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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants. _____ MINERAL COUNTY, Proposed Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, et al., Proposed Defendants. _____	IN EQUITY NO. C-125-RCJ SUBFILE NO. C-125-C 3:73-CV-00128-RCJ-WGC **WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS WITH RESPECT TO MINERAL COUNTY'S AMENDED COMPLAINT IN INTERVENTION**

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I. Introduction.

A. Procedural Background.

The Court has directed the filing of motions related to subject matter jurisdiction in connection with Mineral County's claims in this subproceeding simultaneously with the filing of similar motions with respect to the claims of the Walker River Paiute Tribe and the United States in subproceeding C-125-B. July 25, 2013 Transcript of Proceedings at p. 40, lns. 11-15; November 4, 2013 Transcript of Proceedings at p. 68, ln. 24-p. 69, ln. 3. Pursuant to Fed. R. Civ. P. 12(b)(1), the Walker River Irrigation District ("District") has moved for an order dismissing Mineral County's Amended Complaint in Intervention ("Amended Complaint") because Mineral County's claim is not one over which this Court has continuing jurisdiction and does not arise under the Constitution, laws or treaties of the United States.

In the alternative, the District has asked the Court to stay its exercise of jurisdiction until after Mineral County obtains a final decision ultimately from the Nevada Supreme Court on three significant and determinative issues of Nevada law: (1) whether a county has standing to bring a public trust claim; (2) whether administrative remedies must be exhausted before a public trust claim may be brought; and (3) the relationship between the public trust doctrine and the Nevada water rights system (collectively the "Nevada Law Rulings").

In 1994, Mineral County sought to intervene in this matter to assert its claim. *See*, Docs. 2-4. It amended its request in 1995. Docs. 20-22. At a hearing on September 23, 2013, the Court orally granted Mineral County's motion to intervene. Sept. 23, 2013 Transcript of Proceedings at 37, lns. 9-21. A proposed order was submitted on November 1, 2013, but it does

not appear that it has been entered.[1] Doc. 731.

B. The Amended Complaint.

Mineral County's Amended Complaint can be construed as seeking recognition of a first priority water right to be held by Mineral County for the benefit of Walker Lake. For example, it alleges the claim is being made for "recognition of a right of minimum level of water for Walker Lake by means of certain right being reserved and allowed to flow down the Walker River both East and West Forks in sufficient quantity to reach, replenish and maintain Walker Lake." Doc. 20 at para. 1. Its single claim for relief asks for the "right to at least 127,000 acre feet of flows annually reserved from the Walker River that will reach Walker Lake." *Id*. at para. 15. In its prayer for relief, it asks the Court to order the State of Nevada "to grant a certificate to Mineral County for the benefit of Walker Lake in the amount of 127,000 acre feet per year." *Id*. at p. 5, lns. 19-21. The legal theory under which Mineral County seeks this new water right seems to be based upon an application of the public trust doctrine. *See, e.g., National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709 (Cal. 1983).

Mineral County's Amended Complaint can also be construed as asking the Court to modify each water right recognized in the Walker River Decree so as to reflect a public trust interest in Walker Lake. For example, Mineral County alleges that "without reallocation of the waters to insure priority minimum flows to sustain the Lake, Walker Lake, its users and the citizens of Mineral County and the public will suffer substantial and irreparable damage." Doc. 20 at para. 10. In its claim for relief it asks for "an adjudication and reallocation of the waters of Walker River to preserve the minimum levels in Walker Lake, as a condition to the water rights

[1] Apparently through some clerical error, Mineral County's proposed Amended Complaint was "filed" by the Clerk on March 10, 1995, even though the Court had not heard or granted Mineral County's Motion to Intervene as required by Fed. R. Civ. P. 24. *See* Doc. 20. Therefore citations to the Amended Complaint herein will be to Doc. 20.

licenses of all upstream users – such requirements of minimum levels of Walker Lake to be a condition to each license and certificate presently held by upstream license holders in California and Nevada." *Id*. at para. 13. Those allegations also appear to be based upon an application of the decision in *Audubon.*

Subject matter jurisdiction is alleged to be based upon the "continuing jurisdiction of this Court over the waters of the Walker River and its tributaries in California and Nevada." Doc. 20 at 2. Mineral County also alleges that "the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Id*.

Mineral County purports to bring the action on "its own behalf," for the benefit of its citizens and residents and on behalf of the public." Doc. 20, at para. 3. It alleges that it is established under Nevada law and has the capacity to sue. *Id.*

If Mineral County seeks recognition of a first priority water right to be held by it, there is no subject matter jurisdiction in this Court because it is not part of the Court's continuing jurisdiction, because it is a claim based upon Nevada law, and because Mineral County has not exhausted administrative remedies. If on the other hand Mineral County is asking this Court to modify each water right recognized in the Walker River Decree based upon a Nevada public trust doctrine, the Court should stay its exercise of any jurisdiction it has to modify water rights recognized in the Walker River Decree until Mineral County obtains a final judgment from the Nevada courts on: (1) whether a county has standing to bring a public trust claim; (2) whether exhaustion of administrative remedies is required; and (3) the relationship between the public trust doctrine and the Nevada water rights system. This Court would retain jurisdiction to apply the law as determined by the Nevada Courts to its Decree.

II. The Provisions of the Walker River Decree Do Not Give This Court Subject Matter Jurisdiction to Adjudicate Claims for Additional Water Rights.

Since 1936, this matter has involved administration of the water rights adjudicated by the final judgment entered on April 24, 1936, as amended April 24, 1940, to conform to the mandate of the Court of Appeals in *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). In its final judgment, the Walker River Decree, this Court did not retain jurisdiction to adjudicate or determine claims for new water rights to the Walker River or its tributaries.

In relevant part, Paragraph XIV of the Walker River Decree provides:

> The 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....

Walker River Decree at Paragraph XIV.

Under one construction, Mineral County's Amended Complaint does not allege and does not seek to change the duty of water or to correct or to modify the Walker River Decree. It does not relate to any changes to existing water rights nor to the regulation of existing water rights. Instead, it asks the Court to direct the Nevada State Engineer to issue Mineral County a new and prior water right. Its claim is not within the continuing jurisdiction of the Court.

Relying on the Walker River Decree as a basis for subject matter jurisdiction over Mineral County's Amended Complaint is analogous to those situations where a party has either brought a new action or filed a supplemental pleading in a concluded action alleging a claim in some manner related to the concluded first action. Unless the original court expressly retained jurisdiction to do what it was being asked to do, the subsequent proceeding must have an independent basis for federal subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-381 (1994); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1017 (9th Cir. 2007); *Ortolf v. Siler Bar Mines*, 111 F.3d 85, 86-87 (9th Cir. 1997); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995).

The Walker River Decree does not retain that jurisdiction, nor could it have. Since 1905 in Nevada, water rights may only be obtained under state law by an application for and a permit issued by the Nevada State Engineer. *See*, 1905 Nev. Stat. at 66; *see also*, N.R.S. §§ 533.030(1); 533.325. If Mineral County seeks a water right for Walker Lake under Nevada law, it must first apply to the Nevada State Engineer. No court, including this Court, can grant it such a right.

III. There Is No Independent Basis for Subject Matter Jurisdiction Because Mineral County's Claim Does Not Arise Under the Constitution, Laws or Treaties of the United States.

For a case to arise under federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action, or (2) that plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law. *See*, *Beneficial National Bank v. Anderson*, 539 U.S. 1, 6 (2003); *K2 America Corporation v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1029 (9th Cir. 2011); *Peabody Coal Company v. Navaho Nation*, 373 F.3d 945, 949 (9th cir. 2004). Mineral County's Amended Complaint does not suggest that any federal law creates the cause of action it intends to assert. It also does not show that its right to relief depends upon resolution of a substantial question of federal law. Mineral County cannot make those allegations because the Supreme Court of the United States in *PPL Montana LLC v. Montana*, 132 S.C. 1215 (2012) has expressly stated that the public trust doctrine is "a matter of state law." *PPL Montana*, 132 S. Ct. at 1235. *See also*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284-86 (1997); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 458 (1892); and *National Audubon Society v. Department of Water*, 869 F.2d 1196, 1206 (9th Cir. 1989).

Therefore, if Mineral County's Amended Complaint is construed as seeking a water right for Walker Lake, this Court has no subject matter jurisdiction.

IV. The Court Should Stay Its Exercise of Jurisdiction Over Mineral County's Amended Complaint Until After the Nevada Courts Have Ruled on the Nevada Rulings.

If Mineral County's Amended Complaint is construed as asking this Court to modify water rights adjudicated and recognized by the Walker River Decree based upon the public trust doctrine, the Court should stay its exercise of that jurisdiction until the Nevada Law Rulings are obtained. It is appropriate to stay action in federal courts pending a determination by a state court of decisive issues of state law. *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25 (1959).

In *Thibodaux*, the City had initiated an eminent domain proceeding in state court to take the property of Louisiana Power & Light. The Power Company removed the case to federal court based on diversity. On its own motion, the district court stayed the action to allow the Louisiana Supreme Court to determine whether the City had the authority to exercise eminent domain power under state law. At that time, the scope of such power was unclear and the Louisiana courts had never definitively ruled on the question. *Thibodaux*, 360 U.S. at 30. The Fifth Circuit reversed the stay, and the Supreme Court reversed that decision. In arriving at its conclusion, the court found that abstention was appropriate because the litigation involved an unresolved state law question and more importantly because the federal court was being asked to determine an important issue of state sovereignty--the extent of governmental delegation of power between the City and the State. 360 U.S. at 28.

A similar question was presented in *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968). There a diversity suit was brought in federal court claiming an illegal trespass and seeking damages and an injunction. The defendant admitted the trespass but claimed it was authorized under New Mexico law in order to use water rights granted by the state. The plaintiff contended that if the relevant New Mexico statute was construed to authorize condemnation of private land to secure water for a private business, it would violate New Mexico's Constitution.

The critical issue was an interpretation of the New Mexico Constitution. Both the district court and the court of appeals refused to stay the action pending a determination of the state law issues in state court. *Kaiser Steel* at 391 U.S. 593-94.

The Supreme Court reversed and concluded that the federal action should have been stayed. It reasoned that the state law issue was "one of vital concern in the arid State of New Mexico, where water was one of the most valuable natural resources." *Kaiser Steel*, 391 U.S. at 594. The issue was a novel one which would eventually have to be resolved by New Mexico courts. The Court concluded that "sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital resource." *Id.* at 594. It held that the action in federal court should be stayed with the federal court retaining jurisdiction to insure disposition after a state court determination of the determinative state law issue. *Id.*

In *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), the Ninth Circuit held that a district court had not abused its discretion in refusing to abstain from deciding an antitrust suit pending a determination of state law as to whether a restriction on transfer of surplus water violated the state policy in favor of voluntary transfer and against waste. However, the court recognized that a stay would be appropriate in a case which presents an unsettled question of state law which was truly novel. 858 F.2d at 517. This is such as case.

The Nevada Supreme Court has discussed the public trust doctrine in cases related to the alienation of public land. *See, e.g., Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011). It has never addressed the relationship between the public trust doctrine and Nevada's comprehensive water law under N.R.S. Chapters 533 and 534. It has not ruled on the issue of whether the public trust doctrine affords a basis for altering rights to water which Nevada law has heretofore recognized as vested. It has never addressed the issue of whether a party seeking such

reallocation of vested water rights under the public trust doctrine must first seek relief through the Nevada State Engineer. It has never considered in a water context the important issue of state sovereignty - the extent to which a county has the requisite power and authority to assert a public trust claim.

These issues are of enormous import to all of Nevada in a variety of contexts. They are not isolated to Mineral County or to Walker Lake. They apply to those who rely on water from the Truckee River with respect to both Pyramid Lake and Winnemucca Lake. Today, Pyramid Lake's surface elevation has declined substantially from a surface elevation of 3867 feet in 1882 and Winnemucca Lake no longer exists. *See, California Department of Water Resources, Truckee River Atlas* at 24 (1991). They also apply within the Carson River watershed. Prior to the construction of Lahontan Reservoir, the Carson River supported approximately 113,000 acres of wetlands in Nevada. As a result of the construction of Lahontan Reservoir, those wetlands have been substantially reduced. S. Rep. No. 101-555, 101st Cong. 2d Sess. p. 16 (1990). They also apply to the efforts of the Southern Nevada Water Authority to provide a reliable water supply for the Las Vegas metropolitan area through applications to appropriate and take water from ground water basins in Lincoln, White Pine and Clark Counties. *See, White Pine County v. King*, 2013 WL 6911829 at 5-6 (Dec. 10, 2013). These are just a few examples.

Water is Nevada's most valuable natural resource. How the public trust doctrine relates to Nevada's water law, who can raise it and whether remedies before the Nevada State Engineer must be exhausted before a court action may be brought, are questions which have the potential to impact surface and ground water rights throughout the entire State.

The issues which Mineral County's Amended Complaint presents to this Court are as significant as those presented in *Thibodaux* and *Kaiser Steel*. They go to fundamental issues of state sovereignty. Life in Nevada cannot exist without the diversion of water out of streams and

lakes and out of the ground for purposes unrelated to navigation, commerce, fishing, recreation or ecological use. *See, Audubon*, 658 P.2d at 712. The issues are novel and need to be resolved by Nevada courts. The parties with vested water rights in this case should be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital public resource under Nevada law. That can only be assured if the Court stays this proceeding until such time as Mineral County obtains a final state court determination on the Nevada Law Rulings.

The standing and exhaustion of administrative remedies issues are as significant as those related to the relationship between the public trust doctrine and Nevada's comprehensive water law. The District questions whether Mineral County has either organizational or associational standing to bring the public trust claim. However, there are even more important issues of power and authority under Nevada law which go to the delegation of power between counties and the State, and which should be decided by the Nevada courts.

Public trust resources are by law and definition held in trust by the State of Nevada for the benefit of the whole public, not for the benefit of any single political subdivision of the state. It is not logical, nor practicable, that every county have the power and authority under Nevada law to maintain a suit to allegedly protect whatever part of a public trust water resource is physically located within its boundaries.

For example, Mineral County alleges it has interests in Walker Lake for recreational, economic, aesthetic, preservation of wildlife and economic purposes. Doc. 20 at paras. 3; 7; 9; 10. Other Nevada counties also benefit from the use of the same water resources of the Walker River within their own boundaries. Those counties, Lyon and Douglas, realize similar benefits from those resources. Similarly, three counties, White Pine, Lincoln and Clark, derive benefits from the public trust resources involved with the applications of the Southern Nevada Water

Authority. The issue of whether a county has the power and authority under Nevada law to bring and control an action to protect public trust interests is one of the extent of governmental delegation of power between Mineral County and the State under Nevada law which should be decided by Nevada courts.

The request that this Court stay the action until the Nevada Law Rulings are obtained is exactly what happened in connection with *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d. 419, 658 P.2d 709 (1983). There the original action had been removed by the United States to federal court. After removal, the federal district court determined that abstention would be appropriate and instructed Audubon to file an action in state court to resolve the relationship between the public trust doctrine and the California water rights system and whether exhaustion of administrative remedies was a prerequisite to suit under the public trust doctrine. *See, National Audubon Society v. Department of Water*, 869 F.2d 1196, 1199 (9th Cir. 1989).

In 2000, Mineral County brought an original proceeding in the Nevada Supreme Court against the State of Nevada and the Nevada Department of Conservation and Natural Resources and its Director and the State Engineer. It sought a writ of prohibition preventing those respondents from granting any additional rights to withdraw surface or ground water from the Walker River system. It asked for a writ of mandamus compelling them to reconsider the appropriation and allocation of the waters of the Walker River system to provide annual instream flow to Walker Lake. *Mineral County v. Nevada*, 117 Nev. 235, 20 P.3d 800, 801 (2001).

The Court ruled that issuance of the writs would not be proper because of the pendency of this matter in this Court. *Mineral County*, 20 P.3d at 801. For a host of reasons, the District opposed Mineral County's Petition, including based upon the pendency of this matter and this Court's continuing and exclusive jurisdiction to effectuate the Walker River Decree.

The Nevada Supreme Court concluded that this is the appropriate forum for the final resolution of this matter. *Id*. at 807. It recognized that it had no jurisdiction over the Tribe, the United States, or over California water rights. *Id.* Mineral County told the Nevada Court that after its motion to intervene was granted here, it would seek to have the Nevada Supreme Court "decide the scope of the public trust doctrine pursuant to the federal abstention doctrine." 20 P.3d at 807 n. 35. The Nevada Supreme Court recognized that possibility, but said that the issue need not be addressed by an extraordinary writ. *Id.* Important to the Nevada Supreme Court's conclusion was the fact that only this Court can manage all of the issues, including issues related to Mineral County's claims against those who hold rights under the Walker River Decree based upon federal and California law.

The Court should stay this proceeding and direct Mineral County to seek resolution in the Nevada courts of the standing of a county to bring a public trust claim, whether exhaustion of administrative remedies is required prior to assertion of a public trust claim and of the relationship between the public trust doctrine and Nevada's comprehensive water law. This Court should retain jurisdiction to determine how that Nevada law should be applied to water rights recognized in the Walker River Decree, including those water rights held under federal law and California law.

Dated: March 31, 2014.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 31st day of March, 2014, I electronically served the foregoing *Walker River Irrigation District's Points and Authorities in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), or in the Alternative, to Stay Proceedings With Respect to Mineral County's Amended Complaint in Intervention* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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