

1 of 31

PAUL E. MERRELL *to McCrea 7/9/91*
Lawyer *SAM*
7493 East Five Rivers Road
Tidewater, Oregon 97390
Telephone: (503) 528-7151 Telefax: Via Voicemail

February 9, 1991

Chuck McCrea, Esquire
Jones, Jones, Close
& Brown, Chartered
700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101-6026

VIA TELEFAX

Re: Nevada Power v. Monsanto, et al

Dear Chuck:

This transmits my markup of the draft received yesterday afternoon and the second draft of the motion to supplement. As you'll notice, the latter will need to have one reference to the attached material added after you receive the materials from David and Mr. Bates.

I also enclose an attachment, which includes some specific language in a few places where I didn't have room to write.

I didn't make any changes in the area you said you were rewriting, involving the Webb case.

I found it remarkable how many of the changes I had marked on my copy for receipt of the your draft were the same places you had already changed. We must be nearly on the same wave-length.

I think we are now good enough and should concentrate on buttoning up unless you have overriding concerns in some area.

I have moved some of the footnotes around so they don't all stack up on one page.

David feels strongly that we should work in the topic of judicial estoppel in the introductory portion of page 1.

Chuck McCrea, Sr.
February 9, 191
Page 2

I reinserted the word primary near the bottom of page 1 because statutes of limitations is only one of the issues before the court (we also have the failure to state a claim issue).

On page 4, I rather liked the mental picture I evoked when I came up with the word "cobbled," but am not wedded to it. (Can you see them out there trying to pave a street with case decisions from everywhere but the home jurisdiction?) I also liked the cobbled-collage-culled meter to the sentence. You noticed as did Carol that you can't really cobble legal theories, but it seems like it might come close enough if it reads "instead, they cobbled together a collage of decisions . . ." Why don't you make the call; but remember, in the opening brief I gave in to "unregenerate," and you may crush my hopes that the Ninth Circuit would use this sentence!!!

Some cuts I made are to keep the same number of lines in a paragraph because of additional words I inserted, not because I disapprove of your changes in the same paragraphs. If you would prefer to keep any of those changes in, feel free. As long as we're grammatical, accurate, and within page lengths, I'm easy.

I began marking parenthetical statements that had no wordspacing between them until I realized that Carol was doing that consistently. I assume that's a style judgment in your shop that I have no problem with. Those markings should therefore either be ignored or the problem could be dealt with using a global search and replace, although we'd need to watch it on statutory citations, e.g., Section 3(b)(1)(A), where we'd want the parentheses to stay together.

On page 9, the first phrase following heading 3: The change is important. My original phrasing was ambiguous and you apparently grabbed the wrong ambiguity. Sorry!

As you'll notice in notes 10 and 12, we have four documents to go in the appendix of the brief, and should be referenced, App. pg. *____. I believe you have them all. Could you figure out how they'll page

Chuck McCrea, Sr.
February 9, 191
Page 3

number. On the BNA reports for the Diamond Shamrock and Shell Oil litigation, I'd suggest dropping the cover pages and just use the articles. The reference materials could be typed on the pages with the articles.

That's it for tonight. Talk to you in the a.m.

-- Paul

APPENDIX

Paul Merrell new text to add (references are to 2-8-91 draft).

Add to end of first paragraph, pg. 8 (following "See also note 8 infra." in my handwriting:

Defendants are estopped from arguing that Nevada Power should not have believed their false representations.

Page 11, where I've deleted the reference to the Webb decision, add a new footnote:

As is apparent in this brief, the Nevada Court frequently relies upon Corpus Juris Secundus rules on limitations of actions. Counsel have found no Nevada case in which a rule from that source was rejected. It is therefore reasonable to predict that Nevada would adopt the rule quoted above.

Bottom of pg. 14. In case Carol can't read it, the introductory sentence now reads, "Most of defendants' argument founders on the hypothetical situation."

X Add to end of existing footnote 13, pg. 18:

As recognized by the Ryan Court, this action might proceed as easily in contractual indemnity as in equitable indemnity, based on the hidden defect causing defendants' breach of warranty in the sales contracts, raising an implied term of indemnification.

Pg. 21, where I've deleted the reference to 40 CFR 761.30, replace with:

See e.g., Environmental Defense Fund v. EPA, 636 F.2d 1267 (D.C. Cir. 1980) (voiding EPA's 1979 PCB rules).

Pg 12,
ahead of
9/2

Ct isn't likely to
go out of its way to
find case CSS; it
will simply follow
a contrary view
w/o comment.