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

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

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

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

**RESPONSE TO PRINCIPAL
DEFENDANTS' MOTION TO DISMISS
MINERAL COUNTY'S SECOND
AMENDED COMPLAINT IN
INTERVENTION**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

1 Pursuant to the Court’s Order of April 26, 2022, (ECF 1049),¹ Mineral County
2 respectfully submits the following memorandum of points and authorities in response to the
3 *Principal Defendants’ Joint Motion to Dismiss Mineral County’s Second Amended Complaint in*
4 *Intervention Pursuant to Fed. R. Civ. P. 12(b)(1), 12(B)(6) and 12(b)(7)* (ECF 994), and
5 *Principal Defendants’ Points and Authorities in Support of Motion to Dismiss Mineral County’s*
6 *Second Amended Complaint in Intervention Pursuant to Fed. R. Civ. P. 12(b)(1), 12(B)(6) and*
7 *12(b)(7)* (ECF 996) (“*PD MTD*” or “*Motion to Dismiss*”) filed October 28, 2021. Joinders to
8 Principal Defendants’ *Motion to Dismiss* were subsequently filed by Defendant Norman W. &
9 Kelli J. Annett Family Trust (ECF 998) and Defendant Westfork (ECF 1030).²

10 Defendants assert three basic grounds for their *Motion to Dismiss*: (1) this Court lacks
11 subject matter jurisdiction; (2) Mineral County has failed to join a necessary and indispensable
12 party; and (3) Mineral County’s *Second Amended Complaint in Intervention* fails to state a claim
13 upon which relief can be granted. In reality, however, the bulk of Defendants’ arguments boil
14 down to mistaken and unmeritorious attacks on (1) the nature of Mineral County’s public trust
15 claim and the remedies it seeks; (2) the decisions by the Ninth Circuit Court of Appeals and
16 Nevada Supreme Court on appeal in this subproceeding; and (3) the broad scope of the Court’s
17 remedial power and discretionary authority. Thus, for the reasons set forth below, Defendants’
18 *Motion to Dismiss* is without merit and should be denied.

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24 ¹ Unless otherwise noted, all ECF document numbers refer to filings in this subproceeding,
25 *Mineral County v. WRID*, 3:73-cv-0128.

26 ² For the sake of concision, hereinafter Mineral County will refer to Principal Defendants and
27 those who joined the Motion to Dismiss collectively as Defendants.

PROCEDURAL HISTORY

1
2 The lengthy history of Mineral County’s public trust claim before this Court and the
3 importance of that claim to the health of Walker Lake and the well-being of Mineral County
4 residents and the public more generally is set forth in Mineral County and Walker Lake Working
5 Group’s *Status Report* dated April 21, 2021, (ECF 923), and will not be repeated here. However,
6 because Defendants’ *Motion to Dismiss* is based in large part on a mischaracterization of the
7 arguments before, and decisions by, both the Nevada Supreme Court and the Ninth Circuit Court
8 of Appeals on appeal of Judge Jones’ May 28, 2015, dismissal of Mineral County’s *Amended*
9 *Complaint in Intervention*, it is important to set forth the history of that appeal here.

10
11 Following briefing on threshold issues related to Mineral County’s public trust claim
12 before this Court, on May 28, 2015, Judge Jones dismissed Mineral County’s claim on the
13 ground that Mineral County lacked standing. *Order* (ECF 814).³ Despite dismissing Mineral
14 County’s case for lack of standing, Judge Jones offered the additional grounds for dismissal that:
15 (1) the public trust doctrine does not apply to Walker Lake and the Walker River system; (2) the
16 public trust doctrine cannot be applied to existing water rights without constituting an
17 unconstitutional takings; (3) enforcement of the public trust doctrine is a purely political,
18 nonjusticiable question; and (4) Walker Lake is not part of the Walker River Basin under the
19 Decree and so allocations to the Lake would be prohibited. *Id.* Mineral County and the Walker
20 Lake Working Group appealed Judge Jones’ *Order* to the Court of Appeals for the Ninth Circuit
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24 ³ Simultaneously, Judge Jones dismissed the United States and Walker River Paiute Tribe’s
25 water rights claims, *United States v. WRID*, No. 3:73-cv-00127-RCJ-WGC (Doc. 2223), and
26 denied the National Fish and Wildlife Foundation’s motions to approve permanent and
27 temporary transfers of water to instream use for the benefit of Walker Lake, *United States v.*
28 *WRID*, No. 3:73-cv-00125-RCJ-WGC (Doc. 1340).

1 on June 29, 2015. *Plaintiff-Intervenor Mineral County's and Defendant Walker Lake Working*
2 *Group's Notice of Appeal and Representation Statement* (ECF 825). After briefing and oral
3 argument on all five issues on appeal, the Ninth Circuit reversed Judge Jones as to the first
4 question on appeal, holding that Mineral County has standing to bring its public trust claim for
5 minimum flows to Walker Lake. *Memorandum at 3, Mineral County v. WRID*, No. 15-16342
6 (9th Cir. May 22, 2018).⁴ Additionally, the Ninth Circuit held with regard to additional issue
7 number three, whether Mineral County's claim involves a non-justiciable political question, that
8 Mineral County's claim does not request a remedy that involves or requires any political action
9 by the state legislature. Specifically, the court noted that "Mineral County...does not challenge
10 Nevada's statutory water laws, its requested relief – a modification of the Decree – would not
11 require the legislature to act. Thus, Mineral County's requested remedy is among the
12 'remed[ies] that the court [would be] prepared to give.'" *Id.* at 7 (quoting 13A Charles Alan
13 Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.6 & nn. 12, 13 (3d ed.
14 2017)). Moreover, the court noted that "it is certainly plausible, under the public trust doctrine,
15 that the court would require officials to reserve whatever flows were necessary to uphold the
16 public trust as to Walker Lake." *Id.* at 6. With regard to additional issue number four, whether
17 Walker Lake is within the Walker River Basin, the Ninth Circuit confirmed that Walker Lake is
18 within the Walker River Basin and may receive water under the Decree. *Id.* (citing *United States*
19 *v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 606 (9th Cir. 2018)).
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25 ⁴ For consistency, all orders and filings in Mineral County's Ninth Circuit appeal of Judge Jones'
26 May 28, 2015, dismissal of Mineral County's Amended Complaint in Intervention will be
27 referred to with reference to the case name *Mineral County v. WRID*.

1 In an amended companion order, the Ninth Circuit certified two questions of law relating
2 to the first and second additional issues on appeal to the Nevada Supreme Court: (1) “Does the
3 public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior
4 appropriation and, if so, to what extent?”; and (2) “If the public trust doctrine applies and allows
5 for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of
6 such adjudicated or vested rights constitute a “taking” under the Nevada.” *Mineral County v.*
7 *WRID*, 900 F.3d 1027, 1034 (9th Cir. 2018).

9 Following briefing and oral argument, on September 17, 2020, the Nevada Supreme
10 Court answered the first certified question by holding that “the public trust doctrine applies in
11 Nevada [and clarified] that it applies to rights previously settled under prior appropriation and
12 [further clarified] that the doctrine applies to all waters in the state and the lands submerged
13 beneath navigable waters.” *Mineral County v. Lyon County*, 473 P.3d 418, 421 (Nev. 2020) (*en*
14 *banc*); *see id.* (“we reaffirm that the public trust doctrine applies in Nevada and clarify that the
15 doctrine applies to all waters within the state, including those previously allocated under prior
16 appropriation.”). In other words, the doctrine applies to the water rights in the Walker River
17 Basin. The Court further held that Nevada’s statutory water law is consistent with, but does not
18 supplant, the public trust doctrine, and the doctrine imposes a continuing duty on the sovereign
19 to manage public trust resources for the benefit of the public. *Id.* at 429 n.7; *see also Lawrence*
20 *v. Clark County*, 254 P.3d 606, 611 (Nev. 2011) (referring to the State Engineer’s “continuing
21 responsibility as a public trustee to allocate and supervise water rights so that the appropriations
22 do not ‘substantially impair the public interest in the lands and waters remaining.’”) (quoting
23 *Mineral County v. Nevada*, 20 P.3d 800, 808-09 (Nev. 2001) (Rose, J. concurring)). Finally, the
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1 Court held that the State may not, pursuant to this continuing public trust duty, reallocate
2 previously adjudicated water rights. *Mineral County v. Lyon County*, 473 P.3d at 430.

3 While the Court held that the State may not reallocate previously adjudicated water rights
4 to remedy public trust violations, the Court further recognized that there are other means or
5 mechanisms under Nevada law through which this continuing duty to protect public trust uses of
6 public trust water resources may be fulfilled. *Id.* at 426-427 & n.6, 429; *see also id.* at 432-33
7 (Pickering, C.J., concurring in part and dissenting in part). The remedies that the Nevada
8 Supreme Court recognized as available mechanisms to ensure that the ongoing duty to maintain
9 the public's interest in public trust water resources include regulation, restriction, and curtailment
10 of existing water rights as necessary to protect public interest and welfare. *Id.* In the context of
11 reviewing a number of statutory provisions relating to the means by which the Nevada State
12 Engineer may exercise his authority to regulate, restrict, and curtail water rights, the majority
13 opinion was at pains to insist that its interpretation of the doctrine and the way the statutory
14 water law scheme reflects and guides the doctrine's application does provide remedies for a
15 mismanagement of public trust water resources and allows for judicial review of water rights
16 management decisions in order to safeguard the public's continuing interest in such resources.
17 *See id.* In this case, as pointed out by both Chief Justice Pickering in her dissent and by the
18 Ninth Circuit in its subsequent *Opinion* remanding the case to this Court, those available
19 remedies may include, but are not limited to: "(1) a change in how surplus waters are managed in
20 wet years and how flows outside of the irrigation season are managed; (2) mandating efficiency
21 improvements with a requirement that water saved thereby be released to [Walker Lake]; (3)
22 curtailment of the most speculative junior rights on the system; (4) a mandate that the State
23 provide both a plan for fulfilling its public trust duty to Walker Lake and the funding necessary
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1 to effectuate that plan; and/or (5) an order requiring water rights holders to come up with a plan
2 to reduce consumptive water use in the Basin as was done by the [State Engineer] in Diamond
3 Valley.” *Id.* at 432-33 (Pickering, C.J. dissenting) (quoting Mineral County Reply Brief at 18);
4 *see also Mineral County v. WRID*, 986 F.3d 1197, 1205 (9th Cir. 2021). Thus, while reallocation
5 of water rights is not an available remedy in Nevada for violations of Nevada’s public trust
6 doctrine, the Nevada Supreme Court and Ninth Circuit have recognized multiple alternative
7 remedies that may be ordered in this case.⁵

9 Following the Nevada Supreme Court’s *Opinion*, the Ninth Circuit issued an *Opinion*
10 resolving the final two issues on appeal. *Mineral County v. WRID*, 986 F.3d 1197 (9th Cir.
11 2021). The court reiterated its earlier holding that Mineral County has standing in this case, and
12 cited the Nevada Supreme Court’s holding that Nevada’s public trust doctrine applies to water
13 rights adjudicated under the doctrine of prior appropriation. *Id.* at 1202, 1205. The court was
14 clear that while the public trust doctrine generally applies to alienation of state public trust
15 resources, the doctrine does not apply only in that context, *id.* at 1205, which statement
16 acknowledges the Nevada Supreme Court’s confirmation that the doctrine imposes a continuing
17 duty on the Court to manage the Walker River Basin pursuant to the public trust doctrine. *See*
18 *Mineral County*, 473 P.3d at 430 (“We agree that water rights are subject to regulation for the
19 public welfare and are characterized by relative nonownership rights.”). The Ninth Circuit also
20 confirmed that while Nevada’s public trust doctrine does not permit reallocation of water rights
21 adjudicated under the doctrine of prior appropriation, it does apply to those rights and provides
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25 ⁵ On the basis of this approach, the Nevada Supreme Court held that it need not address the
26 second certified question, since “[w]ithout reallocation, no rights are abrogated and no takings
27 issue is implicated.” *Mineral County*, 473 P.3d at 430.

1 for remedies which do not involve a reallocation of water. *Mineral County v. WRID*, 986 F.3d
2 1197, 1204-05 (9th Cir. 2021). Specifically, the Ninth Circuit held that even Mineral County’s
3 1995 *Amended Complaint in Intervention* was broad enough to encompass the permissible
4 remedies discussed by the Ninth Circuit and Nevada Supreme Court and confirmed that Mineral
5 County may pursue them before this Court on remand. *Mineral County v. WRID*, 986 F.3d at
6 1204-06. While the court rejected as untimely Mineral County’s challenge to the 1936 Decree
7 itself, the court agreed with Mineral County that “the public trust doctrine imposes a continuing
8 affirmative duty on the Decree Court to manage the resource for the benefit of future generations
9 using remedies other than a reallocation of water rights, which is not permitted ... [and so this
10 case] must be remanded to the district court to determine: (1) . . . whether the continuing duty of
11 the Decree Court to maintain Walker Lake’s public trust uses and values has been violated since
12 the entry of the Decree; (2) if so, what level of average annual minimum flows must reach the
13 Lake; and finally (3) what the proper remedy ought to be.” *Id.* at 1205 (citing Suppl. Br. of
14 Appellants Mineral County & Walker Lake Working Grp. at 6, 19). Accordingly, the court
15 vacated Judge Jones’s May 28, 2015, order dismissing Mineral County’s claim, and remanded
16 “with instructions to consider the County’s public trust doctrine claim to the extent it seeks
17 remedies that would *not* involve a reallocation of adjudicated water rights.” *Id.* at 1200.

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21 The Ninth Circuit and Nevada Supreme Court decisions together held that the public trust
22 doctrine applies to water rights adjudicated under the Walker River Decree, imposes a continuing
23 duty on this Court to manage the waters of the Walker River consistent with the public trust
24 doctrine, and that while the doctrine does not permit reallocation of existing water rights,
25 Mineral County may pursue its claim before this Court consistent with the remedies discussed by
26 the Ninth Circuit. *See id.* at 1204-06; *Mineral County v. Lyon County*, 473 P.3d 418 (Nev. 2020).
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1 Consistent with the Ninth Circuit’s 2018 and 2021 decisions and with this Court’s
2 instructions, Mineral County filed a *Second Amended Complaint in Intervention* (“*Second*
3 *Amended Complaint*”) on June 30, 2021, seeking remedies consistent with those envisioned by
4 the Ninth Circuit and Nevada Supreme Court *Opinions*. ECF 936. Those remedies are explained
5 in full in Mineral County’s *Second Amended Complaint* and generally involve: (1) declaratory
6 relief confirming that the public trust doctrine imposes a continuing affirmative duty to manage
7 the Walker River System so as to ensure that flows are sufficient to support Walker Lake’s
8 public trust values; (2) declaratory relief confirming that this duty has not been fulfilled, and (3)
9 requested changes in the management of the Walker River system under the Decree consistent
10 with the continuing public trust duty to preserve Walker Lake and Nevada water law.⁶

11
12 **ARGUMENT**

13 **I. DEFENDANTS’ MOTION TO DISMISS IS BASED ON A MISSTATEMENT OF**
14 **BOTH THE NEVADA SUPREME COURT AND NINTH CIRCUIT RULINGS**

15 Defendants’ *Motion to Dismiss* relies on arguments that Defendants lost before both the
16 Nevada Supreme Court and the Ninth Circuit Court of Appeals. This continued reliance on those
17 arguments is grounded in both a misstatement of the Ninth Circuit and Nevada Supreme Court
18 decisions on appeal and an improper attempt to relitigate issues which Defendants lost before
19 those courts. The Ninth Circuit’s and Nevada Supreme Court’s decisions of those issues, which
20 rejected Defendants’ arguments, constitute the binding law of the case. Accordingly, the Court
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24 ⁶ Defendants’ *Motion to Dismiss* also suggests that Mineral County’s *Second Amended*
25 *Complaint* may not supplement Mineral County’s *Amended Complaint in Intervention*, and also
26 appears to argue that Mineral County may not rely on the affidavits filed as attachments to its
27 March 10, 1995, *Motion for Preliminary Injunction*. See ECF 22. Mineral County’s *Second*
28 *Amended Complaint in Intervention* was not filed as a supplemental pleading, and there is no

1 should reject Defendants' attempt to reargue those issues. Specifically, despite having lost the
2 issues before the Ninth Circuit on appeal, Defendants continue to argue that Mineral County
3 does not have standing to bring its public trust claim, that the Court lacks subject matter
4 jurisdiction over Mineral County's claim, and that Mineral County's claim necessarily involves a
5 nonjusticiable political question. Moreover, Defendants continue to attack the subject matter
6 jurisdiction of this Court, despite the consistent statements of the Ninth Circuit, Nevada Supreme
7 Court, and this Court itself, all of which confirm that this Court has subject matter jurisdiction
8 over Mineral County's public trust claim under Paragraph XIV of the Walker River Decree.
9

10 Similarly, Defendants' *Motion to Dismiss* relies on a fundamental mischaracterization of
11 the Ninth Circuit's remand to this Court as well as the decision by the Nevada Supreme Court on
12 the questions certified to it by the Ninth Circuit. These mischaracterizations are a bald attempt to
13 broaden the issues on remand and to re-litigate those which Defendants already lost on appeal.
14 The Court should not entertain Defendants' invitation to do so. The Ninth Circuit remanded the
15 case to this Court specifically to determine whether the continuing public trust duty to preserve
16 Walker Lake has been violated and, if so, to consider remedies which do not involve a
17 reallocation of water rights adjudicated under the Walker River Decree.
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19 **II. IT IS WELL SETTLED THAT THIS COURT HAS SUBJECT MATTER**
20 **JURISDICTION OVER MINERAL COUNTY'S PUBLIC TRUST CLAIM**

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

22 While the burden of proving that subject matter jurisdiction exists sufficient to survive
23 Defendants' *Motion to Dismiss* under Fed. R. Civ. P. 12(b)(1) falls on Mineral County, the Ninth
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25 reason that Mineral County may not rely on earlier-filed affidavits in support of its *Second*
26 *Amended Complaint in Intervention*, as they already are part of the record in this subproceeding.
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1 Circuit has referred to this burden as “relatively modest” at the motion to dismiss stage of
2 litigation. *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (citing *Bennett v. Spear*, 520
3 U.S. 154, 171 (1997)). By contrast, a party who challenges the clear language of a decree, as
4 Defendants attempt to do in their *Motion to Dismiss*, “assume[s] no light burden.” *St Louis,*
5 *Kansas City, & Colorado Railroad Co. v. Wabash Railroad Co. & City of St. Louis*, 152 F. 849,
6 852 (8th Cir. 1907), *aff’d*. 217 U.S. 247 (1910).

8 B. Paragraph XIV of the Walker River Decree Gives this Court Continuing
9 Jurisdiction Over Mineral County’s Public Trust Claim

10 Despite having lost this issue before the Ninth Circuit in the closely related and
11 simultaneous appeal in the C-127 subproceeding, *United States v. Walker River Irrigation Dist.*,
12 890 F.3d 1161, 1169-70 (9th Cir. 2018), Defendants continue to argue that this Court does not
13 have subject matter jurisdiction over Mineral County’s public trust claim. MTD at 7-19. This
14 Court, the Ninth Circuit, and the Nevada Supreme Court all have confirmed that this Court has
15 continuing exclusive jurisdiction over the waters of the Walker River for the purpose of
16 administering the Walker River Decree, which includes jurisdiction over Mineral County’s
17 public trust claim and the remedies it seeks. Order, at 4, 9 n. 7 (May 28, 2015) (ECF 814);
18 *Mineral County v. Nevada*, 20 P.3d 800, 806 (Nev. 2001); *United States v. WRID*, 890 F.3d
19 1161, 1169-70 (9th Cir. 2018); *Mineral County v. WRID*, 986 F.3d 1197, 1201 (9th Cir. 2021);

21 Pursuant to the Ninth Circuit’s analysis of this Court’s continuing jurisdiction in the C-
22 127 appeal, the plain language of the Walker River Decree clearly gives the Decree Court
23 jurisdiction over Mineral County’s public trust claim. In Paragraph XIV of the Decree, the Court
24 retained jurisdiction “for the purpose of changing the duty of water or for correcting or
25 modifying this decree; also for regulatory purposes . . .” Walker River Decree at XIV. Further,
26 Paragraph XV of the Walker River Decree provides that the Court shall appoint a water master
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1 who, “with the approval of the Court, may make such rules as may be necessary and proper for
2 the enforcement of [the] decree and for the carrying out of its purposes and objects and the
3 proper apportionment and distribution, including rotation of the use of water where necessary, of
4 the waters of said Walker River.” Walker River Decree at ¶ XV. This broad retention of
5 jurisdiction naturally and explicitly includes the administration and regulation of the waters of
6 the Walker River system, including Walker Lake, and gives the Court jurisdiction over Mineral
7 County’s public trust claim. The remedies requested in Mineral County’s *Second Amended*
8 *Complaint* fall well within the jurisdiction retained in Paragraph XIV for regulatory purposes and
9 within the scope of the continuing fiduciary duty which the Nevada Supreme Court held requires
10 the sovereign to exercise regulatory authority to ensure that the public trust values of water
11 resources such as Walker Lake are protected and preserved.
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14 In the appeal filed by the United States and Walker River Paiute Tribe of Judge Jones’
15 2015 dismissal of the C-127 subproceeding, the Ninth Circuit held that Paragraph XIV’s retained
16 jurisdiction for modification of the Decree includes the granting additional water rights under the
17 Decree. *United States v. WRID*, 890 F.3d 1161, 1169-70 (9th Cir. 2018). Defendants’
18 suggestion in their *Motion to Dismiss* that the Ninth Circuit in that case “concluded that
19 [Paragraph XIV] *only* gives the court jurisdiction to modify water rights under the decree and to
20 litigate claims to additional water rights in the Walker River Basin,” PD MTD at 7-8 (emphasis
21 added), is a blatant misrepresentation of the Ninth Circuit’s analysis of this Court’s continuing
22 jurisdiction. Defendants’ argument also is directly contradicted by Principal Defendant WRID’s
23 assertion in briefing before the Ninth Circuit in the closely related C-127 subproceeding that this
24 Court has retained *continuing jurisdiction to administer* water rights under the Walker River
25 Decree. *See* Brief of Appellee Walker River Irrigation District (“WRID”) at 11, *United States v.*
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1 *WRID*, Case No. 15-16478 (9th Cir. Dec. 12, 2016) (emphasis added). Indeed, it would be
2 incoherent to hold on the one hand, that this Court has retained jurisdiction for the purpose of
3 modifying existing water rights and granting additional water rights under the Decree, but then to
4 hold on the other hand that the Court has not retained jurisdiction to administer the Decree and
5 regulate the use of those water rights, a more limited exercise of jurisdiction that clearly is
6 encompassed by the plain language Paragraph XIV’s broad retention of jurisdiction “for
7 regulatory purposes,” and one that this Court has exercised for over a century.

8
9 The remedies Mineral County seeks, including declarative relief and changes to the
10 Court’s own rules governing the management of the Walker River system under the Decree, all
11 fall squarely under the Court’s jurisdiction retained for the purpose of regulating the use of water
12 in the Walker River system, which the Court long has exercised. *See* ECF 936.

13
14 C. This Court Consistently Has Exercised Continuing Exclusive Jurisdiction Over
the Waters of the Walker River

15 For more than a century, this Court has exercised exclusive jurisdiction over the waters of
16 the Walker River Basin, and has entertained claims for declaratory and injunctive relief. To the
17 extent that Mineral County, or anyone, brings water right claims based on either federal or state
18 law, this Court has exclusive jurisdiction to hear such claims, which historically has included
19 claims for declaratory and injunctive relief.

20
21 Since 1902, litigation over water rights in the Walker River Basin properly has been
22 brought exclusively before this Court. *Rickey Land and Cattle Co. v. Miller & Lux*, 218 U.S.
23 258, 262 (1910); *Pacific Livestock Company, et al. v. T.B. Rickey, et al.*, In Equity No. 731, Final
24 Decree (D. Nev. Mar. 22, 1919); *United States v. WRID*, 11 F. Supp. 158, 160 (D. Nev. 1935);
25 *United States v. WRID*, No. C-125 (D. Nev. Apr. 14, 1936), *amended by Order for Entry of*
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1 *Amended Final Decree to Conform to Writ of Mandate*, No. C-125 (D. Nev. Apr. 24, 1940); *see*
2 *also* more recent litigation discussed *infra*.

3 Pursuant to the Court’s retained exclusive jurisdiction, Court adopted the 1953 Rules and
4 Regulations, which the Court found are “necessary for the proper administration” of the Walker
5 River Decree, and which govern the implementation of the same, and appointed a board of water
6 commissioners to aid in the administration of the Decree. *See* Walker River Decree ¶¶ XIV &
7 XV; Order Approving Rules and Regulations for Distribution of Water on the Walker River
8 Stream System, *United States v. WRID*, In Equity C-125 (Sept. 3, 1953). The Court’s retained
9 jurisdiction under Paragraph XIV and its provision for the adoption of rules and regulations
10 contained in Paragraph XV of the Decree necessarily include the power to amend those adopted
11 rules and change the composition of the Board of Water Commissioners as circumstances may
12 require, and as requested by Mineral County in its *Second Amended Complaint*.

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14
15 Decades later, on July 15, 1987, the United States Board of Water Commissioners and
16 the Chief Deputy Water Commissioner filed a petition in the Walker River Decree proceedings
17 for an order establishing the procedure, rules and regulations to be followed with respect to
18 changing the point of diversion, manner of use or place of use of the waters of the Walker River.
19 On May 17, 1988, the Decree Court entered an order provisionally adopting the proposed rules
20 and directing that they be modified in accordance with the Court's order. Order, *United States v.*
21 *WRID*, In Equity C-125 (May 17, 1988). After additional briefing and argument the Court in the
22 Walker River Action entered additional orders concerning the proposed rules and regulations on
23 July 7, 1989 and on September 11, 1989. As a result, the Nevada State Engineer is now required
24 to review change applications, subject to this Court’s approval pursuant to its continuing
25 jurisdiction over the waters of the Walker River Basin.
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1 Several years later, in 1991, Principal Defendant WRID itself filed a petition for
2 declaratory and injunctive relief in the C-125 Case to prevent the California Water Resources
3 Control Board from restricting its water right licenses under the Walker River Decree, arguing in
4 part that California’s action interfered with the Court’s retained jurisdiction and that the Court
5 had continuing jurisdiction as well as inherent authority to enforce the terms and conditions of
6 the Walker River Decree. First Amended Petition for Declaratory and Injunctive Relief and
7 Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion to
8 Storage of Water from California to Nevada at 2-3, *United States v. WRID*, 3:73-cv-0126 (D.
9 Nev. Jan. 3, 1992) (C-126, ECF 1). That petition was settled by stipulated agreement, which
10 provided declaratory and injunctive relief. *See* Stipulation for Entry of Order, *United States v.*
11 *WRID*, 3:73-cv-0126 (D. Nev. Jan. 17, 1996) (C-126, ECF 92). Such declarative relief and
12 regulatory action is precisely the type of action Mineral County seeks here. Additionally, in
13 response to WRID’s petition, the Court amended the Decree’s rules and regulations to ensure
14 compliance with the California Fish and Game Code, which also is consistent with the relief
15 Mineral County requests here, namely amending the Decree’s rules and regulations to ensure
16 compliance with the public trust doctrine. *See* Final Order Pursuant to Stipulation, *United States*
17 *v. WRID*, 3:73-cv-00126 (June 3, 1996) (C-126 ECF 114). Thus, the Decree Court’s description
18 and exercise of its continuing jurisdiction to manage and administer the Walker River Decree
19 consistently has encompassed the type of relief Mineral County seeks.
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23 Almost 30 years ago, in the context of WRID’s motion to dismiss the Walker River
24 Paiute Tribe’s counterclaims filed in the Walker River litigation, C-125, which the Court
25 designated as subfile 3:73-cv-0127, this Court described its retained jurisdiction in broad terms,
26 to include the management of the Decree “as necessary.” Order, *United States v. WRID*, 3:73-
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1 cv-0127 (Oct. 27, 1992) (C-127, ECF 15). More recently, in the context of his 2015 dismissal of
2 Mineral County’s public trust claim, Judge Jones recognized the exclusivity of this Court’s
3 continuing jurisdiction. Order, at 4, 9 n. 7 (May 28, 2015) (ECF 814). Additionally, in the
4 context of his dismissal of the United States’ and Walker River Paiute Tribe’s claim for
5 additional water rights under the Decree, Judge Jones described the Court’s continuing
6 jurisdiction to include motions to modify the Decree, and motions for injunctive relief. *See*
7 Order at 8, *United States v. WRID*, 3:73-cv-0127 (May 28, 2015) (C-127, ECF 2224). On appeal
8 of Judge Jones’ 2015 dismissal of Mineral County’s claim, in part for lack of subject matter
9 jurisdiction, the Ninth Circuit recognized this Court’s continuing exclusive jurisdiction over
10 administration of the Walker River Decree. *See Mineral County v. WRID*, 986 F.3d 1197, 1201
11 (9th Cir. 2021); *see also Mineral County v. WRID*, 900 F.3d 1027, 1028 (9th Cir. 2018) (citing
12 *Mineral County v. Nevada*, 20 P.3d 800, 807 (Nev. 2001)). Consistent with this recognition, the
13 Ninth Circuit remanded the subproceeding to this Court and confirmed that Mineral County
14 “may pursue its public trust claim to the extent that the County seeks remedies that would *not*
15 involve a reallocation of [water] rights.” *Mineral County v. WRID*, 986 F.3d 1197, 1206 (9th
16 Cir. 2021); *see also United States v. WRID*, 890 F.3d 1161, 1169-72 (9th Cir. 2018).

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19 D. The Decree Court Is the Only Court Which May Assert Jurisdiction Over the Res
20 in This *In Rem* Action

21 Consistent with the Decree Court’s statements and exercises of jurisdiction, both this
22 Court and the Nevada Supreme Court have confirmed that the Decree Court has continuing
23 exclusive jurisdiction over the waters of the Walker River based on a holding that the Walker
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1 River litigation may be characterized as an *in rem* proceeding.⁷ *Order* at 10-11 (ECF 592);
2 *Mineral County v. Nevada*, 20 P.3d 800, 806 (Nev. 2001). One attribute of an *in rem* proceeding
3 is that if a court asserts jurisdiction over the property involved, it is vested with the exclusive
4 right to control and administer it. *E.g.*, *United States v. Alpine Land & Reservoir Company*, 174
5 F.3d 1007, 1012-13 (9th Cir. 1999) (explaining that “[t]he reason why exclusivity is inferred is
6 that it would make no sense for the district court to retain jurisdiction to interpret and apply its
7 own judgment to the future conduct contemplated by the judgment, yet have [another] court
8 construing what the [decree] court meant in the judgment. Such an arrangement would
9 potentially frustrate the federal district court's purpose.”) (internal citation omitted). Consistent
10 with this principle, over 20 years ago, before the Nevada Supreme Court in *Mineral County v.*
11 *Nevada*, Defendants WRID and Lyon County made the argument, in direct contradiction to the
12 one it makes now, that this Court retains continuing exclusive jurisdiction to hear Mineral
13 County’s public trust claim. 20 P.3d 800, 806 (Nev. 2001). On the basis of that very argument,
14 the Nevada Supreme dismissed Mineral County’s public trust claim against the State of Nevada
15 and directed Mineral County to pursue its claim in this Court. *Id.* (“We conclude that the federal
16 court is the proper forum in which to resolve this dispute...The general rule is that the first court,
17 whether state or federal, which assumes jurisdiction over real property is entitled to maintain
18 continuing and exclusive jurisdiction over that property.”).

22
23 ⁷ This case is properly characterized as an *in rem* proceeding, *Nevada v. United States*, 463 U.S.
24 110, 144 (1983) (“water adjudications are more in the nature of *in rem* proceedings”), in which
25 the Court has comprehensive and exclusive jurisdiction over the res, the Walker River system.
26 *See Order* at 11 n.2 (Apr. 23, 2012) (ECF 592) (“the action should still be treated as one *in rem*”
27 (citing *Nevada v. United States*, 463 U.S. at 143-44)).

1 Defendants should not now be permitted to argue in direct contradiction to their previous
2 successful argument before the Nevada Supreme Court, that this Court does not, in fact retain
3 continuing exclusive jurisdiction over Mineral County's public trust claim. Indeed, if the Court
4 were to entertain Defendants' shifting arguments, there would be no court or proceeding in
5 which to bring Mineral County's claim and the public trust doctrine would not be enforceable in
6 the Walker River Basin, an unacceptable outcome under the law. *See Marbury v. Madison*, 5
7 U.S. 137, 1 Cranch. 137, 163 (1803) ("it is a general and indisputable rule, that where there is a
8 legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded...")
9 (quoting 3 William Blackstone, *Commentaries on the Laws of England*, at 23).
10

11 Thus, not only is this Court the correct forum for Mineral County's public trust claim, it
12 is the only proper forum for that claim to be decided, because that claim deals with the
13 administration of the Walker River system and water rights under the Walker River Decree,
14 which must be brought before the Decree Court, as the Court that is charged with administering
15 the Walker River Decree and the Court with exclusive power over the *res*. Accordingly,
16 Defendants' argument that the Court does not have jurisdiction over Mineral County's public
17 trust claim is without merit and should be denied.
18

19 E. This Court Has Supplemental Jurisdiction Over Mineral County's Claim

20 Even if the Court were to find that its continuing exclusive jurisdiction over the waters of
21 the Walker River and under Paragraph XIV of the Walker River Decree does not give it
22 jurisdiction over Mineral County's claim, 28 U.S.C. § 1367 gives the Court supplemental
23 jurisdiction. 28 U.S.C. § 1367(a) provides that "in any civil action of which the district courts
24 have original jurisdiction, the district courts shall have supplemental jurisdiction over all other
25 claims that are so related to claims in the action within such original jurisdiction that they form
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1 part of the same case or controversy under Article III of the United States Constitution.

2 Defendants' statement to the contrary appears to rely on an unsupported argument that the

3 Decree Court never had original jurisdiction, is without merit, and should be denied.

4 Defendants' reliance on *Ortolf v. Silver Bar Mines, Inc.*, 111 F.3d 85 (9th Cir. 1997), is
5 misplaced and unavailing. In *Ortolf*, the court declined to exercise supplemental jurisdiction in
6 part because no pending case existed in which the Court had original jurisdiction, and the court
7 noted that supplemental jurisdiction is appropriate only where a court exercises jurisdiction in
8 ongoing litigation in which it has original jurisdiction. *Id.* at 87. The court in that case, unlike
9 the Decree Court here, had not retained jurisdiction over the settlement agreements entered in
10 earlier lawsuits, which formed the basis for a final decision in those lawsuits, and the settlement
11 agreements themselves expressly provided that new litigation would need to be initiated to
12 enforce them. *Id.* Because the Walker River Decree litigation clearly is ongoing, *Ortolf* is
13 distinguishable. Mineral County has not attempted to reopen litigation as was done in *Ortolf*, but
14 has intervened in pending litigation, a scenario in which the exercise of supplemental jurisdiction
15 over Mineral County's public trust claim, including all remedies it envisions, is appropriate.

16 F. The All Writs Act Gives the Court Jurisdiction Over Mineral County's Claim

17 Similarly, even if the Court were to find that its continuing exclusive jurisdiction over the
18 waters of the Walker River and under Paragraph XIV of the Decree does not give it jurisdiction
19 over Mineral County's public trust claim, the All Writs Act, 28 U.S.C. § 1651, gives the Court
20 jurisdiction over Mineral County's public trust claim. Defendants acknowledge that the purpose
21 of the All Writs Act is to "allow a federal court to issue orders as may be necessary or
22 appropriate to effectuate and prevent the frustration of orders it has previously issued." PD MTD
23 at 9. Defendants' current argument also contradicts WRID's statement of jurisdiction in its 1991
24 Petition for Declaratory and Injunctive Relief in the C-126 subproceeding of the Decree
25 proceedings, which relied in part on the All Writs Act as a basis for the Court's jurisdiction. *See*
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1 First Amended Petition for Declaratory and Injunctive Relief and Request for Order to Show
2 Cause; or in the Alternative to Change the Point of Diversion to Storage of Water from
3 California to Nevada at 3, *United States v. WRID*, 3:73-cv-0126 (C-126, ECF 1). In fact, the
4 purpose of the All Writs Act gets to the very essence of Mineral County’s *Second Amended*
5 *Complaint*: that the Court must ensure that the Decree is administered consistent with the
6 continuing public trust duty to preserve Walker Lake as a public trust resource.
7

8 G. It Is Settled That Mineral County Has Standing to Bring Its Public Trust Claim

9 In order to survive a motion to dismiss for lack of standing, “[p]laintiffs need not
10 demonstrate that there is a ‘guarantee’ that their injuries will be redressed by a favorable
11 decision.” *Renee*, 686 F. 3d at 1013 (citing *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d
12 997, 1003 (9th Cir. 1998)). Further, “[p]laintiffs need only show that there would be a ‘change
13 in a legal status,’ and that a ‘practical consequence of that change would amount to a significant
14 increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury
15 suffered.” *Id.* (citing *Utah v. Evans*, 536 U.S. 452, 464 (2002)). A 12(b)(1) motion to dismiss
16 should only be granted if it appears certain that the plaintiff cannot prove any set of facts in
17 support of his claim that would entitle plaintiff to relief. *Cooper v. Bell*, 628 F.2d 1208, 1210
18 (9th Cir. 1980) (citations omitted). Finally, the Ninth Circuit has noted that Plaintiffs need only
19 one viable basis for standing to survive a motion to dismiss. *In re Zappos.com*, 888 F.3d 1020,
20 1030 n.15 (9th Cir. 2018). Similarly, the Court’s “ability ‘to effectuate a partial remedy’
21 satisfies the [standing] redressability requirement.” *Uzuegbunam v. Preczewski*, 141 S. Ct. 792,
22 801 (2021) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).
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25 Defendants argue, with no support, that Mineral County’s requested remedies would not
26 be sufficient to redress its injury. PD MTD at 12. As noted previously, even if the requested
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1 remedies would provide only partial relief, that is sufficient to satisfy the redressability factor of
2 Article III standing. *Uzuegbunam*, 141 S. Ct. at 801. The extent to which a combination of at
3 least some of the remedies Mineral County has requested is a question of fact that cannot yet be
4 determined and must be construed most favorably to Mineral County at this stage of the
5 proceedings. Defendants’ statements about the supposed inefficacy of the remedies requested by
6 Mineral County are purely speculative and without merit, especially given that all that is required
7 is the Court’s ability to effectuate even a partial remedy. *Uzuegbunam*, 141 S. Ct. at 801.
8 Rather, even were the Court to implement only one or two of the many possible remedies set
9 forth in the *Second Amended Complaint* and that limited adoption of remedies were to provide
10 only partial relief from the injury alleged to Walker Lake’s public trust values, that would be
11 sufficient to satisfy the redressability requirement of Article III standing.
12

13 Notably, the Ninth Circuit Court of Appeals in this case has expressed concern about the
14 “risk that standing will be denied because hasty remedial determinations made at a preliminary
15 stage do not reflect the full inventiveness that could be exhibited after trial.” Memorandum at 7,
16 *Mineral County v. WRID*, No. 15-16342 (9th Cir. May 22, 2018) (citing 13A Charles Alan
17 Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.6 & nn.12, 13 (3d ed.
18 2017)). This Court should take this concern of the Ninth Circuit’s into consideration on remand,
19 especially at this motion to dismiss stage of the proceedings. For the following reasons, Mineral
20 County’s claim clearly survives a motion to dismiss under Rule 12(b)(1).
21

22 As noted above, and as Defendants acknowledge, PD MTD, at 2, the Ninth Circuit
23 reversed Judge Jones’ May 28, 2015, order dismissing Mineral County’s public trust claim for
24 lack of standing, and held that Mineral County does have standing to bring its public trust claim
25 for minimum flows to Walker Lake. Memorandum at 3, *Mineral County v. WRID*, No. 15-16342
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1 (9th Cir. May 22, 2018); *see Mineral County v. WRID*, 986 F.3d 1197, 1202 (9th Cir. 2021)
2 (reiterating its earlier ruling that Mineral County has standing to bring its public trust claim).
3 Specifically, the Ninth Circuit held that “Mineral County meets each requirement for Article III
4 standing: ‘injury, causation, and redressability.’” Memorandum at 4, *Mineral County v. WRID*,
5 15-16342 (9th Cir. May 22, 2018) (citing *City of Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th
6 Cir. 2015)). Further, the court held that “Mineral County’s requested relief – flows adequate to
7 restore the water level and quality in Walker Lake – would likely redress its injuries.” *Id.* at 6.
8 Moreover, the court held that “Mineral County’s requested remedy is among the ‘remed[ies] that
9 the court [would be] prepared to give.” *Id.* (citing 13A Charles Alan Wright & Arthur R.
10 Miller, *Federal Practice and Procedure* § 3531.6 & nn.12, 13 (3d ed. 2017)). The 23 types of
11 remedies more specifically requested in Mineral County’s *Second Amended Complaint* are
12 within the scope of the list of types of remedies that the Ninth Circuit considered to be remain
13 available after the reallocation of previously adjudicated water rights and modification of the
14 Decree were ruled out by the Nevada Supreme Court and the Ninth Circuit. *See Mineral County*
15 *v. WRID*, 986 F.3d at 1204-1205. For the reasons set forth above, the Court should no longer
16 entertain Defendants’ redressability argument in this case.
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19 The Ninth Circuit’s ruling that Mineral County has standing to pursue its public trust case
20 is the law of this case. Thus, Defendants’ continued argument for dismissal of Mineral County’s
21 claim on standing grounds is improper. Defendants also misconstrue the Nevada Supreme
22 Court’s decision as stating that Mineral County’s claim would require legislative action. PD
23 MTD at 2. Defendants argue, without support, that the remedies Mineral County seeks require
24 the legislature to act, and therefore, are not redressable by the Court. PD MTD at 10. In fact,
25 only a small subset of the 23 types of remedies requested in Mineral County’s *Second Amended*
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1 *Complaint* make any mention action at all by the state, all in the vein of developing a plan and
2 providing funding for restitutionary relief from the harm resulting from the failure to fulfill the
3 continuing fiduciary duty to protect and preserve the public trust values of Walker Lake, and the
4 only type of action that might involve the legislature would be approval of funding for that
5 restitutionary relief for the sovereign’s breach of its fiduciary duty. *Second Amended Complaint*
6 at 9-10 (remedies paragraphs 12, 15, 17, 18). It is clear from the plain language of the *Second*
7 *Amended Complaint* that none of the requested remedies would require any legislative policy
8 decision making, let alone any change to existing Nevada water law.
9

10 Further, Defendants’ reliance on *Juliana v. United States* is misplaced. First, *Juliana* was
11 decided in the context of a supposed substantive due process claim concerning global climate
12 change and invoked a remedy of extraordinary breadth and vagueness that called for an
13 indeterminate number of intrinsically legislative policy decisions and determinations to be made.
14 *Juliana v. United States*, 947 F.3d 1159, 1169-1172 (9th Cir. 2020). In *Juliana*, Plaintiffs
15 requested a sweeping order directing the federal government to develop a plan to phase out fossil
16 fuel emissions and draw down excess atmospheric CO₂ – an incredibly broad, open-ended and
17 complex task, involving multiple levels of policy-based decisionmaking with no established
18 guiding legal standard. *Id.* at 1171-1173. While the court in *Juliana* held that “‘a constitutional
19 directive or legal standards’ must guide the courts’ exercise of equitable [remedial] power.” *Id.*
20 at 1173 (quoting *Rucho v. Common Cause*, ___ U.S. ___, 139 S. Ct. 2484, 2508 (2019)), in this
21 case the Court is guided by a clear legal standard, namely the continuing fiduciary duty under the
22 public trust doctrine to protect and preserve Walker Lake’s trust values. *Mineral County v. Lyon*
23 *County*, 473 P.3d at 427. In a case such as this one, where an established legal standard is
24 present to guide the Court’s exercise of its broad remedial power, it has long been held to be the
25 proper role for a federal court to exercise that power. *See Marbury*, 5 U.S. at 177-78 (“Few
26 would contest that ‘[i]t is emphatically the province and duty of the judicial department’ to curb
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1 acts of the political branches that contravene those fundamental tenets of American life so dear
2 as to be constitutionalized and thus removed from political whims.).

3 Here, unlike the exceedingly complex policy issues involved with remediation of climate
4 change, the public trust doctrine imposes a clear judicially defined legal duty to preserve Walker
5 Lake for future generations and a set of clear, limited remedies have been requested that are
6 designed to provide effective regulatory and restitutionary relief to undo the harm that has been
7 caused by the failure to fulfill that duty. Because the relief requested by Mineral County is both
8 substantially likely to redress its injuries and within the recognized scope of federal courts to
9 award, the Court should reject Defendants' standing and redressability argument.
10

11 H. Mineral County's Claim Does Not Involve a Political Question

12 Defendants' continued suggestion that Mineral County's claim involves a political
13 question is: (1) an attempt to re-litigate an issue that Defendants already have lost before the
14 Ninth Circuit Court of Appeals and (2) based on a mischaracterization of Mineral County's
15 requested remedies. Specifically, Defendants continue to argue, in direct contradiction to the
16 Nevada Supreme Court's decision in *Lawrence v. Clark County*, that the public trust doctrine is
17 not for the judiciary to interpret and apply, but rather is exclusively for the legislature to interpret
18 and apply. Defendants also argue that Mineral County requests a reallocation of water to Walker
19 Lake, which is a blatant mischaracterization of the remedies included in Mineral County's
20 *Second Amended Complaint*. Compare PD MTD at 15 with *Second Amended Complaint* at 7-11.
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22 Despite having briefed and lost this argument before the Nevada Supreme Court and
23 Ninth Circuit, Defendants continue to argue that the public trust doctrine is not for the Court to
24 interpret or apply, but must be left entirely to the legislative branch. Because it is well settled
25 that the public trust doctrine is judicial in nature, Defendants' reliance on the *Baker v. Carr*
26 political question factors for its continued political question argument is misplaced. In addition,
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1 this argument is inconsistent with the Nevada Supreme Court’s statement on the nature of the
2 public trust doctrine in *Mineral County v. Lyon County*, in *Lawrence v. Clark County*, and in
3 *Mineral County v. Nevada*. The Nevada Supreme Court articulated the judicial nature of the
4 public trust doctrine in *Lawrence v. Clark County*. “[A]lthough the public trust doctrine has
5 roots in the common law, it is distinct from other common law principles because it is based on a
6 policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the
7 State's sovereign power, as recognized by *Illinois Central*.” *Lawrence*, 254 P.3d at 613. As the
8 Court stated in *Lawrence*, “[u]nder the public trust doctrine, the Legislature has the power only
9 to act as a fiduciary of the public in its administration of trust property. The public trust doctrine
10 is thus not simply common law easily abrogated by legislation; instead, the doctrine constitutes
11 an inseverable restraint on the state's sovereign power.” *Id.* Thus, “[i]t is for the courts to decide
12 whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation
13 destroy the constitutional limits on its authority.” *Id.* (citing *San Carlos Apache Tribe v.*
14 *Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) (internal quotations omitted)). The Nevada
15 Supreme Court in *Lawrence* described the Court’s role of “ensuring the continuance of this
16 stewardship” as “vital.” *Id.* at 611 (citing *Mineral County v. Nevada*, 20 P.3d at 808–09 (Rose, J.
17 concurring)). In other words, the trust relationship and duty may not be modified by the state, as
18 trustee. *See id.* at 613 (citing *San Carlos Apache Tribe*, 972 P.2d at 199; *see also Illinois Central*
19 *Railroad v. Illinois*, 146 U.S. 387, 453 (1892)). Thus, “instead of being subject to displacement
20 by statute, the converse is actually true: because of the priority of constitutional norms the
21 public trust doctrine can be used to curb invalid legislative actions.” Gerald Torres & Nathan
22 Bellinger, *The Public Trust: The Law’s DNA*, 4 Wake Forest J.L. & Pol’y 281 (2014).
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1 In *San Carlos Apache Tribe*, cited by the Nevada Supreme Court in *Lawrence*, the
2 Arizona Supreme Court struck down legislation that would have exempted water rights
3 adjudications from public trust review.⁸ The court in that case described the public trust doctrine
4 as a constitutional limitation on legislative power to give away resources held by the state in trust
5 for its people. *San Carlos Apache Tribe*, 972 P.2d at 199. As such, “[t]he Legislature cannot
6 order the courts to make the doctrine inapplicable to these or any proceedings.” *Id.* at 199.
7 Given the Nevada Supreme Court’s reliance on Arizona precedent along with the Nevada
8 Constitution’s Gift Clause and constitutional separation of powers principles in *Lawrence*, there
9 should be no doubt that the question of whether the public trust doctrine requires minimum flows
10 to Walker Lake is properly before this Court and would not properly be left to either the
11 legislative or executive branches of government.
12

13 Both the Ninth Circuit Court of Appeals and the Nevada Supreme Court have been clear
14 on this issue. The public trust doctrine applies to waters already allocated under the doctrine of
15 prior appropriation, and while it does not permit reallocation of these water rights, it imposes a
16 continuing duty on the sovereign to manage these already allocated public trust resources for the
17 benefit of the public. *Mineral County v. Lyon County*, 473 P.3d 418, 421, 425-29 (Nev. 2020)
18 (*en banc*). Both the Nevada Supreme Court’s order on the questions certified to it by the Ninth
19 Circuit and the Ninth Circuit’s remand order further confirmed that the public trust doctrine is a
20 judicial doctrine for the court, not the legislature, to apply, and thus the case was remanded with
21 instructions to consider Mineral County’s claim “to the extent it seeks remedies that would *not*
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26 ⁸ Arizona courts consistently have invalidated legislative attempts to restrict the applicability and
27 scope of the PTD. *San Carlos Apache Tribe*, 972 P.2d at 199; *Arizona Ctr. for Law in the Public*
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1 involve a reallocation of adjudicated water rights.” *Mineral County v. WRID*, 986 F.3d 1197,
2 1206 (9th Cir. 2021); *see also Mineral County v. Lyon County*, 473 P.3d at 429 n. 7. Thus, none
3 of Mineral County’s requested remedies would require the Court to make a political judgment
4 rather than a legal one. Rather, Mineral County’s claim requests that the Court make
5 determinations with regard to: (1) the nature of the continuous public trust duty to preserve
6 Walker Lake; (2) whether that duty has been violated; and (3) what the proper remedy ought to
7 be. Those questions are entirely within this Court’s power to construe and apply the public trust
8 doctrine, and to fashion remedies for the violation of the same.
9

10 Indeed, this Court has long-standing, well-recognized broad discretion, rooted in its
11 equity jurisdiction, to choose among a range of remedies in order to craft appropriate and
12 effective relief in a number of contexts, including breach of fiduciary duty under a trust. *United*
13 *States v. Mitchell*, 463 U.S. 206, 225-27 (1983); *Navajo Nation v. U.S. Dep’t of Interior*, 26 F.4th
14 794, 812 (9th Cir. 2021); *Wilson v. Happy Creek, Inc.*, 448 P.3d 1106, 1110 (Nev. 2019)
15 (affirming that district courts have authority to award equitable relief in water law cases that goes
16 beyond relief that State Engineer may grant under Nevada statutory water law); *Brown v. Board*
17 *of Ed.*, 349 U.S. 294, 300 (1955) (*Brown II*) (discussing the practical flexibility of equity in
18 shaping remedies); Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages-Equity-*
19 *Restitution*, §10.4 at 749 (3d ed. 2018).

20 Remedies in breach of fiduciary duty cases often are restitutionary in nature and may
21 include a range of equitable remedies including declaratory, injunctive and mandamus relief.
22 *See Mitchell*, 463 U.S. at 227. In cases involving important public rights and governmental
23 duties, the relief may include an order requiring state and local officials to provide funding
24

25 *Interest v. Hassell*, 837 P.2d 158, 174 (Ariz. Ct. App.1991); *Defenders of Wildlife v. Hull*, 18
26 P.3d 722, 739 (Ariz. Ct. App. 2001).

1 necessary to implement a prospective remedial plan. *E.g., Milliken v. Bradley*, 433 U.S. 267,
2 287, 289-90 (1977) (dealing with prospective desegregation plan). Where, as here, a court
3 exercises exclusive jurisdiction over the trust corpus (the Walker River system including Walker
4 Lake), logic dictates that the Court’s jurisdiction necessarily includes the authority to determine
5 whether the trustee has breached its fiduciary duty and if so to craft relief that will restore the
6 trust corpus and remedy the harm done to the beneficiaries of the trust.

7 Mineral County’s *Second Amended Complaint*, consistent with the Nevada Supreme
8 Court’s decision and the Ninth Circuit’s remand, no longer requests a reallocation of water rights
9 or a modification of the Walker River Decree. Rather, as explained above, the remaining
10 requested remedies all fall within the proper scope of the Court’s broad remedial power and
11 discretion. Accordingly, Defendants’ political question argument is clearly inapposite and
12 should be rejected by the Court.

13
14 **III. THE STATE OF NEVADA ALREADY IS A PARTY AND SUBJECT TO THIS**
15 **COURT’S JURISDICTION THROUGH NDOW AND THE STATE ENGINEER**

16 Rule 12(b)(7) of the Federal Rules of Civil Procedure provides that a motion to dismiss
17 may be granted for failure to join a necessary and indispensable party under Rule 19. Fed. R.
18 Civ. P. 12(b)(7). However, Defendants’ premise that the state of Nevada is not a party to this
19 subproceeding and subject to the Court’s exclusive jurisdiction over the waters of the Walker
20 River system and the administration of Nevada water rights under the Walker River Decree is
21 mistaken. In fact, the State of Nevada already is and long has been a party to these proceedings
22 under the Decree through two of its agencies – the Nevada State Engineer and the Nevada
23 Department of Wildlife (“NDOW”).

24
25 The state is a party to all Walker Decree proceedings involving the portion of the Walker
26 River system and water rights under the Decree that lie within Nevada through the State
27 Engineer, which is the arm of the state charged with regulating the waters and water rights of

1 Nevada, and which has operated for decades as a special master, subordinate to the Court, with
2 regard to the waters and water rights under the Decree within Nevada. In this role, the State
3 Engineer functions as an arm of this Court and as such is necessarily already present before the
4 Court and subject to the Court's jurisdiction in all proceedings under the Decree that relate to
5 Nevada water rights on the Walker River system.

6
7 In addition, the state is a party to these proceedings under the Walker River Decree
8 through NDOW, which is not only one of the largest surface water rights owners on the Walker
9 River system but also one of the Principal Defendants, represented by the Nevada Attorney
10 General, that joined in filing this current Motion to Dismiss. ECF 996 at i, 30. Further, in
11 derogation of the state's, as well as the Court's, continuing fiduciary duty under the public trust
12 doctrine to protect the trust values of Walker Lake, NDOW acquired those appropriative rights
13 under the Decree and has used them to create the artificial Mason Valley Wildlife Management
14 Area ("MVWMA") in the 1950s and through irrigation to promote bird hunting on the
15 MVWMA, long after upstream diversions began to have a detrimental impact on Walker Lake.
16 As we have explained above, the fiduciary duty under the public trust doctrine attaches to and
17 binds the sovereign. This case deals with Mineral County's public trust claim, which is related
18 to the fiduciary duty as it pertains to the portion of the Walker River system and the water rights
19 on that system that lie within the State of Nevada. And in this case that fiduciary duty attaches to
20 and binds the State of Nevada and also this Court, which stands in the shoes of Nevada for
21 purposes of administering the Decree and regulating water uses in Nevada.

22
23
24 NDOW's unreliability as a steward of the public trust is further demonstrated by the fact
25 that despite owning a flood water right for the benefit of Walker Lake since the early 1970s,
26 NDOW never exercised that right until 2010. Meanwhile, NDOW has consistently argued that
27 its artificially-created Mason Valley Wildlife Refuge effectively is entitled to a greater degree of

1 protection under the public trust doctrine than Walker Lake, one of Nevada’s very few precious
2 natural water bodies. *See* NDOW Brief, at 22, *Mineral County v. Lyon County*, Case No. 75917
3 (Nev. Apr. 12, 2019).

4 Because the State of Nevada already is a party to and already is subject to this Court’s
5 jurisdiction in these proceedings, Defendants’ entire necessary and indispensable party argument
6 under Federal Rule of Civil Procedure 19 is inapposite to the posture of this case. As noted
7 elsewhere, much of Defendants’ misplaced arguments stem from their primary complaint being
8 that this Court lacks the power to impose effective relief for the sovereign’s failure to fulfill the
9 continuing fiduciary duty to protect and maintain the trust values of Walker Lake. As we have
10 explained, that position is completely inconsistent and at odds with federal courts’ long
11 recognized broad remedial power and discretion, rooted in the courts’ equity jurisdiction, to craft
12 effective remedies for a wide range of breaches of fiduciary duty, including those where it is the
13 government itself that is the breaching trustee. *See* William Blackstone, *Commentaries on the*
14 *Laws of England* *23 (1765); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)
15 (quoting Blackstone) (“where there is a right there is a legal remedy.”). Given the fact that the
16 state already is a party to these proceedings and properly subject to the Court’s jurisdiction in
17 this case, and given the breadth of the Court’s remedial power and discretion to craft effective
18 remedies, the Court should reject Defendants’ argument regarding the State of Nevada.
19
20

21 **IV. MINERAL COUNTY HAS STATED A CLAIM UNDER THE PUBLIC TRUST**
22 **DOCTRINE**

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

24 Under Rule 8 of the Federal Rules of Civil Procedure, a complaint requires only “a short
25 and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give
26 the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl.*
27

1 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)
2 (internal quotations omitted)). Pursuant to Rule 12(b)(6), a district court may dismiss a
3 complaint for failure to state a claim upon which relief may be granted if the plaintiff has not set
4 forth factual allegations in support of his claim that would entitle him to relief. *Id.* at 555. A
5 claim is sufficient to withstand a motion to dismiss under Rule 12(b)(6) when, accepting as true
6 the facts alleged in the complaint, the claim has “facial plausibility,” that is, it allows the court
7 “to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
8 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Twombly*, 550 U.S. at 570; *Twombly*, 550
9 U.S. at 555 (“a well-pleaded complaint may proceed even if it appears ‘that a recovery is very
10 remote and unlikely’”) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). For the reasons set
11 forth below, it is clear that Mineral County has stated a claim sufficient to survive a 12(b)(6)
12 motion, as confirmed by the Nevada Supreme Court and Ninth Circuit Court of Appeals
13 decisions, and Defendants’ arguments are without merit.

14
15
16 B. Mineral County Has Stated a Claim Under the Public Trust Doctrine

17 Consistent with the approach taken throughout their *Motion to Dismiss*, Defendants’
18 argument that Mineral County has failed to state a claim relies on a mischaracterization of both
19 Mineral County’s claim as well as the Nevada Supreme Court’s and Ninth Circuit Court of
20 Appeals’ statements of Nevada law. Defendants’ entire failure to state a claim argument rests on
21 a misunderstanding of the nature of Mineral County’s straightforward public trust claim and
22 obvious import of the related rulings of both the Nevada Supreme Court and the Ninth Circuit on
23 the appeal in this subproceeding. A quick review of the law pertaining to the elements of
24 Mineral County’s claim stated in the *Second Amended Complaint* in light of recent appellate
25 court rulings in this case should suffice to make it clear that a public trust claim consistent with
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1 the law has been stated, and therefore this final argument of Defendants is mistaken and without
2 merit. To begin with, there is no question that the public trust doctrine inheres in Nevada law,
3 and that it applies to Walker Lake along with the rest of the Walker River system. *Mineral*
4 *County v. Lyon County*, 473 P.3d 418, 424-25; *see also Mineral County v. WRID*, 986 F.3d at 18-
5 20. The Nevada Supreme Court also has settled that the public trust doctrine imposes a
6 continuing fiduciary duty on the sovereign⁹ to exercise regulatory authority to maintain the trust
7 values of public trust resources such as Walker Lake. *Mineral County*, 473 P.3d at 427, 428-29,
8 429 n.7. A necessary corollary of that continuing fiduciary duty owed by the sovereign to future
9 as well as present members of the public is the right of members of the public, including Mineral
10 County, to petition this Court for relief from the failure to fulfill that duty.

11
12 Defendants misunderstand and ask this Court to misapply the three-part *Lawrence* test
13 relating to the determination of whether a dispensation of public trust property. PT MTD at 24.
14 This argument fails to acknowledge or address two of the Nevada Supreme Court's fundamental
15 holdings on the appeal in *Mineral County v. Lyon County*. First, as noted in the preceding
16 paragraph, is the clear holding in *Mineral County* that even after the initial disposition of trust
17 property the continuing public trust duty continues to bind the sovereign to exercise regulatory
18 authority to maintain public trust resources such as Walker Lake. 473 P.3d at 427. Second, the
19 court in *Mineral County* made clear that the dispensation of usufructuary water rights only could
20 be held to satisfy the third requirement of the *Lawrence* test because various provisions of
21 Nevada statutory water law reflect the Legislature's efforts to provide guidance to the State
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26 ⁹ In this case the sovereign is properly understood to embrace both the Decree Court and the
27 State of Nevada (to the extent the State owns Decreed water rights or the State Engineer
28

1 Engineer – in whose shoes this Court stands in proceedings dealing with the portion of the
2 Walker River system and water rights under the Decree within Nevada – on how to implement
3 the continuing duty under the public trust doctrine to maintain public trust resources. 473 P.3d at
4 428-29, 429 n.7. Pursuant to the Nevada Supreme Court’s holdings in the appeal of this
5 subproceeding, then, there can be doubt that the public trust doctrine imposes a continuing
6 fiduciary duty to protect Walker Lake, as a public trust resource. And, as the Ninth Circuit
7 plainly and correctly held, this leaves it to this Court as the Decree Court to answer the question
8 of what the precise contours of that continuing fiduciary duty are in relation to Walker Lake and
9 the extent to which it requires the Court to modify the management regime established by the
10 Court to administer usufructuary water rights under the Decree. *U.S. v. WRID*, 986 F.3d at 1205-
11 06. Consistent with these appellate rulings, Mineral County’s *Second Amended Complaint*
12 straightforwardly asks this Court to construe the nature and scope of this continuing fiduciary
13 duty to Walker Lake, find that this duty has been breached, and determine which of a range of
14 potential remedies are authorized under that duty and would be most effective in providing relief
15 from the severe harm done to Walker Lake by the failure to fulfill that duty.
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18 An accurate reading of the Nevada Supreme Court’s decision in this case confirms both
19 that individual dispensations of public property are subject to judicial review and that the public
20 trust duty of the state to manage that property for the public good is ongoing. *See Mineral*
21 *County v. Lyon County*, 473 P.3d at 427, 427 n.6; *see also Mineral County v. WRID*, 986 F.3d at
22 1205. Thus, contrary to Defendants’ assertion, the inquiry does not end with the application of
23 the *Lawrence* test merely to the initial general dispensation of usufructuary water rights, nor
24

26 exercises regulatory authority over Decreed rights subordinate to the Court’s ultimate exclusive
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1 would it be appropriate for this Court to abdicate its ongoing public trust responsibility over the
2 waters of the Walker River. Defendants' attempt to argue the opposite is inconsistent with the
3 law and is simply an attempt to re-litigate a point on which they lost on appeal.

4 Defendants even go so far as to argue that Mineral County's public trust claim is
5 inconsistent with Nevada's Constitution, statutes, and inherent limitations on the state's
6 sovereignty. PD MTD at 27. Again, Defendants misunderstand the nature of the public trust
7 doctrine and the Nevada Supreme Court's holdings on the doctrine. Despite having lost this
8 argument on appeal, Defendants continue to argue that Nevada's statutory water laws supplant
9 the public trust doctrine. *Id.* This argument is based on a simple mischaracterization of the
10 Nevada Supreme Court's binding holdings regarding the continuing duty to maintain public trust
11 resources under the public trust doctrine, 473 P.3d at 427, and the relationship between the
12 doctrine and Nevada's statutory water law, which confirm that the statutory water law is
13 consistent with the public trust doctrine in large part because it reflects but does not supplant the
14 doctrine. 473 P.3d at 424-26, 429 n.7. These holdings form the basis for the Ninth Circuit Court
15 of Appeals remand of Mineral County's public trust claim for a determination as to what
16 remedies can be implemented to satisfy that duty. 986 F.3d at 1205-06. The question is not, as
17 Defendants argue, whether there is a continuing duty to manage the Walker River Decree
18 consistent with the public trust doctrine. As we have explained, that question has been settled in
19 the affirmative by both the Ninth Circuit and the Nevada Supreme Court.

20 The question, as the Ninth Circuit clearly stated, is whether that ongoing duty has been
21 violated, and if so, what the proper remedy for that violation is. *Mineral County v. WRID*, 986

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26 jurisdiction.

1 F.3d 1197, 1205 (9th Cir. 2021). Consistent with that ruling, Mineral County's *Second Amended*
2 *Complaint* merely requests enforcement of Nevada law consistent with the sovereign's public
3 trust responsibilities, and consistent with the Nevada Supreme Court's and Ninth Circuit's
4 statements on the availability of such remedies. The dire environmental condition of Walker
5 Lake due to the overappropriation and mismanagement of the Walker River Basin over the past
6 century and a half, a condition and history noted by all courts to pass on Walker River issues,
7 leaves no doubt that the public trust duty to Walker Lake has been violated. The only real
8 remaining question is what remedies would be appropriate and effective.
9

10 **CONCLUSION**

11 For the reasons set forth above, Mineral County respectfully urges the Court to deny
12 Principal Defendants' *Motion to Dismiss* in its entirety.

13 Respectfully submitted this 31st day of May, 2022,

14 /s/ Simeon Herskovits

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CERTIFICATE OF SERVICE

1
2 I hereby certify that on this 31st day of May, 2022, I electronically filed the foregoing
3 **RESPONSE TO PRINCIPAL DEFENDANTS' MOTION TO DISMISS MINERAL**
4 **COUNTY'S SECOND AMENDED COMPLAINT IN INTERVENTION** with the Clerk of
5 the Court using the CM/ECF system, which will send notification of such filing to the email
6 addresses that are registered for this case.
7

8 Additionally, I hereby certify that on this 31st day of May, 2022, I caused to be served,
9 via United States Postal Service First Class Mail, a complete copy of the foregoing **RESPONSE**
10 **TO PRINCIPAL DEFENDANTS' MOTION TO DISMISS MINERAL COUNTY'S**
11 **SECOND AMENDED COMPLAINT IN INTERVENTION**, on the following Defendant who
12 has been granted mailed service by the Court:
13

14 Joe and David Sceirine Ranches
15 P.O. Box 1013
16 Yerington, NV 89447
17
18

19 /s/Iris Thornton
20 Iris Thornton
21
22
23
24
25
26
27
28