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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF NEVADA**
12

13 UNITED STATES OF AMERICA,)
14)
Plaintiff,)
15)
WALKER RIVER PAIUTE TRIBE,)
16)
Plaintiff-Intervenor,)
17 vs.)
18 WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)
19)
Defendants.)
20)

21 MINERAL COUNTY,)
22)
Proposed-Plaintiff-Intervenor,)
23 vs.)
24 WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)
25)
Proposed Defendants.)
26)

IN EQUITY NO. C-125-RCJ-WGC
Subproceeding: C-125-C

3:73-CV-00128-RCJ-WGC

MINERAL COUNTY
REPLY BRIEF IN SUPPORT OF
INTERVENTION

I.

INTRODUCTION

Mineral County respectfully submits this Reply Brief in Support of Intervention which replies to the Walker River Irrigation's (WRID's) Opposition and the Nevada Department of Wildlife's (NDOW's) Answering Brief to Mineral County's Opening Brief in Support of Intervention ("Opening Brief"). Both WRID and NDOW oppose Mineral County's claim that it is entitled to intervene as of right by advancing arguments that are contradictory to and undercut by the positions and arguments advanced by WRID and the State of Nevada in the proceedings before the Nevada State Supreme Court in *Mineral County v. Nevada*, 20 P.3d 800 (Nev. 2001). Before the Nevada Supreme Court, both WRID and the State of Nevada argued that Mineral County's public trust claims already were properly pending in this Court through the County's motion for intervention, and that judicial review of the County's public trust claims had to be restricted to this Court because this Court had retained exclusive ongoing jurisdiction over the allocation and management of the surface flows of the Walker River system. As noted in Mineral County's Opening Brief, the Nevada Supreme Court agreed that Mineral County's pending motion for intervention in this Court provided the County with an effective remedy at law and expressly relied on that fact in dismissing Mineral County's Petition for Writ of Mandamus and Writ of Prohibition.

In contrast to their positions before the Nevada Supreme Court, WRID and NDOW now advance a number of arguments claiming that this Court should either deny intervention completely or permit intervention only permissively under Rule 24(b). Both because their current arguments are erroneous, and because they are belied by their previous arguments to the Nevada Supreme Court about the availability of judicial review for Mineral County's public trust

1 claims pursuant to the County's pending motion for intervention and complaint in intervention in
2 this Court, this Court should reject WRID's and NDOW's arguments against Mineral County's
3 intervention. Rather, for the reasons explained in Mineral County's Opening Brief and below,
4 the Court should find that Mineral County is entitled to intervene as of right pursuant to Rule
5 24(a)(2) for the purpose of prosecuting its public trust claims concerning Walker Lake.
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7 **II.**

8 **WRID'S ARGUMENTS AGAINST INTERVENTION ARE WITHOUT MERIT**

9 Much of WRID's opposition is dedicated to a selective and skewed background
10 discussion of the Walker River and Walker Lake system, Nevada's history of depleting its water
11 resources, and the Walker River Decree proceedings. This self-serving account appears to be
12 designed to suggest both that the public trust has no meaningful applicability to the Walker River
13 or Walker Lake and that the Court should deny Mineral County's motion for intervention
14 because the County should have presented its public trust claims in some other procedural form.
15 While Mineral County disputes WRID's distorted, self-serving "history" and assertions
16 regarding the development of water resources and the public trust doctrine, those are issues
17 properly addressed by the Court in considering the merits of Mineral County's public trust
18 claims. Nor do any of WRID's attempts to characterize the Walker River Decree proceedings
19 change the basic nature of those proceedings, or the fact that they constitute one ongoing case in
20 equity by which this Court exercises exclusive continuing jurisdiction over the surface waters of
21 the Walker River system for a variety of purposes including "correcting or modifying this
22 decree" Walker River Decree, at XIV, pp. 72-73.
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25 WRID's argument that intervention should be denied because Mineral County ought to
26 have presented its public trust claims through a different kind of motion is unsupported by any
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1 legal authority and is premised on a misrepresentation of what Mineral County's public trust
2 claims in intervention are designed to achieve. WRID's argument also is an example of the sort
3 of empty formalism that is antithetical to the spirit of the federal rules of civil procedure.
4 Nothing in the Decree or in any previous ruling of the Decree Court eliminates the availability of
5 intervention, which is provided for in the rules of civil procedure so long as the requirements of
6 Rule 24 are met. Intervention also is contemplated by the Decree Court's previous orders
7 retaining jurisdiction in order to correct or modify the Decree. The County's public trust claims
8 are just such an effort to correct an error or oversight in the Decree by recognizing the public
9 trust obligation to provide for minimum inflows from the Walker River System into Walker
10 Lake.¹ Further, the legal obligation Mineral County seeks to vindicate is necessarily implicated
11 in and potentially impaired or impeded by the Tribe's and the United States' claims in the C-125-
12 B subproceeding as well as existing water right claims on the Walker River under the Decree.
13 Accordingly, WIRD's unsupported assertion that Mineral County's public trust claims are not
14 properly raised through the motion for intervention is without merit and should be rejected by the
15 Court.
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18 While appearing to concede that Mineral County has a valid protectable interest sufficient
19 to support intervention, WRID next makes the incredible argument that there is no relationship
20 between Mineral County's public trust claim and the claims of the Tribe and the United States
21 for recognition of additional water rights under the Decree. This argument is completely
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24 ¹ WRID cites no authority for the proposition that Mineral County can only intervene in direct
25 support of or in direct opposition to the Tribe's and United States' claims. Such a limitation on
26 intervention is contrary to the general principle that an intervenor as of right may assert counter
27 claims and other new claims. *See U.S. v. Exxon Corp.*, 773 F.2d 1240, 1306 (E. App. 1985), cert
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1 contradictory to WRID's arguments to the Nevada Supreme Court in support of its own motion
2 to intervene and in opposition to Mineral County's Petition, where WRID argued that Mineral
3 County's public trust claims already properly were pending in this Court and necessarily
4 implicated both existing water rights and the rights claimed by the Tribe and the United States.²

5 As explained in Mineral County's Opening Brief in Support of Intervention, the public
6 trust obligation to provide for adequate minimum flows from the Walker River System into
7 Walker Lake necessarily affects all existing surface water rights from the System and all claims
8 for surface water rights from the System, including those of the Tribe and the United States.
9 Even WRID recognizes that resolution of Mineral County's public trust claim necessarily will
10 affect all water rights under the Decree, WRID Opposition at 18 – 19. It follows ineluctably that
11 the Decree Court's resolution of what water rights the Tribe and United States may be entitled to,
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14 denied 474 U.S. 1105 (1986); 7C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, &
15 Richard L. Marcus, Federal Practice and Procedure Civil § 1922 (3d ed. 2012).

16 ² See Motion to Intervene of Walker River Irrigation District, Lyon County, and City of
17 Yerington, Nevada at 1-2, *Mineral County v. State of Nevada*, 20 P.3d 800 (Nev. 2001) (Case
18 No. 36352); Points and Authorities in Support of Motion to Intervene at 5-6, *Mineral County*,
19 117 Nev. 235, 20 P.3d 800; Answer of Walker River Irrigation District, Lyon County and the
20 City of Yerington to Petition for Writ of Mandamus and Writ of Prohibition at 2, *Mineral*
21 *County*, 20 P.3d 800 (Second Affirmative Defense – Mineral County's motion to intervene and
22 public trust claim constitute a plain, speedy and adequate remedy), Answer of WRID, et al. at 3,
23 *Mineral County*, 20 P.3d 800 (Fifth Affirmative Defense – all people who claim or hold Walker
24 River surface water rights are "necessary and indispensable parties"; public trust claim "concerns
25 or affects those rights"); Answer of WRID, et al. at 3, *Mineral County*, 20 P.3d 800 (Seventh
26 Affirmative Defense – "all of the surface water rights on the Walker River System are subject to
27 the exclusive jurisdiction" of the Decree Court); Memorandum of Points and Authorities in
28 Opposition to Petition for Writ of Mandamus and Writ of Prohibition of Walker River Irrigation
District, Lyon County, and City of Yerington at 1 – 3, 25, 26, 28, *Mineral County*, 20 P.3d 800;
id. at 18 ("Mineral County has already commenced a proceeding before the United States
District Court for the District of Nevada, the court which regulates and distributes the water of
the Walker River in California, Nevada and on the Walker River Indian Reservation, making the
same request for reallocation of existing rights to use water as it does here. Not only is that an
adequate legal remedy, it is being exercised.").

1 how those rights relate to other rights under the Decree, and how they are to be managed or
2 regulated in relation to the Walker River System is inextricably interrelated with and affected by
3 the Court's resolution of what public trust obligation exists with regard to providing for adequate
4 inflows from the System into Walker Lake and how that obligation is to be met. Clearly,
5 WRID's incoherent protestation notwithstanding, logic and practical impact dictate that Mineral
6 County's public trust claim will affect and be affected by the Tribe's and the United States'
7 claims in the C-125-B subproceeding.
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9 Further, WRID's attempt to frame Mineral County's intervention in the C-125 case as if
10 it were narrowly straightjacketed to the most limited view of the Tribe's and United States'
11 federal reserved water rights is an inappropriate distortion of the nature of this case in equity. As
12 this Court has stated the designation of subproceedings such as 125-B and 125-C within the
13 overarching C-125 case is done for the convenience of the Court, and it does not change the fact
14 that the subproceedings all are part of one unified action, the C-125 case, in which the Court
15 exercises ongoing comprehensive jurisdiction over the surface waters of the Walker River
16 System. When the Court established subproceeding C-125-C for "the purposes of receiving the
17 filing of all documents" pertaining to the motion to intervene and associated claims, it expressly
18 indicated that C-125-C was part of an existing proceeding: "The entire case, including the sub
19 files, C-125, C-125-A, C-125-B, and C-125-C constitute one action. All of these issues and
20 claims also constitute a single law suit. The issues may overlap between the various claims and
21 files which have been established. No claims are to be prejudiced in any way because of their
22 separation into a separate subfile. The separation of the files is for record keeping purposes
23 only." *Minutes of Court* (C-125-B Doc. No. 46) (Jan. 3, 1995). *See also Order Requiring*
24 *Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral*
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1 County, ¶1 (C-125-C Doc. No. 19) (Feb. 9, 1995) (“For the administrative convenience of the
2 Court, the Clerk shall establish a new subfile in this action to be designated C-125-C in which all
3 documents pertaining to the Motion to Intervene and proposed complaint-in-intervention of
4 Mineral County, Nevada shall be placed and filed.”).

5 Accordingly, it would be more proper to consider whether Mineral County’s public trust
6 claims relate to the broader set of interests, rights, and claims within the entire C-125 case. And,
7 as WRID itself has acknowledged, *see note 2 supra*, there cannot be serious doubt that there is a
8 relationship between the Court’s determination of what the public trust doctrine requires in terms
9 of minimum inflows from the Walker River System into Walker Lake and the Court’s
10 determination of the status and regulation of existing and claimed water rights from the Walker
11 River System.
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13 WRID’s argument that the Court’s determination of the Tribe’s and United States’ water
14 rights claims cannot as a practical matter impair or impede Mineral County’s ability to protect its
15 interest in the satisfaction of public trust obligations to Walker Lake also flies in the face of
16 WRID’s assertions to the Nevada Supreme Court, where WRID insisted that determination of the
17 one would have a direct practical impact on the other. *See note 2 supra*. As a practical matter,
18 the disastrous decline in Walker Lake’s water level and water quality have occurred as a direct
19 result of the diversion and consumption of the vast majority of surface flows in the Walker River
20 System to satisfy existing water rights on the system. As NDOW concedes in its Answer, the
21 potential judicial grant or recognition of such additional rights on the System without addressing
22 whether the public trust requires some restriction on all water rights on the System in order to
23 ensure adequate inflows to Walker Lake would only compound the impairment of inflows to
24 Walker Lake that Mineral County’s public trust claims seek to remedy. *See NDOW Answering*
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1 Brief to Mineral County's Opening Brief in Support of Intervention at 2. As noted above, WRID
2 argued to the Nevada Supreme Court that any determination to establish and maintain minimum
3 adequate inflows from the System to the Lake necessarily would impair existing and claimed
4 water rights on the System. In so arguing, WRID has admitted that such practical impairment is
5 part of the relationship between the public trust claim for adequate inflows to Walker Lake and
6 the existing and claimed water rights from the System that are under the Decree Court's
7 continuing equity jurisdiction. Accordingly, WRID's current implausible assertion against
8 practical impairment should be given no weight by this Court.
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10 For the same reasons, WRID's argument that the Court also should deny permissive
11 intervention because Mineral County's public trust claims do not share common questions of law
12 or fact with the Tribe's and the United States' water rights claims is without merit and should be
13 rejected. As explained above, the relationship between Mineral County's public trust claims and
14 the status and regulation of water rights under the Decree necessarily involves a number of
15 common factual and legal questions. This is true both with regard to existing water rights that
16 have been recognized by the Decree Court and claimed water rights that may be recognized by
17 the Court, as was recognized by WRID in its own motion to intervene in Mineral County's
18 public trust petition before the Nevada Supreme Court. Motion to Intervene of Walker River
19 Irrigation District, Lyon County, and City of Yerington, Nevada at 1, 2, *Mineral County*, 20 P.3d
20 800; Points and Authorities in Support of Motion to Intervene at 5-6, *Mineral County*, 20 P.3d
21 800. Having insisted to the Nevada Supreme Court that there were common questions of law
22 and fact between Mineral County's public trust claims and the existing and claimed water rights
23 under the Decree Court's jurisdiction, WRID should not now be heard to argue the contrary.
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As noted in Mineral County's Opening Brief, the intervention test is a practical threshold inquiry, *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (citing *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir.1980) (internal quotation marks omitted), and if a proposed intervenor would be substantially impacted in a practical sense by the determination made in an action, he is entitled to intervene. Fed. R. Civ. P. 24(a) advisory committee's notes; *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citing Fed. R. Civ. P. 24(a) advisory committee's notes); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995) (citing *NRDC v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1342 (10th Cir. 1978); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citations omitted). Given Mineral County's clear protectable interest in the preservation of Walker Lake, which WRID appears to concede, and given that disposition of the claims brought in the C-125 case clearly would impact that interest, Mineral County clearly is entitled to intervention as of right, and WRID's attempt to oppose intervention based on unsupported formalistic arguments should be rejected.

III.

NDOW'S ARGUMENTS AGAINST INTERVENTION AS OF RIGHT ARE WITHOUT

MERIT

Unlike WRID, NDOW appears to concede that the proper scope of inquiry is the C-125 proceedings, which is consistent with the State of Nevada's argument before the Nevada

Supreme Court in *Mineral County v. State* that the C-125-C litigation provided Mineral County with a legal remedy justifying dismissal of Mineral County's State Court petition.³

NDOW also does not contest permissive intervention. However, it raises a number of spurious objections to Mineral County's entitlement to intervene as of right, which the Court should reject. While WRID does not seriously dispute that Mineral County has a legally protectable interest in public trust protections for Walker Lake, NDOW does claim that any protectable interest in – or right to assert – the public trust doctrine belongs to the State of Nevada and cannot be asserted by Mineral County. This contention is mistaken. It is recognized generally that members of the public have a legal right to assert or enforce the public trust obligations concerning a water resource covered by the public trust. *See National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 860 (9th Cir. 1983) (where the sovereign is unwilling to represent the public, anyone with standing who can adequately represent the public's interest may be allowed to do so) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). This only makes sense, since there would

³ State of Nevada's Answer to Petition for Writ of Mandamus and Writ of Prohibition, at 7, 12-15, *Mineral County*, 20 P.3d 800 (noting that the Decree Court retains exclusive, comprehensive continuing jurisdiction over the waters of the Walker River System); *id.* at 14 (asserting that there is a necessary connection, relationship between Mineral County's public trust claims and existing surface water uses from the Walker River System. "[O]nly the Decree Court can consider whether modifications to surface water appropriations should occur to assist Walker Lake."); *id.* at 14 – 15 (asserting that Mineral County's public trust claim must be determined by the Decree Court in order to ensure that water rights holders, who are characterized as real parties in interest, are afforded an opportunity to dispute Mineral County's factual and legal contentions); *id.* at 15 (arguing that Mineral County's motion for intervention and petition to intervene constitute and adequate legal remedy, and going further to say that Mineral County "can effectively pursue" its public trust claims in the Decree Court once it completes service in the C-125-C subproceeding).

1 be no other way for public trust obligations to be enforced where the state or other pertinent
2 sovereign governmental entity has failed to recognize or comply with its obligations under the
3 public trust doctrine. As Mineral County explained in its Opening Brief, the County has brought
4 this motion for intervention and public trust claim on behalf of Mineral County residents and
5 other members of the public who are within the class of people for whose benefit the public trust
6 exists. Accordingly, Mineral County is indeed a proper party to assert a claim seeking to enforce
7 the public trust doctrine so as to ensure that the Decree Court makes provision for adequate
8 inflows from the Walker River System into Walker Lake in order to protect the qualities, values,
9 and uses of Walker Lake that the public trust doctrine is meant to protect. The fact that NDOW
10 and the State of Nevada have never sought to assert or enforce the public trust in order to protect
11 Walker Lake in this way, and the fact that that the State of Nevada affirmatively opposed the
12 recognition or application of the public trust doctrine in any meaningful sense before the Nevada
13 Supreme Court⁴, only underscores the appropriateness and need for Mineral County to prosecute
14 its public trust claim.
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17 NDOW concedes that “Mineral County can certainly speak for itself and its citizens and
18 it can reasonably assert economic and other interests which have been harmed by the
19 deterioration of Walker Lake.” NDOW Response at 17. This amounts to an acknowledgement
20 that Mineral County is a party that has a legal right to raise public trust claims relating to Walker
21 Lake on its own behalf and on behalf of its citizens, or residents. In effect, then, NDOW
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24 ⁴ See State of Nevada Answer at 19 – 31, *Mineral County*, 20 P.3d 800 (asserting various
25 grounds why the public trust doctrine could not be asserted with regard to Walker Lake or did
26 not require any action beyond the continued operation of the Walker River Decree and Nevada
27 water law without change).
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1 concedes that Mineral County does indeed have a legally protectable interest relating to the
2 subject matter of the Walker River Decree proceedings.

3 What NDOW appears really to be arguing is that it, and by extension the State of Nevada,
4 is a more appropriate party to be asserting the public trust claims that Mineral County is
5 asserting, and that therefore the Court should deny Mineral County intervention as of right
6 because its interests are adequately represented by NDOW and/or the State of Nevada. This
7 contention does not hold up to any serious scrutiny. To begin with, neither NDOW nor the State
8 of Nevada has ever intervened in the Decree proceedings to assert any public trust claim or
9 obligation to protect Walker Lake in any way, let alone to ensure adequate inflows to Walker
10 Lake. To the contrary, when the State did weigh in on the question of the public trust doctrine
11 the State affirmatively argued against Mineral County's public trust claims and interests,
12 asserting that the public trust doctrine either did not apply at all to Walker Lake and the Walker
13 River System or that it required nothing at all other than the continued status quo operation or
14 application of the Decree and Nevada water law. That history of adversarial litigation on the part
15 of the State of Nevada against the interests and claims of Mineral County concerning Walker
16 Lake alone suffices to vitiate NDOW's claim that it and the State already adequately represent
17 the interests that Mineral County seeks to vindicate through its public trust claims.

18 NDOW also offers a self-congratulatory recitation of its actions over some time
19 concerning Walker Lake's fisheries, including its very belated acquisition of the most junior and
20 uncertain surface water right on the Walker River System, as a demonstration that it already is
21 adequately addressing the public trust interests or obligations that pertain to Walker Lake. In
22 fact, NDOW and the State of Nevada have historically failed to assert the public trust doctrine as
23 a ground for protecting Walker Lake and have failed to take effective action to ensure adequate
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1 inflows to the Lake and protect the Lake's water level or water quality. This is apparent from the
2 fact that NDOW must concede that over the past several decades inflows to Walker Lake have
3 remained chronically and severely inadequate and have resulted in the gradual destruction of
4 Walker Lake's fisheries, its functionality as an important stopover for migratory birds, and its
5 aesthetic and recreational values and uses. The fact that NDOW and the State of Nevada
6 consider this history and the state of affairs it has led to evidence that they already are adequately
7 addressing the needs of Walker Lake is ample evidence, in itself, of a dramatic difference
8 between the interests represented by NDOW and the State and the public trust interests that
9 Mineral County seeks to vindicate.

11 The inadequacy of NDOW's and the State of Nevada's purported representation of the
12 interests that Mineral County seeks to intervene to protect is further illustrated by the fact that the
13 flood water right that NDOW points to as an example of how it is protecting the same interests
14 that Mineral County seeks to vindicate through its public trust claims is junior not only to all
15 upstream surface water rights under the Decree but also to WRID's various substantial flood and
16 storage water rights, ensuring that most "surplus" water in the Walker River System is diverted
17 and used consumptively upstream even in what are considered extraordinary "flood" conditions.
18 What is more, by agreement between the Nevada State Engineer and the Nevada Department of
19 Fish and Game (NDOW's predecessor agency), NDOW's flood water right, Certificate No.
20 10860, Permit No. 25792, was made subject even to later upstream appropriations for future
21 municipal and industrial uses. *See* Walker River Irrigation District, et al., Points and Authorities
22 in Support of Motion to Intervene, Appendix of Walker River Irrigation District et al, Volume I,
23 at 205, *Mineral County*, 20 P.3d 800 (Letter from Frank Groves, Director of Nevada Department
24 of Fish and Game, to Roland Westergard, Nevada State Engineer (April 18, 1972)); Walker
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1 River Irrigation District, et al., Points and Authorities in Support of Motion to Intervene,
2 Appendix of Walker River Irrigation District et al, Volume I, at 206-08, *Mineral County*, 20 P.3d
3 800 (Nevada State Engineer Ruling on Application No. 25792 (April 19, 1972)). That is a far
4 cry from Mineral County's position, which is that adequate annual inflows from the Walker
5 River System into Walker Lake must be provided for by the Decree Court such that the Lake is
6 returned to and maintained in a condition that supports its public trust values.
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8 Finally, NDOW cannot reasonably purport to adequately represent Mineral County's
9 interests in vindicating the public trust obligation to maintain adequate inflows into Walker Lake
10 because NDOW is one of the largest owners of surface water rights in the upstream portion of
11 the Walker River System, which it uses and asserts that it is required to use for the benefit of the
12 artificially created Mason Valley Wildlife Management Area in preference to Walker Lake. By
13 committing itself to the diversion and use of Walker River surface flows in Mason Valley to the
14 detriment of Walker Lake, NDOW has adopted a position that puts it at odds with the exclusive
15 Walker Lake interests that Mineral County seeks to protect through intervention and prosecution
16 of its public trust claims.

17 These examples are illustrations of the ways in which NDOW's and the State of
18 Nevada's litigation positions and practical actions have consistently diverged substantially from
19 the claims and interests being advanced by Mineral County. As was explained in Mineral
20 County's Opening Brief in Support of Intervention, the burden on a would-be intervenor to
21 establish that existing parties may not adequately represent an intervenor's interests is minimal,
22 requiring only that the "representation of [its] interest 'may be' inadequate." *Trbovich v. United*
23 *Mine Workers of America*, 404 U.S. 528, 538 (1972); *Citizens for Balanced Use v. Montana*
24 *Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011). Furthermore, courts consider this burden
25 satisfied when "the interests of [the intervenor] were potentially more narrow and parochial than
26 the interests of the public at large," *Californians for Safe & Competitive Dump Truck Transp. v.*
27 *Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998). As explained above, Mineral County's public
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1 trust claims and interests diverge substantially from and are more far reaching with regard to
2 Walker Lake than the positions that NDOW and the State of Nevada have taken in this litigation
3 and the related litigation before the Nevada Supreme Court, or the actions and goals that NDOW
4 and the State have pursued in the Walker River and Lake Basin. Accordingly, Mineral County
5 plainly has met the burden of demonstrating that its interests are not adequately represented by
6 NDOW or the State of Nevada (or any other existing party).

7 In addition to erroneously asserting that it adequately represents the interests advanced by
8 Mineral County, NDOW loosely raises doubts about the timeliness of Mineral County's Motion
9 for Intervention. While NDOW does not go so far as to actually argue, or provide support for the
10 contention, that Mineral County should be denied intervention as of right on the ground of
11 untimeliness, it does raise that question in a heading in its Response to Mineral County's
12 Opening Brief and suggest that Mineral County's public trust claims "ideally should have been
13 made while the Walker River was being adjudicated in the 1920's and 1930's," prior to the entry
14 of the Walker River Decree. NDOW Answering Brief at 14.

15 NDOW's focus on the entry of the Decree is not determinative of the timeliness of
16 Mineral County's motion for intervention in part because the claims Mineral County seeks to
17 advance through intervention relate to the Court's ongoing, perpetual, public trust duty to
18 maintain adequate water levels in Walker Lake. A claim that seeks to enforce such a public trust
19 duty may be asserted at any time. *See, e.g., State v. Bunkowski*, 503 P.2d 1231, 1238 (Nev.
20 1972) (holding that "the public rights in public waters cannot be alienated or made subject to
21 easements except by legislative action; neither can the state's right in public waters be prescribed
22 against nor can these rights be impaired by an estoppel growing out of a mere failure to object to
23 encroachment"). For this reason, as well as the others presented in this Reply and Mineral
24 County's Opening Brief, NDOW's doubt about the timeliness of Mineral County's Motion for
25 Intervention is misplaced.
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1 In its Opening Brief Mineral County explained why its 1994 Motion for Intervention was
2 timely in the context of the ongoing Walker River Decree proceedings and the long delay before
3 the severe and ever-worsening harmful effects on Walker Lake of the allocation of surface
4 waters of the Walker River System under the Decree became apparent. *See* Mineral County
5 Opening Brief at 9 – 11. As noted there, the timeliness of a motion to intervene depends on a
6 number of case-by-case contextual considerations and is not determined merely on the basis of
7 how much time has passed since the underlying action was commenced. *See Mille Lacs Band of*
8 *Indians v. State of Minn.*, 989 F.2d 994, 999 (8th Cir. 1993) (granting intervention even after
9 substantial time had passed since commencement of suit). Thus, it has been observed that “[t]he
10 determination as to timeliness is a flexible one and must be made on a case-by-case basis taking
11 into account all the appropriate circumstances,” and a motion for intervention generally is less
12 likely to be denied on timeliness grounds if it is made for intervention as of right. *Brown v.*
13 *Board of Educ’n of Topeka*, 84 F.R.D.383, 398 (D. Kan. 1979) (finding post-judgment motion
14 for intervention timely after case had lain dormant for 24 years where court retained
15 jurisdiction). As discussed in Mineral County’s Opening Brief, under all the circumstances of
16 this case Mineral County’s Motion for Intervention to assert its public trust claims should be
17 considered timely.

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IV.

CONCLUSION

For the reasons stated above and in its Opening Brief in Support of Intervention, Mineral County respectfully requests that the Court grant its Motion for Intervention and Amended Complaint in Intervention and issue an order to proceed with briefing on the merits of Mineral County's claims.

Respectfully submitted this 14th day of January, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2013, I electronically filed the foregoing

MINERAL COUNTY REPLY BRIEF IN SUPPORT OF INTERVENTION with the Clerk

of the Court using the CM/ECF system, which will send notification of such filing to the email

addresses that are registered for this case; and I further certify that on this 14th day of January,

2013, I caused a copy of the foregoing to be served on the following non CM/ECF participants by

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