

MEMORANDUM

TO: Distribution

FROM: Charles H. McCrea 

RE: Nevada Power v. Monsanto, et al. 9th Circuit Court of Appeals

DATE: October 10, 1991

This case was argued today in the Ninth Circuit. San Francisco was in the throes of a near record heat wave (93 degrees). Because the Federal Court House was damaged in the 1989 earthquake, this hearing was held in the moot courtroom of Hastings College of Law. Hastings' moot courtroom is appreciably less formal and less intimidating than the Court's usual domicile. The three judges (Scopil, Pregerson and O'Scannlain) sat on a dias approximately 12 feet from the lectern used by counsel.

We arrived early and observed argument on four cases preceding ours on the calendar. In every case, notwithstanding the rule requiring counsel to make a brief statement of the case, the Court waived the rule and went immediately into questions of counsel, which told me that the judges had read the briefs ahead of time and knew what the cases were about.

The judges returned from the first recess minus their robes and in shirt sleeves, and invited counsel to remove their jackets too. This contributed to the informal atmosphere which I thought was very productive.

Paul Merrell argued the case for Nevada Power. When he went to the lectern, he asked whether the Court wanted him to make a statement of the case as required by the rule, and was informed

that they did not. He then observed that Nevada Power had filed the last brief and said that he would be happy to field any questions from the Court but otherwise wished to hear what the appellees had to say in response to our Reply Brief and save the balance of our time for rebuttal and questions from the Court. The Court agreed to this.

Bruce Featherstone of Baker & McKenzie argued the case for the appellees. We (Paul Merrell, David McCrea and I) were pleased that the Court asked questions of Featherstone which we thought reflected considerable knowledge of the issues. Among other things, the Court asked Featherstone, "You are holding Nevada Power responsible for knowing something [appellee's fraud] that you deny exists, are you not?" Featherstone could only admit it. He addressed furthermore arguments to our claims for fraud, failure to warn and indemnity, but we felt he did not say anything likely to change any outcome the Court would reach solely by reading the briefs.

On rebuttal, Paul Merrell addressed the matters Featherstone had raised and answered questions from the Court. Again, we felt that the questions asked of Merrell reflected knowledge of the issues by the judges.

I don't even bet horses; no way would I bet judges. I did not leave the courtroom with the impression that we had either won or lost; the odds are against us simply because we are asking the Ninth Circuit to reverse the District Court - something appellate courts don't like to do unless there are compelling reasons for it.

Memorandum
October 16, 1991
Page 3

Nevertheless, I felt comfortable with what I had seen and heard during the course of our argument.

Richard L. Hinckley, Esq.
David S. McCrea
Paul Merrell
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File