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12 IN THE UNITED STATES DISTRICT COURT
13
14 FOR THE DISTRICT OF NEVADA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

3:73-cv-00128-MMD-CSD

17 WALKER RIVER PAIUTE TRIBE,

18 Plaintiff-Intervenor,

19 v.

20 WALKER RIVER IRRIGATION DISTRICT,
a corporation, et al.,

21 Defendants.

**PRINCIPAL DEFENDANTS’ REPLY
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
MINERAL COUNTY’S SECOND
AMENDED COMPLAINT IN
INTERVENTION**

22
23 MINERAL COUNTY,

24 Plaintiff-Intervenor,

25 v.

26 WALKER RIVER IRRIGATION DISTRICT,
et al.,

27 Defendants.
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14
15
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21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. THE MANDATE DOES NOT PREVENT THE COURT FROM CONSIDERING THE ISSUES RAISED BY THE MOTION TO DISMISS..... 1

III. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE COUNTY’S PUBLIC TRUST CLAIM..... 2

A. The Conclusion that Paragraph XIV of the Decree Was a Retention of Jurisdiction to Litigate Claims for Additional Water Rights Does Not Encompass the Claim the County Makes Here.2

B. This Court Has Never Exercised Exclusive Or *In Rem* Jurisdiction Over the Waters of the Walker River.3

C. The Court Does Not Have Supplemental Jurisdiction Over the County’s Public Trust Claim.6

D. The Court Does Not have Jurisdiction over the County’s Public Trust Claim Under the All Writs Act.6

E. The County Has Not Met Its Burden to Establish Standing Here and Therefore There is No Subject Matter Jurisdiction.7

F. This Court must Determine, in the First Instance, Whether the Complaint Implicates the Political Question Doctrine.9

IV. THE STATE IS A NECESSARY PARTY AND AN UNNAMED DEFENDANT.... 12

V. THE COUNTY HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED..... 13

A. Nevada’s Public Trust Doctrine Does Not Impose An Affirmative Duty On Nevada Or this Court to Ensure the Restoration of Walker Lake.13

B. The County’s Public Trust Argument is Inconsistent with Nevada’s Public Trust Doctrine As Interpreted by the Nevada Supreme Court in *Lyon County*.15

VI. CONCLUSION..... 16

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Bahrampour v. R.O. Lampert,
356 F.3d 969 (9th Cir. 2004).....6

Baker v. Carr,
369 U.S. 186 (1962)..... 11, 12

Central Reserve Life of North America Ins. Co. v. Struve,
852 F.2d 1158 (9th Cir. 1988)..... 13

Church of Scientology of California v. United States,
506 US 9 (1992).....7

Demery v. Kupperman,
735 F.2d 1139 (9th Cir. 1984)..... 13

Duensing v. Gilbert,
2013 WL 1316890 (D.Nev. 2013) 12

Dugan v. Rank,
372 U.S. 609 (1963)..... 13

Gudenavichene v. Mortgage Elec. Registration Sys.,
2012 WL 1142868 (D. Nev. 2012) 12

In Re Zappos.com,
888 F.3d 1020 (9th Cir. 2018).....7

Julianna v. United States,
947 F.3d 1159 (9th Cir. 2020).....8

Knickmeyer v. Nevada ex rel Eighth Judicial District Court,
173 F.Supp.3d 1034 (D. Nev. 2016) 12

Lawrence v. Clark County,
254 P.3d 606 (Nev. 2011) 10, 14, 15

Miller & Lux v. Rickey
127 F. 573 (Cir. Ct. Nev. 1904)..... 4

Mineral County v. Lyon County,
473 P.3d 418 (Nev. 2020)1, 2, 5, 10, 13-16

Mineral County v. Nevada,
20 P.3d 800 (Nev. 2001)5

Mineral County v. Walker River Irrig. Dist.,
986 F.3d 1197 (9th Cir. 2021)..... 1, 2, 5, 9, 10

Mono County (sic) v. Walker River Irrig. Dist.,
735 Fed. Appx. 271 (9th Cir. 2018).....2

National Audubon Society v. Superior Court,
658 P.2d 709 (Cal. 1983) 14

Nevada v. United States,
463 U.S. 110 (1983).....4

Renee v. Dunkin,
686 F.3d 1002 (9th Cir. 2012).....7

San Carlos Apache Tribe v. Superior Court,
972 P.2d 179 (Ariz. 1999)..... 11

1 *The Wilderness Society v. Norton*,
 434 F.3d 584 (DC Cir. 2006) 7

2 *United States v. Alpine Land & Reservoir Co*,
 174 F.3d 1007 (9th Cir. 1999)..... 5

3 *United States v. Cote*,
 51 F.3d 178 (9th Cir. 1995)..... 1

4 *United States v. New Mexico*,
 438 US 696 (1978) 6

5 *United States v. Walker River Irrg. Dist.*,
 890 F.3d 1161 (9th Cir. 2018)..... 3

6 *United States v. Walker River Irrg. Dist.*,
 11 F.Supp. 158 (D. Nev. 1935) 4

7 *Uzuegbunam v. Preczewski*,
 141 S.Ct. 792 (2021) 7

8 *Walden v. Nevada*,
 945 F.3d 1088 (9th Cir. 2019)..... 12

9 *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 448 P.3d 1106 (2019) 11

10

11 **Statutes**

12 28 U.S.C. § 1367 6

13 28 U.S.C., §1651 6

14 NRS 501.331 13

15 NRS 532.165 13

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1 **I. INTRODUCTION.**

2 Mineral County’s Response to the Principal Defendants’ Motion to Dismiss (ECF 1051) is
3 based upon an alleged duty under Nevada’s public trust doctrine that does not exist as a matter of
4 law. From that non-existent legal duty, the County seeks remedies that are not available.

5 Based upon the opinion in *Mineral County v. Lyon County*, 473 P.3d 418 (Nev. 2020)
6 (hereinafter “*Lyon County*”) the only public trust duty is to follow Nevada’s comprehensive water
7 law which itself satisfies Nevada’s public trust doctrine. Even if this Court believes Nevada’s water
8 law should do more, it cannot substitute its judgment for that of the Nevada Legislature.
9 Consequently, Mineral County’s Second Amended Complaint fails and should be dismissed.

10 **II. THE MANDATE DOES NOT PREVENT THE COURT FROM**
11 **CONSIDERING THE ISSUES RAISED BY THE MOTION TO DISMISS.**

12 The Ninth Circuit’s mandate allowing the County to “pursue its public trust claim to the
13 extent that the County seeks remedies that would not allow a reallocation of water rights” does not
14 preclude consideration of any issue raised by the Motion to Dismiss. Under the “mandate rule,”
15 the trial court may consider and decide any matters left open by the mandate. *See, United States v.*
16 *Cote*, 51 F.3d 178, 182 (9th Cir. 1995). In deciding what matters are left open by a mandate, the
17 Court may review the opinion delivered by the Ninth Circuit and its separate memorandum on
18 standing. *Id.*

19 The only issue the mandate did not leave open is the County’s inability to seek a
20 reallocation of water rights. Accordingly, all other issues remain open. The opinion recognizes
21 “the County argues that ‘the public trust doctrine imposes a continuing duty on the Decree court
22 to manage the resource for the benefit of future generations using remedies other than a
23 reallocation of water rights, which is not permitted.’” *Mineral County v. Walker River Irrig. Dist.*,
24 986 F.3d 1197, 1205 (9th Cir. 2021). However, the Ninth Circuit did not decide that the continuing
25 duty the County alleges in its Second Amended Complaint actually exists under Nevada’s public
26 trust doctrine.

27 No court has considered whether this Court has subject matter jurisdiction over the claim
28 now asserted. Moreover, no court has addressed whether the County can satisfy the redressability

1 requirement for standing based upon the remedies it now seeks. The Circuit’s previous ruling on
2 standing was based upon the incorrect assumption that the County could obtain a reallocation of
3 water rights without action by the Nevada Legislature. *See, Mono County (sic) v. Walker River*
4 *Irrig. Dist.*, 735 Fed. Appx. 271, 274 (9th Cir. 2018). As a result of the decision in *Lyon County*,
5 however, we know now that such a reallocation cannot happen absent such action. Nothing in the
6 Circuit’s decision precludes this Court from considering whether the remedies the County seeks
7 will redress its alleged injuries. Moreover, no court has considered whether those remedies
8 implicate the political question doctrine. Finally, no court has considered whether, in light of the
9 remedies the County now seeks, the State of Nevada is a necessary but unjoined party.

10 The issues raised in the Motion to Dismiss were left by the mandate for this Court to
11 consider in the first instance. In fact, the Ninth Circuit declined to address the viability of the
12 County’s proposed remedies under Nevada’s public trust doctrine, although it did recognize that
13 defense arguments concerning their legal deficiencies may have merit. To this end, the Ninth
14 Circuit made clear that “arguments [which] have not been developed, passed on by the district
15 court, or briefed on appeal” should be left “for the district court to address in the first instance, on
16 remand.” *Mineral County*, 986 F.3d at 1206. This is precisely what the Principal Defendants ask
17 this Court to do now because no Court has, to date, expressly done so. And, more importantly, the
18 remedies the County does propose cannot be maintained as a matter of law.

19 Neither the Nevada Supreme Court’s delineation of Nevada’s public trust doctrine, nor the
20 Ninth Circuit’s decision to remand this case to this Court save the County’s deficient complaint or
21 serve as procedural or substantive hurdles to the pending motion. In issuing the mandate, the Ninth
22 Circuit did not decide that the County has a viable claim under Nevada’s public trust doctrine and
23 did not decide any of the other issues raised by the Motion to Dismiss. Therefore, this Court may
24 consider and decide them now.

25 **III. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER 26 THE COUNTY’S PUBLIC TRUST CLAIM.**

27 **A. The Conclusion that Paragraph XIV of the Decree Was a Retention of Jurisdiction 28 to Litigate Claims for Additional Water Rights Does Not Encompass the Claim the County Makes Here.**

1 In *United States v. Walker River Irrig. Dist.*, 890 F.3d 1161 (9th Cir. 2018), the Court held
2 that paragraph XIV of the Decree “may properly be read as also retaining jurisdiction in the Nevada
3 district court to litigate additional rights in the Walker River Basin.” 890 F.3d at 1171. It reached
4 that conclusion “because the Supreme Court in *Arizona II* relied on a reference to modification of
5 the *Arizona I* decree to conclude that it retained its jurisdiction to hear a suit asserting claims for
6 additional rights.” 890 F.3d at 1171.

7 It did not consider whether that retention of jurisdiction to modify the Decree included the
8 litigation the County brings here concerning a declaration of Nevada’s public trust duties with
9 respect to Walker Lake. Here, the County does not seek to “modify” the Decree. Its declarations
10 seek instead a wide range of relief, none of which modifies the Decree. There is no jurisdiction
11 under Paragraph XIV for any remedy the County seeks that, if granted, would not modify the
12 Decree.

13 **B. This Court Has Never Exercised Exclusive Or *In Rem* Jurisdiction Over the Waters**
14 **of the Walker River.**

15 The County argues that this Court has “for more than a century... exercised exclusive
16 jurisdiction over the waters of the Walker River Basin.” ECF 1051 at 12, Ins. 15-16. In support of
17 that contention, the County points to various orders of the Court concerning rules for the
18 distribution of water, appointment of a water master and rules concerning changes to water rights
19 adjudicated by the Decree. *Id.* at 13-15.

20 The Motion does not question the Court’s jurisdiction and power to modify or amend any
21 prior orders it has made, including the Order Approving Rules and Regulations For Distribution
22 of Water On the Walker River System pursuant to Paragraph XV of the Decree, its orders
23 appointing a water master pursuant to Paragraph XV of the Decree, and its orders adopting rules
24 and regulations for changes to water rights pursuant to Paragraphs XIV and XV of the Decree. The
25 Court has jurisdiction over all of those, not only pursuant to those paragraphs of the Decree, but
26 also pursuant to the All Writs Act with respect to administration of the Decree. Requests to modify
27 or amend any of those orders can be considered and acted upon by a motion made by an interested
28 party without regard to the duties Nevada may or may not have under the public trust doctrine with

1 respect to Walker Lake.

2 However, none of those orders are or were based upon a determination that the Court has
3 “exclusive jurisdiction over the waters of the Walker River Basin.” ECF 1051 at 12. Those orders
4 are based on the Court’s power to enforce its decree and administer the water rights adjudicated
5 by it. The fact the Court exercised any jurisdiction does not mean that it has jurisdiction in this
6 case to adjudicate Nevada’s public trust obligations with respect to Walker Lake.

7 This also is not an *in rem* action. Although *in personam* water right adjudications are
8 sometimes analogized to an *in rem* action, they are not *in rem* actions. *See, Nevada v. United States*,
9 463 U.S. 110, 143-144 (1983). There is nothing in the Amended Complaint filed in 1926 to suggest
10 that the United States asked this Court to assume *in rem* jurisdiction over the Walker River in
11 Nevada or in California. The Court could not have assumed such jurisdiction over the Walker
12 River in California because it is outside the boundaries of the District of Nevada. *See, Miller &*
13 *Lux v. Rickey*, 127 F.573, 575 (Cir. Ct. Nev. 1904).

14 The 1926 action was one in equity brought by the United States as plaintiff against some
15 253 defendants. The action was an *in personam* action under the provisions of 42 U.S. Stat. 849.
16 *See, United States v. Walker River Irrig. Dist.*, 11 F.Supp. 158, 159 (D. Nev. 1935). That statute
17 allowed a proceeding to be brought by the United States in any district where any one of the
18 defendants being a necessary party was an inhabitant. It allowed service of process to run in any
19 other district where a defendant was found as if service happened in the district where the action
20 was brought. It gave the district court personal jurisdiction over persons and entities outside of
21 Nevada, including in California.

22 Moreover, we have found no case to hold a court that enters a water decree thereafter has
23 exclusive and ongoing jurisdiction to determine any and all claims related to the water source
24 involved in its decree. When this Court quieted title and determined the relative rights of water
25 users, it determined by decree the use rights of the parties at that time. It did not carve up ownership
26 of the Walker River per se. Nevada and California hold that ownership.

27 The Decree itself is evidence the Court did not understand or assert that it alone was the
28 only entity with authority over the water of the Walker River, much less over Nevada’s alleged

1 public trust obligations with respect to Walker Lake. The Decree on its face recognizes that since
2 1905 in Nevada, and since 1914 in California, rights for the use of water could only be obtained
3 under state law by an application for a permit issued by the appropriate state agency. Paragraph
4 IX of the Decree tabulates several applications made to the Nevada State Engineer for permits to
5 appropriate water. The Decree provides those applications are subject to final action by the State
6 Engineer. It says the same with respect to California in Paragraph VIII of the Decree. Those
7 provisions belie any contention that Paragraph XIV of the Decree, or any analogy to *in rem*
8 jurisdiction gives this Court exclusive jurisdiction to hear any and all claims related to the Walker
9 River, including a claim concerning Nevada's alleged public trust obligations to Walker Lake.

10 *Mineral County v. Nevada*, 20 P.3d 800 (Nev. 2001), is not contrary to that conclusion.
11 Relying on that case, the County accuses the District and Lyon County of contradiction. ECF 1051
12 at 16, Ins. 2-20. There is no contradiction when the matters are placed in context.

13 Here, the County cannot seek any reallocation of the water rights adjudicated by the
14 Decree. Among other things, in *Mineral County*, the County filed an original petition in the Nevada
15 Supreme Court seeking a Writ of Mandamus to compel Nevada, through the Department of
16 Conservation, to reconsider the appropriations and allocations of the waters of the Walker River
17 system to provide for an annual instream flow to Walker Lake. In other words, it was seeking a
18 reallocation of the water rights adjudicated by the Decree. It was in that context that the District
19 and Lyon County argued, and the Nevada Supreme Court concluded, that the “decree court, which
20 has had continuing involvement in the monitoring of the Walker River for more than eighty years,
21 is the proper forum for the redress that the Petitioner's seek.” *Id.*, 20 P.3d at 807. [Emphasis added.]
22 That is not the case now because reallocation is unavailable.

23 *United States v. Alpine Land & Reservoir Co*, 174 F.3d 1007 (9th Cir. 1999) is also
24 inapplicable. There, Churchill County appealed to a state court a State Engineer ruling concerning
25 a change to a water right adjudicated in the Alpine Decree. The Alpine Decree expressly provides
26 and reserves jurisdiction to review State Engineer decisions concerning changes to Alpine Decree
27 water rights. 174 F.3d at 1011. Thus, the court found that the change application at issue was within
28 the scope of jurisdiction reserved by the Alpine Decree. *Id* at 174 F.3d at 1014. There is no express

1 reservation in this Decree concerning decisions relating to Nevada’s alleged public trust
2 obligations to Walker Lake. Because the reallocation of adjudicated water rights is not a lawful
3 and available remedy, there is no action involved here which arises under the Decree.

4 **C. The Court Does Not Have Supplemental Jurisdiction Over the County’s Public Trust**
5 **Claim.**

6 The Court does not have supplemental jurisdiction over the public trust claim based upon
7 the “ongoing litigation” related to the claims of the United States and Walker River Tribe for
8 additional water for the Reservation. To establish supplemental jurisdiction based upon those
9 claims, the County must show its public trust claim is part of the same case or controversy, as
10 required by 28 U.S.C. § 1367. A claim is part of the same case or controversy when it shares a
11 common nucleus of operative facts with the other claims, and they would normally be tried
12 together. See, *Bahrampour v. R.O. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004).

13 Here, the claims asserted for the Walker River Reservation do not arise out of a common
14 nucleus of operative facts with the County’s public trust claim. They are not claims that would
15 normally be tried together and, in fact, are not being tried together. They do not rely on identical,
16 or even similar, facts for their resolution, and thus do not form part of the same case or controversy
17 under Article III for purposes of supplemental jurisdiction.

18 The operative facts necessary to establish the existence of a right to water based upon
19 federal law are that the land has been reserved by the United States for a federal purpose, the date
20 of reservation, a primary reservation purpose requiring water, and an amount of water necessary
21 to fulfill that primary purpose. See, *United States v. New Mexico*, 438 US 696, 698-702 (1978).
22 The County’s Second Amended Complaint asserts operative facts under its public trust claim
23 related to Walker Lake that do not involve any similar nucleus of operative facts. The Court does
24 not have supplemental jurisdiction to hear the County’s claim based upon the public trust doctrine.

25 **D. The Court Does Not have Jurisdiction over the County’s Public Trust Claim Under**
26 **the All Writs Act.**

27 The County does not dispute that the All Writs Act, 28 U.S.C., §1651, does not provide an
28 independent basis for subject matter jurisdiction in its own right. Instead, it again accuses the

1 District of contradicting a position it took in 1991 when it filed a Petition for Declaratory and
2 Injunctive relief. ECF 1051 at 18-19. No useful purpose is achieved by explaining why the All
3 Writs Act applied there. Suffice it to say it does not apply here.

4 The County does not seek to enforce the Decree. It argues that its public trust claim is
5 brought to “ensure that the decree is administered consistent with the continuing public trust duty
6 to preserve Walker Lake as a public trust resource.” ECF 1051 at 19, Ins. 3-7. Presently, there is
7 nothing in the Decree which is being frustrated by its administration as written. There is nothing
8 in the Decree which the County seeks to enforce here.

9 **E. The County Has Not Met Its Burden to Establish Standing Here and Therefore**
10 **There is No Subject Matter Jurisdiction.**

11 Even if a plaintiff is not obligated to guarantee its injuries will be redressed by a favorable
12 decision, the plaintiff must nevertheless show the relief sought is “substantially likely” as opposed
13 to “merely speculative,” to redress its injuries. The County relies on *Renee v. Dunkin*, 686 F.3d
14 1002 (9th Cir. 2012) to assert that a change in legal status can establish redressability, and under
15 the facts of that case it did. *See, Renee*, 686 F.3d at 1013-1014. However, that has no application
16 here.

17 The County’s reliance on *In Re Zappos.com*, 888 F.3d 1020 (9th Cir. 2018) to contend that
18 it need only have one viable basis for standing to survive a motion to dismiss is also misplaced.
19 ECF 1051 at 19. The *Zappos* Court did not refer to the redressability prong of standing. It referred
20 to the injury requirement for standing. *See, In Re Zappos*, 888 F.3d at 1030, n. 15.

21 This is also not a case involving mootness where a “nominal” remedy, like nominal
22 damages for violation of a constitutional right, is appropriate redress as was the case of
23 *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021), or a partial remedy, like the return or destruction
24 of copies of unlawfully taken records, is appropriate redress as was the case in *Church of*
25 *Scientology of California v. United States*, 506 US 9 (1992).

26 The Court is not obligated to ignore logic and reason in deciding whether it is “likely,” as
27 opposed to “merely speculative,” that an injury will be redressed by a favorable decision. *See, The*
28 *Wilderness Society v. Norton*, 434 F.3d 584, 592 (DC Cir. 2006), (“it simply defies reason to think

1 that a court order compelling NPS to issue final boundary maps and legal descriptions of Death
2 Valley National Park will reduce off-road vehicle abuses in the wilderness.”). Here, the same can
3 be said of those remedies which may be within the Court’s power to award.

4 For example, amending the 1953 Rules and Regulations to add a seventh division, changing
5 the makeup of the Board of Water Commissioners, requiring more transparency in the
6 administration of the Decree and ordering additional gaging stations are not substantially likely to
7 redress the County’s alleged injuries. They will not produce the hundreds of thousands of acre feet
8 of water needed purportedly to provide a viable put and take Lahontan Cutthroat Trout fishery.
9 Moreover, even if the Court had the power to and did require the denial of change applications yet
10 to be filed, declare the system over appropriated, cancel unperfected permits, require denial of
11 pending applications for new permits, cancel water rights or find unidentified water rights
12 abandoned, to name just a few, its actions are not substantially likely to provide the water needed
13 to redress the County’s claimed injuries. None of those actions would change the status quo with
14 respect to the use of water.

15 A plan and funding to restore and maintain Walker Lake “at a minimum water level of
16 approximately 3,965 feet above mean sea level, or a Lake salinity level of 10,000 mg/l TDS”¹ is
17 no less likely to involve an indeterminate number of legislative policy decisions than one to reduce
18 atmospheric carbon levels to 350 parts per million to stabilize the global climate. The alleged clear
19 legal standard of a “continuing fiduciary duty under the public trust doctrine to protect and preserve
20 Walker Lake’s trust values,” is no standard at all. It is an invitation for a court to inject itself into
21 areas reserved for the executive and legislative branches of government. This case is not
22 distinguishable from *Julianna v. United States*, 947 F.3d 1159 (9th Cir. 2020), on those bases. *See*,
23 ECF 1051 at 22. An order for such a plan involves all of the same problems that the *Julianna* court
24 found present. Moreover, any such plan would have to consider the climate change which could
25 not be redressed in *Julianna*.

26 The County argues only a “small subset of the 23 remedies requested... make any mention

27 _____
28 ¹ The Lake’s current elevation is 3909.9 feet above mean sea level. Its salinity is 26,100 TDS
(mg/l).

1 [of] action at all by the state... and that the only type of action that might involve the legislature
2 would be approval of funding,” which the County contends does not require any legislative policy
3 decision making. ECF 1051 at 21, ln 26-22 ln. 9. The remedies requiring funding are in paragraphs
4 12, 15, 17, and 18 of its prayer. To suggest that funding decisions made by a legislature do not
5 involve policy, like decisions to fund the remedies the County seeks here, ignores reality.

6 **F. This Court must Determine, in the First Instance, Whether the Complaint**
7 **Implicates the Political Question Doctrine.**

8 The remedies the County seeks implicate the political question doctrine. The County
9 ignores this fact, arguing that courts can embrace nonjusticiable political questions in *all* cases
10 involving the public trust doctrine. The public trust doctrine does not, however, magically
11 transform nonjusticiable political questions into legitimate legal remedies. Moreover, the history
12 of this case demonstrates that neither the Ninth Circuit nor the Nevada Supreme Court intended
13 for this Court to re-write Nevada’s comprehensive water law or ignore the legal deficiencies in the
14 County’s Complaint. And finally, case law is clear that this Court should decline the County’s
15 invitation to mandate how the State of Nevada should discharge its public trust duties when, as
16 here, there is no allegation that the State has failed to abide Nevada’s comprehensive water law
17 and, consequently, the public trust doctrine that is codified in it.

18 In its Response, the County mischaracterizes the Ninth Circuit’s decision remanding
19 this case and improperly conflates the public trust doctrine with the legal viability of the remedies
20 it now seeks to pursue. The Ninth Circuit expressly and explicitly *declined* to address the legal
21 viability of the remedies the County now seeks, stating that “these arguments have not been
22 developed, passed on by the district court, or briefed on appeal. ***We therefore leave them for the***
23 ***district court to address, in the first instance, on remand.***” *Mineral County*, 986 F.3d at 1206
24 (emphasis added). Thus, the County’s repeated assertion that the Defendants have already lost the
25 political question issue is false. Moreover, the Defendants do not assert that the Court cannot
26 interpret or apply the public trust doctrine, as the County falsely suggests. Instead, the Defendants
27 maintain that the remedies the County proposes would constitute judicially-crafted remedies that
28 are inconsistent with Nevada’s comprehensive statutory water law, which the Nevada Supreme

1 Court has determined adheres to the public trust doctrine. Thus, the Court, in addressing the
2 political questions doctrine in the first instance, should find that the remedies the County seeks
3 threaten to unsettle the balance between the judicial and legislative branches of government and
4 accordingly involve nonjusticiable political questions. The fact that the remedies are sought under
5 the guise of the public trust doctrine does not alter this conclusion.

6 Indeed, the remedies the County proposes – found only in a *dissenting opinion* in *Lyon*
7 *County*, 473 P.3d at 431-32 – cannot be maintained as a matter of law in the wake of the *majority*
8 *opinion* in *Lyon County*. In that decision, the court reached the following conclusions and holdings:

9 [W]e hold that Nevada’s comprehensive water statutes are already consistent
10 with the public trust doctrine because they (1) constrain water allocations based
11 on the public interest and (2) satisfy all of the elements of the dispensation of
12 public trust property that was established in *Lawrence*.

13 *Id.* at 513, 473 P.3d at 426.

14 [W]e cannot use the public trust doctrine as a tool to uproot an entire water
15 system, particularly where finality is firmly rooted in our statutes. We cannot
16 read into the statutes any authority to permit reallocation when the Legislature
17 has already declared that adjudicated water rights are final, nor can we substitute
18 our own policy judgments for the Legislature’s.

19 *Id.* at 519, 473 P.3d at 430.

20 The Nevada Supreme Court found that Nevada’s comprehensive water law is consistent
21 with the public trust doctrine and that the public trust doctrine may not be used by courts in Nevada
22 to uproot Nevada’s comprehensive water statutes. The Ninth Circuit remanded the case for the
23 narrow and limited purpose of permitting the County to attempt to state a claim and seek remedies
24 that do not involve the reallocation of water rights “adjudicated under the [Walker River] Decree
25 and settled under the doctrine of prior appropriation.” *Mineral County*, 986 F.3d at 1206.
26 Accordingly, it is appropriate and necessary for this Court to determine whether the County’s
27 claims present nonjusticiable political questions.

28 The Ninth Circuit declined to address this argument in the first instance. In declining to
address the legal viability of the remedies sought by the County, the Ninth Circuit noted that the
defense arguments concerning the legal deficiencies of the County’s requested remedies may have
merit. *See id.* (“To be sure, some of the arguments the Irrigation District raises may have merit”).

1 As demonstrated in the Motion through consideration of the factors enumerated in *Baker v. Carr*,
2 369 U.S. 186 (1962), the Defendant’s arguments *do* have merit.

3 Rather than address those arguments directly, the County cites cases supporting the
4 proposition that “[i]t is for the courts to decide whether the public trust doctrine is applicable to
5 the facts.” ECF 1051 at 24:12-13 (citations omitted). This question is not presented by the Motion.
6 The Nevada Supreme Court has already determined that the public trust doctrine is applicable to
7 the facts of this case, but that Nevada’s comprehensive water law is consistent with the public trust
8 doctrine and Nevada courts should not uproot that system. Thus, the actual question presented by
9 the Motion is whether this Court should order the State to perform actions that are not embodied
10 in the Nevada’s comprehensive water statutes. This Court should not do so.

11 The County relies on *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz.
12 1999), for the proposition that courts may invalidate legislative attempts to restrict the applicability
13 and scope of the public trust doctrine. ECF 1051 at 25, n.8. In that case, however, the Arizona
14 Supreme Court considered a legislative act and determined that the Arizona legislature exceeded
15 its constitutional authority by enacting a statute that violated the public trust doctrine. The decision
16 in *San Carlos* is, therefore, distinguishable; indeed, it is completely inapposite. The Nevada
17 Supreme Court has already determined that the Nevada Legislature has *not* exceeded its authority
18 by instituting Nevada’s comprehensive water statutes, and that those statutes are consistent with
19 the public trust doctrine. Thus, this Court is not being asked to determine whether a legislative act
20 violates the public trust doctrine as was the case in *San Carlos*. Instead, the County is asking this
21 Court to substitute its judgment for that of the Nevada Legislature and order the State of Nevada
22 to do certain things, even after the Nevada Supreme Court found Nevada’s comprehensive water
23 statutes to be consistent with the public trust doctrine. *San Carlos*, and the other cases cited by the
24 County are, therefore, inapplicable² and an analysis of the *Baker* factors is appropriate.

25
26 ² The facts of this case are not analogous to those cases cited by the County, including *Wilson v.*
27 *Happy Creek, Inc.*, which recognizes a district court’s limited equitable powers in construing a
28 specific statute: NRS 533.395. Importantly, the Nevada Supreme Court indicated that the scope
of those powers is narrow. “[T]his case presents unique facts that fit squarely within th[e] limiting
principles previously established.” 135 Nev. 301, 314, 448 P.3d 1106, 1116 (2019). The County’s
reliance on *Wilson* is inappropriate because it seeks broad remedies that are not authorized in

1 Tellingly, the County summarily dismissed the applicability of *Baker* and thus declined to
2 address the factors for determining whether a nonjusticiable political question is before this Court.
3 This omission demonstrates that the County cannot explain how its proposed remedies are proper
4 or why they do not involve political questions. Accordingly, the County all but concedes that the
5 political question doctrine is an insurmountable hurdle to its case if the doctrine applies.³ The
6 doctrine does apply, and the factors in *Baker* are present here. The County seeks Court
7 management of operations committed to other government branches. Thus, the Court should
8 dismiss the Complaint for presenting nonjusticiable political questions irrespective of the County's
9 argument that those questions are presented under the public trust doctrine.

10 **IV. THE STATE IS A NECESSARY PARTY AND AN UNNAMED DEFENDANT.**

11 The parties named by the County cannot afford it the relief it seeks. The County asks the
12 Court for declaratory relief against the State of Nevada specifically. The Nevada Department of
13 Wildlife ("NDOW") and the State Engineer are not the State of Nevada, and the remedies the
14 County seeks cannot be implemented by either NDOW or the State Engineer either individually
15 or collectively. The County makes the unsupported and conclusory assertion that the State of
16 Nevada is a party to these proceedings through the Nevada State Engineer and the NDOW.⁴ ECF
17 1051 at 27:21-23. The County does not distinguish between the State of Nevada and these two
18 agencies, but the law does.⁵ An executive department such as NDOW is not the State. Similarly,
19 an officer such as the Nevada State Engineer, appointed by an executive officer, is not the State.

20 Notably, while NDOW is the agency charged with administering the wildlife laws of the
21 Nevada's comprehensive water statutes; namely, state funding and programs for the purported
22 benefit of Walker Lake.

23 ³ "The failure of the opposing party to file points and authorities in response to any motion shall
24 constitute a consent to granting the same." D. Nev. 7-2(d). "This failure-to-oppose rule does not
25 apply solely to failure to file a physical document, but also failure to assert in an opposition
26 argument that oppose those presented in the motion." *Knickmeyer v. Nevada ex rel Eighth Judicial
27 District Court*, 173 F.Supp.3d 1034, 1044 (D. Nev. 2016) (citing *Duensing v. Gilbert*, 2013 WL
28 1316890 (D.Nev. 2013) (failing to respond to defendant's arguments on the issue constituting
consent to the granting of the motion); *Gudenavichene v. Mortgage Elec. Registration Sys.*, 2012
WL 1142868 (D. Nev. 2012) (plaintiff's failure to respond to any of the arguments raised in the
motion to dismiss constituted consent to granting the motion).

⁴ NDOW is a party as a water right holder. The State Engineer is not a Party.

⁵ See, e.g., *Walden v. Nevada*, 945 F.3d 1088, 1090 (9th Cir. 2019) (wherein the Plaintiffs alleged
violations by the "State of Nevada and the Nevada Department of ..." (emphasis added).

1 State of Nevada,⁶ and the State Engineer is responsible for administering and enforcing Nevada’s
2 water laws,⁷ the County seeks remedies that exceed Nevada’s current comprehensive water
3 statutes, including funding programs and plans like those the County seeks. NDOW and the State
4 Engineer are not empowered to fund programs and plans like the ones the County seeks.
5 Consequently, the State of Nevada is the real party in interest in this matter and the County requires
6 a judgment against the State of Nevada to be afforded the declaratory and injunctive relief that it
7 seeks.

8 Additionally, the County cannot avoid the categorical bar to the relief it seeks by focusing
9 on NDOW and the State Engineer. “Where the state is in fact the real party in interest, the eleventh
10 amendment precludes a district court from exercising jurisdiction over the claims presented even
11 though only state officials have been named as party defendants.” *Central Reserve Life of North*
12 *America Ins. Co. v. Struve*, 852 F.2d 1158, 1160-61 (9th Cir. 1988) (citation omitted). A state is
13 deemed to be the real party in interest where “‘the judgment sought would . . . interfere with the
14 public administration,’ or if the effect of the judgment would be ‘to restrain the Government from
15 acting, or to *compel it to act.*’” *Demery v. Kupperman*, 735 F.2d 1139, 1146 (9th Cir. 1984)
16 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (emphasis added).

17 By the unambiguous language of the Amended Complaint, the County seeks to compel the
18 State of Nevada to act. Further, the effect of a judgment of this Court in the County’s favor would
19 directly interfere with the State of Nevada’s public administration. Thus, the State of Nevada is a
20 necessary and indispensable party to this action. Yet, it is absent. The County’s claims must
21 therefore be dismissed.

22 **V. THE COUNTY HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF**
23 **CAN BE GRANTED.**

24 **A. Nevada’s Public Trust Doctrine Does Not Impose An Affirmative Duty On**
25 **Nevada Or this Court to Ensure the Restoration of Walker Lake.**

26 Whether the County has stated a claim upon which relief may be granted under Nevada’s
27 public trust doctrine turns on whether *Lyon County* “settled that the public trust doctrine imposes

28 ⁶ See, e.g., NRS 501.331.

⁷ See, e.g., NRS 532.165-167.

1 a continuing fiduciary duty on the sovereign to exercise regulatory authority to maintain the trust
2 values of public resources such as Walker Lake.” ECF 1051 at 31, Ins. 5-8. The Nevada Supreme
3 Court did precisely the opposite.

4 The County continues to consider Walker Lake as the resource to be protected by Nevada’s
5 public trust doctrine. However, consistent with its prior application of the public trust doctrine in
6 *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011), the Nevada Supreme Court considered the
7 resource to be the right to use water, not Walker Lake. The Court analyzed the legislature’s
8 dispensation of the right to use water under the three-part test that it had established in *Lawrence*.
9 Nowhere did the Court suggest that even if the dispensation of the right to use water satisfied the
10 *Lawrence* test, Nevada’s public trust doctrine nevertheless imposed a continuing duty to exercise
11 regulatory authority over that dispensation to restore Walker Lake.

12 Before the Nevada Supreme Court, the County argued that “the statutory scheme did not
13 ensure that the state is fulfilling its continuous public trust duties.” It maintained that the “statutory
14 scheme does not place an affirmative fiduciary duty on the state to assure that public trust resources
15 are available for future generations.” The Court said, “we disagree.” *See, Lyon County*, 473 P.3d
16 at 427.

17 The Court then went on to explain why it disagreed and how and why Nevada’s statutory
18 scheme did meet that affirmative duty. In doing so, it referred to the specific sections of Nevada’s
19 water law which met that duty. *See, Lyon County*, 473 P.3d at 427-429. In note 7, the Court said
20 that the statutes “guide the doctrine’s’ application” and also satisfy it. *Id.* at 429. As we explain
21 below, the Court’s response to the County’s continuing affirmative duty argument is that those
22 duties must be found in those Nevada’s statutes. *See, infra* at 15-16.

23 The Court rejected the notion that any court, including this Court, could impose
24 requirements not in the statutory scheme in the name of the public trust doctrine. It said that
25 Nevada’s public trust doctrine cannot be used “as a tool to uproot an entire water system.” *Lyon*
26 *County*, 473 P.3d at 430. It rejected the urging of the dissent to follow *National Audubon Society*
27 *v. Superior Court*, 658 P.2d 709, 732 (Cal. 1983). *Id.* at n. 10.

28 The County has not stated a claim under Nevada’s public trust doctrine upon which relief

1 may be granted. Nevada’s public trust doctrine does not require this Court or Nevada to make any
2 change in the management of the Walker River under the Decree not required by Nevada’s water
3 law. The doctrine acts as a restraint on alienation of a public resource, here, the right to use water,
4 and it has been satisfied. Therefore, any change in management or additional regulation must come
5 from the legislature, not this Court.

6 **B. The County’s Public Trust Argument is Inconsistent with Nevada’s Public**
7 **Trust Doctrine As Interpreted by the Nevada Supreme Court in *Lyon County*.**

8 The Defendants argued that the County’s public trust claim must be dismissed not only because
9 it is inconsistent with the three-part test in *Lyon County* and *Lawrence* relating to disposition of
10 trust resources, ECF 996 at 24-27, but also because it is inconsistent with *Lyon County*’s broader
11 holding that the public trust doctrine is incorporated in Nevada’s statutory water laws and does not
12 establish separate duties outside of the statutory laws. *Id.* at 27-29. In response to the latter
13 argument, the County contends that Defendants argued in the Supreme Court, and are arguing here,
14 that “Nevada’s statutory water laws *supplant* the public trust doctrine,” and that, contrary to the
15 Defendants’ argument, the statutory law is consistent with the public trust doctrine “in large part
16 because it reflects but does not *supplant* the doctrine.” ECF 1051 at 33-34 (emphasis added). The
17 County both misconstrues *Lyon County* and mischaracterizes, and misquotes, the Defendants’
18 argument, there and here.

19 First, the County misconstrues *Lyon County*. *Lyon County* held that Nevada’s public trust
20 doctrine is based on Nevada’s Constitution and statutes and the “inherent limitations” on the state’s
21 sovereignty recognized in *Illinois Central*, see *Lyon County*, 473 P.3d at 424, and that under these
22 principles Nevada’s statutory water law “codified,” “incorporates” and is “consistent with” the
23 public trust doctrine. *Id.* at 424 (“codified”), 431 (“incorporates”), 421, 426, 429 (“consistent
24 with”). As *Lyon County* stated, “Nevada’s statutory scheme already incorporates the public trust
25 doctrine, giving force to constitutional and inherent limitations on state sovereignty that protect
26 the public interest in the waters of the state, . . .” *Id.* at 431. *Lyon County* then held that—since
27 the statutory water laws do not authorize reallocation of water rights adjudicated in the Walker
28

1 River Decree—the public trust doctrine does not separately authorize such reallocation. *Id.* at 429-
2 430. Under *Lyon County*, the public trust doctrine does not establish separate duties that exist
3 outside of the statutory laws, but instead the statutory laws incorporate the public trust duties.

4 Since *Lyon County* held that the statutory laws incorporate the public trust duties, and since
5 the statutory laws do not authorize the State Engineer or this Court to provide additional inflows
6 into Walker Lake to maintain minimum lake levels, neither the State Engineer nor this Court, nor
7 anyone else, has a public trust duty to provide the inflows, contrary to the County’s argument.
8 Although the County contends that the state has a continuing public trust duty to manage trust
9 resources, ECF 1051 at 33, any such continuing public trust duty is established under the statutory
10 laws, and the statutory laws do not establish a continuing duty to provide inflows into Walker
11 Lake. The Nevada Legislature, and not this Court, is responsible for determining whether to
12 provide the additional inflows. Notably, the County makes no mention of *Lyon County*’s holding
13 that Nevada’s statutory law “codified,” “incorporates” and is “consistent with” the public trust
14 doctrine—the very foundation of *Lyon County*’s interpretation of the doctrine. The County thus
15 ignores *Lyon County*’s language and misconstrues its holding.

16 Second, the County mischaracterizes and misquotes the Defendants’ argument. Contrary
17 to the County’s assertion, the Defendants did not argue that Nevada’s statutory laws “supplant”
18 the public trust doctrine; the word “supplant” is not used. Rather, the Defendants argued that *Lyon*
19 *County* held that Nevada’s statutory law “codified,” “incorporates” and is “consistent with” the
20 public trust doctrine—as *Lyon County* expressly held and as cited above. ECF 996 at 27. A statute
21 that *codifies, incorporates* and is *consistent with* a doctrine plainly does not *supplant* the doctrine.
22 The County’s response, by mischaracterizing and misquoting the Defendants’ argument,
23 demonstrates that the County has no effective response to the Defendants’ argument, and that its
24 Amended Complaint should be dismissed for failure to state a claim upon which relief can be
25 granted.

26 **VI. CONCLUSION.**

27 For all of the foregoing reasons, the Court should grant the Motion to Dismiss.
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Date: August 1, 2022

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Date: August 1, 2022

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 1st day of August
2022 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/ Kathy M. Miyoshi
Kathy M. Miyoshi