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U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

OIL-DRI CORPORATION OF  
NEVADA, a Nevada corporation  
and OIL-DRI CORPORATION OF  
AMERICA, a Delaware  
corporation.  
Petitioners and Plaintiffs,  
vs.  
WASHOE COUNTY, a political  
subdivision of the STATE OF  
NEVADA,  
Respondent and Defendant.

CV-N-02-0186-ECR (RAM)

ORDER

We now consider the issue which we raised, sua sponte, in our order (#61) dated December 17, 2002, concerning our jurisdiction to entertain this action.

**BACKGROUND**

In July of 1999, Oil-Dri Corporation of Nevada and Oil-Dri Corporation of America (collectively "Oil-Dri") submitted a Plan of Operations ("Plan") to the Carson City Field Office of the Bureau of Land Management ("BLM") for the development, on federal land, of two

1 open pit mine areas, from which clay would be extracted. The proposed  
2 project also included exploration and development activities and the  
3 construction of haul and access roads. The federal land that would  
4 be involved in the project was located in Washoe County, Nevada (the  
5 "County"). The plan also covered the construction of a facility on  
6 private land adjacent to the mining areas where the clay would be  
7 processed into oil absorbent material and cat litter. The BLM issued  
8 a Final Environmental Impact Statement and Record of Decision in  
9 September, 2001.

10 On December 15, 2000, Oil-Dri submitted an application to the  
11 Washoe County Planning Department seeking a special use permit  
12 covering both the public and private land components of the company's  
13 project.<sup>1</sup> Oil-Dri also applied to the Nevada Division of  
14 Environmental Protection, the Washoe County Air Quality Management  
15 Division and the Nevada State Engineer for various other permits. On  
16 December 18, 2001, the County Planning Commission considered the  
17 special use permit application during a public hearing. At that  
18 hearing, the Commission took public comment and voted to deny the  
19 special use permit in its entirety.

20 Oil-Dri then appealed the decision to the County's Board of  
21 Commissioners on December 31, 2001. On February 26, 2002, the Board  
22 of Commissioners held an appeal hearing, and the appeal was denied.  
23 As a result of this denial, the BLM withdrew its Record of Decision  
24 for the project.

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26 <sup>1</sup> As discussed further below, Oil-Dri claims that it was improper for  
27 the County to require one application covering both the public and private  
28 land.

1 Oil-Dri filed the instant action on April 11, 2002. In its  
2 Petition/Complaint (the "Complaint"), Oil-Dri seeks judicial review  
3 of the County's decision denying the special use permit. The company  
4 prays for a declaratory judgment that the County's action were  
5 unlawful and in excess of its authority, arbitrary and capricious, and  
6 not supported by substantial evidence. Oil-Dri also asks for a trial  
7 on the issue of actual damages sustained as a result of the County's  
8 denial.

9 After reviewing the various briefs filed by the parties, we  
10 raised the issue, sua sponte, regarding our jurisdictional basis to  
11 entertain this suit.<sup>2</sup>

12 **ANALYSIS**

13 **I. 28 U.S.C. § 1331**

14 Article III of the Constitution gives the federal courts power  
15 to hear cases "arising under" federal law. U.S. Const. art. III, §  
16 2. However, that grant of power to the federal courts is not self  
17 executing. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807  
18 (1986). Rather, it was the Judiciary Act of 1875 that first gave the  
19 federal courts general federal-question jurisdiction. Id. That  
20 statute, as currently codified, states: "The district courts shall  
21 have original jurisdiction of all civil actions arising under the  
22 Constitution, laws, or treaties of the United States." 28 U.S.C. §  
23 1331.

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25

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26 <sup>2</sup> Under Fed. R. Civ. P. 12(h)(3), we may raise the question of subject  
27 matter jurisdiction, sua sponte, at any time during the pendency of the  
28 case. Snell v. Cleveland, Inc., 316 F.3d 822, 826 (9th Cir. 2002).

1 As the Supreme Court explained in Franchise Tax Bd. v. Constr.  
2 Laborers Vacation Trust, 463 U.S. 1, 8 (1983), "[s]ince the first  
3 version of § 1331 was enacted, the statutory phrase 'arising under the  
4 Constitution, laws, or treaties of the United States' has resisted all  
5 attempts to frame a single, precise definition for determining which  
6 cases fall within, and which cases fall outside, the original  
7 jurisdiction of the district courts." (citation omitted). The Court  
8 has counseled that jurisdictional determinations under § 1331 "require  
9 sensitive judgments about congressional intent, judicial power, and  
10 the federal system." Merrell Dow, 478 U.S. at 810.

11 As a general rule, "the presence or absence of federal-question  
12 jurisdiction is governed by the 'well-pleaded complaint rule,' which  
13 provides that federal jurisdiction exists only when a federal question  
14 is presented on the face of the plaintiff's properly pleaded  
15 complaint." ARCO Env'tl. Remediation, L.L.C. v. Dep't of Health and  
16 Env'tl. Quality, 213 F.3d 1108, 1113 (9th Cir. 2000) (quoting  
17 Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)). Under this  
18 rule, jurisdiction depends solely on the plaintiff's claims for relief  
19 and not on any anticipated federal defenses to those claims. Id.

20 The "vast majority" of federal question cases are those brought  
21 under a federal law that itself creates a private cause of action.  
22 Merrell Dow, 478 U.S. at 808. Clearly, such cases arise under  
23 federal law. Id. The more difficult question relates to when cases  
24 based on state law causes of action arise under federal law.

25 Where state law creates the cause of action, a case may still  
26 arise under federal law if federal law completely preempts the state  
27

1 law, or some substantial, disputed question of federal law is a  
2 necessary element of one of the plaintiff's well pleaded claims.  
3 Rains v. Criterion Sys., Inc., 80 F.3d 339, 345 (9th Cir. 1996)  
4 (citing Franchise Tax, 463 U.S. at 13). Complete preemption is a  
5 "narrow exception to the 'well-pleaded complaint rule.'" Hofler v.  
6 Aetna US Healthcare, 296 F.3d 764, 768 (9th Cir. 2002) (quoting Holman  
7 v. Laulo-Rowe Agency, 994 F.2d 666, 668 (9th Cir. 1993)). It applies  
8 when a federal law "so completely preempt[s] a particular area that  
9 any civil complaint raising this select group of claims is necessarily  
10 federal in character." Id. (quoting Metro. Life Ins. Co. v. Tavior,  
11 481 U.S. 58, 63-64 (1987)). Most federal statutes do not completely  
12 preempt state law. Id.

13 If complete preemption does not apply, a case may still arise  
14 under federal law if the plaintiff's right to relief necessarily  
15 depends on the resolution of some substantial, disputed issue of  
16 federal law. ARCO, 213 F.3d at 1114. The mere presence of a federal  
17 issue in the plaintiff's state cause of action, however, is not  
18 sufficient in and of itself to confer federal jurisdiction. Wander  
19 v. Kaus, 304 F.3d 856, 858 (9th Cir. 2002) (citing Merrell Dow, 478  
20 U.S. at 813). Rather, as Justice Cardozo explained: "To bring a case  
21 within the statute, a right or immunity created by the Constitution  
22 or laws of the United States must be an element and an essential one,  
23 of the plaintiff's cause of action.... The right or immunity must be  
24 such that it will be supported if the Constitution or laws of the  
25 United States are given one construction or effect and defeated if  
26 they receive another." Gully v. First Nat'l Bank in Meridian, 299

1 U.S. 109, 112 (1936)<sup>3</sup>; see also United States v. Morros, 268 F.3d 695,  
2 700 (9th Cir. 2001) (applying the same test).

3 **II. Oil-Dri's Complaint**

4 Oil-Dri's complaint states that this suit is brought pursuant  
5 to: (1) the General Mining Law of 1872, 30 U.S.C. §§ 21-54; (2) the  
6 Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (collectively  
7 the "Mining Act"); and (3) Nev. Rev. Stat. 278.0233. (Compl. at ¶  
8 1).<sup>4</sup> The Mining Act does not create a private right of action for  
9 this type of suit. See 30 U.S.C. §§ 21-54.<sup>5</sup> For this reason, Oil-Dri  
10 styled its complaint as a request for judicial review in accordance  
11 with Nev. Rev. Stat. 278.0233. Accordingly, this case involves a  
12 cause of action created by state law.

13  
14 Section 278.0233 of the Nevada Revised Statutes allows a person  
15 who has any right, title or interest in real property, and who is  
16 denied a permit required by statute or ordinance to put that property  
17 to a certain use, to sue the agency that denied the permit if the  
18 agency's decision was: (1) arbitrary or capricious; or (2) unlawful  
19 or in excess of lawful authority. Nev. Rev. Stat. 278.0233(a)(1) &  
20

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21 <sup>3</sup> Professor Chemerinsky notes that "the Court never has done better  
22 than Justice Cardozo's explanation in the Gully case" in terms of  
23 establishing a test for jurisdiction under § 1331 when the case is based on  
a state law cause of action. Erwin Chemerinsky, Federal Jurisdiction 283  
(3d ed. 1999).

24 <sup>4</sup> The complaint also states that the suit is brought under the  
25 Declaratory Judgment Act, 28 U.S.C. § 2201, however, that act does not  
26 itself confer jurisdiction. Clark v. Busey, 959 F.2d 808, 812 (9th Cir.  
1992).

27 <sup>5</sup> The only cause of action created by the Mining Act concerns the  
28 judicial determination of adverse claims. See 30 U.S.C. § 30.

1 (2). According to Oil-Dri, judicial review in accordance with Section  
2 278.0233 is subject to Nevada's Administrative Procedure Act, and is  
3 confined to the record presented before the County Commission. Oil-  
4 Dri challenges the County's decision on four grounds under Section  
5 278.0233.

6 First, Oil-Dri claims that the County's denial of the special use  
7 permit was arbitrary and capricious as it related both to the proposed  
8 mining operation on federal land and processing plant on private land.  
9 (Compl. at ¶ 34). Under Nevada law, an agency decision is arbitrary  
10 or capricious if it was not supported by substantial evidence. City  
11 of Reno v. Reno Police Protective Ass'n, 59 P.3d 1212, 1219 (Nev.  
12 2002). Substantial evidence is defined as "evidence that a reasonable  
13 person would deem adequate to support a decision." Id.

14 Second, according to Oil-Dri the County's decision was unlawful  
15 under Section 278.0233 because it violated Chapter 278B of the Nevada  
16 Revised Statutes as well as Washoe County ordinances relating to  
17 traffic issues. (Compl. at ¶ 34). Specifically, Oil-Dri asserts that  
18 under Nevada law it was unlawful for the County to cite regional  
19 traffic concerns as a basis for denying the special use permit. (Br.  
20 in Supp. of Pet'r/Pls.' Pet./Compl., #11, at 27-36).

21 Third, Washoe County ordinances, Oil-Dri argues, required the  
22 County to review the mining operation and processing plant separately.  
23 (Compl. at ¶ 34; Br. in Supp. of Pet'r/Pls.' Pet./Compl., #11, at 12).  
24 By considering the two projects together, under one permit  
25 application, the County effectively reviewed the processing plant in  
26 light of factors in the ordinances that govern mining projects on  
27

1 public land. Oil-Dri concludes, then, that the County's decision to  
2 require one permit application was unlawful.

3 Oil-Dri's fourth challenge under Section 278.0233 is the only one  
4 that raises a federal issue. Relating to its proposed mining project  
5 on federal land, Oil-Dri claims that the County acted unlawfully  
6 because it did not have the authority to deny the special use permit,  
7 but instead could only impose reasonable environmental conditions on  
8 the project. See (Compl. at ¶ 5) (citing South Dakota Mining Ass'n  
9 v. Lawrence County, 977 F. Supp. 1396 (D. S.D. 1997)). Essentially,  
10 Oil-Dri argues that the County's action was in direct conflict with  
11 the Mining Act and related federal law, and was therefore preempted  
12 under the Supremacy Clause of the United States Constitution. See  
13 Lawrence County, 977 F. Supp. at 1396 (holding a county ordinance  
14 prohibiting all surface mining on certain federal lands within the  
15 county invalid under the Supremacy Clause).

### 16 **III. Analysis Under § 1331**

17  
18 As just described, this action does not fall into that group of  
19 cases constituting the "vast majority" in which the cause of action  
20 is created by federal law. Merrell Dow, 478 U.S. at 808. Rather, we  
21 are faced with a cause of action created by state law possibly  
22 requiring the resolution of a federal preemption issue.

23 The Mining Act does not completely preempt state and local  
24 regulation of mining on federal land. See Cal. Coastal Comm'n v.  
25 Granite Rock Co., 480 U.S. 572, 582-84 (1987) (concluding that the  
26 Mining Act does not preempt all state and local regulation of  
27 unpatented mining claims in national forests). Instead, Oil-Dri has

1 argued that the County's decision to deny the special use permit is  
2 in conflict with federal mining law, and is therefore preempted under  
3 the Supremacy Clause. Because conflict, and not complete, preemption  
4 is involved here, that possible federal issue alone is not sufficient  
5 to make this case one arising under federal law. Hofler, 296 F.3d at  
6 768. As a result, in order for this case to satisfy § 1331, Oil-Dri's  
7 right to relief must necessarily depend on the resolution of the  
8 preemption issue, and that issue must be substantial. ARCO, 213 F.3d  
9 at 1114.

10 The preemption issue raised by Oil-Dri is substantial because it  
11 is not so "implausible, foreclosed by prior decisions of [the Supreme  
12 Court], or otherwise completely devoid of merit as not to involve a  
13 federal controversy." United States v. Morros, 268 F.3d 695, 701 (9th  
14 Cir. 2001) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S.  
15 83, 89 (1998)). Nonetheless, it does not appear that the resolution  
16 of this federal issue is necessary to the resolution of this case.

17 Oil-Dri insists that "if the General Mining Laws are interpreted  
18 to allow state regulation that, in effect, completely prohibits mining  
19 on federal lands, then Washoe County prevails. If such regulation of  
20 mining on Federal Land is prohibited by the Supremacy Clause, then  
21 Oil-Dri prevails." (Br. of Pet./Pls. Regarding Jurisdiction, #66, at  
22 8). In support of this argument Oil-Dri cites United States v.  
23 Morros, 268 F.3d 695 (9th Cir. 2001).

24  
25 In Morros, the Department of Energy filed five permit  
26 applications with Nevada's State Engineer to obtain sufficient water  
27 to conduct site characterization activities regarding the use of Yucca

1 Mountain as a possible nuclear waste repository. Id. at 697. The  
2 State Engineer denied the permits, stating that the water was not  
3 going to be used for site characterization, but rather for use in the  
4 actual storage of nuclear waste. Id. at 698. This use of the water,  
5 the State Engineer found, would directly conflict with Nev. Rev. Stat.  
6 459.910, which makes it "unlawful for any person or governmental  
7 entity to store high-level radioactive waste in Nevada." Id. (quoting  
8 Nev. Rev. Stat. 459.910). The United States sued in United States  
9 District Court, arguing that the Nuclear Waste Policy Act ("NWPA"),  
10 which designated Yucca Mountain as the sole site characterization  
11 location, preempted Section 459.910. Id. at 697.

12 As grounds for the court's jurisdiction, the United States cited  
13 28 U.S.C. §§ 1331 and 1345.<sup>6</sup> Id. at 699. The district court found  
14 that it lacked jurisdiction under § 1331, but that jurisdiction under  
15 § 1345 was proper. Id. The court then dismissed the case on  
16 abstention grounds. Id.

17 On appeal, the Ninth Circuit analyzed the issue of jurisdiction  
18 under § 1331 and determined that the case did arise under federal law.  
19 In doing so, the court stated that the gravamen of the complaint was  
20 that the State Engineer's ruling violated the Supremacy Clause. Id.  
21 at 700. The court explained that, "[i]f the NWPA is interpreted to  
22 contemplate . . . that only the Federal Government shall be entitled  
23 to determine whether siting a nuclear waste repository at Yucca  
24 Mountain is in the public interest, then the United States will  
25

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26 <sup>6</sup> Section 1345 gives the District Courts original jurisdiction of all  
27 civil actions, suits or proceedings commenced by the United States. 28  
28 U.S.C. § 1345.

1 prevail. If NWPA is not so interpreted .... then the United States  
2 will lose." Id. Oil-Dri insists that we are presented with the same  
3 situation in this case.

4 Morros, however, is distinguishable from this case on several  
5 grounds. First, the district court had proper jurisdiction under §  
6 1345 because the United States commenced the suit. As a result, the  
7 court was not faced with a suit, such as this one, in which the cause  
8 of action is created by state law. Second, without reaching the  
9 merits of the issue, the Ninth Circuit noted that "Congress may have  
10 preempted the field of nuclear waste disposal." Id. at 702.  
11 Consequently, the doctrine of complete preemption, discussed above,  
12 may have been implicated. Third, the Ninth Circuit found that the  
13 resolution of the complete preemption claim would be dispositive of  
14 the suit. Oil-Dri's cause of action does not involve such a necessary  
15 federal issue.

16 Nevada Revised Statutes section 278.0233 allows a court to  
17 overturn an agency decision if that decision was either: (1) arbitrary  
18 or capricious; or (2) unlawful or in excess of lawful authority. As  
19 described previously, Oil-Dri claims that the County's decision was  
20 arbitrary and capricious because it was not supported by substantial  
21 evidence, and unlawful on three separate grounds. One of these  
22 grounds is based on federal preemption law. For several reasons,  
23 however, it is apparent that this federal issue is not a necessary  
24 element of Oil-Dri's case.

25 To begin with, Section 278.0233 is phrased in the alternative:  
26 a plaintiff can prevail by showing either that the agency decision was  
27

1 arbitrary or capricious or that the decision was unlawful in some  
2 manner. A court could decide in favor of Oil-Dri in this case, then,  
3 solely on the basis that the County's decision was not founded on  
4 substantial evidence, and therefore, was arbitrary and capricious.  
5 In that instance, the resolution of the federal preemption issue would  
6 not be necessary to dispose of the case.

7 Similarly, a court could decide that the County's decision was  
8 unlawful because the County incorrectly relied on traffic concerns or  
9 improperly required one permit application when it should have  
10 analyzed the merits of the proposed projects separately. Once again,  
11 in such a situation a court could rule in favor of Oil-Dri on purely  
12 state law grounds without ever reaching the federal preemption issue.

13 Finally, and we believe most importantly, even if a court decided  
14 that federal mining law did not preempt the County's decision to deny  
15 the special use permit, Oil-Dri could win on any of the other theories  
16 it has advanced. The implication of this fact is that the federal  
17 preemption issue is not a necessary element of one of the plaintiff's  
18 well pleaded claims. Rains v. Criterion Sys., Inc., 80 F.3d 339, 345  
19 (9th Cir. 1996) (citing Franchise Tax, 463 U.S. at 13). To be sure,  
20 if a court agreed with Oil-Dri on the preemption issue, it would  
21 prevail under Section 278.0233. Nonetheless, such a ruling is not an  
22 essential element of Oil-Dri's case because it could lose on that  
23 issue and still prevail based on the other state law grounds.

24  
25 In light of these facts, we believe that this case is actually  
26 one arising under state law, involving a nonessential federal issue.

1 As a result, this case does not arise under federal law, and we do not  
2 have jurisdiction under § 1331.

3 **IV. 42 U.S.C. § 1983**

4 Oil-Dri also argues that, although not pled as such, its  
5 complaint can be rephrased as a cause of action under 42 U.S.C. §  
6 1983. Although that statute does not itself confer jurisdiction,  
7 Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 252 n.1 (9th Cir.  
8 1974), if Oil-Dri's complaint did present a cause of action under §  
9 1983 we would then presumably have jurisdiction under 28 U.S.C. §§  
10 1331 or 1343.

11 According to Oil-Dri, its Second Claim for Relief, which states  
12 that the company was damaged by the County's arbitrary and capricious  
13 denial of its special use permit, can be restated as a § 1983 claim  
14 for deprivation of substantive due process rights. (Br. of Pet./Pls.  
15 Regarding Jurisdiction, #66, at 10). The concept of substantive due  
16 process "forbids the government from depriving a person of life,  
17 liberty, or property in such a way that 'shocks the conscience' or  
18 'interferes with rights implicit in the concept of ordered liberty.'"  
19 Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998)  
20 (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)).  
21 Substantive due process also guards against arbitrary and capricious  
22 government action. Tyson v. City of Sunnyvale, 920 F. Supp. 1054,  
23 1062 (N.D. Cal. 1996). A review of Oil-Dri's complaint demonstrates  
24 that it does not raise a substantive due process claim.

25 Although the complaint uses the words arbitrary and capricious,  
26 they relate specifically to Nev. Rev. Stat. 278.0233. Under Nevada  
27

1 law, an agency decision is arbitrary or capricious if not supported  
2 by substantial evidence. City of Reno v. Reno Police Protective  
3 Ass'n, 59 P.3d 1212, 1219 (Nev. 2002). The complaint clearly alleges  
4 that it was this state law standard that was violated. There is  
5 nothing in the complaint alleging behavior that would "shock the  
6 conscience," or "interfere with rights implicit in the concept of  
7 ordered liberty." Nunez, 147 F.3d at 871. In other words, nowhere  
8 in the complaint does Oil-Dri allege that its constitutional rights  
9 were violated. Therefore, Oil-Dri's complaint does not state a claim  
10 for violation of its substantive due process rights, and a cause of  
11 action under § 1983 was not pled.<sup>7</sup>

12 **AMENDMENT**

13 In Oil-Dri's Response to Washoe County's and Defendant-  
14 Intervenors' Briefs on Jurisdiction (#72), Oil-Dri requests leave to  
15 file a first-amended complaint in which the issue of preemption will  
16 be well-pleaded. We treat Oil-Dri's request as a motion to amend  
17 under Fed. R. Civ. P. 15(a).

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18  
19 <sup>7</sup> We note that the grant or denial of a special use permit under Nevada  
20 law is discretionary. Nevada Contractors v. Washoe County, 792 P.2d 31, 33  
21 (Nev. 1990). As such, it is doubtful that Oil-Dri had a constitutionally  
22 protected property interest in the permit. Tyson, 920 F. Supp. at 1063;  
23 Boulder City v. Cinnamon Hills Assocs., 871 P.2d 320, 325 (Nev. 1994).

24 We also note, without deciding, that this case seems to present a  
25 Takings Clause issue more so than a deprivation of Oil-Dri's substantive due  
26 process rights. That is, the County's denial of the special use permit  
27 might be characterized as a taking of property rights enjoyed by Oil-Dri  
28 under the Mining Act. The Takings Clause, then, would provide the more  
explicit source of constitutional protection for Oil-Dri's rights than would  
the doctrine of substantive due process. Esplanade Props., LLC v. City of  
Seattle, 307 F.3d 978, 982 (9th Cir. 2002). Consequently, any substantive  
due process claim would be preempted by the more proper Takings Clause  
claim. Id. Oil-Dri, however, has specifically stated that "this is not a  
takings case." (Pls.' Resp. to County's and Def.-Intervenors' Brs. on  
Jurisdiction, #72, at 3).

1 Leave to amend under Fed. R. Civ. P. 15(a) "shall be freely given  
2 when justice so requires," and there is a strong policy in favor of  
3 permitting amendment. Bowles v. Reade, 198 F.3d 752, 757 (9th Cir.  
4 1999). Rule 15(a) is to be applied with extreme liberality. Forsyth  
5 v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997). The factors of  
6 undue delay, bad faith, futility of amendment and prejudice to the  
7 opposing party can be considered by a district court in deciding  
8 whether to permit amendment. Id.

9 Although we have our doubts that Oil-Dri can demonstrate in an  
10 amended complaint that we properly have subject matter jurisdiction  
11 over this case, none of the factors just listed outweighs the strong  
12 policy in favor of allowing amendment. Therefore, we find that the  
13 proper course is to allow Oil-Dri to file an amended complaint in  
14 which it can attempt to assert valid grounds for our jurisdiction.

15 **CONCLUSION**

16 In light of the preceding, we find that this case does not arise  
17 under federal law. Rather, this suit simply involves a state law  
18 cause of action containing a nonessential federal issue. As a result,  
19 we do not have jurisdiction under § 1331, and the case should be  
20 dismissed. We also find that Oil-Dri has not alleged a violation of  
21 its substantive due process rights, and therefore, did not present a  
22 valid cause of action under § 1983. Nonetheless, we find that Oil-Dri  
23 should be given a chance to cure these defects by filing a First  
24 Amended Complaint.

25

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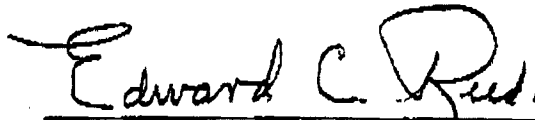
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1 IT IS, THEREFORE, HEREBY ORDERED THAT, as addressed above, we do not  
2 have jurisdiction to hear this action, and it is therefore **DISMISSED**  
3 pursuant to Fed. R. Civ. P. 12(h)(3).  
4

5 IT IS FURTHER ORDERED THAT Oil-Dri's motion to file a first amended  
6 complaint is **GRANTED**. Oil-Dri shall have 20 days within which to file  
7 a First Amended Complaint that properly establishes our jurisdiction  
8 to hear this case, if it is able to do so.  
9

10 IT IS FURTHER HEREBY ORDERED THAT, in light of this order, Oil-Dri's  
11 Brief in Support of Petitioners'/Plaintiffs' Petition/Complaint for  
12 Declaratory Relief, Review of Land-Use Decision and Money-Damages  
13 (#11) is **DISMISSED**, without prejudice, as moot, and Washoe County's  
14 Cross-Motion for Summary Judgment (#32) along with Defendant-  
15 Intervenors' Cross-Motion for Summary Judgment (#45) are **DENIED**,  
16 without prejudice, as moot.  
17  
18

19 DATED this 28 day of February, 2003.

20  
21 

22 UNITED STATES DISTRICT JUDGE  
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