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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,

Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT, et al.,

Defendants.

3:73-cv-00128-MMD-WGC

PRINCIPAL DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS MINERAL COUNTY'S SECOND AMENDED COMPLAINT IN INTERVENTION PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(B)(6) AND 12(b)(7)

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I. INTRODUCTION.

A. Background.

The long history of this matter is set forth in detail in ECF #576 at pgs. 1-15 and is not repeated here. Mineral County's original proposed complaint in intervention was filed on October 25, 1994. ECF #3. The Principal Defendants do, however, provide a brief summary of the procedural background. After being directed to file revised pleadings, (ECF #19). Mineral County's Amended Complaint in Intervention was filed without a decision on intervention on March 10, 1995. ECF #20. Eventually, the Court proceeded with briefing and a hearing on the Motion to Intervene. ECF #714; ECF #626. The Court orally granted the motion. ECF #732 at 37. A proposed order was later submitted, but it does not appear that it was ever entered. ECF #731.

The Amended Complaint alleged subject matter jurisdiction based upon this Court's "continuing jurisdiction" and that "the matter in controversy arises under the Constitution, laws, or treaties of the United States." ECF #20 at 2. The Amended Complaint sought to modify the Walker River Decree and reallocate the waters of the Walker River so that at least 127,000-acre feet per year reaches Walker Lake. ECF #20 at 4-6. The legal basis for the claim was alleged to be the "doctrine of the maintenance of the public trust." *Id.* at 5-6. Mineral County alleged that "without reallocation of the waters to ensure priority to sustain the Lake, Walker Lake will suffer substantial and irreparable damage." *Id.* at para. 10, pg. 4.

After granting the Motion to Intervene, the Court directed the filing of motions related to its subject matter jurisdiction. *See*, ECF #737 at 67-69. The Walker River Irrigation District moved to dismiss the Amended Complaint on the ground that it did not arise under the Constitution, laws, or treaties of the United States, and was not one over which this Court had continuing jurisdiction. ECF #751; ECF #751-1. Others joined that motion. *See*, ECF #752; ECF #753; ECF #754.

B. The District Court Decision.

The Court ruled that Mineral County did not have standing to assert a public trust claim. ECF #814 at 6-8. However, it went on to address the merits of Mineral County's claim. It recognized that the relief Mineral County sought, modification of the Walker River Decree in a manner to provide minimum flows to Walker Lake, would be adverse to the water rights recognized by it. The Court

concluded that Nevada law does not allow the public trust doctrine to be used to abrogate appropriative rights. To the contrary, it held, correctly, that the relationship between the public trust doctrine and the appropriative water rights system in Nevada only permitted the doctrine to be used prospectively to prevent the granting of appropriative rights, not retroactively to divest them. ECF #814 at 8-16. It also ruled that such a retroactive divestiture would constitute a taking, which would require just compensation under both the state and federal constitutions, and that it had no authority to grant such relief. ECF #814 at 17-19. As a result of those conclusions, the Court entered a judgment dismissing the Amended Complaint. *Id.* at 20. The dismissal was appealed to the Ninth Circuit. ECF #825.

C. The Proceedings in the Ninth Circuit.

1. Standing.

The Ninth Circuit first concluded in a memorandum disposition that Mineral County had standing to assert its claim. *Mineral County v. Walker River Irrigation Dist.*, 900 F.3d 1027, 1030, n. 4 (9th Cir. 2018). In its ruling on standing, the Ninth Circuit recognized that Mineral County must show "injury, causation, and redressability." *See*, *Mono County (sic) v. Walker River Irrigation Dist.*, 735 Fed. Appx. 271, 273-74 (2019). On the issue of "redressability" the Ninth Circuit recognized that a court could not order the Nevada legislature to amend Nevada's water laws, but suggested that the requested relief would not require the legislature to act. 735 Fed. Appx. at 273-274. As will be discussed below, the Ninth Circuit was wrong on the redressability issue, because the Nevada Supreme Court has made clear that Mineral County's requested relief would require legislative action.

2. The Certified Questions.

Because the remaining issue was an important question of Nevada law, the Ninth Circuit certified two questions to the Nevada Supreme Court. 900 F 3d. at 1031. The certified questions were:

> Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?
>
> If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

Id. at 1034.

D. The Nevada Supreme Court's Answer to the Questions.

The Nevada Supreme Court addressed the questions, in *Mineral County v. Lyon County*, 473 P.3d 418 (Nev. 2020). After rephrasing the first question, the Nevada Supreme Court held "that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation." *Id.* at 431. As a result of this holding, the Court recognized, there would be no modification of the Walker River Decree reallocating any of the water rights adjudicated by it and thus no issue of either a physical or regulatory taking of any of those rights. The Nevada Supreme Court accordingly said that it "need not address the second certified question." *Id.*

E. The Final Ninth Circuit Opinion.

The Ninth Circuit directed the parties to address the effect of the Nevada Supreme Court's decision on the issues pending in this case. The defendants argued that the Nevada Supreme Court's decision required it to affirm the dismissal of Mineral County's Amended Complaint and the Judgment entered thereon by the District Court. However, the Ninth Circuit declined to do so. It said:

> To the extent that Mineral County seeks a reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation, the parties agree that the County's claim is foreclosed by the Nevada Supreme Court's decision. Insofar as the County seeks a reallocation of water rights, it appears that "the voluntary sale and purchase of water rights is the only available means to accommodate the needs of current water right holders and to restore Walker Lake under the Decree.

Mineral County v. Walker River Irrig. Dist. 986 F.3d 1197, 1203 (9th Cir. 2021).

The Ninth Circuit noted that Mineral County contended that it should vacate the judgment and remand for further proceedings on two legal theories. 986 F. 3d at 1203-1204. However, the Court rejected Mineral County's first theory, or claim, that it should be allowed to challenge the Walker River Decree on the ground that the Decree itself violates the public trust doctrine. *Id.* at 1204. It said that such challenge was untimely. *Id.* As a result Mineral County is precluded from challenging the Decree.

The Ninth Circuit concluded that perhaps Mineral County could seek remedies that would not involve a reallocation of water rights. It recited the proposed remedies which Mineral County had

raised for the first time in its Reply Brief to the Nevada Supreme Court. The Ninth Circuit was not persuaded that a remand was unnecessary. First, it assumed that Nevada's public trust doctrine was something more than a restraint on alienation of a trust resource. It did so by extracting a single sentence from the opinion in *Mineral County* where the Nevada Court provided a general description of the public trust doctrine by referring to the decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), and saying that the doctrine "generally acts as a restraint on the state in alienating public trust resources." *See*, 986 F. 3d at 1205. Relying on that sentence and disregarding the Nevada Supreme Court's description of the development of the doctrine in Nevada in the remainder of its opinion, the Ninth Circuit said that the Nevada Supreme Court did not determine whether other remedies were viable. Second, it said that the County's Complaint was at least broad enough to justify a remand, without determining whether it actually stated valid claims. And third, it would not address the arguments that the remedies were unavailable as a matter of law. The Ninth Circuit accordingly concluded that these issues should be left to this Court to address in the first instance. *Mineral County*, 986 F.3d at 1205-1206. The Ninth Circuit did not decide whether a claim for any of those remedies can be stated under Nevada's public trust doctrine.

II. THE SECOND AMENDED COMPLAINT IN INTERVENTION.

A. The Allegations of the Second Amended Complaint.

The Second Amended Complaint was filed on June 30, 2021. *See* ECF #936.[1] The alleged bases for subject matter jurisdiction include the Court's continuing or reserved jurisdiction over the waters of the Walker River, presumably pursuant to Paragraph XIV of the Decree. Subject matter jurisdiction is also alleged to be based upon 28 U.S.C. § 1331, federal question, 28 U.S.C § 1367, (supplemental jurisdiction), and 28 U.SC. § 1651, the All Writs Act. ECF #936, para 4,

---

[1] Mineral County states that the Second Amended Complaint "supplements" its Amended Complaint filed March 10, 1995, and further that certain affidavits also filed March 10, 1995, are applicable to the Second Amended Complaint. *see*, ECF # 936 at p. 2; *see* also, n. 1. Mineral County's Second Amended Complaint supersedes its original Complaint and its Amended Complaint. *See Hal Roach Studios Inc., v. Richard Finer and Co*. 896 F. 2d 1542 (9th Cir. 1990). In addition, the Court has not granted Mineral County permission to file a "Supplemental" pleading pursuant to Fed. R. Civ. P. Rule 15(d). Supplemental pleading is allowed solely for purposes of setting out transactions, occurrences, or events that happened after the date of the pleading to be supplemented.

pg. 3-4. The purported legal foundation for the Second Amended Complaint is an assertion that:

> The statutory and common law of Nevada, including the public trust doctrine, imposes an affirmative duty on both the State of Nevada and the Decree Court to exercise continuing regulatory and administrative power over the waters and water rights of the Walker River system to ensure that sufficient average annual inflows reach Walker Lake to restore and maintain Lake elevation and salinity levels sufficient to support the Lake's Lahontan cutthroat trout fishery, which also will restore the Lake's other public trust values, including environmental, wildlife, recreational, and aesthetic values, for current and future generations of Nevadans and the public.
>
> ECF #936, para. 20 at pg. 7.

Mineral County contends that the Decree Court and Nevada have violated those alleged duties by "permitting excessive and unreasonable upstream consumptive uses to reduce average inflows to Walker Lake." *Id.* at para. 21. It alleges that the Decree Court's and Nevada's public trust obligation "requires restoration and maintenance of the Walker Lake ecosystem to a condition which will sustain a healthy put-grow- and take Lahontan Cutthroat Trout fishery." *Id.* at para. 22. Specifically, it alleges that the Decree Court and Nevada have a duty to manage the waters of the Walker River so that Walker Lake is maintained at a "minimum water level of 3,965 feet above sea level" and a Lake salinity level of 10,000 mg/l TDS." *Id.* at para. 23.

Mineral County seeks a wide range of relief from those allegations. First, it requests that the Court issue a declaration that the State of Nevada and the Decree Court have a continuing public trust duty to manage the Walker River system to ensure minimum inflows into Walker Lake to restore and maintain minimum elevation levels and prevent certain salinity levels, and that they have "historically failed" to perform their public trust duty. ECF #936, paras. 1-2, at p. 8.

Second, in describing the State of Nevada's alleged public trust duty, Mineral County alleges that the State of Nevada is required to develop a plan to provide additional inflows into Walker Lake, provide funding to implement the plan, and otherwise provide efficiency improvements in the Walker River system. ECF #936, paras. 12, 15, 18, at pgs. 9-10.

Third, in describing the Decree Court's alleged public trust duty, Mineral County asserts that the Decree Court is required to: modify the formula used to determine water rights in priority

(ECF #936 para. 3 at p. 8); mandate restrictions in times of shortage (*Id.* para 4); require that water in excess of that needed to satisfy decreed rights be delivered to Walker Lake (*Id.* para 5); require the denial of all change of use applications that would negatively affect Walker Lake inflows (*Id.* para 6 at p. 9); find that the Walker River system is overappropriated, cancel unperfected permits, cancel water rights for which necessity of use does not exist, and find that decreed water rights have been abandoned if the water has not been put to reasonable use (*Id.* paras. 7, 8, 9 at p. 9); modify delivery schedules from and management of the Topaz and Bridgeport reservoirs (*Id.* para 10); modify the decreed rights of Walker River Irrigation District (*Id.* para 11); order that water for Walker Lake under Nevada Department of Wildlife ("NDOW") Certificate No. 10860 "be automatically delivered to Walker Lake" (*Id.* para 16 at p. 10); require NDOW to change its water rights for the Mason Valley Wildlife Area to instream use for Walker Lake (*Id.* para 17); direct the Board of Water Commissioners to prevent waste and impose penalties therefor, adopt rules for penalty enforcement, instruct the Water Master to facilitate the delivery of changed water rights to Walker Lake; modify the 1953 Rules and Regulations to change the makeup of the U.S. Board of Water Commissioners; and require real time gauging stations and a website showing real time water delivery and stream flow data (*Id.* paras 13, 14, 19, 20, 21, 22 and 23 at pgs. 10-11).

B. The Grounds for Dismissal of the Second Amended Complaint.

There are four separate and independent reasons why this Court should dismiss the Second Amended Complaint. First, this court lacks subject matter jurisdiction. This Court's continuing jurisdiction under paragraph XIV of the Decree is limited to modifying and correcting the Decree. But, Mineral County seeks far more than mere modifications and/or corrections. Mineral County seeks injunctive and declaratory relief against the State of Nevada. The continuing jurisdiction does not encompass those claims. There is no federal question here and neither 28 U.S.C. § 1367, nor 28 U.S.C. § 1651 provides an independent basis for jurisdiction.

Second, the Second Amended Complaint is not justiciable. Its claims are not redressable and as a result Mineral County has no standing. It also presents nonjusticiable political questions that this Court cannot answer. For example Mineral County asks this Court to order the State of

Nevada to develop a plan for Walker Lake and provide funding for that plan. Mineral County also asks this Court to order the State of Nevada to redirect its water resources from the Mason Valley Wildlife Area to Walker Lake, and to fund programs for water efficiency and for the lease and purchase of water rights to deliver additional water to Walker Lake. Whether the State of Nevada does any of that lies within the province of the Nevada Legislature, not this Court.

Third, the Complaint fails to name a necessary and indispensable party, the State of Nevada, as a defendant. Mineral County seeks declaratory and injunctive relief against the State of Nevada. Yet, the State of Nevada is not a defendant in this case. This Court cannot proceed to entertain the relief Mineral County seeks in the absence of the State of Nevada.

Finally, the Complaint fails as a matter of law because it is premised on a non-existent legal claim. Specifically, Mineral County alleges that it seeks remedies to enforce the State of Nevada's "continuing public trust duty to maintain minimum average annual inflows from the Walker River system into Walker Lake." However, no such legal duty exists under Nevada's public trust doctrine. *See, Mineral County v. Lyon County*, 473 P.3d 418 (Nev. 2020).

III. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION.

A. Standard for Dismissal under Rule 12(b)(1).

The party asserting subject matter jurisdiction bears the burden of establishing it. Dismissal is appropriate if the complaint, considered in its entirety, fails to allege facts sufficient to establish subject matter jurisdiction. *In Re Dynamic Random Access Memory Antitrust Litigation*, 546 F. 3d 980, 984-985 (9th Cir. 2008). Mineral County has not met that burden here.

B. Paragraph XIV of the Walker River Decree Does Not Give The Court Subject Matter Jurisdiction to Grant Declaratory Relief as to Nevada's, or this Court's Purported Obligations to Walker Lake.

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. In *United States v. Walker River Irrigation Dist.*, 890 F. 3d 1161 (9th Cir. 2018), the Ninth Circuit concluded that this provision only gives the court

jurisdiction to modify water rights under the decree and to litigate claims to additional water rights in the Walker River Basin. 890 F. 3d at 1169; 1171. This limited jurisdiction does not extend to Mineral County's claims.

Based upon a flawed interpretation of Nevada's public trust doctrine, Mineral County does not seek to correct or modify the Decree. The decision of the Nevada Supreme Court very clearly precludes any modifications of the water rights recognized in the Decree. Moreover, Mineral County does not seek additional water rights. Its claim is not within the Court's continuing jurisdiction.

The Second Amended Complaint seeks declaratory judgments against Nevada and this Court with respect to their alleged continuing duty under Nevada law with respect to Walker Lake. There is nothing in paragraph XIV which constitutes a reservation of jurisdiction to entertain such a claim. Moreover, much of the relief that Mineral County requests is not directed to modifying Decree, but rather to subsequent orders of the Court, like those establishing the 1953 Rules and Regulations, the United States Board of Water Commissioners and the Administrative Rules Governing Changes to Water Rights. Although the Court certainly has the power in appropriate circumstances to change or modify any of those orders, that power does not give it jurisdiction to do so in the context of a declaratory relief action on the contours of Nevada's public trust doctrine.

Relying on paragraph XIV of the Walker River Decree as a basis for subject matter jurisdiction over the Second 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 asserting a claim allegedly related in some manner 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. Silver Bar Mines,* 111 F. 3d 85, 86-87 (9th Cir. 1997); *Hagestad v. Tragesser,* 49 F.3d 1430, 1433 (9th Cir. 1995). There is none in this case.

C. Supplemental Jurisdiction Does Not Expand the Court's Reserved Jurisdiction.

In an action in which it has original jurisdiction, 28 U.S.C. § 1367(a) permits a federal court to exercise jurisdiction to hear and determine a claim over which it would otherwise have no independent basis for subject matter jurisdiction. 15A Moore's, *Federal Practice* § 106.03[1] at 106-8 (2021). The justification for such jurisdiction is efficient judicial administration and convenience and fairness to litigants. *See*, *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

Because the Walker River Decree, under its reservation of jurisdiction paragraph, does not establish an independent basis of federal subject matter jurisdiction here, 28 U.S. C. § 1367(a) cannot provide a separate jurisdictional basis for the Second Amended Complaint to proceed. Without original jurisdiction, there is no basis for supplemental jurisdiction at all.

In *Ortolf v. Silver Bar Mines, Inc.,* 111 F.3d 85 (9th Cir. 1997), settlement agreements had ended two diversity cases. The district court had not retained jurisdiction to enforce the settlement agreements. Because there was no retained jurisdiction, the Ninth Circuit held that there was no supplemental jurisdiction to enforce them. *Ortolf*, 111 F.3d at 87. The same is true here as to Mineral County's claim for declaratory relief.

D. The All Writs Act Does Not Expand the Court's Reserved Jurisdiction.

The All Writs Act, 28 U.S.C, § 1651, does not provide any independent basis for subject matter jurisdiction in its own right. *Syngenta Corp. Protection, Inc. v. Henson,* 537 U.S. 28, 31 (2002); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). Its purpose is to allow a federal court to issue orders as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued. *See*, *United States v. New York Telephone Co.,* 434 U.S. 159, 172 (1977). The Second Amended Complaint does not allege that the Court must act here to effectuate or prevent frustration of the Walker River Decree.

E. 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 Second Amended Complaint does not allege that any federal law creates the cause of action it asserts. 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,* 565 U.S. 576 (2012) has expressly stated that the public trust doctrine is "a matter of state law." *PPL Montana*, 565 U.S. at 603. *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). Moreover, the Second Amended Complaint expressly alleges that Mineral County's claim is based upon the "statutory and common law of Nevada, including the public trust doctrine." ECF #936 at para 20, pg. 7. Thus, federal question jurisdiction does not exist.

F. Assuming Arguendo That Mineral County Has Stated a Claim Under Nevada's Public Trust Doctrine, It Does Not Have Article III Standing Here, and Therefore There is No Subject Matter Jurisdiction.

1. Introduction.

As noted above, in its memorandum decision on standing, the Ninth Circuit recognized that to establish standing Mineral County must show "injury, causation and redressability." *See*, pg. 2 supra. However, the Ninth Circuit assumed that the Court could fashion relief that did not require the Legislature to act. *See*, 735 Fed. App. 4 at 273-274. This assumption was made before the Nevada Supreme Court issued its decision in *Mineral County*. And now, the relief Mineral County asks the Court to order does require the Legislature to act.

Mineral County asks the Court to declare Nevada's obligations to Walker Lake and that it has failed to meet them. *See* Second Amended Complaint, ECF #936 at 8, paras. 1 & 2. It asks that all unperfected water permits be cancelled and that water rights for which necessity of use

does not exist be cancelled. *Id.* at p. 9, paras. 7-8. It requests the Court to order Nevada to provide funding for Court mandated efficiency improvements and to purchase water saved for Walker Lake. *Id* at pp. 9-10, para. 12. It seeks an order mandating Nevada to "develop a plan for fulfilling its public trust duty to Walker Lake and to provide the funding necessary to implement the plan." *Id.* at para 15. It asks that Nevada be ordered to abandon water use on the Mason Valley Wildlife Area in favor of Walker Lake. *Id.* at para 16. Finally, it seeks an order mandating that "Nevada fund programs for temporary and permanent water delivery measures, including water leasing and purchase programs, to deliver additional water to Walker Lake sufficient to achieve and maintain the Lake and TDS levels… necessary to support a healthy put-grow and take Lahontan cutthroat trout fishery." *Id.* at para 18.

To have standing under Article III of the Constitution, Mineral County must show (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision. *Juliana v. United States*, 947 F3d 1159, 1168 (9th Cir. 2020). Assuming for the sake of argument that Mineral County can satisfy the first two requirements, it cannot satisfy the third. Mineral County's position here is not unlike that of the plaintiffs in *Julianna*.

In *Juliana*, the plaintiffs challenged the actions and inaction of United States' officials and agencies with respect to climate change. The complaint was based upon alleged violations of substantive rights under the United States Constitution and a public trust claim grounded in the Fifth and Ninth Amendments. *Juliana*, 947 F. 3d at 1165. The plaintiffs sought declaratory relief and an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]." *Id. Juliana* was an interlocutory appeal from a denial of a Rule 12(b)(1) motion to dismiss based upon a lack of standing and on the basis that the complaint raised non-justiciable political questions. *Juliana*, 947 F. 3d at 1165-1166.

The *Juliana* court focused on whether the plaintiffs' claimed injuries were "redressable" by an Article III court. *Id.* at 1169. It noted that not all "meritorious legal claims are redressable in federal court." *Id.* at 1170. It ultimately concluded that the plaintiffs' claims were not redressable. *Id.* at 1174-1175. *Juliana* is strikingly similar to what Mineral County seeks here.

2. The Relief Mineral County Seeks Is Not Redressable and Therefore Mineral County Does Not Have Standing.

To establish Article III redressability, Mineral County must show that the relief it seeks is both (1) substantially likely to redress its injuries and (2) within the district court's power to award. *Juliana*, 947 F.3d at 1170. In *Juliana*, the plaintiffs' sought a declaration that the government was violating the Constitution. The Court concluded that that relief alone was not substantially likely to mitigate the plaintiffs' asserted injuries. *Id.* The same is true here. A mere declaration that Nevada is violating the public trust doctrine will not in and of itself redress Mineral County's injuries.

Keeping in mind that Mineral County seeks an outcome that restores and keeps Walker Lake at an elevation of 3,965 feet above sea level and a Lake salinity level of 10,000 mg/l TDS, and alleges that its current elevation is 3,914.25 feet above sea level and its salinity level is roughly 22, 000 mg/l TDS (*See* ECF #936 at p. 7, para. 23, p. 5, paras. 11,15), it becomes clear that much of the other relief Mineral County seeks also is not substantially likely to redress its alleged injuries. For example, changing the 1996 Administrative Rules, declaring the system overappropriated, cancelling unused water rights, adding a seventh water division to the 1953 Rules and Regulations, adding a seventh water Commissioner, requiring "transparent" management and ordering additional real time gauging stations, will not produce the over one million acre feet of water it will take to raise the Lake's level by 50.75 feet, much less provide the additional average annual inflow it will take to maintain it at that elevation. Here, as in *Juliana*, the relief Mineral County seeks is not substantially likely to redress its injuries and thus the first redressability prong is not satisfied.

In *Juliana*, the crux of the plaintiffs' requested remedy was "an injunction requiring the government to cease permitting, authorizing and subsidizing fossil fuel use and to prepare a plan subject to judicial approval to draw down harmful emissions." *Id.* That requested relief is not unlike that which Mineral County requests here from Nevada, i.e., cancellation of water permits, funding for Court mandated efficiency improvements, funding to purchase and lease water rights,

development of a plan to fulfill Nevada's public trust duties and funding to implement it and the shifting of water resources from the Mason Valley Wildlife Area to Walker Lake. *See*, pp. 5 supra.

Even assuming that the relief it requests is likely to redress its injuries, Mineral County cannot meet the second prong. The relief it seeks is not within the power of an Article III court. It is beyond the power of an Article III court to design and mandate efficiency improvements, and to order and require funding of an overall plan to achieve Mineral County's goals for Walker Lake. Similar to *Juliana*, even if the Court merely ordered a plan for the political branches to decide what is best for Walker Lake, the Court would still be required to pass judgment on its sufficiency and potentially substitute its judgment for the judgments of the executive and legislative branches of government. As in *Juliana*, the timeframe involved in reversing Walker Lake's decline would require Court supervision of any plan or plans for decades. *See*, *Juliana*, 747.F 3d at 1172. Here, as in *Juliana*, there are no standards to guide the Court in the exercise of that supervisory authority. *Id* at 1173.

Finally, as in *Juliana*, Mineral County must make its case for the relief it seeks to the political branches or to the electorate at large. Whether or not the political branches have abdicated their responsibility with respect to Walker Lake, a court is not allowed to "step into their shoes." *Juliana*, 947 F.3d at 1175. Therefore, here as in *Juliana*, the Court must conclude that Mineral County does not have Article III standing.

G. Mineral County's Claims Are Barred by the Political Question Doctrine.

This Court should not answer the political questions that Mineral County now wants it to decide. When this Court dismissed Mineral County's prior complaint in intervention, it broached the political question issue and stated "[t]he Court will not purport to command the State of Nevada how to discharge its public trust duties." ECF# 814 at 19:8-9. Nevertheless, Mineral County now asks for just that type of command from this Court with its Complaint against the State of Nevada. The Court should reject the invitation under the political question doctrine.

1. Legal Standard.

"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, (1803), but some "[q]uestions, in their nature political," are

beyond the power of the courts to resolve. *Id.* at 170. The political question doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394, (1990).

The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The functional nature of this doctrine requires an inquiry into "the precise facts and posture of the particular case." *Id.* at 217.

That some governmental actions are beyond the reach of the courts reflects the Constitution's limitation of the "judicial power of the United States" to "cases" or "controversies." U.S. CONST. art. III; *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, (2006) ("the doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 215, (1974) ("[t]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines . . . ."). "It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516, (2007).

Six factors inform whether a case presents a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. While the first two factors are most important, *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (examining only the first two factors); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (observing that the factors are "probably listed in descending order of both importance and certainty"), the presence of any one of these factors can render a case nonjusticiable. *See id.* at 277 (referencing the six factors as six "independent tests"); *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political question, we need only conclude that one factor is present, not all."). This case presents at least three factors that render this controversy a nonjusticiable political question.[2]

2. Claims Triggering the Political Question Doctrine Require Dismissal.

Mineral County asks this Court to legislate. Specifically, Mineral County's Complaint asks this Court to order the State of Nevada to create and fund programs related to the use and conservation of water. The proper venue for seeking this type of relief is the Nevada Legislature, not this Court.

It is inappropriate to ask a court within the United States' tripartite government to make a political judgment, rather than a legal one. *See El-Shifa Pharmaceutical Industries Co. v. U.S.*, 607 F.3d 836, 845, (D.C. Cir. 2010) ("[U]sing a judicial forum to reconsider [a substantive political judgment entrusted expressly to the coordinate branches of government] would be anathema to the separation of powers."). Yet, Mineral County is asking this Court to make a political judgment rather than a legal one – should the waters of the Walker River system be allocated to Walker Lake to ensure minimum inflows to that body of water or should they be used beneficially elsewhere in the Walker River system in accordance with Nevada's statutory water law. This Court should not engage in such a political judgment call because the Nevada Legislature has already answered it. In fact, the Nevada Supreme Court set forth in *Mineral County* the textually demonstrable

[2] The Nevada Supreme Court has adopted the *Baker* factors to determine the justiciability of controversies that might present political questions. *See North Lake Tahoe Fire Prot. Dist. v. Washoe County Bd. of County Comm'rs*, 310 P. 3d 583 (Nev. 2013). Therefore, this Court need not consider whether the federal interpretation of the political question doctrine applies or Nevada's interpretation of the political question doctrine applies. They are the same.

constitutional commitment of this issue to the Nevada Legislature when it addressed the doctrines prior appropriation and public trust under Nevada's existing water laws.

Specifically, the Nevada Supreme Court noted that Article 8, Section 9 of the Nevada Constitution (the "gift clause") "limits the *Legislature's* ability to dispose of the public's resources . . . ." *Mineral County,* 473 P. 3d at 424 (emphasis added). Further, the court "noted that the *Legislature* effectively codified the principles behind the public trust doctrine through NRS 321.0005 and NRS 533.025." *Id.* (emphasis added). Additionally, as the Nevada Supreme Court recognized in this case, the Nevada Legislature "has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights in Nevada." *Id.* Accordingly, the Nevada Supreme Court has interpreted the Nevada Constitution as committing to the Nevada Legislature the authority to determine how to distribute public resources, including water. And the Nevada Supreme Court has determined that the Nevada Legislature has, consistent with all aspects of the public trust doctrine, properly exercised and demonstrated that authority through legislative enactments governing the use of water. There is, therefore, no room for this Court to substitute its judgment for that of the Nevada Legislature as Mineral County asks this Court to do.

The Ninth Circuit, has in fact, concluded that cases like this one, which seek injunctive relief and, effectively, court management of operations committed to other government branches, are particularly susceptible to the application of the political question doctrine. *See Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("[T]he framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches . . . [S]uch suits are far more likely to implicate political questions."). Yet, Mineral County seeks injunctive relief amounting to operational decision-making, including but not limited to, this Court ordering state funding and programs for the purported benefit of Walker Lake. This requested relief directly implicates political questions committed to the Nevada Legislature that this Court should not decide. *See, e.g, Gilligan v. Morgan*, 413 U.S. 1, 7 (1973) (No judicial intervention in the Ohio National Guard because "The relief sought by respondents, requiring initial judicial review and continuing surveillance by a

federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.")

Underscoring this conclusion is the fact that the Nevada Supreme Court has recognized that Nevada's water law – as properly enacted by the Nevada Legislature – comports with the public trust doctrine and the constitutional constraints set forth in the Nevada Constitution. Thus, the public trust doctrine does not leave room for Mineral County to ask this Court to do more than what Nevada's existing water law already does. And it does not allow this Court to substitute its judgment for that of the Nevada Legislature to increase inflows to Walker Lake. Mineral County's claims accordingly fail under the first *Baker* factor because the issue before this Court has been constitutionally committed to the Nevada Legislature, and the Nevada Legislature, as the Nevada Supreme Court has held, has acted within the bounds of its constitutional authority.

Mineral County's claims also fail under the third *Baker* factor. This Court faces the impossibility of deciding the matter without an initial policy determination of a kind clearly for nonjudicial discretion. The Nevada Supreme Court has already held in this case that Nevada's comprehensive water statutes "satisfy all of the elements of the dispensation of public trust property that [were] established in *Lawrence*." *Id.* at 426 (citation omitted). If the current comprehensive water statutes satisfy the public trust doctrine, as the Nevada Supreme Court has already held, then a determination of affirmative steps to be taken, if any, to increase water into Walker Lake necessarily involves policy considerations leading to policy determinations. In fact, Mineral County wants this Court to determine that certain beneficial uses of water in the Walker River system should yield to Mineral County's demand for annual inflows into Walker Lake. That policy determination has already been made by the Nevada Legislature consistent with Nevada's public trust doctrine, and this Court should not substitute its policy judgment for that of the Legislature. Put plainly, if the application and satisfaction of the public trust doctrine is no longer at issue, which it is not, then programs of the type advocated by Mineral County should be developed by the Nevada Legislature, if at all, and not authorized or ordered by this Court.

In an analogous case recently brought before the Iowa Supreme Court, the plaintiffs sought to apply Iowa's public trust doctrine and asked for a judicial directive to the legislature to "adopt and implement a mandatory remedial plan to restore and protect public use." *Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780, 797 (2021). In finding that the plaintiffs' claim presented nonjusticiable political questions, the Iowa Supreme Court stated "[n]ot only would this directive be aimed at the legislature, which in itself raises separation of power concerns, but an indefinite number of policy choices would then need to be made." *Id.* Additionally, the court observed that "[t]his case, if it proceeds, would put the judiciary in the position of commandeering additional state funding for intensive regulation . . . in yet-to-be-determined ways." *Id.* at 798. Mineral County's claims presently before this Court are no different.

The *Iowa* plaintiffs, in fact, pursued an effort to repurpose the public trust doctrine, just as Mineral County seeks to do so here. This Court should reject Mineral County's invitation to do so. Indeed "even if a court could decide that the public trust doctrine mandated a particular outcome, the question would immediately arise how to get there." *Id.* at 797. And here, the Nevada Supreme Court has already determined that Nevada's existing comprehensive water law satisfies the public trust doctrine. Consequently, the proper branch of government to provide the relief requested by Mineral County is the Nevada Legislature.

The fourth *Baker* factor provides yet another basis for this Court to dismiss Mineral County's claims under the political question doctrine. If the Court mandates the creation and funding of programs related to the use and conservation of water as set forth in the Complaint, this Court shall unmistakably telegraph a lack of respect due to a coordinate branch of government: namely, the Nevada Legislature. The Complaint includes express language requesting the Court *mandate* action by the State of Nevada. *See, e.g.* ECF #936 at Paras. 12, 15, 18. Even setting aside the fact that the State of Nevada is not a party in this case, granting the relief Mineral County seeks would ignore the Nevada Supreme Court's determination concerning the constitutional commitment of the prior appropriation and public trust doctrines to the Nevada Legislature, and simultaneously trivialize the Nevada Legislature's authority over its own comprehensive statutory scheme governing water rights. The Court should reject Mineral County's invitation to bypass

and second-guess the Nevada Legislature and dismiss the Complaint for presenting nonjusticiable political questions.

IV. MINERAL COUNTY HAS FAILED TO JOIN A NECESSARY PARTY AND INDESPENSABLE PARTY.

Mineral County asks this Court to mandate action by the State of Nevada in many of its claims for relief to enforce the State's purported duty to ensure minimum inflows into Walker Lake. *See, e.g.* ECF #936. at p. 8, paras. 1, 2, 12, 15, and 18. For example, Mineral County specifically seeks declaratory relief against the State of Nevada, declaring that (1) the State has a continuing duty pursuant to the public trust doctrine to increase flows into Walker Lake to restore and maintain that lake, and (2) the State has historically failed to ensure that the public trust values of Walker Lake are maintained. *See Id.* at p. 8, paras 1 and 2.[3] Mineral County accordingly asks this Court to determine whether the State of Nevada has or has not fulfilled an alleged duty under the public trust doctrine in connection with Walker Lake.

Additionally, Mineral County expressly seeks injunctive relief against the State of Nevada that would obligate the State to (1) develop and fund a plan "for fulfilling its public trust duty to Walker Lake," and (2) fund other programs for temporary and permanent water delivery measures for the benefit of Walker Lake. *See id.* at p. 10, paras. 15 and 18. Thus, Mineral County wants this Court to not only judge the State of Nevada's historical conduct but also mandate future action on the State's part, including the appropriation of public funds. Although these claims fail as a matter of law (because the State has no duty under the public trust doctrine to ensure minimum inflows into Walker Lake), they also fail and must be dismissed for an additional reason – the State of Nevada is not a party to the present action. And Mineral County is barred from naming the State of Nevada as a defendant in this case under the prohibitions set forth in Eleventh Amendment to the United States Constitution. Accordingly, all of Mineral County's claims must be dismissed

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[3] Mineral County has also asserted these claims against this Court. *See, e.g., Complaint* at p. 8, para. 1 ("Declaring that the State of Nevada ***and Decree Court*** have a continuing duty …") (emphasis added). It is unclear, however, how this Court can entertain a claim that asks this Court to declare that itself has historically failed to abide by the public trust doctrine.

for failure to join a necessary and indispensable party.

A. Legal Standard.

Rule 19(a) of the Federal Rules of Civil Procedure provides:

> (1) Required Party: A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if: . . .
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

Rule 12 of the Federal Rules of Civil Procedure provides that a complaint may be dismissed for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). "Under Rule 19, if the party 'who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.' If it cannot proceed, a motion to dismiss under Rule 12(b)(7) for failure to join a party is properly granted." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 851 (9th Cir. 2019) (quoting Fed. R. Civ. P. 19(b)). Here, this action cannot proceed in the absence of the State of Nevada, and the State of Nevada cannot be joined absent its consent. Accordingly, the case must be dismissed pursuant FRCP 12(b)(7).

B. State of Nevada is a Necessary and Unnamed Defendant.

As noted above, Mineral County requests declaratory and injunctive relief against the State of Nevada even though the State is not named as a defendant. But the State of Nevada is subject to service of process and may be defended by the Nevada Attorney General's office pursuant to the provisions of NRS 228.180. In fact, the Nevada Attorney General is authorized to defend the State of Nevada in cases involving the "waters of all interstate streams located partly in the State of Nevada, where such waters, or part thereof, are claimed by any other state or the citizens thereof" and "the public lands, and to the waters therein and thereunder, located in the State of

Nevada." NRS 228.180. Thus, it is evident that Nevada is subject to service of process and may be defended by the Nevada Attorney General in a case such as this one. It is further evident that joinder of the State of Nevada would not be the basis upon which this Court would be deprived of subject matter jurisdiction, although the State may not consent to being a party in this action.

By asserting claims directly against the State of Nevada, Mineral County has made the State a required party. It is, indeed, beyond question that the State of Nevada has an interest in defending itself against Mineral County's allegations, which could result in declaratory and/or injunctive relief against the State. Such relief would, according to Mineral County, include an order from this Court directing the State to develop and fund programs for the benefit of Walker Lake. The State of Nevada would undoubtedly want to defend itself against such claims and defend itself against the serious allegation that the State has historically failed to fulfill its public trust duties.

It is also beyond question that the State of Nevada is currently unable to protect its interests and defend itself against Mineral County's quest for declaratory and injunctive relief. Mineral County wants this Court to declare that the State of Nevada has historically failed to fulfill its public trust duties, and Mineral County wants this Court to order the State to develop and fund programs for the benefit of Walker Lake. Yet, despite these affirmative requests against the State of Nevada, the State is not present as a party to defend itself. Accordingly, this Court must determine whether Mineral County's complaint should be dismissed for failure to join a necessary and indispensable party.

A three-step inquiry applies to a motion to dismiss for failure to join an indispensable party under Rule 19. This inquiry is as follows:

1. Is the absent party necessary (i.e., required to be joined if feasible) under Rule 19(a)?
2. If so, is it feasible to order that the absent party be joined?
3. If joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed?

Salt River Project Agr. Imp. & Power Dis. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (citing

EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779-800 (9th Cir. 2005)).

The first question has been answered, as set forth above, in the affirmative. The State of Nevada is a necessary party because Mineral County seeks both declaratory and injunctive relief against the State.

The second question is answered in the negative. It is not feasible to join the State of Nevada as a defendant in this case because the Eleventh Amendment to the United States Constitution stands as a bar to joining the State as a party absent its consent. *See U. S. Constitution, Eleventh Amendment* ("[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.") Indeed, a state may not be sued in federal court by its own citizen or a citizen of another state, unless the state consents to jurisdiction. *Hans v. State of Louisiana*, 134 U.S. 1, 13, (1890) ("[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State's] consent."). The State of Nevada has not consented to this Court's jurisdiction in this suit. Consequently, it is not feasible to join the State of Nevada as a defendant.

Turning to the third question and final question, Rule 19(b) sets forth the factors to determine whether a party is indispensable. It states that if a necessary party cannot be joined,

> The court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: [1] first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; [2] second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; [3] third, whether a judgment rendered in the person's absence will be adequate; [4] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Fed. R. Civ. P. 19(b).

Here, each of these factors weighs in favor of dismissing Mineral County's complaint. This Court cannot enter a judgment for declaratory and injunctive relief against the State of Nevada if the State is not a party because such a judgment would be prejudicial to the State. In fact, such a

judgment would adjudge the State of Nevada as committing a dereliction of its public trust duties and order the State to remedy its prior dereliction without the State ever being heard or having an opportunity to defend itself against Mineral County's allegations of malfeasance. Such a proceeding would be unduly prejudicial to the State and not comport with due process. *See, e.g., Hanson v. Denckla*, 357 U.S. 235, 54-55 (1958) (a judgment that affects the rights of a party who is not joined as such violates due process). Thus, with the State of Nevada being absent, the Court cannot afford the complete relief that Mineral County seeks.

Furthermore, there is no way for this Court to proceed without the State of Nevada as a party and mitigate or eliminate the prejudice the State would suffer. The crux of Mineral County's complaint is that, in Mineral County's own words, it "seeks to enforce ***the State of Nevada's*** … continuing duty to maintain minimum average annual inflows from the Walker River system into Walker Lake …" ECF# 936. at p. 2, para. 1 (emphasis added). While the Defendants maintain there is no such duty as a matter of law, the premise of Mineral County's complaint – enforcement against the State of the State of Nevada's continuing duty to protect Walker Lake – requires the State to be present as a party. The State must be allowed to defend itself against this legal theory, and without the relief Mineral County seeks against the State of Nevada, it can find no adequate remedy in these proceedings. Simply put, in absence of the State of Nevada, this Court cannot enforce the State's purported trust duty, declare that the State of Nevada has failed historically to fulfill its duty, or direct the State to adopt remedial measures. Consequently, a judgment rendered in the State of Nevada's absence will not be adequate.

Finally, Mineral County does have alternative remedies if this case is dismissed for non-joinder. Mineral County could try to pursue it claims against the State of Nevada in state court, or alternatively, Mineral County could go to the Nevada Legislature and ask it, rather this Court, to appropriate funds for the Walker Lake programs the County seeks. Thus, dismissal of Mineral County's claims will not leave the County without a remedy. Instead, it will require Mineral County to pursue its remedies in the proper state forum, rather than this Federal Court.

V. MINERAL COUNTY HAS NOT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER NEVADA'S PUBLIC TRUST DOCTRINE.

A. Standard for Dismissal Under Rule 12 (b)(6).

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), all allegations of material fact are taken as true and are construed in the light most favorable to the plaintiff. *Anderson v. Clow*, 89 F. 3d 1399, 1403 (9th Cir. 1996). Dismissal is proper under Fed. R. Civ. P. 12 (b)(6) when a complaint either (1) lacks a cognizable legal theory or (2) fails to allege facts to support a cognizable legal theory. *Somers v. Apple, Inc.* 729 F.3d 953, 959 (9th Cir. 2013). The complaint must contain sufficient factual matter which is accepted as true to state a claim that is "plausible on its face." *Id.* That requires pleading of facts, as distinguished from conclusory allegations. 739 F. 3d at 960. Here Mineral County has failed to allege facts which state a claim under Nevada's public trust doctrine.

B. Mineral County Has Failed to State A Claim Under the Three-Part Test Established by the Nevada Supreme Court in *Mineral County* and *Lawrence*.

Mineral County's entire Second Amended Complaint is predicated on the theory that the State of Nevada and the Decree Court have a mandatory duty under Nevada's public trust doctrine to provide additional inflows into Walker Lake in order to achieve and maintain minimum lake levels, and that they have violated that duty. However, those allegations do not state a claim under Nevada's public trust doctrine upon which relief can be granted.

The Nevada Supreme Court has made clear that, historically and in Nevada, the public trust doctrine is a doctrine that "acts as a restraint on the state in alienating public trust resources." *Mineral County*, 473 P.3d at 423. In *Lawrence v. Clark County,* 254 P.3d 606 (Nev. 2011), the alienation of lands formerly submerged by the Colorado River, were at issue. In *Lawrence*, the Court adopted a three-part test for determining whether a dispensation of public trust property was valid. It applied that test in *Mineral County*, in concluding that Nevada's dispensation of the right to use water made by Nevada's water law was consistent with the public trust doctrine. 473 P. 3d at 428-429.

Therefore, under that three-part test in order to state a claim upon which relief may be

granted under Nevada's public trust doctrine, a plaintiff must allege with facts, that: the State has disposed of a public trust asset and (1) that the disposition was without a public purpose, (2) was without fair consideration, and/or (3) did not meet the state's obligation to maintain the trust for the use and enjoyment of present and future generations. *Lawrence*, 254 P. 3d at 405; *Mineral County*, 473 P.3d at 427-429. Mineral County has not made and cannot make those factual allegations here.

Nevada has not disposed of Walker Lake. Nevada's disposition of the right to use water, which before that use flowed to Walker Lake, has been found by the Nevada Supreme Court in *Mineral County* (this very case) to be consistent with the State's public trust obligations. Because there has been no disposition of a public trust resource here at all, much less a disposition which cannot meet one or all of the *Lawrence* three-part test, Mineral County's Second Amended Complaint fails to state a claim upon which relief can be granted.

Moreover, the *Mineral County* decision, rejected the very notion that the doctrine allows or requires a court or an administrative agency to independently regulate such resources without legislative guidance, which is essentially what Mineral County seeks in its Second Amended Complaint here. It declined to follow the approach taken by the California Supreme Court in *National Audubon v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), (referring to *National Audubon* "we decline to diminish the stability of prior allocations and detract from the simultaneous operation of both prior appropriation and the public trust doctrine . . . ." *Mineral County*, 473 P.3d at 430, n. 10.).

Equally important, the Nevada Supreme Court acknowledged the role the legislative branch of government plays in the disposition of public resources, and confirmed the conclusion it reached in *Lawrence*, that the judicial branch was required to give deference to the Legislature's conclusions. Finding that Nevada's comprehensive water law was consistent with the public trust doctrine, the Court deferred to the public policy decisions the Legislature has made with respect to the regulation of the use of water. *Mineral County*, 473 P.3d at 430.

Because the Nevada Supreme Court held that Nevada's comprehensive water statutes – statutes which include no requirement that water resources be regulated to provide minimum inflows

to Walker Lake or any other water dependent resource – "are consistent with the public trust doctrine," that doctrine cannot impose a duty on Nevada or this Court to provide additional inflows into Walker Lake. *Mineral County*, 473 P. 3d at 426-430. This Court cannot and the public trust doctrine does not require it to substitute its policy judgments for those of the legislature concerning when change applications should be denied (N.R.S. 533.370), how the priority system operates in times of shortage and otherwise, cancellation of water permits (N.R.S. 533.395; 533.410), abandonment of water rights (N.R.S. 533.060), waste of water (N.R.S. 533.460) and penalties for such waste (N.R.S. 533.480). They are provided for in the Nevada water law which the Nevada Supreme Court has found is fully consistent with the public trust doctrine. The Court expressly rejected the dissent's assertion, which was based upon arguments in Mineral County's Reply Brief and which are now made here, that Mineral County could obtain the relief it seeks by measures not involving the reallocation of the water rights recognized by the Walker River Decree. *See, Mineral County*, 473 P.3d at 431-432.

In administering and distributing water under the Walker River Decree, in Nevada, the Court is required to apply Nevada law. *See*, *United States v. United States Board of Water Commissioners*, 893 F. 3d 578, 595 (9th Cir. 2018) ("Decreed rights are administered under state law"); see also *United States v. Alpine Land & Reservoir Co.*, 697 F. 2d 851, 858 (9th Cir. 1983) ("[S]tate law will control the distribution of water rights to the extent there is no preemptive federal directive."). Because, Nevada's public trust doctrine, does not impose the obligations on Nevada which Mineral County seeks to impose here to provide additional inflows into Walker Lake, it also does not impose a separate obligation on the Court to provide those inflows. The Court has no greater obligation under Nevada's public trust doctrine to provide the inflows than the State of Nevada itself has. The Court's obligation is to follow Nevada law.

Here, Mineral County has not alleged that Nevada has disposed of a public trust resource and that that disposition fails to meet the three-part test in *Lawrence*. Instead, it seeks to impose requirements on Nevada, which the Nevada legislature has not provided for, to short circuit the provisions of Nevada's water law which provide for cancellation of water rights, abandonment of water rights and changes to water rights and to have the Court adopt rules of and penalties for waste and unauthorized use of water which are already provided for in Nevada's water law which law the

Nevada Supreme Court has found is fully consistent with the public trust doctrine. It has not alleged a legally cognizable theory and it has not alleged facts which support such a theory. The Second Amended Complaint must be dismissed for failure to state a claim upon which relief can be granted.

C. Mineral County's Public Trust Claim Is Also Inconsistent With the Public Trust Doctrine as Interpreted By the Nevada Supreme Court in *Mineral County*.

Not only does Mineral County fail to allege the elements required to state a claim under Nevada's public trust doctrine, its allegations that the State of Nevada and the Decree Court have a public trust duty to provide additional inflows into Walker Lake, are also inconsistent with Nevada's public trust doctrine, as the doctrine was defined and applied by the Nevada Supreme Court in *Mineral County*. There, the Nevada Supreme Court concluded that Nevada's public trust doctrine derives not only from the common law but also "from Nevada's Constitution, its statutes, and the inherent limitations on the state's sovereignty" recognized by the United States Supreme Court in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (*Illinois Central*). *Mineral County*, 473 P.3d at 424. Mineral County's public trust claim is inconsistent with both Nevada's Constitution and statutes and the "inherent limitations" on the State's sovereignty.

1. Mineral County's Public Trust Claim Is Inconsistent With Nevada's Constitution and Statutes.

The Nevada Supreme Court in *Mineral County* held that Nevada's statutory water rights "codify[y]" public trust principles, *Mineral County*, 473 P.3d at 424, "incorporate[]" the public trust doctrine, *id.* at 431, and are "consistent with" the public trust doctrine. *Id.* at 429. Thus, Nevada's public trust doctrine is not an entirely separate body of law that exists outside of Nevada's statutory laws, and it does not impose duties that are separate and distinct from duties codified in Nevada's statutory laws. Rather, since the statutes codify and incorporate public trust doctrine principles, the duties imposed under the statutes are those imposed under the public trust doctrine. There is therefore no public trust duty to allocate water to a trust resource, such as Walker Lake, separate and apart from any statutory duty. Since there is no statutory duty to allocate the water, there is no public trust duty.

The Nevada Supreme Court in *Mineral County* described more fully how Nevada's statutory water law codifies and incorporates public trust principles, stating those laws provide that "the public land and water of this state do not belong to the state to use for any purpose, but only for those purposes that comport with the public's interest in the particular property, exemplifying the fiduciary principles at the heart of the public trust doctrine." *Mineral County*, 473 P.3d at 425. The Court emphasized that the statutes authorize the State Engineer to administer the statutory system by issuing permits for appropriation of water, but limits the authority by authorizing permits only for uses that are "beneficial" and not detrimental to the "public interest." *Id.* at 426-427. The Court also concluded that the statutes do not authorize the reallocation of water rights adjudicated and settled under the prior appropriation doctrine, and therefore the public trust doctrine does not separately authorize reallocation of such water rights. *Id.* As a result, there is no separate public trust duty to allocate water to a trust resource.

Similarly, Nevada's statutory water law does not impose a duty on Nevada or anyone else to allocate water for a public trust resource, such as by providing additional inflows into Walker Lake, and thus the public trust doctrine imposes no such duty. Since the statutes codify and incorporate the public trust principles, as *Mineral County* said, Nevada's public trust doctrine does not establish separate duties to allocate water for Walker Lake that exist outside of the statutes, and—since the statutes impose no duty—neither does the public trust doctrine. Just as *Mineral County* held that the public trust doctrine does not authorize reallocation of water rights adjudicated and settled under the prior appropriation doctrine because the statutory laws do not authorize such reallocation, the public trust doctrine does not impose a duty on the State of Nevada or the Decree Court to provide additional inflows into Walker Lake, because, again, the statutory laws impose no such duty.[4]

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[4] As noted, *Mineral County* held that Nevada's public trust doctrine is based not only on Nevada's statutes but also on its Constitution. *Mineral County*, 473 P.3d at 424. Nothing in the Nevada Constitution provides for regulation of water rights, or suggests that the State of Nevada or the Decree Court have a public trust duty to provide additional inflows into Walker Lake.

2. Mineral County's Public Trust Claim Is Inconsistent With The "Inherent Limitations" on the State's Sovereignty.

The Nevada Supreme Court, in holding that the public trust doctrine establishes "inherent limitations" on the state's sovereignty, also held that the doctrine "generally acts as a *restraint* on the state in *alienating* public trust resources." *Mineral County*, 473 P.3d at 423 (emphases added). The Court said that Nevada "can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers." *Id.* at 425.

A *restraint* on the state's sovereign authority to *alienate* a public trust resource is, by definition, not a duty that the state *exercise* its sovereign authority by allocating water for a resource, such as by providing additional inflows into Walker Lake. The public trust doctrine limits the state's authority to act to alienate a trust resource, but does not compel the state to act to protect the resource. Whether water should be allocated for a resource, such as by providing additional inflows into Walker Lake, depends on the judgment of the Nevada Legislature, as expressed in its statutory enactments, and is not determined or resolved by Nevada's public trust doctrine. *Mineral County*, 473 P.3d at 426-430, & n. 10 (("[W]e [cannot] substitute our own policy judgments for the Legislature's."). Thus, the "inherent limitations" of the public trust doctrine do not impose a duty on the State of Nevada and the Decree Court to provide additional inflows into Walker Lake.

VI. CONCLUSION.

The Court does not have subject matter jurisdiction over Mineral County's Second amended Complaint. It should grant the Motion to Dismiss under Rule 12(b)(1) and that should be the end of its inquiry. *See, Steel Co. v. Citizens for a Better Environment* 523 U.S. 83, 109-110 (1998) ("When the courts lack jurisdiction to entertain an action, resolution of its merits "will have to await another day.").

If the Court concludes it does have subject matter jurisdiction here, then it should consider and grant the Motion to Dismiss under rule 12(b)(7) for failure to join an indispensable party. Finally, if the Court also denies the Motion to Dismiss under Rule 12(b)(7), it should grant the

Motion to Dismiss under Rule 12(b)(6). Mineral County has no legally cognizable claim under Nevada's public trust doctrine.

Date: October 28, 2021

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 28th day of October 2021 I electronically served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record.

/s/ Katherine M. Rodriguez
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