Simeon M. Herskovits, Nevada Bar No. 11155
Iris Thornton, *pro hac vice*
Advocates for Community and Environment
P.O. Box 1075
El Prado, New Mexico 87529
Phone: (575) 758-7202
Fax: (575) 758-7203
Email: simeon@communityandenvironment.net
Email: iris@communityandenvironment.net

Sean A. Rowe, Nevada Bar No. 10977
Mineral County District Attorney
P.O. Box 1210
Hawthorne, Nevada 89415
Phone: (775) 945-3636
Fax: (775) 945-0740
Email: srowe@mineralcountynv.org

Attorneys for Mineral County

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-RCJ Subproceeding: C-125-C 3:73-CV-00128-RCJ-WGC **MINERAL COUNTY'S POINTS AND AUTHORITIES IN RESPONSE TO WALKER RIVER IRRIGATION DISTRICT'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO STAY**
MINERAL COUNTY, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	

TABLE OF CONTENTS

TABLE OF CONTENTS……..... i

TABLE OF AUTHORITIES…… ii

I. INTRODUCTION…….. 1

II. PROCEDURAL HISTORY…….....2

III. BACKGROUND FACTS CONCERNING WALKER LAKE AND THE SEVERE AND WORSENING IMPAIRMENT THE LAKE'S PUBLIC TRUST VALUES AND USES..……. 4

IV. ARGUMENT……..... 7

A. Introduction: The Public Trust Doctrine……. 7

B. WRID's Motion to Dismiss…….. 13

C. There Is No Need for this Court to Stay the Exercise of Its Exclusive Jurisdiction over the Subject Matter of this Litigation or Certify Legal Questions to the Nevada Supreme Court Because the Law Pertaining to those Questions Is Clear and Settled…… 17

i. The Public Trust Doctrine and Its Relationship to the Rest of Nevada Water Law Is Not a Novel Question, But Rather an Issue that Has Been Ruled on by the State Supreme Court and Is Clear and Settled, and that this Court Is Best Suited To Apply To the Walker River System……..... 21

ii. Mineral County Clearly Has Standing to Bring its Public Trust Claim……24

iii. The Law Is Clear That Mineral County Need Not Exhaust Administrative Remedies Prior to Bringing Its Public Trust Claim in this Court…….. 26

V. CONCLUSION……..... 28

TABLE OF AUTHORITIES

Cases

Coast Fed. Bank, FSB v. United States,
323 F.3d 1035 (Fed. Cir. 2003) 14

Desert Irr. Ltd. v. Nevada,
944 P.2d 835 (Nev. 1997) 8

Illinois Central R.R. v. Illinois,
146 U.S. 387 (1892) ..... passim

In re Water Use Permit Applications,
9 P.3d 409 (Haw. 2000) 7, 12, 24, 27

Kaiser Steel Corp. v. W.S. Ranch Co.,
391 U.S. 593 (1968) 18, 19, 20

Kern-Tunale Water Dist. v. City of Bakersfield,
828 F.2d 514 (9th Cir. 1987) 18, 19

King, et al. v. Millard County, et al.,
Nevada Supreme Court Case No. 64815 21

Kootenai Envtl Alliance v Panhandle Yacht Club,
671 P.2d 1085 (Idaho 1983) 7, 12, 24, 27

Lawrence v. Clark County,
254 P.3d 606 (Nev. 2011) ..... passim

Louisiana Power & Light Company v. City of Thibodaux,
360 U.S. 25 (1959) 18, 19, 20

McAbee Constr., Inc. v. United States,
97 F.3d 1431 (Fed. Cir. 1996) 15

Meredith v. City of Winter Haven,
320 U.S. 228 (1943) 19

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

Nat'l Audubon Soc'y v. Superior Court of Alpine County,
658 P.2d 709 (Cal. 1983) ..... passim

St. Louis, Kansas City, and Colorado R.R. Co. v. Wabash R.R. Co.,
152 F. 849 (8th Cir. 1907), *modified on other grounds and aff'd* 217 U.S. 247 (1910) 15

State Engineer v. Cowles Bros., Inc.,
478 P.2d 159 (Nev. 1970) 8, 22

State v. Bunkowski,
503 P.2d 1231 (Nev. 1972) 8,13, 27

Turf Paradise v. Arizona Downs,
670 F.2d 813 (9th Cir. 1982) 19

United States v. Alpine Land & Reservoir Co.,
174 F.3d 1007 (9th Cir.1999) 18

United States v. ITT Baking Co.,
420 U.S. 223 (1975) 14

United States v. Walker River Irrigation Dist.,
104 F.2d 334 (9th Cir. 1939) 2

United States v. Walker River Irrigation Dist.,
11 F. Supp. 158 (D. Nev. 1935) 2

United States v. Walker River Irrigation Dist.,
14 F. Supp. 10 (D. Nev. 1936) 2

Wisconsin v. Deetz,
224 N.W.2d 407 (Wisc. 1974) 25

Statutes

NRS § 321.005 ..... 9, 10

NRS § 533.025 ..... 9, 10

Court Rules

Nev. R. App. P. 5(a) 18, 28

Other Authorities

40 Fed. Reg. 29,864 (1975) 5

Dr. Saxon E. Sharpe, Dr. Mary E. Cablk, & Dr. James M. Thomas, Desert Research Institute, *The Walker Basin, Nevada and California: Physical Environment, Hydrology, and Biology, Publication No. 41231* (May 2008)..... 4, 5, 6

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970) 22, 25

USGS Station 10288500, Walker Lake near Hawthorne, Nevada http://waterdata.usgs.gov/nv/nwis/uv/?site_no=10288500&agency_cd=USGS& 5

Walker River Decree..... passim

Webster's New International Dictionary of the English Language, Second Ed. Unabridged (1956)..... 15

I. INTRODUCTION

Pursuant to the Court's Order of November 4, 2013, (Doc.736), Mineral County respectfully submits the following memorandum of points and authorities in response to the *Walker River Irrigation District's ("WRID's") Motion to Dismiss Pursuant to Feed. R. Civ. P. 12(b)(1), or in the Alternative to Stay Proceedings with Respect to Mineral County's Amended Complaint in Intervention* and WRID's *Points and Authorities in Support of Motion to Dismiss* (Docs. 751 and 751-1). For the reasons set forth below, WRID's Motion is without merit and should be denied.

To encapsulate the matter before the Court, in this case Mineral County asserts a claim that the public trust doctrine requires that the Walker River system be managed and regulated under the Walker River Decree in such a way as to ensure that adequate inflows are provided from the Walker River system to Walker Lake so as to restore and sustain the public trust values and uses of Walker Lake. In its motion WRID asserts that this Court did not retain broad enough jurisdiction in the Walker River Decree to entertain Mineral County's public trust claim, if that claim is interpreted as claiming a new water right within the priority system.

In the alternative, WRID argues that if this Court's broad retained jurisdiction does extend to Mineral County's public trust claim, then the Court should stay the exercise of its jurisdiction until the Nevada state courts rule on what WRID characterizes as three "novel" questions, namely: (1) whether the public trust applies to water in Nevada and how it relates to Nevada water rights; (2) whether Mineral County has standing to assert its public trust claim; and (3) whether Mineral needs to exhaust Nevada state administrative remedies before it can pursue its claim in court.

As explained in greater detail below, while Mineral County's public trust claim does not seek a priority water right, under the plain language of the Walker River Decree this Court plainly retained broad enough continuing jurisdiction to address Mineral County's regardless of how that claim is characterized. WRID's request that this Court stay the exercise of that jurisdiction is ill taken, considering that WRID forcefully argued directly to the contrary when Mineral County attempted to raise these issues before the Nevada Supreme Court nearly a decade and a half ago. In addition, WRID's arguments for abstention and a stay with regard to the three issues it raises are mistaken because the issues are not "novel" but rather are issues that have been addressed and settled by Nevada state courts, providing ample guidance to this Court in resolving Mineral County's public trust claim under the exclusive jurisdiction the Court has exercised over the Walker River system for the better part of a century.

II. PROCEDURAL HISTORY

Subproceeding C-125-C is part of the litigation over the waters and water rights of the Walker River system that commenced in 1924, when certain upstream users prevented water from reaching the Walker River Paiute Reservation. This conduct prompted the United States to sue to determine a water right for the Reservation and the relative rights to water of particular parties in Nevada and California. On April 14, 1936, the United States District Court for the District of Nevada issued Decree C-125 (the "Walker River Decree" or "Decree"). *See United States v. Walker River Irrigation Dist.*, 11 F. Supp. 158 (D. Nev. 1935); *United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10 (D. Nev. 1936). The Decree was amended on April 24, 1940, to conform with the Court of Appeal's decision in *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

Within the Walker River Decree this Court (the "Decree Court") retained jurisdiction "for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . ." Walker River Decree ¶ XIV, at 72-73. Pursuant to the Decree, the United States District Court has appointed a federal water master to oversee the distribution of waters in the Walker River and its tributaries in accordance with the Decree. Over the years, the Court has exercised ongoing authority over and supervision of these proceedings, including approving rules to implement the Decree, addressing requests to amend the Decree, and appointing Water Masters and the U.S. Board of Water Commissioners. In addition, it has designated three subproceedings, including C-125-C.

On October 25, 1994, Mineral County filed a *Notice of Motion and Motion for Intervention* and a *Petition to Intervene* in the C-125-B subproceeding of the C-125 litigation. (C-125-B Doc. Nos. 31, 32). On January 3, 1995, the Court created subfile C-125-C, or 3:73-CV-128. *Minutes of the Court*, at 1 (C-125-C Doc. No. 1). On February 9, 1995, the Court ordered Mineral County to file revised Intervention Documents and to serve these Intervention Documents on all claimants to the waters of the Walker River and its tributaries pursuant to Federal Rule of Civil Procedure 4. *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶¶ 2, 3 (Doc. No. 19). Mineral County filed its *Amended Complaint in Intervention*, (Doc. No. 20), *Amended Memorandum of Points and Authorities in Support of Mineral County's Amended Complaint in Intervention*, (Doc. No. 21), and *Motion for Preliminary Injunction; Memorandum of Points and Authorities; Affidavit of Kelvin J. Buchanan; and Affidavit of Gary L. Vinyard, Ph.D.* (Doc. No. 22), on March 10, 1995.

At the September 23, 2013, hearing the Court granted Mineral County's Motion to Intervene. *Minutes of Proceedings*, Doc. No. 726 (Sept. 23, 2013). Thereafter, at the November 4, 2013, status conference the Court set a briefing schedule for jurisdictional motions to dismiss in both subproceedings C-125-B and C-125-C. Minutes of Proceedings, Doc. No. 736 (Nov. 4, 2013). Pursuant to the Court's direction, on March 31, 2014, the Walker River Irrigation District ("WRID") filed its *Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), or in the Alternative to Stay Proceedings with Respect to Mineral County's Amended Complaint in Intervention* and its supporting Points and Authorities. Doc. Nos. 751 and 751-1. Mono County, Circle Bar N Ranch, LLC, and Lyon County joined in WRID's Motion. Doc. Nos. 752, 753, and 754.

WRID also filed a *Motion to Dismiss Claims of United States Based Upon State Law Pursuant to Fed. R. Civ. P. 12(b)(1)* and supporting points and authorities in subproceeding C-125-B. C-125-B Doc. Nos. 1981, 1981-1, and 1981-2. Mono County, Circle Bar N. Ranch, and Lyon County joined in WRID's Motion. C-125-B Doc. Nos. 1982, 1983, and 1985. The State of Nevada also filed a *Motion to Dismiss Concerning Threshold Jurisdictional Issues* in subproceeding C-125-B. C-125-B Doc. No. 1980.

III. BACKGROUND FACTS CONCERNING WALKER LAKE AND THE SEVERE AND WORSENING IMPAIRMENT THE LAKE'S PUBLIC TRUST VALUES AND USES

Walker Lake is a rare desert terminus lake located in Mineral County, Nevada, that is one of Nevada's and the western United States' rare, precious natural public water resources. By far its primary source of water is inflow from the Walker River. Dr. Saxon E. Sharpe, Dr. Mary E. Cablk, & Dr. James M. Thomas, Desert Research Institute, *The Walker Basin, Nevada and California: Physical Environment, Hydrology, and Biology, Publication No. 41231*, at 13-14 (May 2008); *see also* Memorandum of Points and Authorities in Support of Mineral County's Proposed Petition to Intervene, Affidavit of Kelvin J. Buchanan (Oct. 25, 1994) (Doc. No. 3).

The only additional inflow into Walker Lake consists of relatively minor amounts of local groundwater, local surface water runoff, and precipitation on the Lake surface.

Historically, Walker Lake has supported a balance of algae, zooplankton, small crustaceans, insects, and four native fish species: the tui chub, Lahontan cutthroat trout, speckled dace, and Tahoe sucker. Sharpe, et al., at 36. The Lahontan cutthroat trout is listed as threatened under the federal Endangered Species Act. 40 Fed. Reg. 29,864 (1975). The tui chub is identified as a "subspecies of concern" by the American Fisheries Society. Walker Lake also has provided important, scarce habitat for a variety of migratory birds, including American white pelicans, common loons, snowy plovers, long-billed curlews, double crested cormorants, gulls, herons, terns, grebes, avocets, and many others. *See* Sharpe, et al., at 27, 32, & 39.

As upstream appropriations of water from the Walker River and its tributaries increased over the 20th Century, the natural flow of water into Walker Lake was effectively cut off. As a result, the Lake's level dropped from an elevation of 4,083 feet above mean sea level (msl) in 1882 to a level of approximately 3,917 feet above msl as of May 30, 3014. USGS Station 10288500, Walker Lake near Hawthorne, NV, http://waterdata.usgs.gov/nv/nwis/uv/?site_no=10288500&agency_cd=USGS&. This drop in elevation resulted in a decrease in lake volume from approximately 9.0 million acre feet to 1.25 million acre feet. *Id*. As water volume decreased, salinity and total dissolved solids in the Lake increased. This impact to water quality has severely degraded the entire ecosystem of Walker Lake, resulting in a devastating loss of biodiversity. What had been a healthy Lahontan cutthroat trout fishery, that was maintained by stocking after dams on the River prevented natural spawning, has been eliminated for the time being by the diminished inflows to Walker Lake and resulting degraded water quality in the Lake. Even the Lake's tui chub fishery now is threatened

with extinction because salinity in the Lake has risen to a level that precludes successful reproduction. Sharp, et al., at 1. Thus, the tragic effect of upstream overappropriation has been to strangle the Lake, devastate its once-thriving fisheries, eliminate the once-spectacular flocks of migratory birds that depended on the Lake, and, perhaps most importantly, drive away the many Nevadans and other Americans who used Walker Lake for recreational enjoyment and economically productive activities.[1]

The inadequacy of inflows from the Walker River to Walker Lake has caused the dramatic lowering of the water level and degradation of water quality in Walker Lake, devastating Walker Lake's fisheries and ecosystem and the Lake's ability to serve as a vital stop for migratory birds on the Pacific Flyway, as it has since before human memory. The severity and continued worsening of the damage to Walker Lake due the inadequacy of inflows from the Walker River has caused the near total loss of the Lake's environmental, economic, recreational, and aesthetic values to the public at large, Nevadans in particular, and Mineral County residents most egregiously.

Because neither the parties nor the Court considered the public trust values and uses of Walker Lake, or the long-term implications of private appropriations of water from the Walker River system, at the time the Walker River Decree was developed, the Decree fails to make any provision for inflows to Walker Lake. The result of this omission has been the reduction of average annual inflows from the Walker River system to Walker Lake to an amount that is inadequate to sustain the Lake's continued ecological health and or its important environmental, economic, recreational, and aesthetic values and uses. Sharpe, et al., at 13-14.

---

[1] Indeed, the Walker River Paiute Tribe, whose people once depended on the Lake for their subsistence and way of

IV. ARGUMENT

A. Introduction: The Public Trust Doctrine

The public trust doctrine is a fundamental principle of law that originated in ancient Roman and English common law, and has underpinned the water law of Nevada and all of its sister states since their inception. *Lawrence v. Clark County*, 254 P.3d 606, 617 (Nev. 2011); *In re Water Use Permit Applications*, 9 P.3d 409, 443-45 (Haw. 2000); *Kootenai Envtl. Alliance v Panhandle Yacht Club*, 671 P.2d 1085, 1095 (Idaho 1983); *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 718-24 (Cal. 1983). The public trust doctrine holds that water resources such as Walker Lake, Walker River, and their tributary water sources are inherently the property of the public at large, including future generations. Because of the inherent public ownership of such waters, the public trust doctrine imposes a permanent affirmative duty on the state to hold those water resources in trust for the public and act as trustee to protect the public's long-term interests in those waters.

As the United States Supreme Court explained over a century ago, the public's interest in these waters is perpetual in nature and therefore the state, as the trustee of the public's rights in these waters, can never abdicate or lose ultimate control over them, and only could relinquish its control over them in a public manner and in strict, clearly expressed, furtherance of the long-term public interests protected by the public trust. *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453-54 (1892). By the same token, neither a governor, a state engineer, nor even a state legislature can abdicate or sign away the state's fiduciary responsibilities to protect the public's long-term interests in these water resources. *Id.* Even, perhaps especially, when water resources have been mismanaged in such a way as to create a conflict between the narrow interests of select private water rights holders and the broader public interests protected by the public trust doctrine, the State is obligated to give precedence to the public interests safeguarded under the

---

life, can no longer rely on the Lake as the Tribe's principal subsistence resource.

doctrine. While these public trust obligations are paramount in the government's management of the public's waters, the doctrine is not inconsistent with private property rights in water, but rather such private property rights always are bounded by the requirements of the public trust doctrine. *See Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 712 (Cal. 1983).

After implicitly acknowledging the public trust doctrine for many years, *e.g.*, *State Engineer v. Cowles Bros., Inc.*, 478 P.2d 159 (Nev. 1970), *State v. Bunkowski*, 503 P.2d 1231 (Nev. 1972), *Desert Irr. Ltd. v. Nevada*, 944 P.2d 835 (Nev. 1997), the Nevada Supreme Court expressly addressed the scope and role of the public trust doctrine in Nevada law in *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011). In doing so, the Nevada Supreme Court described the history of the doctrine and its characteristics in detail.

> The public trust doctrine is an ancient principle thought to be traceable to Roman law and the works of Emperor Justinian. Justinian derived the doctrine from the principle that the public possesses inviolable rights to certain natural resources, noting that "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea." He also stated that "rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men."

Lawrence, 254 P.3d at 608 (citations omitted).

> …in what has become the seminal public trust doctrine case, the Supreme Court decided *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In *Illinois Central* the Court noted that because the State of Illinois was admitted to the United States on "equal footing" with the original 13 colonies, it, like the colonies, was granted title to the navigable waters and the lands underneath them. *Id.* at 434 … More specifically, it possessed only "title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* . . . While the Court noted that such lands need not, under all circumstances, be perpetually held in trust, it recognized that in effecting transfers, the public interest is always paramount, providing that "[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as

> are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.*

Lawrence, 254 P.3d at 609.

In confirming the existence of the public trust doctrine in Nevada, the Court in *Lawrence v. Clark County* relied heavily on Justice Rose's concurrence in *Mineral County v. Nevada*, 20 P.3d 800 (Nev. 2001). As Justice Rose noted, the Nevada Court and sister courts had recognized that:

> public ownership of water is the "most fundamental tenet of Nevada water law." Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times "forms the outer boundaries of permissible government action with respect to public trust resources." In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

Mineral County, 20 P.3d at 808 (Rose, J., concurring) (citations omitted). Justice Rose continued, explaining that "'the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.' Our dwindling natural resources deserve no less." *Id.* at 809.

In *Lawrence v. Clark County* the Nevada Supreme Court found that the public trust doctrine in Nevada has a basis, in part, in the Nevada Constitution's gift clause, which limits the legislature's ability to dispose of public resources by placing the state in a fiduciary relationship with the public. *See Lawrence*, 254 P.3d at 612. The Court in *Lawrence* also held that NRS 321.005 and NRS 533.025 statutorily affirm the public trust doctrine in Nevada. NRS 321.005

provides that "state lands must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes." *Lawrence*, 254 P.3d at 612 (citing NRS 321.005). Similarly, "NRS 533.025 provides that '[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.' Notably, NRS 533.025 does not provide that Nevada's water belongs to the state; rather, it belongs to the public." *Lawrence*, 254 P.3d at 612-13. The Court in *Lawrence* also held that the public trust doctrine in Nevada is also based on the inherent limitations on the state's sovereign power, as recognized in *Illinois Central Railroad*. *Id*. at 613.

In a case bearing considerable similarity to this case, the California Supreme Court held that the public trust doctrine required the State of California to ensure adequate inflows to Mono Lake. Like Walker Lake, Mono Lake is a terminal lake, which suffered from excessive upstream diversions. In that case, the National Audubon Society filed a lawsuit alleging that the State had violated its public trust duties to ensure adequate inflows to Mono Lake. The court engaged in a discussion of the relationship between the public trust doctrine and California's system of appropriative water rights.

> In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the sate and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust.

Nat'l Audubon Soc'y, 658 P.2d at 712. The court was careful to note, however, that the public trust is not only an affirmation of state power, "[i]t is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering

that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id*. at 724; *see also id.* at 727. "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id*. at 728.

The court also noted that the granting of water rights may be reconsidered when it is apparent that the public trust was not considered when the rights were granted.

> The water rights enjoyed by DWP were granted, the diversion was commenced, and has continued to present without any consideration of the impact upon the public trust. An objective study and reconsideration of the water rights in the Mono Basin is long overdue. The water law of California – which we conceive to be an integration including both the public trust doctrine and the board-administered appropriative rights system – permits such a reconsideration; the values underlying that integration require it.

Id. at 712. Because of the inherent public ownership of such waters, the court recognized a permanent, or continuing, affirmative duty on the state as the administrator of to hold those water resources in trust for the public and act as trustee to protect the public's long-term interests in those waters. *Id*. at 723, 727-28. In exercising its sovereign power and obligation to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. *Id.* at 728. The State has an affirmative obligation to reconsider past allocation decisions whether or not those decisions were made after due consideration of their effect on the public trust. *Id*. This duty is even more compelling where, as here, the past allocation decisions were made without consideration of the public trust values and uses at stake. *See id.* at 712-13. This right to revoke previously granted water rights stems partially from the fact that water rights are usufructuary rights. The owner of a water right owns the right to use water, but does not own the water itself. As such, these rights are always subject to the public trust, which underpins the granting of all

water rights. *See id*. at 721-723, 727, 728; *see also Kootenai*, 671 P.2d 1085 (Idaho 1983); *In re Water Use Permit Applications*, 9 P.3d 409 (2000) (*Wai' Hole Ditch* case).

As noted above, the failure to consider and provide for adequate inflows from the Walker River system to sustain Walker Lake's environmental, recreational, economic, and aesthetic values and uses over the long term has resulted in the gradual strangulation of Walker Lake and the near total elimination of those important public trust values and uses. Allowing so precious a public water resource – one of only two sizeable natural lakes contained in the State of Nevada – to be destroyed through excessive upstream appropriation violates the government's public trust obligation to maintain the health of Walker Lake for the benefit of the public. Under any reading of the public trust doctrine a vital, navigable body of water like Walker Lake that has supported and naturally would continue to support thriving fisheries and wildlife and a local economy must be safeguarded for the benefit of the public at large and future generations.

The public trust doctrine underpins and ultimately controls the application of Nevada and California water law, as well as federal common law, and the governmental management of water resources such as the Walker River and Walker Lake. Had the doctrine properly been considered and applied in the historic allocation and management of the waters of the Walker River and its tributaries, it would have led to a balanced approach that protected the health and viability of Walker Lake as the priceless recreational, economic, scenic, and environmental resource it rightfully is, while allowing reasonable amounts of water to be appropriated upstream for productive agricultural uses. Unfortunately, past government officials and the Decree Court itself failed to consider the need to maintain the health of the entire Walker River system or to appreciate the devastating effects that permitting excessive water appropriations from the Walker River and its tributaries would have on Walker Lake. These circumstances forced Mineral

County to file its Motion for Intervention in order to represent the public's interests in Walker Lake and ensure that sufficient inflow from the River reaches the Lake to restore and maintain the Lake's public trust values and uses, including fisheries, recreation, and wildlife.

Thus, the public trust doctrine holds that water resources such as Walker Lake, Walker River, and their tributary water sources are inherently the property of the public at large, including future generations. And the doctrine requires the State of Nevada and this Court to affirmatively manage and regulate Walker Lake, and the lands underneath, for the protection of public uses, including navigation, commerce, fisheries, recreation, and wildlife. *See Lawrence*, 254 P.3d 606; *Mineral County*, 20 P.3d at 807-08 (Rose, J., concurring); *Bunkowski*, 503 P.2d 1231; *Illinois Central R.R.*, 146 U.S. 387; *Nat'l Audubon Soc'y*, 658 P.2d 709.

With this understanding of the doctrine, it is clear that Mineral County's public trust doctrine claim does not seek a water right for Walker Lake, but rather a recognition and enforcement of the public trust duty to protect and maintain Walker Lake as the trustee of the public's rights in the waters of the Lake. The public trust duty acts as a constraint on the entire Walker River system and underpins the water rights granted under the Decree and otherwise on the system.

B. WRID's Motion to Dismiss[2]

WRID's only argument for dismissing Mineral County's public trust claim is based on a mischaracterization of Mineral County's claim as one for a water right for Walker Lake, Doc. 751-1 at 3-5, despite the fact that Mineral County has made it clear that its public trust claim is

[2] Circle Bar N Ranch joined WRID's motion to dismiss and also filed a motion to dismiss in subproceeding C-125-B. C-125-B. Doc. Nos. 1983; 1983-1. To the extent that Circle Bar N Ranch's arguments in C-125-B affect subproceeding C-125-C, Mineral County addresses them below.

not tantamount to a request for a new priority water right on the Walker River system, but rather a request for the enforcement of the public trust duty, as recognized by Nevada law, which requires adequate inflows to Walker Lake be maintained. As explained above, all of the relevant case law concerning the public trust doctrine explains its operation in this way, and not as creating a water right. Accordingly, WRID's argument in support of dismissal plainly is misplaced, and Mineral County's public trust claim cannot properly be dismissed on this ground. Indeed, by framing its argument for dismissal within the speculative qualifying language, "[i]f Mineral County seeks recognition of a first priority water right to be held by it," WRID all but concedes this point.

Even if the Court were to characterize Mineral County's claim as a claim for a new water right for Walker Lake, under the terms of the Walker River Decree itself it is clear that this Court has subject matter jurisdiction to hear such a claim. This Court retained jurisdiction "for the purpose of *changing the duty of water* or for *correcting* or *modifying* the decree; also *for regulatory purposes*, including a change of point of diversion or of the place of use of any water user." 1936 Decree ¶ XIV (emphasis added). Contrary to WRID's suggestion that the Court's jurisdiction is limited to changes to existing water rights and the regulation of existing water rights, Doc. No. 751-1 at 4, the Court's continuing jurisdiction is composed of four separate elements: changing the duty of water, correcting the Decree, modifying the Decree, and "regulatory purposes" stated in general terms without restriction.

In construing the terms of decrees, courts apply rules of construction that are essentially the same as the rules of construction applied to contracts. *See United States v. ITT Baking Co.*, 420 U.S. 223, 233-37 (1975). Pursuant to these rules "interpretation begins with the language of the [decree]." *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003).

Terms and provisions that are "clear and unambiguous . . . must be given their plain and ordinary meaning." *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). Further, the court construing a decree is required to presume that all of the words used in the Decree were used "carefully and thoughtfully" to express the court's "deliberate intention." *See St. Louis, Kansas City, and Colorado R.R. Co. v. Wabash R.R. Co.*, 152 F. 849, 851 (8th Cir. 1907), *modified on other grounds and aff'd* 217 U.S. 247 (1910).

Here the words used in paragraph XIV of the Decree are straightforward and unambiguously broad in their meaning. The verb "correct" means "[t]o make or set right; to remove the faults or errors of." *See Webster's New International Dictionary of the English Language, Second Ed. Unabridged* at 597 (1956). The verb "modify" means "[t]o change somewhat the form or qualities of; to alter somewhat; as, to modify the terms of a contract." *Id.* at 1577. "Regulatory" is an adjective meaning "[o]f or pertaining to regulation; making regulations." *Id.* at 2099. "Regulation" as a verb means "[t]o prescribe or control by regulations," and as a noun means "[a]ct of regulating or state of being regulated." *Id.* The verb "regulate" means "to govern or direct according to rule." *Id.* The conjunction "or" is "[a] coordinating particle that marks an alternative." *Id.* at 1712. Thus, under the clear, plain, meaning of these terms, paragraph XIV of the Walker River Decree unmistakably designates three quite different and distinct types of claim or legal action that this Court has retained jurisdiction to entertain, separate from the narrow, technical "purpose of changing the duty of water" which the Court also retained the jurisdiction to do. Because paragraph XIV of the Decree uses the disjunctive conjunction "or," the plain meaning of this paragraph is that the Court retained jurisdiction to consider requests or claims for any and all of these types of potential action by the Court.

Given the plain meaning of the terms used by the Decree Court in paragraph XIV of the Walker River Decree, there is no sound basis for WRID's claim that the scope of the jurisdiction retained by the Court does not extend to Mineral County's public trust claim. This is so regardless of whether that claim is viewed as seeking a water right, or as a claim that the Court should modify the Decree for the regulatory purpose of recognizing and providing for the enforcement of the public trust duty to ensure adequate inflows from the Walker River system to Walker Lake in order to restore and sustain the public trust values and uses of Walker Lake for present and future generations of the public.

This interpretation of Paragraph XIV is consistent with other provisions of the Decree. For example, from Paragraph XI, which enjoins any interference with the rights established in the Walker River Decree, it logically follows that the Court must have retained jurisdiction to consider other claims to the waters of the Walker River system to ensure that those rights do not conflict with the rights recognized in the Decree.

Given the applicable rules of construction, the plain meaning of the terms in Paragraph XIV of the Decree, and the internal logic of the Decree, the straightjacketed, self-defeating, reading of paragraph advanced by WRID, *see* Doc. No. 751-1 at 3-5, clearly is incorrect and inappropriate. Accordingly, the Court should deny WRID's Motion to Dismiss on this ground, as well, regardless of whether Mineral County's public trust claim is viewed as seeking a new water right or not.

C. <u>There Is No Need for this Court to Stay the Exercise of Its Exclusive Jurisdiction over the Subject Matter of this Litigation or Certify Legal Questions to the Nevada Supreme Court Because the Law Pertaining to those Questions Is Clear and Settled</u>

Perhaps recognizing that its argument for dismissal of Mineral County's public trust claim lacked merit, WRID argues in the alternative that this claim presents three legal questions

that are so new, and on which the law is so unsettled, that this Court should stay the exercise of its exclusive jurisdiction over the Walker River system until "Mineral County obtains a final decision ultimately from the Nevada Supreme Court" on those legal issues. The three issues WRID claims require a stay are: (1) whether Mineral County has standing; (2) whether Mineral County must exhaust state administrative remedies before it may bring a public trust claim; and (3) the relationship between the public trust doctrine and the Nevada water rights system. *See* Doc. No. 751-1- at 1.

As explained below, WRID's arguments concerning these issues and the need for staying the Court's exercise of jurisdiction are without merit because they are not, in fact novel or unsettled areas of law, and there is ample legal precedent to guide the Court in its resolution of those issues. In reality, WRID's attempt to entice this Court into staying the exercise of its exclusive jurisdiction over the Walker River system until the Nevada Supreme Court has ruled on these issues in nothing more than another in the series of cynical stratagems employed by WRID for nearly 20 years to delay and obstruct resolution of the merits of Mineral County's public trust claim. In addition to obstructing Mineral County's initial service efforts and raising a number of pretextual procedural issues to repeatedly delay and obstruct the Court from reaching the merits of this subproceeding, more than ten years ago WRID vigorously asserted diametrically opposed arguments before the Nevada Supreme Court, insisting that that court could not consider or rule on Mineral County's public trust claim because this Court had exclusive jurisdiction over issues concerning the Walker River system, including Mineral County's claim, and because this Court was the most competent court to rule on these issues and the proper forum to afford a legal remedy in response to Mineral County's claim. In light of this history of delay and opposition to the Nevada Supreme Court considering Mineral County's

public trust claim, the Court should not humor WRID's present about-face effort to further delay the case by returning it to the very court WRID previously objected to.[3]

WRID's request for a stay flies in the face of the fact that in 2001, at the urging of WRID, the Nevada Supreme Court held that this Decree Court has exercised continuing exclusive jurisdiction over the Walker River system for more than 80 years and has the greatest understanding of the competing claims and interests in the waters of the system. The Nevada Supreme Court held that it could not exercise jurisdiction to consider Mineral County's public trust claim on the ground that it could not properly address issues related to this C-125-C subproceeding, because "'to construe these Decrees so that the district court does not retain exclusive jurisdiction would render the retention of jurisdiction a nullity.'" *Mineral County*, 20 P.3d at 806 (quoting *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir.1999)). Thus, as the Nevada Supreme Court already has indicated, abstention in this case would be unnecessary and inappropriate.

In support of its argument for a stay, WRID relies primarily on *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25 (1959), and to a lesser degree on *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968) and *Kern-Tunale Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), for the proposition that a stay would be appropriate in a case which

---

[3] Because WRID's request for a stay is without merit and there is no sound basis for the Court to stay the execution of its exclusive jurisdiction in this case, the procedure for obtaining state court rulings should not matter. However, WRID's failure to acknowledge or inform the Court of the most efficient way of obtaining rulings on these issues from the Nevada Supreme Court illustrates the actual purpose of WRID's request for a stay, which is simply to further delay and obstruct the Court's consideration of the merits of Mineral County's public trust claim. Although, as explained below, a stay would be inappropriate in this case, were the Court to seek rulings from the Nevada Supreme Court on any issues, the most efficient procedure for doing so would be to certify any such question to that court pursuant to Nevada Rule of Appellate Procedure 5(a). Rather than acknowledge this established procedure, WRID suggests that Mineral County be required to institute a second state court action to obtain the state court

presents an unsettled important question of state law which is truly novel. *See* WRID Motion to Dismiss at 7. However, WRID fails to note that "[a]bstention is an extraordinary and narrow exception which is appropriate only where the consequences of exercising federal jurisdiction outweigh [the] obligation to adjudicate suits over which [a federal court has] jurisdiction . . . . The federal courts are obliged to exercise their jurisdiction in all but the most exceptional cases." *Kern-Tunale Water Dist. v. City of Bakersfield*, 828 F.2d 514, 518 (9th Cir. 1987) (citing *Turf Paradise v. Arizona Downs*, 670 F.2d 813, 819 (9th Cir. 1982)). Moreover, a "mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of state court action." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27 (1959) (citing *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943).

Thibodaux is readily distinguished from this case. To begin with, *Thibodaux* was filed as a state court case and subsequently removed to federal court. 360 U.S. at 25. In *Thibodaux*, the Supreme Court upheld the exercise of the district court's discretion to stay the federal court proceedings in the context of a truly extraordinary "quandary" created by a conflict between a state attorney general opinion that conflicted with the apparent meaning of a state statute in question, which had never been interpreted by any state court, and which therefore raised a completely novel question of state law that already was the subject of a plainly unsettled conflict within the state's legal system. 360 U.S. at 30. Similarly, in *Kaiser Steel*, the Court held that a stay of federal jurisdiction was required because the case involved a "truly novel" question of state law which no court had ever considered at all. 391 U.S. 593, 594.

---

rulings in a transparent effort to impose the maximum burden on Mineral County and cause the maximum delay in the Court's resolution of the merits of Mineral County's claim.

At the present stage of this case, unlike *Thibodaux* and *Kaiser Steel*, because the Nevada Supreme Court already has considered and ruled on the public trust doctrine, its contours, and relationship with the rest of Nevada water law, there no longer is any novel question of state law that must be decided by the Nevada Supreme Court before this Court may properly resolve Mineral County's claim. Unlike *Kaiser* and *Thibideaux*, where unclear state statutory language had never been construed, here the public trust doctrine has been clearly adopted and applied by the Nevada Supreme Court, and there are no novel questions of state law at play.

Nearly a decade and a half ago, when Mineral County attempted to raise its public trust claim before the Nevada Supreme Court, the question of how the public trust doctrine should be interpreted and applied under Nevada law was a novel question that had not been expressly addressed by any Nevada court. But, as discussed in detail above, in the wake of Justice Rose's concurrence in *Mineral County v. Nevada*, and the Nevada Supreme Court's ruling in *Lawrence v. Clark County*, this question has been addressed and settled by the state's highest court. Ironically, when the question of how the public trust doctrine should be understood and applied under Nevada law was truly novel WRID took a position diametrically opposed to the one it now advances in its Motion, insisting that this Court, the Decree Court, was the only proper forum in which to litigate this case. *See Mineral County v. Nevada*, 20 P.3d 800; Answer of Walker River Irrigation District et al. at 2-4, *Mineral County v. Nevada*, 20 P.3d 800 (Nev. Nov. 1, 2000) (Case No. 3652); Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandamus and Writ of Prohibition of Walker River Irrigation District, et al. at 18, *Mineral County v. Nevada*, 20 P.3d 800 (Nev. Nov. 1, 2000) (Case No. 3652). Even at that time, when the questions involved in Mineral County's claim could be considered genuinely novel, the Nevada Supreme Court itself determined that the Decree Court is the best forum in which to

litigate this case. *Mineral County*, 20 P.3d at 801, 806. In light of this history, and the Nevada Supreme Court's previous rulings, WRID's effort to persuade the Court to stay the exercise of its jurisdiction should be recognized for what it is – nothing more than a delay tactic – and rejected as such.

i. The Public Trust Doctrine and Its Relationship to the Rest of Nevada Water Law Is Not a Novel Question, But Rather an Issue that Has Been Ruled on by the State Supreme Court and Is Clear and Settled, and that this Court Is Best Suited To Apply To the Walker River System

WRID's suggestion that a ruling on various contours of the public trust doctrine in Nevada involves important and novel questions of state law that must be certified to the Nevada Supreme Court for decision is entirely without merit and is belied by Nevada case law cited by WRID itself in its motion to dismiss which clearly outlines the contours of the public trust doctrine in Nevada as it relates to water bodies such as Walker Lake. WRID bases the bulk of its argument on the fact that the public trust issues in this case are ones of great importance to the State of Nevada. Mineral County agrees that the issues in this case are important.[4] However, while the public trust doctrine is an important part of Nevada law, it is far from novel and has been the subject of substantial guidance from the Nevada Supreme Court. Thus, the public trust doctrine and its relationship with the rest of Nevada law is not an appropriate issue for certification to the Nevada Supreme Court.

---

[4] WRID's reference to the Southern Nevada Water Authority's groundwater rights applications in eastern Nevada, which are the subject of an appeal before the Nevada Supreme Court is a misleading attempt to create an air of controversy around the public trust doctrine in Nevada. That case deals exclusively with groundwater, did not involve any meaningful consideration of the public trust doctrine at the state district court level, and does not involve the public trust doctrine at all on appeal. *See King, et al. v. Millard County, et al.*, Nevada Supreme Court Case No. 64815. Accordingly, that case has no implications for the public trust claim in this case or for the public trust doctrine in Nevada at all.

WRID attempts to mislead the Court into mistakenly thinking that the public trust doctrine's place in Nevada water law is novel by mischaracterizing the Nevada Supreme Court's ruling in *Lawrence v. Clark County*, as one narrowly relating only to the alienation of public land. In fact, a careful reading of *Lawrence* reveals that the Court in that case comprehensively outlined the contours of the public trust doctrine in Nevada as it relates to water bodies of the state. "Thus, in this opinion, we clarify Nevada's public trust doctrine jurisprudence by expressly adopting the doctrine and determining its application in Nevada, given the public's interest in Nevada's waters and the law's acknowledgement of that interest." *Lawrence*, 254 P.3d at 607. "'When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.'" *Lawrence*, 254 P.3d at 617, n. 5 (quoting Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 490 (1970)).

Indeed, the court in *Lawrence* noted that the first case in which the Nevada Supreme Court recognized concepts foundational to the public trust doctrine actually involved the State Engineer of Nevada and an application to drill a well on a dry lake bed. The Nevada Supreme Court in that case noted that "the state owns the waters and the beds beneath them, based on their navigable status at the time of statehood." *Lawrence*, 254 P.3d at 610 (discussing *State Engineer v. Cowles Bros., Inc.*, 478 P.2d 159 (Nev. 1970)). Contrary to WRID's suggestion, the adoption and explanation of the public trust doctrine in *Lawrence* is not limited to alienation of public land. Rather, the doctrine applies to any public trust resource, including water and the allocation of that water by the Nevada State Engineer. Thus, the Nevada Supreme Court's decision in

Lawrence v. Clark County makes it clear that the public trust doctrine in Nevada imposes a duty to protect water bodies such as Walker Lake from overappropriation upstream.[5] As the Court noted in *Lawrence v. Clark County*,

> [t]his court has itself recognized that this public ownership of water is the "most fundamental tenet of Nevada water law." Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times "forms the outer boundaries of permissible government action with respect to public trust resources." In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

Lawrence v. Clark County, 254 P.3d at 611; *see also supra*, discussion contained in Section IV(A).

Not only has the Nevada Supreme Court clearly affirmed application of the public trust doctrine and discussed its contours in Nevada, the broader body of law governing the public trust doctrine is well developed and dates back to Roman law and English Common Law, and the doctrine is a fundamental principle of federal common law. *See, supra*, discussion contained in Section IV(A). Additionally, state courts throughout the 9th Circuit have confirmed the public trust doctrine's status as a fundamental legal principle and explored the various implications of its application to water rights controversies and historic overappropriation of water resources. *See, e.g.*, *Lawrence*, 54 P.3d 606 (Nev. 2011); *Nat'l Audubon Soc'y*, 658 P.2d 709 (Cal. 1983)

---

[5] While Mineral County took the position in the 2000 Writ of Mandamus and Prohibition proceedings before the Nevada Supreme Court that at that time it planned to seek to have the Nevada Supreme Court "decide the scope of the public trust doctrine pursuant to the federal abstention doctrine," *Mineral County*, 20 P.3d at 807 n.35, this was because at that time, the Nevada state courts had not formally adopted or analyzed the public trust doctrine. As noted above, since that time the Supreme Court has issued two separate opinions addressing the scope of the public trust doctrine in Nevada, the latter of which formally adopted the doctrine. *See Mineral County*, 20 P.3d 800; *Lawrence*, 254 P.3d 606. So, the situation has changed over the past 14 plus years, and the issue no longer truly is novel or unsettled in Nevada.

(Mono Lake case); *Kootenai*, 671 P.2d 1085 (Idaho 1983); *In re Water Use Permit Applications*, 9 P.3d 409 (2000) (*Wai' Hole Ditch* case). Thus, the law in this area is essentially settled, and the courts of Nevada and its sister states have provided ample guidance concerning the application of the public trust doctrine in the context of the rest of Nevada's (and California's) water law. And under any reasonable construction of the public trust doctrine, it clearly imposes a duty to ensure the restored health of Walker Lake. Accordingly, it is not necessary and would not be appropriate for this Court to stay the exercise of its jurisdiction and certify to the Nevada Supreme Court.

ii. Mineral County Clearly Has Standing to Bring its Public Trust Claim

WRID next makes the unsupported assertion that the question of whether Mineral County has standing to bring a public trust claim is a novel question of state law that must be certified to the Nevada Supreme Court for decision. Tellingly, when intervention was briefed, and the opportunity arose in the context of intervention's legally protected interest test, WRID did not seriously dispute that Mineral County has a legally protectable interest in public trust protections for Walker Lake. As explained below, standing to bring a claim to assert or protect the public trust has uniformly been held to be broadly available to essentially any individual or entity. Given WRID's failure to point to any substantive doubt about Mineral County's standing or protected legal interest in asserting the public trust doctrine duty to provide adequate inflows to Walker Lake, WRID's unsupported argument concerning standing, like its argument about the public trust doctrine's applicability to water in Nevada, is nothing more than another pretext designed to obstruct and delay actual consideration of the merits of Mineral County's public trust claim.

It is a well established principle of the public trust doctrine that any member of the public may bring a public trust claim. *See Nat'l Audubon Soc'y*, 658 P.2d at 716, n. 11 (any member of

public, and in this case plaintiffs alleging harm to recreational and aesthetic interests, has standing to sue to protect the public trust); *Wisconsin v. Deetz*, 224 N.W.2d 407, 413 (Wisc. 1974) ("The public trust doctrine merely establishes standing for the state, or any person suing in the name of the state for the purpose of vindicating the public trust"); *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). This only makes sense, since there would be no other way for public trust obligations to be enforced where, as here, the state or other pertinent sovereign governmental entity has failed to recognize, enforce, or comply with its obligations under the public trust doctrine.

As discussed above, Mineral County brought this public trust claim on behalf of the public at large, citizens of Nevada more particularly, and most pointedly on behalf of Mineral County residents, all of whom are within the class of people for whose benefit the public trust exists. The County has established that its and the public's recreational, aesthetic, and economic interests have been harmed by the substantial impairment of Walker Lake resulting from the failure to recognize and fulfill the public trust obligation to ensure adequate inflows to Walker Lake from the Walker River system. *See* Affidavits of Kelvin J. Buchanan and Gary L. Vinyard, Doc. No. 22. Thus, Mineral County is a proper party to assert a claim seeking to enforce the public trust doctrine and ensure that the Decree Court enforces the public trust obligation to provide for adequate inflows from the Walker River System into Walker Lake in order to sustain the values, and uses of Walker Lake that the public trust doctrine protects.

The fact that neither NDOW nor the State of Nevada has never sought to assert or enforce the public trust in order to protect Walker Lake in this way, and the fact that that the State of Nevada affirmatively opposed the recognition or application of the public trust doctrine in any

meaningful sense before the Nevada Supreme Court,[6] only underscores the appropriateness and need for Mineral County to prosecute its public trust claim. Accordingly, Mineral County's standing to bring its public trust claim should not be considered open to serious debate, and it certainly is not the sort f issue or question that requires or is appropriate for certification to the Nevada Supreme Court.

iii. The Law Is Clear that Mineral County Need Not Exhaust Administrative Remedies Prior to Bringing Its Public Trust Claim in this Court

WRID also suggests, in passing, and without any supportive argument whatsoever, that exhaustion of administrative remedies may be a novel question of state law that must be certified to the Nevada Supreme Court for decision. *See* WRID Motion to Dismiss, at 9. To begin with, the Court should regard this argument from WRID with a jaundiced eye, since WRID aggressively asserted before the Nevada Supreme Court that no such administrative remedy was available or could be provided in response to Mineral County's public trust claim. *See* Answer of Walker River Irrigation District et al. at 3-4, *Mineral County v. Nevada*, 20 P.3d 800 (Case No. 3652); Memorandum of Points and Authorities of Walker River Irrigation District et al. at 18, 28, *Mineral County v. Nevada*, 20 P.3d 800 (Case No. 3652). No Nevada court has required exhaustion of administrative remedies before bringing a public trust claim, and Nevada law does not provide any administrative procedure or remedy for such a claim. In general, public trust claimants or petitioners are not required to challenge specific appropriations or otherwise exhaust administrative remedies in an action based solely on the state's violation of the public trust doctrine. *See Nat'l Audubon Soc'y*, 658 P.2d at 730 (plaintiffs bringing action based solely on

---

[6] *See* State of Nevada Answer at 19 – 31, *Mineral County*, 20 P.3d 800 (asserting various grounds why the public trust doctrine could not be asserted with regard to Walker Lake or did not require any action beyond the continued

public trust not required to exhaust administrative remedies contained in state's water rights system); *Kootenai*, 671 P.2d at 1094; *In re Water Use Permit Applications*, 9 P.3d at 445, 453, 455. Consistent with this general approach, the Nevada Supreme Court has held that the state's right in public waters cannot be prescribed against nor impaired by "an estoppel growing out of a mere failure to object to encroachment." *State v. Bunkowski*, 503 P.2d at 1238. Further, because the public trust doctrine imposes a continuing duty on the state, a public trust claim may be raised at any time, *see id.* at 1238, and requiring exhaustion of administrative remedies in the context of such a claim would not be practical for that reason as well. Accordingly, apart from the fact that Nevada law appears not to provide any administrative remedy for a public trust claim such as Mineral County's, it is clear that there is no legal requirement under Nevada law for Mineral County to exhaust any administrative remedies prior to pursuing its public trust claim in this Court.

The suggestion that some unidentified administrative remedy must be exhausted before the Court can exercise jurisdiction over Mineral County's public trust claim is especially dubious in the context of the Walker River litigation, in which the Decree Court, and not the Nevada State Engineer, makes the ultimate determinations about the allocation of and relative rights to water in the Walker River system. The diminished authority of the State in these proceedings is, perhaps, illustrated by the fact that in the nearly 20 years since this case was instituted, the State of Nevada has not taken effective action to meet the public trust obligation to provide for adequate inflows from the Walker River system to Walker Lake in order to restore and sustain the Lake's public trust values and uses. The State's inability, or disinclination, to ensure that the

---

operation of the Walker River Decree and Nevada water law without change).

requirements of the public trust doctrine are fulfilled with regard to Walker Lake only further demonstrates the futility and illusory nature of WRID's vaguely suggested exhaustion of administrative remedies requirement.

For the foregoing reasons, none of the issues raised by WRID are novel or unsettled questions of law, and therefore a stay is not appropriate in this case. If, however, the Court is inclined to stay the exercise of its jurisdiction with regard to nay issue, the proper procedure for the Court to follow would be to certify the legal question or questions to the Nevada Supreme Court for decision pursuant to Nev. R. App. P. 5(a).

V. CONCLUSION

For the reasons stated above, Mineral County respectfully urges the Court to deny WRID's *Motion to Dismiss Pursuant to Feed. R. Civ. P. 12(b)(1), or in the Alternative to Stay Proceedings with Respect to Mineral County's Amended Complaint in Intervention* in its entirety.

Respectfully submitted this 30th day of May, 2014,

/s/ Simeon M. Herskovits

Simeon M. Herskovits, Nevada Bar No. 11155
Iris Thornton, *pro hac vice*
Advocates for Community and Environment
P.O. Box 1075
El Prado, New Mexico 87529
Phone: (575) 758-7202
Fax: (575) 758-7203
Email: simeon@communityandenvironment.net
Email: iris@communityandenvironment.net

Sean A. Rowe, Nevada Bar No. 10977
Mineral County District Attorney
P.O. Box 1210
Hawthorne, Nevada 89415
Phone: (775) 945-3636
Fax: (775) 945-0740
Email: srowe@mineralcountynv.org

Attorneys for Mineral County

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2014, I electronically filed the foregoing **MINERAL COUNTY'S POINTS AND AUTHORITIES IN RESPONSE TO WALKER RIVER IRRIGATION DISTRICT'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO STAY** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for the C-125-B and C-125-C subproceedings; I further certify that on this 30th day of May, 2014, postcards containing notice of this filing were mailed to all pro se parties in the C-125-B subproceeding; and I further certify that on this 30th day of May, 2014, I caused a copy of the forgoing to be served on the following C-125-C non CM/ECF participants by U.S. Mail, postage prepaid:

David Parraguirre
1700 Wendy Way
Reno, NV 89509

Deborah Hartline
P.O. Box 1343
Quincy, CA 95971

Margaret & Terry Hawkins
945 E. Main Street, #168
Fernley, NV 89801

Tom Talbot
TALBOT LAND & LIVESTOCK
1650 North Sierra Highway
Bishop, CA 93514

Richard Fulstone
F.M. Fulstone, Inc.
R.N. Fulstone Company
2022 Nevada State Highway No. 208
P.O. Box 61
Smith, NV 89430

Rachel Tholke Trust
c/o Dawn Cooper, Trustee
P.O. Box 97
Coleville, CA 96107

Silverado, Inc.
c/o Scott Shackelton
4160 Long Knife Road
Reno, NV 89509

Beverly Sceirine
P.O. Box 249
Yerington, NV 89447

David Sceirine
P.O. Box 1013
Yerington, NV 89447

Joe Sceirine
P.O. Box 1013
Yerington, NV 89447

Twelves Family Trust
c/o Roy Snyder, Trustee
4164 South Syracuse
Denver, CO 80237

Presto Family Trust Agreement
Beatrice Presto, et al., Trustees,
1462 Douglas Avenue
Gardnerville, NV 89410

Centennial Livestock
David Wood
652 W. Cromwell, Suite 103
Fresno, CA 93711

Norman Annett
P.O. Box 455
Bridgeport, CA 93517

David and Karen Hardy Family Trust
P.O. Box 21351
Carson City, NV 89721

Pauline Bradshaw
P.O. Box 55
Wellington, NV 89444

Stanley and Janet Hunewill
P.O. Box 368
Bridgeport, CA 93517

William Weaver
Sweetwater Ranch
2535 State Road 338
Wellington, NV 89444

Garry Stone
Water Master
290 South Arlington Ave
Reno, NV 89501

R.A. Pelayo
5336 Awbury 7 Ave
Las Vegas, NV 89110

James Fousekis
2848 Garber Street
Berkeley, CA 94705

Renee Presto
1792 Solitude Lane
Gardnerville, NV 89410

Leslie Bradshaw
P.O. Box 55
Wellington, NV 89444

/s/ Noel Simmons
Noel Simmons