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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 WALKER RIVER PAIUTE TRIBE,)
 Plaintiff-Intervenor,)
)
 vs.)
 WALKER RIVER IRRIGATION DISTRICT,)
 a corporation, et al.,)
 Defendants.)
)
 _____)
 MINERAL COUNTY,)
 Plaintiff-Intervenor,)
)
 vs.)
 WALKER RIVER IRRIGATION DISTRICT,)
 a corporation, et al.,)
 Defendants.)
 _____)

IN EQUITY NO. C-125-MMD
Subproceeding: 3:73-CV-00128-MMD-WGC

**MINERAL COUNTY AND
WALKER LAKE WORKING
GROUP STATUS REPORT**

1 Pursuant to the Court's *Minute Order* of March 23, 2021, Doc. No. 908, Mineral County
2 and Walker Lake Working Group respectfully submit the following Status Report in advance of
3 the status conference scheduled for April 28, 2021. This status report provides the Court with
4 the recent history in this case, including events occurring during the year prior to Judge Jones'
5 erroneous dismissal of Mineral County's claim on May 28, 2015, proceedings before the Court
6 of Appeals for the Ninth Circuit on appeal of that decision, proceedings before the Nevada
7 Supreme Court on questions certified to it by the Court of Appeals for the Ninth Circuit, and
8 finally the recent proceedings before the Court of Appeals for the Ninth Circuit which resulted in
9 the reinstatement of Mineral County's claim and remand to this Court with instructions to
10 proceed consistent with the Ninth Circuit's decision. This Report then outlines the issues that
11 remain to be decided by this Court, namely the task of completion of service on California
12 riparian water rights owners and a decision on the merits of Mineral County's claim.

15 **1. Mineral County's Public Trust Claim Case History**

16 **A. Mineral County's Petition to Intervene and Motion for Intervention:**

17 Mineral County's public trust claim for minimum flows to Walker Lake has been
18 pending before this Court since October 25, 1994, when Mineral County filed a Petition to
19 Intervene and Motion for Intervention in the Walker River litigation to address the chronic
20 overappropriation and overconsumption of water from the Walker River and its tributaries that
21 has resulted in persistently inadequate inflows from the Walker River into Walker Lake and the
22 consequent destruction of Walker Lake and its traditional environmental, recreational and
23 economic public trust uses. *United States v. Walker River Irrigation District*, 3:73-cv-0127 (Doc
24 Nos. 31 & 32). On January 3, 1995, the Court created this subproceeding to address Mineral
25 County's Petition. *Minutes of Court* (Doc. No. 1). On February 9, 1995, the Court ordered
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1 Mineral County to file revised Intervention Documents and to serve these Intervention
2 Documents on all claimants to the waters of the Walker River and its tributaries pursuant to
3 Federal Rule of Civil Procedure 4. *Order Requiring Service of and Establishing Briefing*
4 *Schedule Regarding the Motion to Intervene of Mineral County*, ¶¶ 2, 3 (Doc. No. 19). Mineral
5 County filed its *Amended Complaint in Intervention*, (Doc. No. 20), *Amended Memorandum of*
6 *Points and Authorities in Support of Mineral County’s Amended Complaint in Intervention*,
7 (Doc. No. 21), and *Motion for Preliminary Injunction; Memorandum of Points and Authorities;*
8 *Affidavit of Kelvin J. Buchanan; and Affidavit of Gary L. Vinyard, Ph.D.* (Doc. No. 22), on
9 March 10, 1995 (“*Intervention Documents*”). On September 29, 1995, the Court clarified the
10 documents that Mineral County was required to serve on defendants and confirmed that persons
11 or entities who are served or waive personal service, but do not appear and respond, will be
12 deemed to have notice of all subsequent filings with the Court. *Order* (Doc. No. 48).

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15 B. Status of Rule 4 Service

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17 On September 6, 2013, following a number of service reports filed by Mineral County,
18 the Court confirmed that Mineral County had properly served all identified defendants in the C-
19 125-C subproceeding as of that time.¹ *See Minutes of Proceedings*, at 2 (Doc. No. 725).

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22 ¹ During 2011 and 2012, the parties in both the C-127 and C-128 subproceedings briefed the
23 issue of whether Mineral County and the United States would need to serve successors-in-
24 interest to served defendants. (Doc. Nos. 516, 523, 535). In the fall of 2011, Magistrate Judge
25 Leavitt issued an Order on the treatment of successors-in-interest, which held that pursuant to
26 Federal Rule of Civil Procedure 25(c), once a defendant is served, a successor-in-interest by
27 virtue of *inter vivos* transfer need not be served, but rather that it is the defendant’s duty to
28 inform any successor-in-interest of the pending Walker River litigation and the burden is on that
successor-in-interest to appear in the litigation. *Amended Order Concerning Service Issues*
Pertaining to Defendants Who Have Been Served (Doc. No. 542). With regard to successors-in-
interest by virtue of a defendant’s death, the Court held that pursuant to Federal Rule of Civil
Procedure 25(a), when a death is formally noted on the record by service of a statement noting
the death filed in Case No. 3:73-cv-0128, Mineral County or any other party or the decedent’s
representative and/or successor(s)-in-interest shall move for substitution of the proper successor-

1 Between the filing of its *Intervention Documents*, and the Court's confirmation in 2013 that
2 service on identified claimants to the waters of the Walker River was complete, Mineral County
3 served over 1,000 proposed defendants.
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5 Following the Court's confirmation that service on these identified appropriative water
6 rights holders was complete, the Court ordered Mineral County to complete Rule 4 service on an
7 additional category of water users: holders of riparian water rights within the Walker River
8 Basin under California law who have not already been served as a result of other appropriative
9 surface water rights they may own. *Minutes of Proceedings* (Nov. 4, 2013) (Doc. No. 736);
10 *Summary for the Status Conference Held November 4, 2013* (Nov. 20, 2013) (Doc. No. 733).
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12 On December 31, 2013, Mineral County filed a comprehensive report outlining the status
13 of service to date in order to provide the Court with a comprehensive view of its ratified service
14 efforts and service that remained to be completed. *Mineral County Report on Status of Served*
15 *Defendants and Newly Added Defendants to be Served* (Dec. 31, 2013) (Doc. No. 738). During
16 2014, Mineral County researched and compiled the list of California riparian water rights holders
17 who the Court ordered it to serve via Rule 4 of the Federal Rules of Civil Procedure. In the
18 spring of 2015, Mineral County mailed requests for waivers of personal service to those owners
19 pursuant to Rule 4(d)(1), which list totaled 341 additional defendants. That effort yielded 161
20 waivers of personal service from defendants, 16 of whom also filed notices of appearance, and
21 also resulted in notices of appearance filed by two defendants who did not return a waiver,
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26 in-interest within 90 days of such notice pursuant to Fed. R. Civ. P. 25(a). On April 23, 2012,
27 following objections by WRID to Judge Leavitt's successor-in-interest orders, (Doc Nos. 552 &
28 553), and a response to those objections by Mineral County, (Doc. No. 563), Judge Reed upheld
Judge Leavitt's orders. *Order* (Doc. No. 592).

1 leaving 178 riparian water rights holders who remain to be served via personal service. When
2 Judge Jones dismissed the case on May 28, 2015, Mineral County discontinued all service efforts
3 pending the outcome of the appeal to the Court of Appeals for the Ninth Circuit, as there no
4 longer was a valid active case for purposes of service. Mineral County estimates that the list of
5 riparian owners who remain to be served totals 178, which number could change slightly
6 depending on what research reveals regarding the transfer of properties since the completion of
7 Mineral County's efforts at service by mail prior to Judge Jones's dismissal of the case.
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9 Service on this remaining list of riparian owners will be the first task Mineral County
10 proposes to address as the litigation of Mineral County's claim resumes.
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12 C. The Court Grants Intervention to Mineral County to Pursue Its Public Trust Claim

13 Following briefing and argument, Mineral County's Motion for Intervention was granted
14 by Judge Jones during a hearing on September 23, 2013, as reflected in both the transcript and
15 minutes of that hearing.² *Minutes of Proceedings* (Doc. No. 726); Transcript of Motion Hearing,
16 at 37, lines 9-12 (Doc. 732). At the Court's request, *see* Doc. 726, Mineral County filed a
17 *Proposed Order Granting Intervention* on November 1, 2013, (Doc. 731), but it has not yet been
18 signed and entered by the Court.
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20 D. Briefing of Threshold Issues

21 After intervention was granted, on November 4, 2013, the Judge Jones ordered briefing
22 on "basic threshold jurisdictional issues" in the spring of 2014. *Minutes of Proceedings* (Doc.
23 No. 736). On March 31, 2014, the Walker River Irrigation District ("WRID") filed a motion to
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28 ² This case was reassigned to Judge Robert Clive Jones on June 20, 2012, when Judge Reed retired. *Minutes of the Court* (Doc. No. 598).

1 dismiss Mineral County’s public trust claim.³ *Walker River Irrigation District’s Motion to*
2 *Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), or In the Alternative, to Stay Proceedings with*
3 *Respect to Mineral County’s Amended Complaint in Intervention* (Doc. No. 751); *Walker River*
4 *Irrigation District’s Points and Authorities In Support of Motion to Dismiss Pursuant To Fed. R.*
5 *Civ. P. 12(B)(1), or In the Alternative, to Stay Proceedings With Respect to Mineral County’s*
6 *Amended Complaint in Intervention* (Doc. No. 751-1). In its Motion to Dismiss, WRID argued
7 that the Court did not retain broad enough subject matter jurisdiction in the Walker River Decree
8 to entertain Mineral County’s public trust claim, if that claim is interpreted as claiming a new
9 water right within the priority system. *See Walker River Irrigation District’s Points and*
10 *Authorities In Support of Motion to Dismiss Pursuant To Fed. R. Civ. P. 12(B)(1), or In the*
11 *Alternative, to Stay Proceedings With Respect to Mineral County’s Amended Complaint in*
12 *Intervention* at 3-5. In the alternative, WRID argued that if the Court’s retained jurisdiction does
13 extend to Mineral County’s public trust claim, then the Court should stay the exercise of its
14 jurisdiction until the Nevada state courts rule on what WRID characterized as three “novel”
15 questions, namely: (1) whether the public trust applies to water in Nevada and how it relates to
16 Nevada water rights; (2) whether Mineral County has standing to assert its public trust claim;
17 and (3) whether Mineral County needs to exhaust Nevada state administrative remedies before it
18 can pursue its claim in court. *See id.* at 5-11. Mineral County responded on May 30, 2014,
19 clarifying that its public trust claim does not seek a priority water right and that under the plain
20 language of the Walker River Decree this Court plainly retained broad enough continuing
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28 ³ Defendants Lyon County, Nevada, Mono County, California, and parties led by Circle Bar N Ranch and represented by the Schroeder Law Offices joined in WRID’s motion to dismiss. (Doc. Nos. 752, 753, & 754).

1 jurisdiction to address Mineral County’s regardless of how that claim is characterized.⁴ *Mineral*
2 *County’s Points and Authorities In Response to Walker River Irrigation District’s Motion to*
3 *Dismiss or In the Alternative to Stay*, at 2 (Doc. No. 759). In addition, Mineral County pointed
4 out that “WRID’s arguments for abstention and a stay with regard to the three issues it raises are
5 mistaken because the issues are not “novel” but rather are issues that have been addressed and
6 settled by Nevada state courts, providing ample guidance to this Court in resolving Mineral
7 County’s public trust claim under the exclusive jurisdiction the Court has exercised over the
8 Walker River system for the better part of a century.” *Id.*

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11 E. Dismissal of Mineral County’s Claim by the Court and Appeal by Mineral County
12 and Walker Lake Working Group to Court of Appeals for the Ninth Circuit

13 Roughly a year later, on May 28, 2015, Judge Jones dismissed Mineral County’s public
14 trust claim on the ground that Mineral County lacked standing to bring its public trust claim
15 (Doc. 814).⁵ Despite dismissing Mineral County’s case for lack of standing, Judge Jones offered
16 the additional grounds for dismissal that: (1) the public trust doctrine does not apply to Walker
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20 ⁴ The United States of America and Walker River Paiute Tribe also filed responses to WRID’s
21 Motion to Dismiss, arguing respectively that “this Court has exclusive and ongoing jurisdiction
22 under the 1936 Decree to hear and determine additional water right claims in the Walker River
23 basin,” *United States Response to Motion to Dismiss*, at 2 (Doc. No. 760), and that the Court
24 retained jurisdiction under the Decree “for the purposes of changing the duty of water or for
25 correcting or modifying this decree; also for regulatory purposes, including a change of point of
26 diversion or of the place of use of any water user. . . [and that b]ecause *Mineral County’s*
Amended Complaint in Intervention (Mar. 10, 1995) (Doc. 20) involves water from the Walker
27 River system, the Court should exercise the jurisdiction it retained under the 1936 Decree.”
Walker River Paiute Tribe’s Response to Motion to Dismiss, or In the Alternative, to Stay
Proceedings Filed By Walker River Irrigation District, at 2 (Doc. No. 758).

28 ⁵ Simultaneously, Judge Jones dismissed the United States and Walker River Paiute Tribe’s
water rights claims, *United States v. Walker River Irrigation District*, No. 3:73-cv-00127-RCJ-
WGC (Doc. 2223), and denied the National Fish and Wildlife Foundation’s motions to approve
permanent and temporary transfers of water to instream use for the benefit of Walker Lake,
United States v. Walker River Irrigation District, No. 3:73-cv-00125-RCJ-WGC (Doc. 1340).

1 Lake and the Walker River system; (2) the public trust doctrine cannot be applied to existing
2 water rights without constituting an unconstitutional takings; (3) enforcement of the public trust
3 doctrine is a purely political, nonjusticiable question; and (4) Walker Lake is not part of the
4 Walker River Basin under the Decree and so allocations to the Lake would be prohibited. *Order*
5 (Doc. No. 814). So, instead of certifying questions of unsettled law to the Nevada Supreme
6 Court, as urged by WRID, Judge Jones simply dismissed Mineral County's claims on these
7 additional bases without providing the parties with an opportunity to fully brief those issues.
8 Mineral County and the Walker Lake Working Group appealed Judge Jones's May 28, 2015,
9 *Order* to the Court of Appeals for the Ninth Circuit on June 29, 2015.⁶ *Plaintiff-Intervenor*
10 *Mineral County's and Defendant Walker Lake Working Group's Notice of Appeal and*
11 *Representation Statement* (Doc. No. 825). After briefing and oral argument on all five issues on
12 appeal, the Court of Appeals for the Ninth Circuit resolved and reversed Judge Jones as to the
13 first question on appeal, holding that Mineral County has standing to bring its public trust claim
14 for minimum flows to Walker Lake.⁷ *Memorandum, Mineral County v. WRID*, No. 15-16342, at
15 3 (9th Cir. May 22, 2018). Additionally, in the context of its redressability discussion, the court
16 held with regard to additional issue number three, whether Mineral County's claim involves a
17 non-justiciable political question, that Mineral County's claim does not request a remedy that
18 involves or requires any political action by the state legislature. Specifically, the court noted that
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24 ⁶ At the time that Judge Jones dismissed Mineral County's claim, the principal parties were
25 engaged in settlement negotiations. Those negotiations were halted when the case was
26 dismissed.

27 ⁷ In the United States and Walker River Paiute Tribe's appeal of Judge Jones' May 28, 2015,
28 *Order* similarly dismissing their claims, *see* 3:73-cv-0127 Doc. No. 2223, the Court of Appeals
for the Ninth Circuit also took the extraordinary step of removing Judge Jones from the Walker
River Decree proceedings, including this subproceeding, citing erratic decision making and
demonstrated bias. *United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1173 & n. 14
(9th Cir. 2018).

1 “Mineral County...does not challenge Nevada’s statutory water laws, its requested relief – a
2 modification of the Decree – would not require the legislature to act. Thus, Mineral County’s
3 requested remedy is among the ‘remed[ies] that the court [would be] prepared to give.’” *Id.* at 7
4 (quoting 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §
5 3531.6 & nn. 12, 13 (3d ed. 2017)). With regard to additional issue number four, whether
6 Walker Lake is within the Walker River Basin, in the parallel appeal of Judge Jones’ May 28,
7 2015, *Order* denying the National Fish and Wildlife Foundation’s petition for modification of the
8 Walker River Decree for the purpose of delivering water to Walker Lake, the Ninth Circuit
9 confirmed that Walker Lake is within the Walker River Basin and may receive water under the
10 Decree. *United States v. U.S. Bd. of Water Comm’rs*, 893 F.3d 578, 606 (9th Cir. 2018).

13 Finally, in a companion order, the Ninth Circuit Court of Appeals certified the following
14 two questions of law relating to the first and second additional issues on appeal to the Nevada
15 Supreme Court for decision: (1) “Does the public trust doctrine apply to rights already
16 adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?”; and
17 (2) “If the public trust doctrine applies and allows for reallocation of rights settled under the
18 doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights
19 constitute a “taking” under the Nevada.” *Mineral County v. WRID*, 900 F.3d 1027, 1034 (9th
20 Cir. 2018).

23 Following briefing and oral argument before the Nevada Supreme Court, on September
24 17, 2020, the Court answered the first certified question by holding that the public trust doctrine
25 applies to all water in Nevada, including water rights already adjudicated under the doctrine of
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1 prior appropriation.⁸ *Mineral County v. Lyon County*, 136 Nev. Adv. Op. 58, at 5, 14-15 (Sept.
2 17, 2020) (*en banc*). The Court further held that Nevada’s statutory water law is consistent with,
3 but does not supplant, the public trust doctrine, and so the doctrine imposes a continuing duty on
4 the sovereign to manage public trust resources for the benefit of the public. *Id.* at 21 & 21-22
5 n.7. The Nevada Supreme Court further recognized that there are means or mechanisms under
6 Nevada law through which this continuing duty to protect public trust uses of public trust water
7 resources may be fulfilled. *Id.* at 18-19 & n.6, 21-22; *see also id.* at 2 (Pickering, C.J.,
8 concurring in part and dissenting in part). Finally, the Court held that the State may not,
9 pursuant to this continuing duty, reallocate previously adjudicated water rights to remedy public
10 trust violations. *Id.* at 24.

13 Because the Supreme Court held “that the public trust doctrine does not permit
14 reallocation, [it further held that it] need not address the second certified question, which asks:
15 "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine
16 of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a
17 'taking under the Nevada Constitution requiring payment of just compensation?" Without
18 reallocation, no rights are abrogated and no takings issue is implicated.” *Id.* at 26.

20 Following the Nevada Supreme Court’s *Opinion*, the Court of Appeals for the Ninth
21 Circuit provided the parties with the opportunity to file supplemental briefs addressing the effect
22 of the Nevada Supreme Court’s opinion on the remaining two issues before the court. *Order*,
23 *Mineral County v. WRID*, No. 15-16342 (9th Cir. Sept. 25, 2020). Following that briefing, the
24 Court of Appeals for the Ninth Circuit issued an *Opinion* resolving the final two issues on
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28 ⁸ While the Nevada Supreme Court’s *Opinion* states that it answered the first certified question
in the negative, this phrasing was the result of the fact that the Court had reworded the certified
question. As originally worded, the first question clearly was answered in the affirmative.

1 appeal. *Opinion, Mineral County v. WRID*, No. 15-16342 (9th Cir. Jan. 28, 2021). The court
2 reiterated the Nevada Supreme Court’s holding that Nevada’s public trust doctrine applies to
3 water rights adjudicated under the doctrine of prior appropriation. *Id.* at 7. The court also
4 confirmed that while Nevada’s public trust doctrine applies to these rights and does not permit
5 reallocation of water rights adjudicated under the doctrine of prior appropriation, it does provide
6 for remedies that do not involve reallocation of water and such remedies therefore may be
7 pursued by Mineral County before the district court. *Id.* Accordingly, the court vacated the
8 judgment of the district court, which dismissed Mineral County’s public trust claim and
9 remanded “with instructions to consider the County’s public trust doctrine claim to the extent it
10 seeks remedies that would *not* involve a reallocation of adjudicated water rights.” *Id.* at 7.
11 Specifically, the Court of Appeals for the Ninth Circuit held that Mineral County “may pursue its
12 public trust claim to the extent that the County seeks remedies that would *not* involve a
13 reallocation of [water] rights.” *Id.* at 21. Finally, the Court rejected as untimely Mineral
14 County’s challenge to the 1936 Decree itself, and therefore, Mineral County’s claim must
15 proceed pursuant to the public trust doctrine’s continuing affirmative duty on the part of the state
16 to preserve public trust resources for future generations. *See id.* at 7, 16-18.

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20 As Mineral County has made clear, both before the Court of Appeals for the Ninth
21 Circuit and the Nevada Supreme Court, it does not seek a reallocation of water rights in the
22 Walker River Basin. Mineral County Reply Brief, at 12, *Mineral County v. WRID*, No. 15-
23 16342 (9th Cir. Nov. 4, 2016); Mineral County Reply Brief at 7, 14-15, 18, *Mineral County v.*
24 *Lyon County*, 136 Nev. Adv. Op. 58 (June 26, 2020). Specifically as stated in that briefing, it
25 envisions remedies that may include or be in the same vein as: (1) a change in how surplus
26 waters are managed in wet years and how flows outside of the irrigation season are managed; (2)
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1 mandating efficiency improvements with a requirement that water saved thereby be released to
2 Walker Lake; (3) temporary curtailment of the most speculative junior rights on the system; (4) a
3 mandate that the State provide both a plan for fulfilling its public trust duty to Walker Lake and
4 the funding necessary to effectuate that plan; and/or (5) an order requiring water rights holders to
5 come up with a plan to reduce consumptive water use in the Basin as was done by the Nevada
6 State Engineer in Diamond Valley. In its January 28, 2021, *Opinion*, the Ninth Circuit held that
7 Mineral County's Amended Complaint is broad enough to encompass these remedies and
8 confirmed that Mineral County may pursue them before the Court on remand. *Opinion*, at 20-21,
9 *Mineral County v. WRID*, No. 15-16342 (9th Cir. Jan. 28, 2021). Thus, once service on
10 remaining riparian water rights holders has been completed, Mineral County intends to pursue
11 those remedies before the Court.
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14 **2. Remaining Issues Pending Before the Court**

15 Following the Ninth Circuit's remand and consistent with previous undisturbed orders of
16 this Court, the following issues remain pending before the Court:
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- 18 (1) Completion of Rule 4 service on California riparian water rights holders;
- 19 (2) Following completion of Rule 4 service, develop procedure for Rule 5 service;
- 20 (3) Factual development and briefing and argument on Mineral County's public trust
21 claim; and
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1 (4) Factual development and briefing and argument on remedies available to Mineral
2 County to ensure fulfillment of the public trust duty to protect the public trust uses of Walker
3 Lake.

4 Dated: April 21, 2021

5 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2021, I electronically filed the foregoing **MINERAL COUNTY AND WALKER LAKE WORKING GROUP STATUS REPORT**, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to parties of record via their E-Mail addresses.

/s/ Simeon Herskovits
Simeon Herskovits