rights in the Walker River Basin vis-à-vis 150 upstream entities and individuals. See Miller & Lux v. Rickey, 146 F. 574 (C.C.D. Nev. 1906); Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 259 (1910). Two years later, Rickey Land & Cattle Company filed two actions in California state court against Miller & Lux, also seeking to quiet its title to water rights in the Walker River Basin. See Rickey Land & Cattle, 218 U.S. at 259. Miller & Lux moved to enjoin the proceedings in California on the ground that the federal court in Nevada had acquired prior exclusive jurisdiction. Id. at 260. The lower court agreed and enjoined the California proceedings. Id. The Supreme Court affirmed. Id. at 262.

In 1919, the lower federal court issued the “Rickey Decree” apportioning the relative surface-water rights among the 151 parties. Although neither the United States nor the Tribe participated in that litigation, the Rickey Decree recognized a state-law based irrigation water right for the Reservation. See United States v. Walker River Irrigation Dist., 11 F. Supp. 158, 160 (D. Nev. 1935).

C. The 1924 Federal Proceeding

In 1924, the United States filed suit in the District of Nevada to establish federal water rights for the Reservation. At the time, the Reservation encompassed 86,400 acres of land. The named defendants were 253 individuals and entities located upstream from the Reservation. See id. at 159. The complaint, as amended in 1926, sought a right to an unimpeded flow of 150 cubic feet per second (“cfs”) of water from the Walker River. The basis for the water claim was the original 1859 reservation of land, which the complaint alleged constituted an implicit “set aside … of the waters of the said Walker River and its tributaries [in the amount of] 150 cubic feet of water per second of time.” In addition, the United States requested a determination of “the relative rights of the parties hereto in and to the waters of the said river and its tributaries in Nevada and California.”

Although other reservations existed in the Walker River Basin as of 1926, the amended complaint did not assert claims to water rights on behalf of any other tribes. Nor did the amended complaint assert claims on behalf of the United States for any other federally owned properties in the Basin or seek groundwater rights for any tribe or federal property.

D. The 1936 Decree

The district court issued a decision on June 6, 1935, and entered a decree on April 14, 1936, Walker River Irrigation Dist., 11 F. Supp. 158. The court denied the United States’ claim to a federal water right for the Reservation, concluding that the Tribe’s only water rights were based on state-law principles of prior appropriation. Id. at 167. The bulk of the decree set forth the amounts of water awarded to the United States and each of the other parties. These awards included rights that the district court had adjudicated in the course of its proceeding, as well as rights incorporated from the Rickey Decree.

Paragraph XI of the Decree provides:

Each and every party to this suit and their [sic] and each of their servants, agents and attorneys and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein described, be and each of them hereby is forever enjoined and restrained from claiming any rights in or to
the waters of Walker River and/or its branches and/or its
tributaries, except the rights set up and specified in this
decree . . . .

Paragraph XII provides that the decree “shall be deemed to
determine all of the rights of the parties to this suit and
their successors in interest in and to the waters of Walker
River and its tributaries” with certain exceptions.

Paragraph XIV provides:

The Court retains jurisdiction of this cause for the pur-
pose of changing the duty of water or for correcting or
modifying this decree; also for regulatory purposes,
including a change of the place of use of any water user . . . .
The Court shall hereafter make such regulations as to
notice and form or substance of any applications for
change or modification of this decree, or for change of
place or manner of use of water as it may deem
necessary.

We reversed in part. United States v. Walker River Irriga-
tion Dist., 104 F.2d 334, 339–40 (9th Cir. 1939). We held
that, under Winters v. United States, 207 U.S. 564 (1908),
the federal government had reserved a federal water right on
behalf of the Tribe for irrigation with a priority year of 1859,
the year that the Reservation was established. Id. Contrary
to the United States’ allegations, however, the Ninth Circuit
concluded that the amount of the reserved right was only
26.25 cfs because that was the amount needed to sustain the
2100 acres of irrigable land on the Reservation. Id. at 340.

On remand, the district court amended the original de-
cree in a few places. For example, the phrase “as of the 14th
day of April, 1936” was added to Paragraph XII, so that the
amended clause reads: “This decree shall be deemed to
determine all of the rights of the parties to this suit and their
successors in interest in and to the waters of Walker River and
its tributaries as of the 14th day of April, 1936,” with certain
exceptions. (Emphasis added.) The phrase “of point of diver-
sion or” was added to Paragraph XIV, so that the amended
paragraph reads: “The Court retains jurisdiction of this cause
for the purpose of changing the duty of water or for correct-
ing or modifying this decree; also for regulatory purposes,
including a change of point of diversion or of the place of use
of any water user . . . .” (Emphasis added.) Paragraph XI was
not amended.

E. Later Filings in the 1924 Proceeding

Appellee Walker River Irrigation District (“WRID”) is a
Nevada irrigation district. Appellees Lyon County et al. are
(1) Lyon County, Nevada; (2) Mono County, California; and
(3) ranching entities, ranchers, and other individuals. Each
of these parties holds certain water rights in the Walker Riv-
er Basin under the 1936 Decree. Appellee Nevada Depart-
ment of Wildlife (“NDOW”) is the state agency responsible
501.331.

In 1991, WRID filed a petition in the 1924 case invoking
the court’s continuing jurisdiction over the waters of the
Walker River. The petition was in response to a Califor-
nia State Water Resources Control Board (the “Cal. Water
Board”) decision to issue restrictions on WRID’s Califor-
nia water licenses. WRID sought to enjoin the Cal. Water
Board from implementing the restrictions; in the alternative,
it sought to move the point of diversion for its storage rights
from their locations in California to locations in Nevada.

In 1992, the Tribe answered WRID’s petition and filed its
own counterclaims in the same action. As amended in 1997,
the Tribe’s counterclaims asserted three claims for relief. The
first counterclaim involves the right of the Tribe to store wa-
ter in Weber Reservoir. The second counterclaim involves the
right of the Tribe to use water on lands restored to the reser-
The third claim for relief asserts a right to use groundwater
underlying and adjacent to the lands of the Reservation.

The United States also sought leave to file counterclaims.
WRID opposed the United States’ motion and moved to
dismiss the Tribe’s counterclaims on the ground that they
amounted to a complaint in a new action. The district court
rejected that position and allowed the United States to file its
counterclaims. It reasoned that all claims – WRID’s petition,
the Tribe’s counterclaims, and the United States’ counter-
claims – “arise[] out of the property rights established, and
not established[,] in the Walker River Decree,” and under
the 1936 Decree, it retained “jurisdiction to manage the De-
cree as necessary.” For administrative purposes, the court
established a “subfile A” for WRID’s request to modify the
Decree and a “subfile B” for the Tribe’s and United States’
counterclaims.5

The United States amended its counterclaims in 1997. The
amended counterclaims assert a total of eleven claims to
water rights in the Walker River Basin, which fall into three
categories: (1) claims on behalf of the Tribe;6 (2) claims on
behalf of various other Indian tribes and Indian individuals
in the Walker River Basin; and (3) claims for several federal
properties. According to the United States these are “all [of
the] known federal interests within the Walker River Basin.”

On April 18, 2000, the district court ordered the Tribe and
the United States to name as counterdefendants and serve all
claimants whose rights in the Walker River Basin could be
affected.7

F. The District Court’s Decision

In 2011, on the retirement of Judge Reed, the case was
reassigned to Judge Jones. When attorneys representing the

6. Such rights are “in addition to the right . . . awarded to the Unit-
ed States in the Decree entered . . . on April 15, 1936.”
7. Initial service of approximately 3,280 parties was complete as of October 2014.
United States first appeared before Judge Jones, he told them he was “developing a policy” of “disallowing” or “debarring U.S. Attorneys from Washington … because of concerns about adherence to Nevada Bar standards and ethical standards.” The appearing attorneys informed him that they were based in Denver and Boise, and Judge Jones then stated that he had “no problem” and “would in fact grant the motion … to allow you to appear.” However, Judge Jones later denied them permission to appear. He withdrew that order only after the United States filed a petition for a writ of mandamus in the Ninth Circuit to require Judge Jones to permit their appearance.8

In 2013, Judge Jones scheduled briefing on potential motions to dismiss the counterclaims. At a status conference, he clarified that the first round of motions should address jurisdiction only: “[T]his isn’t all motions to dismiss. There will be a further deadline for that following this jurisdictional round.… I don’t want to address the other jurisdiction issues especially, for example, like res judicata, U.S. versus Nevada, unless it directly relates to jurisdiction.” Appellees filed separate motions to dismiss under Rule 12(b) (1). WRID argued that, under the terms of the 1936 Decree, the district court lacked continuing jurisdiction to adjudicate new claims for water rights in the Walker River Basin, and that the United States and Tribe were required to file a new action.9 Consistent with the court’s instruction to argue only jurisdictional issues, briefing on the motions did not raise or address res judicata.

On May 28, 2015, the district court granted WRID’s motion and dismissed all of the counterclaims either as barred by res judicata, or laches, or for lack of jurisdiction. The court first concluded that it retained continuing jurisdiction to adjudicate appellants’ counterclaims: the Decree “is clear in favor of the Tribe’s and the United States’ reading of ‘modify’ to permit the adjudication of yet-unlitigated rights.” The court reasoned that “[c]ontinued jurisdiction to ‘modify’ the Decree implies an ability to increase or decrease one’s rights thereunder,” and that “[t]he phrase ‘correcting or modifying this decree’ implies that modifications are to be distinguished from corrections, i.e., that changes to the Decree may be based on yet-unlitigated claims in addition to claims that were decided incorrectly or which suffer from scrivener’s errors.”

Despite concluding that it had jurisdiction, the district court abruptly reversed course and held that it “believes the present action is in fact a new action, and that the present claims are therefore precluded.” The court gave two reasons for construing the counterclaims as a new action. First, the Decree “prevents the United States (like all parties) from claiming any additional rights beyond those adjudicated therein.” Second, “[t]he Sub-files were given their own administrative existences, so they are independent cases at least in form.” In determining that the new action was precluded, the court relied on Nevada v. United States, 463 U.S. 110 (1983), and the language in the 1936 Decree stating that the parties are “forever enjoined and restrained from claiming any rights in or to the waters of Walker River … except the rights set up and specified in this Decree.”

The district court also noted that “[e]ven if the present Sub-file were not in substance a new action but better characterized as a Rule 60(b)(6) motion in the original action, laches would almost certainly bar the claims.”

Finally, the district court denied NDOW’s groundwater-related motion because no “particular claim by the United States or the Tribe [sought] to enjoin any particular ground-water pumping”; and, moreover, the court would properly “preside over any separate action to enjoin groundwater pumping based on interference with decreed rights.”

The Tribe and the United States timely appealed.

II. STANDARD OF REVIEW

Dismissal of a claim based on res judicata is reviewed de novo. Mpoyo v. Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005). The district court’s interpretation of a judicial decree is also reviewed de novo, although this court typically “give[s] deference to the district court’s interpretation based on the court’s extensive oversight of the decree from the commencement of the litigation to the current appeal.” Labor/ Cmty. Strategy Ctr. v. L.A. Cry. Metro. Transp. Auth., 263 F.3d 1041, 1048 (9th Cir. 2001) (internal quotation marks omitted). However, deference to the district court is reduced where, as here, the district judge has not overseen the litigation from its inception. Cf. Gates v. Gomez, 60 F.3d 525, 530 (9th Cir. 1995).10

III. DISCUSSION

A. Continuing Jurisdiction

At the outset, we must determine whether the district court had jurisdiction under the Decree to hear the counterclaims. We conclude that the district court was correct that it retained jurisdiction to modify water rights under the decree, but erred in concluding that the counterclaims constituted a “new action.” As such, the district court had jurisdiction over the counterclaims.

Paragraph XIV of the 1936 Decree provides that “[t]he Court retains jurisdiction of this cause for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes, including a change of the place of use of any water user … .” The district court read that “modify” in this clause allows the court to adjudicate yet-unlitigated water rights. We agree. The court cor-

8. The circumstances of Judge Jones’ initial refusal to admit government counsel pro hac vice and his eventual recanting of that order after the government petitioned the Ninth Circuit for a writ of mandamus requiring their admission are recounted in United States v. U.S. District Court (In re United States), 791 F.3d 945, 950 (9th Cir. 2015).

9. NDOW’s motion sought to dismiss only the claims to enjoin off-reservation groundwater pumping.

10. Recall that in this case, which originated in 1924, and in which the original Decree was entered in 1936, the case was not reassigned to Judge Jones until 2011, some 87 years after its inception.
rectly reasoned that “[c]ontinued jurisdiction to ‘modify’ the Decree implies an ability to increase or decrease one’s rights thereunder,” and that “[t]he phrase ‘correcting or modifying this decree’ implies that modifications are to be distinguished from corrections, i.e., that changes to the Decree may be based on yet-unlitigated claims in addition to claims that were decided incorrectly or which suffer from scrivener’s errors.”

We reject appellees’ argument that “modifying” should not be read so broadly. First, although the term “modifying” would plausibly support either a broader or a narrower meaning, see BLACK’S LAW DICTIONARY 1156 (10th ed. 2014) (defining “[m]odification” as “[a] change to something; an alteration or amendment”), appellees’ interpretation is particularly crabbed and selective. Specifically, appellees argue that “the modification provision of Paragraph XIV … authorizes the court to (1) modify the duties and authority of the Water Master,” “(2) modify the definitions in the Decree, such as the definition of ‘irrigation seasons,’” and “(3) modify the duties of … the parties to pay costs.” In essence, appellees’ position is that the district court retained jurisdiction to modify every provision in the Decree except those provisions setting forth water rights. Paragraph XIV does not support appellees’ proposed interpretation.

Second, we agree with the district court that the juxtaposition of “correcting” with “modifying” in Paragraph XIV supports the broader reading of modify by suggesting that the terms have distinct meanings. In contrast, appellees urge us to apply noscitur a sociis, the principle that “a word is known by the company it keeps,” Yates v. United States, 135 S. Ct. 1074, 1085 (2015), and draw the opposite inference from the word “correcting.” They argue that “the fact that the word ‘modifying’ is used in conjunction with the word ‘correcting’ … indicates that the word ‘modifying’ does not refer to changes based on additional water rights” because “‘correcting’ connotes a relatively minor, technical change.”

Courts apply the noscitur a sociis canon to construe a single term “in a list of terms,” where that term appears opened but should be caged in light of the other terms in the list. See id. at 1085–86 (construing the term “tangible object” as used in “any record, document, or tangible object”). The purpose of the rule is “to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.” Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (emphasis added). While we agree that “correcting” connotes a minor, technical change, we disagree with appellees’ contention that the other powers listed in the jurisdiction provision are of a lesser magnitude than the power to add water rights pursuant to the term “modifying.” The only power that is obviously minor is “correcting”; the others could just as likely refer to expansive powers. There is no obvious limitation on the retention of jurisdiction “for regulatory purposes.” In addition, the meaning of “the duty of water” at the time of the Decree was the “quantity required for crop production on a given area, usually during a year or irrigation season.” See A.P. Davis & Will R. King, Dep’t of the Interior, Manual of the United States Reclamation Service 326 (1917). Thus, to change the duty of water would also change the quantities of water awarded, as the amount awarded is equal to the duty of water multiplied by the acreage. Appellees’ argument that “modifying” should be read narrowly is unconvincing.

Third, the Supreme Court in Arizona v. California, 460 U.S. 605 (1983) (Arizona II), construed a water rights decree with similar jurisdictional language as retaining jurisdiction to address yet-unlitigated rights to the same waterway. Arizona II addressed requests by the United States and Indian tribes “to have … water rights increased” from what they were determined to be in Arizona v. California, 373 U.S. 546 (1963) (Arizona I), “earlier proceedings” in the same case. 460 U.S. at 608. Arizona I culminated in a decree in which the Court “retained jurisdiction over the case for the purpose of further modifications and orders that [the Court] deemed proper.” Id. at 611. The specific language of the provision retaining jurisdiction was:

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Id. at 618 (emphasis added).

The Arizona II Court interpreted such language to “grant[] [it] power to correct certain errors, to determine reserved questions, and if necessary, to make modifications in the Decree.” Id. It therefore exercised jurisdiction to consider the question of whether the tribes were “entitled to additional water rights,” although it circumscribed “the circumstances which make exercise of this power appropriate.” Id. at 613, 618. Similar to the Arizona I decree, the 1936 Decree retains jurisdiction for the purpose of “modifying [the] decree.” Because the Supreme Court in Arizona II relied on a reference to modification of the Arizona I decree to conclude that it retained jurisdiction to hear a suit asserting claims for additional rights, we conclude that the 1936 Decree may properly be read as also retaining jurisdiction in the Nevada district court to litigate additional rights in the Walker River Basin.

NDOW and the Lyon County et al. parties, take the position that, despite the retention of jurisdiction in Paragraph XIV, Paragraph XI of the 1936 Decree declines jurisdiction to adjudicate additional rights to the Walker River. Paragraph XI states:

Each and every party to this suit and their [sic] and each of their servants, agents and attorneys and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein

11. Those restrictions go to the question of whether the claims are precluded, not whether the court has jurisdiction.
described, be and each of them hereby is forever enjoined and restrained from claiming any rights in or to the waters of Walker River and/or its branches and/or its tributaries, except the rights set up and specified in this decree . . . .

(Emphasis added.) Lyon County notes that the decree construed in Nevada, 463 U.S. 110, contained almost identical language.

This paragraph, however, does not bear on the scope of the district court’s continuing jurisdiction. Unlike Paragraph XIV, Paragraph XI does not mention jurisdiction. It instead purports to limit claims that the parties may bring in any forum. Thus, under appellees’ reading, Paragraph XI would bar the United States, the Tribe, and any other party to the 1924 action from bringing another claim to rights in the Walker River Basin in any court, even if the basis for such claim — under state or federal law — arose after the 1936 Decree was entered.

The better reading of Paragraphs XI and XII is that, together, they reiterate standard preclusion principles, i.e., that no party may relitigate a claim to water rights in the Walker River Basin, in the Nevada District Court or any other court, that was litigated in the original case as of April 14, 1936. Nevada v. United States supports this interpretation, as the Nevada Court construed nearly identical language in a decree not to determine the existence of continuing jurisdiction, but instead in applying the principles of res judicata.

Finally, we hold that the district court erred in characterizing the counterclaims as constituting a new action. The district court based its decision on the fact that Judge Reed assigned the counterclaims to a “subfile” and thus gave them “their own administrative existence[].” However, this conclusion contradicts the established procedural practice of the case, and previous orders from Judge Reed. First, designating a subfile (emphasis on the prefix “sub”) logically means that the contents are part of the larger case and not an entirely new action. In this long-running case, subfiles have been used to aid administrative convenience and organization. For example, in 1991, when WRID petitioned for a modification of the decree it asked the court to designate “a subproceeding number” for the action. The district court acceded to this request, designating the petition as subfile A. None of the parties argued that this constituted “a new action.” Second, Judge Reed, in denying WRID’s 1992 motion to dismiss the counterclaims, already rejected the argument that the counterclaims should be considered as claims in a new action.12 Based on the procedural history of this case, and the fact that the Tribe and the United States brought their counterclaims under the same caption as the 1924 action, we conclude that these counterclaims do not constitute a new action.13

B. Res Judicata

This circuit has never “upheld a dismissal for claim or issue preclusion where the parties were not given any opportunity to be heard on the issue,” Headwaters v. U.S. Forest Serv., 399 F.3d 1047, 1055 (9th Cir. 2005), and we decline to do so here. Our decision is further bolstered by the fact that the district court explicitly told the parties not to brief res judicata issues, before dismissing on that ground. We therefore reverse the district court’s decision that all of the counterclaims were precluded. On remand, the district court should “subject [any potential] res judicata decision to the rigors of the adversarial process.” Nev. Emps. Ass’n v. Keating, 903 F.2d 1223, 1225 (9th Cir. 1990).

Furthermore, because we have concluded that the counterclaims are not a new action, traditional claim preclusion and issue preclusion do not apply. See Arizona v. California, 460 U.S. 605, 619 (1983) (“Res judicata and collateral estoppel do not apply … [where] a party moves the rendering court in the same proceeding to correct or modify its judgment.”). Instead, the counterclaims are “subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.” Id.

C. Reassignment

The United States requests that, on remand, this case be reassigned to a different district judge. “We reassign only in rare and extraordinary circumstances, such as when the district court has exhibited personal bias or when reassignment is advisable to maintain the appearance of justice.” Nat’l Council of La Raza v. Cegavske, 800 F.3d 1032, 1045 (9th Cir. 2015) (internal quotation marks and citations omitted).

To determine whether reassignment is appropriate, we court consider:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness.

12. Although the parties do not make the argument, the doctrine of “law of the case” would also appear to support continuing application of the principle adopted by Judge Reed.

13. Although it is unclear, the district court may also have relied on the similarity between the preclusive language in Paragraph XI and the Orr Ditch decree at issue in Nevada v. United States to conclude that the counterclaims should constitute a new action. As discussed above, Paragraph XI does not relate to the court’s jurisdiction. Further, Nevada is distinguishable on both form and substance. On form, Nevada is distinct because the parties there filed their claims as a new action, under a new caption. See Nevada, 463 U.S. at 118–19. On substance, it is distinct because the Orr Ditch decree at issue in Nevada did not reserve jurisdiction for the district court to “modify” the document. See United States v. Orr Water Ditch Co., Equity No. A3 at 88 (D. Nev. 1944). Therefore, unlike the Tribe and the United States here, the plaintiffs in Nevada were required to bring their claims in a new action because they had no avenue to modify the underlying decree.
United States v. Rivera, 682 F.3d 1223, 1237 (9th Cir. 2012). “The first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge.” Id. (internal quotation marks omitted).

We reluctantly conclude that reassignment is appropriate here because we believe (1) that Judge Jones would have substantial difficulty putting out of his mind previously expressed views about the federal government and its attorneys, and (2) that reassignment will preserve the appearance of justice. See United States v. Estate of Hage, 810 F.3d 712, 722 (9th Cir. 2017) (holding that Judge Jones “harbored animus toward the federal agencies” and that “the judge’s bias and prejudgment are a matter of public record”); Nat’l Council of La Raza, 800 F.3d at 1046; In re United States, 791 F.3d at 958 (concluding that Judge Jones’ exclusion of federal government attorneys appeared to be based on his personal hostility to federal government policies and officials).

When Justice Department attorneys appeared in this case, Judge Jones stated that he was “developing a policy” of “disallowing” or “‘debarring’ U.S. Attorneys from Washington, D.C. because of concerns about their adherence to ‘ethical standards.’” See id. at 950. When the Justice Department attorneys informed Judge Jones that they were from the Boise and Denver offices, Judge Jones still denied the attorneys’ applications to appear. Only after the United States filed a petition for a writ of mandamus with this Court to order Judge Jones to grant the pro hac vice admissions did Judge Jones reverse his decision and allow the Justice Department attorneys to appear. Id. at 951.

Because Judge Jones’ statements are coupled with his unprecedented sua sponte dismissal of the United States’ counterclaims, we conclude that reassignment is necessary. In a prior case, the Ninth Circuit also relied on Judge Jones’ sua sponte rulings to support a decision to reassign. See Nat’l Council of La Raza, 800 F.3d 1046 (noting two sua sponte rulings against out-of-state attorneys in deciding to reassign the case to another judge on remand). Here, even after admitting the government attorneys, Judge Jones demonstrated his unwillingness to consider fairly the United States’ interests in this case by making the unprecedented decision to sua sponte dismiss the counterclaims on res judicata grounds, after ordering counsel not to brief the issue. For these reasons we conclude that Judge Jones would have substantial difficulty in fairly considering the United States’ counterclaims on remand. These facts also support reassigning the case to a different judge in order to preserve the appearance of justice.

While we appreciate that the United States’ and the Tribe’s counterclaim proceeding is only a “sub-file” of this long-running case, it is nonetheless an integral part of the Walker River Basin Water Rights litigation and cannot be separated from it. To be clear, therefore, this reassignment order applies to all aspects of the Walker River Basin water rights case pending in the District of Nevada.

IV. CONCLUSION

While the district court was correct that it retained jurisdiction to modify the Decree, the district court erred in characterizing the counterclaims as part of a new action and then sua sponte dismissing them on res judicata grounds. We therefore reverse the order of the district court and remand for further proceedings consistent with this opinion. On remand, the case shall be randomly reassigned to a different district judge.

REVERSED, REMANDED and REASSIGNED.

14. This opinion is filed concurrently with dispositions in United States v. United States Board of Water Commissioners (Nos. 15-16316, 15-16317, 15-16319, 15-16321, 15-16489) and United States v. Walker Lake Working Group (No. 15-16342). Our decision to reassign this case to a different district judge upon remand necessarily applies to all of these related appeals, which arise out of the same case.

15. This is attested to by Judge Jones’ order that all 3,280 claimants to Walker River Basin water rights be served with summons and the United States’ counterclaims in this sub-file proceeding. See footnote 7, supra, and accompanying text.
Lujan is a San Francisco resident, and has been for more than four decades. He had a credit card with Chase Bank USA, N.A. (Chase), which he used in San Francisco for personal and household expenses.

Chase is a Delaware corporation, or at least Lujan so asserts. The credit card account Lujan maintained with Chase was governed by a cardmember agreement with a choice-of-law provision stating that “federal law and the law of Delaware” govern the agreement. The same agreement also had a provision for attorney’s fees. Chase informed cardmembers, “if you are in default because you have failed to pay us, you will pay our collection costs, attorney’s fees, court costs, and all other expenses of enforcing our rights under this agreement.”

When the last activity on Lujan’s credit card account left an unpaid balance, sometime in the second half of 2007, Chase assigned away its claim against Lujan. Initially, Chase assigned the claim to Turtle Creek Assets, Ltd., which assigned it on to Wireless Receivables Acquisition Group (Wireless), which assigned it in turn to PCC. On June 21, 2011, PCC filed this case in the Contra Costa County Superior Court, alleging a cause of action for common counts. The complaint alleges both an open book account for money due and an account stated in writing, and specifies the amount owed as $8,831.90. An attorney for the Law Offices of Clark Galen (salaried employees of PCC) filed the case, and PCC Vice President Todd Shields verified the complaint.


The parties filed competing motions for summary judgment on both the complaint and cross-complaint. On the complaint, the trial court granted Lujan’s motion for summary judgment. It reasoned that PCC’s action was to recover a debt incurred under an agreement with a choice-of-law provision, so it applied Delaware’s three-year statute of limitations and found PCC’s claims time-barred. On the cross-complaint, the trial court granted summary judgment to cross-defendants Wireless, Shields, and Galen, finding that none of them meets the statutory definition of a debt collector. But PCC is a debt collector and filed this case after the statute of limitations had run, so the trial court concluded PCC violated both the FD-
CPA and the RFDCPA and granted Lujan summary judgment against cross-defendant PCC. Lujan’s summary judgment motion sought from each cross-defendant the statutory maximum of $1,000 for violating each of two different provisions of the FDCPA and the RFDCPA, but the court’s order is silent on this request for statutory damages.

The trial court signed a final judgment, which it entered on March 1, 2016. Before signing Lujan’s proposed judgment, the trial court crossed out the sentence that would have awarded Lujan statutory damages, leaving him with only “attorney fees and costs of suit as provided by the respective statutes.” On July 12, 2016, the trial court issued two post-judgment orders addressing attorney’s fees and costs. One order awarded Lujan $140,550.51, representing a lodestar slightly reduced from his request, enhanced by a multiplier of 1.5. The other order denied fees to Wireless, Garen, and Shields, in part because the cross-complaint was not an action “‘on a contract’ ” within the meaning of Civil Code section 1717 (section 1717).

PCC filed timely notices of appeal on both the underlying judgment in the collection action (case No. A147922) and the order on attorney’s fees and costs (case No. A148925). Lujan timely cross-appealed the summary judgment in favor of Wireless and the individual cross-defendants, and the trial court’s failure to award statutory damages and to find a second violation of the FDCPA and the RFDCPA based on improper venue. The cross-defendants who won summary judgment appealed the denial of their attorney’s fees motion (case No. A148925).

DISCUSSION

We review de novo the trial court’s entry of summary judgment. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860.) A party moving for summary judgment bears the initial burden of proof, as well as “the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.” (Id. at p. 850.) When a defendant moves for summary judgment, if his moving papers make out a prima facie case entitling him to judgment, “the burden of production shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact.” (Jones v. Wachovia Bank (2014) 230 Cal. App.4th 935, 945.) Likewise, if the plaintiff meets its initial burden, the defendant must show a triable issue of material fact to defeat summary judgment. (Professional Collection Consultants v. Lauron (2017) 8 Cal.App.5th 958 (Lauron).)

We address first the trial court’s grant of summary judgment in Lujan’s favor on the complaint, then summary judgment for and against Lujan on the cross-complaint, and finally the trial court’s orders granting attorney’s fees and costs to Lujan and denying them to Wireless and the individual cross-defendants.

I.

In moving for summary judgment on PCC’s complaint, Lujan makes a prima facie case that he was entitled to summary judgment on statute of limitations grounds. He points to Chase’s cardmember agreement and argues that his use of the credit card constituted acceptance of the terms of that agreement. (See Anastas v. American Sav. Bank (In re Anastas) (9th Cir. 1996) 94 F.3d 1280, 1285.) He points to the Delaware choice-of-law provision in the cardmember agreement and to the three-year limitations period of 10 Delaware Code section 8106, a code section he plausibly asserts applies to actions for breach of contract, open book account, and account stated in writing. And Lujan applies California choice-of-law principles to argue that the election of Delaware law should be enforced: PCC’s claims fall within the scope of the contract’s choice-of-law provision; there is a reasonable basis for the parties to have chosen the law of the state where Chase is incorporated; and no fundamental policy of California is offended by applying Delaware’s somewhat shorter statute of limitations. (See Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 916-917.)

In response to Lujan’s prima facie case, PCC points to no new evidence but makes numerous arguments. PCC’s first argument is that the cardmember agreement is irrelevant because an action based on an open book account or an account stated in writing is completely independent of, and unrelated to, the underlying contract, rendering superfluous the contract’s choice-of-law provision. If one were to disregard the cardmember agreement, PCC’s cause of action would be governed by California’s four-year statute of limitations for breach of a written contract, including an open book account or account stated in writing (Code Civ. Proc., § 337), but we cannot disregard the cardmember agreement here. PCC’s argument misunderstands the common counts PCC has pleaded, and mistakenly elevates form in pleading over substance.

The elements of a cause of action for breach of contract are well known. A plaintiff must establish: the existence of a contract, plaintiff’s performance (or excuse for non-performance), defendant’s breach, and resulting damages. (Lauron, supra, 8 Cal.App.5th at p. 968.) Less well-known are the common counts. “A common count is not a specific cause of action . . . ; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness . . . .” (McBride v. Boughton (2004) 123 Cal. App.4th 379, 394.) PCC pleads two common counts.

“A ‘book account’ is ‘a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith . . . .’ ” (Lauron, supra, 8 Cal.App.5th at p. 969.) The creditor must keep these records in the regular course of its business and “in a reasonably permanent form,” such as a book or card file. (Code Civ. Proc., § 337a.) “A
book account is ‘open’ where a balance remains due on the account.” (Lauron, at p. 969.)

“An account stated is ‘an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing.’ ” (Lauron, supra, 8 Cal.App.5th at p. 968.) “When an account stated is ‘assented to, either expressly or impliedly, it becomes a new contract.’ ” . . . Accordingly, an action on an account stated is not based on the parties’ original transactions, but on the new contract under which the parties have agreed to the balance due.” (Ibid.)

The trial court rejected PCC’s request to apply California’s four-year statute of limitations because the court concluded that the action was one “to recover a debt incurred under the credit agreement,” which had a Delaware choice-of-law provision. Going further, the court explained, “[m]onies due under an express written contract, such as the cardmember agreement at issue herein, ‘cannot, in the absence of a contrary agreement between the parties, be treated as items under an open book account so as to allow the creditor to evade or extend the statutory limitations period.’ ” (See Tsemetzin v. Coast Federal Savings and Loan Assn. (1997) 57 Cal.App.4th 1334, 1343.) We need not go this far and express no view as to whether, under different circumstances, credit card debt can be collected using common counts. It is enough to note that in this case, as the trial court observed at the outset, the gravamen of the complaint is Lujan’s failure to pay monies owed Chase for his use of the card under the cardmember agreement. (Lauron, supra, 8 Cal.App.5th at p. 971.)

“The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled.” (City of Vista v. Robert Thomas Securities, Inc. (2000) 84 Cal.App.4th 882, 889; see also Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396, 412.) Thus, if a complaint alleges acts of actual and constructive fraud but frames its cause of action as one for breach of fiduciary duty, the statute of limitations for fraud applies. (Ibid.) Similarly, where the gravamen of a complaint is a liability created by statute, a plaintiff cannot extend the limitations period by framing his case as a breach of contract instead. (Giffin v. United Transportation Union (1987) 190 Cal.App.3d 1359, 1362.) So, here, because the gravamen of PCC’s complaint is that Lujan failed to pay Chase money it incurred under the cardmember agreement, PCC cannot extend the three-year statute of limitations that applies for such a breach of contract claim by pleading common counts instead.

PCC fails to establish that the trial court erred in identifying the gravamen of this complaint as an action to collect debt incurred under the cardmember agreement. Looking first to the complaint itself, because it relies on a simplified form of pleading, the complaint contains no facts to support the allegations of an open book account and an account stated in writing except that Chase “was the original creditor for the claim upon which this action is based.” Of course, the cardmember agreement is what established the terms under which Chase became Lujan’s creditor, and the cardmember agreement is the only evidence of a creditor-debtor relationship that PCC cites in its briefs. If Lujan maintained an open book account with Chase, that account was one that arose out of the cardmember agreement. (See Lauron, supra, 8 Cal. App.5th at p. 969 [a book account is a statement of transactions ‘arising out of a contract ’].) If Lujan and Chase assented in writing to the amount of his indebtedness, as is required for an account stated in writing (id. at p. 968), perhaps the cardmember agreement forms a portion of that writing. Certainly PCC presents no other evidence of a written agreement between the parties.2 In short, although PCC does not expressly frame its case as a breach of the cardmember agreement, it produces no evidence to dissuade us that breach of this agreement is indeed the gravamen of its complaint. (See id. at p. 971.)

None of the cases on which PCC relies requires a contrary result. Zinn v. Fred R. Bright Co. (1969) 271 Cal.App.2d 597, 604 was an action for an account stated in writing where the writing was an uncashed check that the debtor-employer gave the creditor-employee, representing the amount owed the employee as a profit-sharing bonus. (Id. at p. 599.) That the court in Zinn applied the statute of limitations for an account stated in writing is unsurprising, since the evidence was that this was the gravamen of the creditor’s case. (Id. at p. 602.) Nothing about this result compels us to apply California’s statute of limitations in a case where the only writing in evidence is a contract that invokes Delaware law. Nor is Boon v. Professional Collection Consultants (2014) 978 F.Supp.2d 1163 persuasive authority on this point, as the case contains little analysis on the statute of limitations and involves a debtor who submitted no relevant evidence, but attempted in vain to rely on his pleadings to oppose summary judgment. (Id. at p. 1168.)

PCC’s second argument is that if this action is governed by Delaware law, then Delaware law tolls the statute of limitations indefinitely while defendant Lujan is absent from the state of Delaware. Delaware’s non-resident tolling statute provides: “If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process . . . .” (Del. Code Ann. tit. 10, § 8117.) “Numerous courts outside of Delaware have declined to apply 10 Delaware Code section 8117 where,” as here, “it would result in indefinite tolling.” (Lauron, supra, 8 Cal.App.5th at p. 974.) We follow Lauron in declining to apply this tolling provision. (Ibid.) Because Lujan is not susceptible to suit in Delaware, applying the tolling provision would produce the absurd result of abolishing the statute of limitations defense entirely,

2. PCC references no other written agreement in its briefs, and “‘[w]e have no duty to search the record for evidence . . . .’” (Lauron, supra, 8 Cal.App.5th at p. 974.)
which is surely inconsistent with a fundamental policy of California law. Because Delaware’s tolling provision is not inherent in, or inseparable from, its statute of limitations (see Del. Code Ann. tit. 10, § 8106 [with exceptions not including § 8117]), our refusal to adopt Delaware’s non-resident tolling statute does not prevent us from enunciating Delaware’s statute of limitations. *Saudia Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.* (Del. 2005) 866 A.2d 1, 18 is not inconsistent with this result. It stands for the proposition that if Lujan were to move to Delaware and PCC to pursue a collection action there in the future, then Delaware courts would apply the non-resident tolling statute and might still find the action timely. That result does not require an out-of-state court to apply Delaware’s non-resident tolling statute to persons who have never lived in Delaware.

PCC’s third argument is that because the cardmember agreement was not signed by anyone, it cannot act to waive the statute of limitations. In support of this argument, PCC cites California’s Code of Civil Procedure section 360.5, which prevents parties from waiving the statute of limitations except in a signed document. But Lujan does not argue, and the trial court does not find, that Lujan or anyone else has waived the right to assert the statute of limitations. Rather, the trial court gives full effect to a statute of limitations defense in granting Lujan summary judgment. (See *Lauron*, supra, 8 Cal.App.5th at p. 973.)

PCC’s fourth argument is that none of the terms of the cardmember agreement, other than Lujan’s promise to pay, can be enforced because Lujan did not sign the cardmember agreement. For support, PCC relies on a single case, which is silent on the validity of an unsigned cardmember agreement. PCC’s case relies on the proposition that “it is the use of the credit card, and not the issuance, that creates an enforceable contract.” (*Bank of America v. Jarczyk* (W.D.N.Y. 2001) 268 B.R. 17, 22.) This is entirely consistent with Lujan’s theory of how his contract with Chase was formed, and with enforcing the terms of the cardmember agreement. (*Id.* at p. 24.)

PCC’s fifth argument, in the alternative, is that because Chase is a federally charged bank we should apply the four-year statute of limitations that federal law establishes for civil actions arising out of acts of Congress, rather than Delaware law. But “PCC’s breach of contract action does not arise under an Act of Congress; it is a state law claim. Accordingly state law,” specifically Delaware law, governs. (*Lauron*, supra, 8 Cal.App.5th at p. 972.)

Finally, PCC argues that if its claim against Lujan is time-barred but Lujan’s cross-complaint results in a judgment against PCC, then PCC should be entitled to offset an award against it by the amount Lujan owes on the Chase debt. PCC is mistaken. It relies on Code of Civil Procedure section 431.70, but that statute applies only “[w]here cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person . . . .” (Code Civ. Proc., § 431.70, italics added.) The purpose of the statute is to allow offset of competing claims in a circumstance where one party “allow[s] the statute of limitations to run on its claim, reasoning that the two claims have canceled one another out,” only later to confront the opposing party’s claim once its own is time-barred. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 195.) Here, Lujan’s cross-complaint alleges PCC’s unlawful attempt to collect on the time-barred debt, claims that by definition did not exist at a time before PCC’s claim was barred by the statute of limitations. Because Lujan’s claims only arose after the statute of limitations on Chase or PCC’s claim had run, Code of Civil Procedure section 431.70 has no relevance here.

In sum, PCC fails to raise a triable issue of material fact as to which statute of limitations applies, so the trial court appropriately granted Lujan summary judgment.

**DISPOSITION**

Summary judgment in favor of Lujan against PCC, both on PCC’s complaint and Lujan’s cross-complaint, is affirmed. The award of attorney’s fees and costs to Lujan is affirmed. Summary judgment in favor of Wireless on the cross-complaint and denial of fees and costs to Wireless are both affirmed. As to Shields and Garen, summary judgment in their favor on the cross-complaint is reversed, the denial of fees and costs is affirmed, and the case is remanded for further proceedings consistent with this decision. PCC shall pay Lujan’s costs on appeal, and the cross-defendants shall bear their own costs.

**Tucher, J.**

We concur: Richman, Acting P.J., Stewart, J.

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
Cite as 18 C.D.O.S. 4899

TERRI RAINES, Plaintiff and Appellant, v. COASTAL PACIFIC FOOD DISTRIBUTORS, INC., Defendant and Respondent.

No. C083117

COUNSEL
Mayall Hurley, William J. Gorham III and Nicholas J. Scardigli for Plaintiff and Appellant.
Weintraub Tobin Chediak Coleman Grodin, Charles L. Post, Brendan J. Begley, Meagan D. Bainbridge and James Kachmar for Defendant and Respondent.

OPINION

After defendant Coastal Pacific Food Distributors, Inc. (Coastal Pacific) terminated plaintiff Terri Raines from her employment there, Raines sued Coastal Pacific for age and disability discrimination and other related claims. In addition, she sought recovery, both individually and in a representative capacity under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.),1 for Coastal Pacific’s failure to provide and maintain accurate wage statements as required by section 226, subdivision (a) (section 226(a) and its provisions). Raines appeals from a judgment in favor of Coastal Pacific after the trial court reversed its original ruling denying Coastal Pacific’s motion for summary adjudication as to that claim.

Raines contends triable issues of fact remain on her individual claim for statutory penalties under section 226, subdivision (e) (section 226(e) and its provisions). Section 226(e) authorizes an “employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a)” to recover damages or statutory penalties. Raines contends there are triable factual issues as to whether she sustained an injury and whether Coastal Pacific’s failure to provide accurate wage statements was knowing and intentional. She next contends the trial court erred in granting summary adjudication on her PAGA claim by improperly finding injury was required. Finally, she contends the trial court committed procedural error in reversing its original order denying summary adjudication.

We find merit only in the second contention. As we explain, a representative PAGA claim for civil penalties for a violation of section 226(a) does not require proof of injury or a knowing and intentional violation. This is true even though these two elements are required to be proven when bringing an individual claim for damages or statutory penalties under section 226(e). Because the trial court erroneously required proof of injury on the PAGA claim, the grant of summary adjudication was improper and we therefore reverse the judgment as to that claim.

FACTUAL AND PROCEDURAL BACKGROUND

Coastal Pacific hired Raines as a billing clerk in 1998 and terminated her employment in 2014. Raines filed suit against Coastal Pacific, alleging age discrimination, disability discrimination, and related claims. As relevant here, the first amended complaint alleged Coastal Pacific failed to furnish Raines and other employees accurate itemized wage statements showing the applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate and failed to maintain copies of accurate wage statements, as required by section 226(a). Raines sought to recover both statutory penalties on an individual basis and civil penalties on a representative basis under PAGA, as well as attorney fees, costs, and interest.

Coastal Pacific filed a motion for summary judgment or summary adjudication, seeking dismissal of all of Raines’s claims. While Coastal Pacific was successful with respect to many of the claims, the trial court denied summary adjudication as to the claim for age discrimination and failure to prevent age discrimination, and the claims for failure to furnish and maintain accurate wage statements. As to the Labor Code violations, the court found recovery under PAGA was permissible and there was a triable issue as to whether the information necessary to determine applicable hourly rates was on the pay stub.

The parties then settled the age discrimination claims, leaving only the section 226(e) and PAGA claims to be resolved.

The parties stipulated that from November 28, 2013, through February 28, 2015, the wage statements issued by Coastal Pacific did not include the overtime hourly rate of pay. Those wage statements did include both the number of overtime hours worked by the employee and the total overtime pay. The parties further stipulated that Raines had provided notice to the Labor and Workforce Development Agency of her allegations of section 226 violations, a prerequisite for a PAGA claim.

The parties stipulated that before the issues of injury and a knowing and intentional violation, as those terms are de-
fined in section 226(e), were submitted to the jury, the trial court should determine the legal issue of whether Raines was required to prove she suffered injury in order to obtain civil penalties under PAGA. If the court found proof of injury was not required to prove a PAGA claim, the parties stipulated there were 16,252 violations for failure to furnish an accurate wage statement, and zero violations for failure to maintain wage statements.

Coastal Pacific submitted a trial brief in which it argued that if the trial court determined a jury trial was appropriate, it should first resolve two legal questions. First, it argued the question of injury could be decided as a matter of law, asking the court to find the overtime hourly rate was “readily ascertainable” under the “reasonable person” standard because it required only simple math to calculate. Second, Coastal Pacific argued that if Raines were not entitled to statutory penalties under section 226(e) because of the absence of injury, she could not recover civil penalties under PAGA. In her trial brief, Raines stated her remaining claims as (1) an individual claim for statutory penalties under section 226(e) for failure to furnish accurate wage statements; (2) an individual claim for statutory penalties under section 226(e) for failure to maintain copies of accurate wage statements; and (3) a representative PAGA claim for civil penalties for failure to furnish accurate wage statements. Raines argued the threshold issue of whether an injury was required for a PAGA claim had already been decided by the trial court in its ruling on the summary judgment motion.

The court ruled Raines had not suffered an injury, as required for the individual claim under section 226(e), because the hourly overtime rate could be determined from the wage statement by simple math. The court reversed its earlier decision on the motion for summary adjudication as to the causes of action pertaining to Labor Code violations.

Raines objected, claiming the trial court was granting an untimely motion for reconsideration and that it modified its summary adjudication order without notice to the parties. The court rejected these objections, finding it was not bound by its previous ruling. In its judgment in favor of Coastal Pacific, the court noted it was modifying its earlier order. It determined a reasonable person could determine the overtime hourly rate from the wage statement; consequently, there was no injury. Without an injury, the section 226(e) claim failed. The court found an injury was also necessary for the PAGA claim. Because the failure to furnish claim failed, so did the failure to maintain claim.

Raines moved for a new trial. The trial court denied the motion.

DISCUSSION

I

Section 226 and Its Enforcement

Section 226(a) requires an employer to provide employees with an accurate itemized wage statement including nine
for enforcement and education; the remaining 25 percent is distributed to aggrieved employees. (§ 2699, subd. (i).)

“An employee plaintiff suing, as here, under [PAGA], does so as the proxy or agent of the state’s labor law enforcement agencies. The act’s declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. [Citation.]

In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA]. [Citation.]” (Arias v. Superior Court (2009) 46 Cal.4th 969, 986.)

“The central provision of PAGA is section 2699. Subdivision (a) of the statute permits aggrieved employees to recover civil penalties that previously could be collected only by LWDA. [Citation.] In addition, to address violations for which no such penalty had been established, subdivision (f) of the statute created ‘a default penalty and a private right of action’ for aggrieved employees. [Citation.]” (Home Depot U.S.A., Inc. v. Superior Court (2010) 191 Cal.App.4th 210, 216.)

Raines sought recovery under the default provision of section 2699, subdivision (f), applicable where there is no existing civil penalty. While section 226(a) does not provide for civil penalties, section 226.3 provides civil penalties for a violation of section 226(a). Thus, her PAGA claim would fall under subdivision (a) of section 2699. Federal courts disagree whether subdivision (a) or subdivision (f) of section 2699 applies where the allegation is the failure to provide adequate wage statements. Some courts have read section 226.3 to limit civil penalties to only those instances where the employer failed to provide any wage statement or to keep records. (York v. Starbucks Corp. (C.D.Cal., Nov. 1, 2012, No. CV 08-07919 GAF) 2012 U.S. Dist. Lexis 190239, at pp. *11-12; Fleming v. Covidien, Inc. (C.D.Cal., Aug. 12, 2011, No. ED CV-10-01487 RGK) 2011 U.S. Dist. Lexis 154590, at p. *7.) We find more persuasive a decision that found section 226.3 sets out a civil penalty for all violations of section 226. (Culley v. Lincare, Inc. (E.D.Cal. 2017) 236 F.Supp.3d 1184, 1194.)

In construing a statute, we consider “the object to be achieved and the evil to be prevented by the legislation.” (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1159, superseded on another point as noted in Manson v. Del Taco, Inc. (2009) 46 Cal.4th 661, 664.) Section 226(a) is intended to require employers to provide an adequate wage statement, itemizing the information to be included, “to assist the employee in determining whether he or she has been compensated properly.” (Soto v. Motel 6 Operating, L.P. (2016) 4 Cal.App.5th 385, 390.) Section 226.3 provides the civil penalty for failure to comply. In our view, LWDA would not be prohibited from seeking civil penalties for a grossly inadequate wage statement simply because the employer did provide a statement. Otherwise, the purpose of the statute would be thwarted.

In alleging a violation of section 226(a), Raines sought two different forms of recovery. “[A] PAGA plaintiff can collect civil penalties set out in § 226.3, and, if the wage statement violations create ‘injury as a result of a knowing and intentional’ violation, the statutory penalties set out in § 226(e)(1).” (Culley v. Lincare, Inc., supra, 236 F.Supp.3d at p. 1194.)

We turn now to whether summary adjudication in favor of Coastal Pacific was proper as to either Raines’s individual claim for statutory penalties or her representative (PAGA) claim for civil penalties from Coastal Pacific for its failure to provide accurate wage statements.

II

Injury under Section 226(e)

Raines contends the trial court erred in granting summary adjudication on her individual claim for statutory penalties under section 226(e) for the failure to provide an accurate wage statement, specifically the failure to provide the hourly overtime rate. She contends there are triable issues of fact as to whether she suffered injury as well as whether Coastal Pacific’s failure was knowing and intentional.

Section 226(e) permits “[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a)” to recover the greater of actual damages or statutory penalties. “An employee is deemed to suffer injury” if the employer fails to provide accurate and complete information of the hourly rate, required by item (9), and “the employee cannot promptly and easily determine from the wage statement alone” the applicable hourly rate. (§ 226(e)(2)(B).) The statute defines “promptly and easily determine” to mean “a reasonable person would be able to readily ascertain the information without reference to other documents or information.” (§ 226(e)(2)(C).)

For purposes of section 226(e), a plaintiff is “injured” “if the accuracy of any of the items enumerated in § 226(a) [including the hourly rate] cannot be ascertained from the four corners of the wage statement.” (Ovieda v. Sodexo Operations, LLC (C.D.Cal., Oct. 3, 2013, No. CV 12-1750-GHK) 2013 WL 12122413 at p. *3.) An actual injury is shown where “there is a need for both additional documentation and additional mathematical calculations in order to determine whether Plaintiffs were correctly paid and what they may be owed.” (Reinhardt v. Gemini Motor Transport (E.D.Cal. 2012) 879 F.Supp.2d 1138, 1142.) In contrast, where the deficiency in the wage statement could be corrected by “simple

2. The significance of whether subdivision (a) or subdivision (f) of section 2699 is the applicable PAGA statute is amount of the penalty.

3. Although California Rules of Court, rule 8.1115 generally does not permit citation of unpublished California cases, it does not prohibit citation of unpublished federal cases. (Cal. Rules of Court, rule 8.1115; Farm Raised Salmon Cases (2008) 42 Cal.4th 1077, 1096, fn. 18.)

In support of its motion for summary judgment or summary adjudication, Coastal Pacific provided excerpts of Raines’s deposition. In her deposition, Raines testified her wage statements showed when she worked overtime and the amount she was paid for overtime. She could not normally do division in her head, but she knew how to use a calculator to perform division. Coastal Pacific also provided a sample wage statement for Raines. It showed that for the pay period of October 27, 2013, through November 2, 2013, Raines worked 1.5 hours of overtime and was paid $34.94. Dividing 34.94 by 1.5 provides the hourly rate for overtime of $23.29. Raines offered no evidence to dispute these facts. “[W]here relevant facts are not in dispute, questions of fact may be decided as a matter of law in a summary judgment proceeding.” *(Wang v. Nibelink (2016) 4 Cal.App.5th 1, 28.)*

Raines contends it cannot be said as a matter of law that a reasonable person can “readily ascertain” the hourly rate for overtime. This is so, Raines argues, because determining the overtime hourly rate “presents a relatively complex mathematical problem that surely most people could not readily do in their heads.” The calculation would require the use of a calculator.

We reject this argument. Here, one can determine the hourly overtime rate “from the wage statement alone.” *(§ 226(e)(2)(B).)* It can be “promptly and easily” determined by simple arithmetic. *(Ibid.)* The mathematical operation required is division, which is taught in grade school. Although many people cannot perform the calculation in their heads, it can be easily performed by use of a pencil and paper or a calculator; no additional documents or information are necessary. *(§ 226(e)(2)(C).)*

Since Raines could not show a triable issue of fact as to the requisite injury, we, like the trial court, need not determine whether there was a triable issue of fact as to whether Coastal Pacific’s failure to provide the hourly rate for overtime was knowing and intentional.

The trial court did not err in granting summary adjudication in favor of Coastal Pacific on Raines’s individual claim for statutory penalties under section 226(e).

III

**Whether Injury is Required for PAGA Claim**

The trial court granted summary adjudication on Raines’s PAGA claim because it found Raines was required to show injury for that representative claim as well as for the section 226(e) claim. Raines repeats her earlier contention that there is a triable issue of fact as to injury, and further contends that even if she cannot establish injury, injury is not required for the PAGA claim. Since we have rejected the first point, we now address the second.

Whether a PAGA claim for a violation of section 226(a) requires the same showing of injury as an individual claim for statutory penalties under section 226(e) is a question of statutory interpretation that we review de novo. *(Bruns v. E-Commerce Exchange, Inc. (2011) 51 Cal.4th 717, 724.)* Courts have reached different conclusions on this question. Two federal cases have found a PAGA claim based on violation of section 226 fails when a plaintiff has failed to establish the elements of section 226(e), including injury. These cases have labeled the PAGA claim “derivative,” but provide no further analysis on the issue. *(Green v. Lawrence Serv. Co. (C.D.Cal. 2013 No. LA CV12-06155 JAK) 2013 U.S. Dist. Lexis 109270, at pp. *41-43; Elliot v. Spherion Pac. Work, LLC (C.D.Cal. 2008) 572 F.Supp.2d 1169, 1181-1182 (Elliot).)*

In contrast, in *McKenzie v. Federal Express Corp.* (C.D. Cal 2011) 765 F.Supp.2d 1222 *(McKenzie),* at page 1232, the district court found recovery under PAGA for a violation of section 226(a) did not require proving an injury under section 226(e). The court reasoned, “PAGA does not contain any language indicating that injury within the meaning of Labor Code section 226(e) must be shown.” *(McKenzie, at pp. 1231-1232.)* The court relied on *Lopez v. G.A.T. Airline Ground Support, Inc.* (S.D.Cal., July 19, 2010, No. (09-CV-2268-IEG) 2010 U.S. Dist. Lexis 73029, which found that because section 226 does not provide a penalty, penalties under section 2699, subdivision (f) are available for a violation of section 226(a). The *McKenzie* court reasoned that: (1) the plaintiff sought recovery under section 2699, subdivision (f); (2) section 2699.3 provides that such a civil action requires a violation of one of the provisions listed under section 2699.5; and (3) section 2699.5 listed subdivision (a) of section 226, but not subdivision (e). Therefore, the court concluded that to recover a PAGA penalty, one need only prove a violation of subdivision (a) of section 226, not subdivision (e) with its injury requirement. *(McKenzie, at p. 1232.)*


After briefing in this case was complete, Division 1 of the First District addressed the question of whether the requirements of section 226(e) applied to a PAGA claim for a viola-
alties for the violation of section 226(a), not the damages
In this context, PAGA is concerned with collecting civil pen
not apply to a PAGA claim for a violation of section 226(a).

The appellate court reversed, holding “a plaintiff seeking
civil penalties under PAGA for a violation of section 226(a)
does not have to satisfy the ‘injury’ and ‘knowing and in
tentional’ requirements of section 226(e)(1).” (Lopez, supra,
15 Cal.App.4th at p. 780.) The court began its analysis with
the plain language of the applicable statutes. It reasoned that
PAGA was concerned only with civil penalties, while section
226(e) provided for damages or statutory penalties. (Lopez,
at p. 780.) Case law has distinguished between statutory pen
alties and civil penalties. “The civil penalties recovered on
behavior of the state under the PAGA are distinct from the statu
several federal cases, citing

The court found support for its plain language analysis in the legisla
tive history that showed section 226(e) authorized a
private right of action for statutory damages or penalties and not a
civil penalty. (Lopez, at pp. 781-784.)

The Lopez court noted its conclusion was consistent with that of many federal cases, citing McKenzie, supra,
765 F.Supp.2d 1222; Willner v. Manpower, Inc., supra,
35 F.Supp.3d 1116; Gaasterland v. Ameriprise Fin. Serv., Inc.
(N.D.Cal., Sept. 15, 2016, No. 16-CV-03367-LHK) 2016
U.S. Dist. Lexis 126648 (§ 226(e) does not apply to PAGA
claim for violation of § 226(a)); Stafford v. Brink’s, Incorpo
U.S. Dist. Lexis 194677 (PAGA claim based on violation of
§ 226 does not require showing of knowing and intentional
injury); Burnham v. Ruan Transportation (C.D.Cal., Aug. 30,
2013, No. SACV 12-0688 AG) 2013 U.S. Dist. Lexis 198505
[plaintiffs must prove injury to recover damages under § 226,
but not to recover PAGA penalties].) (Lopez, supra, 15 Cal.
App.4th at p. 785.)

We agree with the conclusion of Lopez and the federal cas
es it cites that the requirements for a section 226(e) claim do
not apply to a PAGA claim for a violation of section 226(a).
In this context, PAGA is concerned with collecting civil pen
alties for the violation of section 226(a), not the damages
or statutory penalties provided for in section 226(e). As we
explain, post, we find additional support for this conclusion
beyond the reasoning of Lopez.

Coastal Pacific urges this court not to follow Lopez. First,
it contends the issue of whether injury was required for a
PAGA claim was not before the trial court in that case, as the
Lopez trial court rested its decision on only the knowing and
intentional requirement of section 226(e) and the Lopez app
ellate court needed to address only that issue to resolve the
appeal. We see no principled reason to distinguish between
the two different requirements of section 226(e) of injury and
a knowing and intentional violation and Coastal Pacific offers
none. We agree with the Lopez court that its analysis applies
equally to both requirements.

Second, Coastal Pacific faults the Lopez decision for fail
ing to discuss the federal cases that found there was no
violation of section 226(a) without an injury. The trial court
in the instant case followed Green v. Lawrence Serv. Co.,
supra, 2013 U.S. Dist. Lexis 109270 and Elliot, supra, 572
F.Supp.2d 1169, which found injury was required due to the
“derivative” nature of a PAGA claim. The trial court sum
marized these cases and Price v. Starbucks Corp., supra,
192 Cal.App.4th 1136: “In effect, these courts are interpreting
and applying the statute to say that ‘no injury’ amounts to
‘no violation.’ ”

We disagree that “‘no injury’ amounts to ‘no violation.’ ”
A PAGA claim for a violation of section 226(a) seeks to re
cover civil penalties. Those civil penalties are provided for
in section 226.3. That section provides: “Any employer who
violates subdivision (a) of Section 226 shall be subject to
a civil penalty in the amount of two hundred fifty dollars
($250) per employee per violation in an initial citation and
one thousand dollars ($1,000) per employee for each viola
tion in a subsequent citation, for which the employer fails to
provide the employee a wage deduction statement or fails to
keep the records required in subdivision (a) of Section 226.
The civil penalties provided for in this section are in addition
to any other penalty provided by law. In enforcing this sec
tion, the Labor Commissioner shall take into consideration
whether the violation was inadvertent, and in his or her dis
cretion, may decide not to penalize an employer for a first
violation when that violation was due to a clerical error or
inadvertent mistake.”

Section 226.3 permits the Labor Commissioner to take
into consideration whether the section 226(a) violation was
inadvertent. Under section 226(e), an employer may bring
an individual suit for damages or statutory penalties only for
a “knowing and intentional failure by an employer to com
ply with subdivision (a).” The civil penalty has no “knowing
and intentional” requirement because inadvertence is only
a factor to consider, not a disqualifying condition. Because
section 226.3 clearly does not include the knowing and in
tentional requirement of section 226(e), there is no reasoned
basis to import the injury requirement of section 226(e) to the
civil penalty. We agree with Green and Elliot that a PAGA
claim is derivative, but it is derivative of section 226(a) and section 266.3, not section 226(e).

Both the trial court and Coastal Pacific justify their interpretation by questioning why the Legislature would permit civil penalties for a violation of section 226(a) that did not cause injury, when it does not permit damages (or statutory penalties) in such a case. But damages and civil penalties have different purposes; these different purposes may well explain the Legislature’s reasoning. Damages are intended to be compensatory, to make one whole. (See Civ. Code, § 3281.) Thereby, there must be an injury to compensate. On the other hand, “Civil penalties, like punitive damages, are intended to punish the wrongdoer and to deter future misconduct.” (People v. First Federal Credit Corp. (2002) 104 Cal.App.4th 721, 732.) An act may be wrongful and subject to civil penalties even if it does not result in injury.

Further, we note that a trial court has discretion in awarding civil penalties and may reduce the award for technical violations that cause no injury. “In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (§ 2699, subd. (e)(2); see Thurman v. Bayshore Transist Management, Inc. (2012) 203 Cal.App.4th 1112, 1135-1136 [no abuse of discretion to reduce penalty by 30 percent].) The court is also directed to consider whether the violation was inadvertent in assessing penalties. (§§ 226.3; 2699, subd. (e)(1); Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement (2011) 192 Cal.App.4th 75, 82 [§ 226.3 “envisions a two-part analysis: first, a mandatory consideration of whether the violation was inadvertent; second, if inadvertence is found, a discretionary decision about whether to penalize a first violation”].)

At oral argument, Coastal Pacific cited to two new cases that it asserted supported its position that a derivative PAGA claim requires injury.6 Coastal Pacific contends that Kim v. Reins Int’l California, Inc. (2017) 18 Cal.App.5th 1052, reviewed March 20, 2018 (Kim) and Harris v. Best Buy Stores, L.P. (N.D.Cal., Feb. 20, 2018, No. 17-cv-00446-HSG) 2018 U.S. Dist. Lexis 28079 (Harris) hold that when an individual claim of a Labor Code violation fails, the derivative PAGA claim must fail as well. We find Kim and Harris speak to the issue of standing to bring a PAGA claim and thus are inapposite here.

Under PAGA, an “aggrieved employee” may bring suit for civil penalties for Labor Code violations. (§ 2699, subd. (a).) An “aggrieved employee” is any person employed by the alleged violator and against whom an alleged violation has been committed. (Id., subd. (c).) In both Kim and Harris, the PAGA claim was dismissed because the plaintiff was not an “aggrieved employee”; no Labor Code violation had been committed against him. In Kim, plaintiff had settled and voluntarily dismissed his wage and hour claim; the court held after a voluntary dismissal, Kim was no longer an “aggrieved employee.” (Kim, supra, 18 Cal.App.5th at p. 1059.) In Harris, plaintiff’s overtime wage claim had been dismissed with prejudice in a prior action. (Harris, supra, 2018 U.S. Dist. Lexis 28079, at p. *28.) Both cases concern the need for a Labor Code violation, not whether the employee suffered “injury” under section 226(e)(2)(B). Here, it is undisputed that a Labor Code violation (failure to provide overtime rate) had been committed against Raines.

Finally, Coastal Pacific argues the Legislature never intended to permit PAGA plaintiffs to “slice up the Labor Code.” It argues that if section 226(a) is separated from section 226(e) for PAGA claims, then PAGA penalties could be recovered from employers excluded from such penalties in subdivisions (d) (babysitters and the like) and (i) (governmental entities) of section 226 because PAGA does not mention those subdivisions. We find no merit in this argument. Both subdivisions (d) and (i) begin: “This section does not apply . . . .” Thus, employers described in these subdivisions cannot violate section 226(a); these subdivisions are exceptions thereto. By contrast, section 226(e) does not provide an exception to section 226(a); instead, it provides a private right of action for damages or statutory penalties, as long as certain conditions (injury and a knowing and intentional violation) are met.

Because the trial court incorrectly found an employee must suffer an injury in order to bring a PAGA claim, it erred in granting summary adjudication on Raines’s PAGA claim.

IV

Alleged Procedural Errors

Raines contends the trial court erred procedurally in reversing its previous order denying Coastal Pacific’s motion for summary adjudication on the labor law violations. Raines contends the court was required to solicit briefing and hold a hearing before changing its order. Instead, according to Raines, the court improperly granted an untimely motion for reconsideration.

Raines relies on Le Francois v. Goel (2005) 35 Cal.4th 1094 (Le Francois), a case she claims has “circumstances nearly identical to those present in this matter.” In Le Francois, the trial court denied defendants’ motion for summary judgment. Over a year later, individual defendants filed a new motion for summary judgment based on the same grounds as the first. The motion was transferred to another judge who granted it. (Id. at p. 1097.) Our Supreme Court held the trial court erred in granting the second motion. (Id. at p. 1109.) Le Francois interpreted the procedural statutes “as imposing a limitation on the parties’ ability to file repetitive motions, but not on the court’s authority to reconsider its prior interim

---

6. Coastal Pacific did not supply this court (and opposing counsel) with notice of the new authority as provided for in California Rules of Court, rule 8.254.
rulings on its own motion.” (Id. at p. 1105.) “Unless the requirements of [Code of Civil Procedure] section 437c, subdivision (f)(2), or 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court on its own motion. To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion—something we think will happen rather rarely—it should inform the parties of this concern, solicit briefing, and hold a hearing.” (Id. at p. 1108.)

Here, the judgment indicates the trial court reversed its prior order on the motion for summary judgment or summary adjudication “on its own motion.” Le Francois holds the court had inherent authority to do so. (Le Francois, supra, 35 Cal.4th at p. 1105.) This change of mind came after the parties filed trial briefs and stipulated that the court should decide the legal question of whether a PAGA claim required an injury. We need not decide if the court provided proper notice and a hearing before changing its ruling because Raines cannot show any prejudice. A trial court’s judgment may not be set aside for procedural error unless the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We have independently reviewed the court’s rulings, after full briefing by the parties and an opportunity to be heard, both as to the individual section 226(a) claims and the representative PAGA claim. Therefore, any error as to proper notice or hearing has been cured.

Raines argues we should not require a miscarriage of justice because Le Francois did not. There, the dissent argued the case should be affirmed due to lack of prejudice because the trial court had authority to grant the summary judgment motion on its own motion. (Le Francois, supra, 35 Cal.4th at pp. 1109-1110 (conc. & dis. opn. of Kennard, J.).) The majority rejected this argument because the plaintiff had no notice of the reconsideration and it was unknown what response he might have made. (Id. at p. 1109, fn. 6.) The circumstances here are different. We have decided the same issues that were considered by the trial court in the motion for summary adjudication; the Le Francois court did not.

**DISPOSITION**

The judgment is reversed as to the PAGA claim only. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(3).)

We concur: Raye, P. J., Renner, J.

Duarte, J.

Cite as 18 C.D.O.S. 4905

**NIELSEN CONTRACTING, INC. et al.,**

**Plaintiffs and Respondents,**

**v.**

**APPLIED UNDERWRITERS, INC. et al.,**

**Defendants and Appellants.**

No. D072393

In The Court of Appeal of the State of California

Fourth Appellate District

Division One


Filed May 23, 2018

**ORDER DENYING REHEARING AND MODIFYING OPINION NO CHANGE IN JUDGMENT**

**THE COURT:**

It is ordered that the opinion filed herein on May 3, 2018, be modified as follows:

1. On page 5, following the third sentence of the first full paragraph and before footnote 3, the following two sentences are added:

   This agreement was subject to certain exceptions, including that (1) CIC was permitted to renew a policy “issued in connection with an RPA in force as of July 1, 2016”; and (2) AUCRA could issue or renew an RPA if Shasta Linen's rulings were successfully challenged in a court proceeding. Additionally, the parties agreed that arbitrations under “an in-force RPA or a past RPA entered into or issued in California will take place in California.”

3. On page 25, following the second sentence of the first full paragraph, add as footnote 4 the following footnote, which will require renumbering of all subsequent footnotes:

   Defendants maintain we should not consider Shasta Linen because its decision was “undermined” by the Stipulated Cease and Desist order. This argument is unsupported. The stipulation reaffirms Shasta Linen’s ruling that AUCRA may not issue or renew RPAs absent compliance with the administrative filing requirements set forth in sections 11658 and 11735. The parties’ agreement as to certain limited exceptions to this rule and to conduct any arbitrations in California does not undercut Shasta Linen’s reasoning. The administrative decision is relevant to our analysis because we have found its reasoning persuasive, not because we are legally bound by its conclusions.
There is no change in the judgment.
The petition for rehearing is denied.

McCONNELL, P. J.

Copies to: All parties