IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; and WALKER LAKE WORKING GROUP, Appellants, vs. LYON COUNTY; CENTENNIAL LIVESTOCK; BRIDGEPORT RANCERS; SCHROEDER GROUP; WALKER RIVER IRRIGATION DISTRICT; STATE OF NEVADA DEPARTMENT OF WIDLIFE; and COUNTY OF MONO, CALIFORNIA, Respondents.	)	Electronically Filed Jun 26 2019 10:33 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 75917

UNOPPOSED MOTION TO EXCEED TYPE-VOLUME LIMITATION

Appellants Mineral County and Walker Lake Working Group, by and through undersigned counsel, respectfully move the Court for permission to exceed the 7,000 word limit for their Reply Brief set by Nevada Rule of Appellate Procedure 32(a)(7)(A)(ii). This Motion is made pursuant to Nevada Rule of Appellate Procedure 32(a)(7)(D), and is supported by the attached Memorandum of Points and Authorities. Counsel for all parties, and the Nevada State Engineer and the Walker River Paiute Tribe, have been contacted and stated that they do not oppose this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL SUMMARY

Appellants now move this Court for an enlargement of the type-volume limitation set by NRAP 32(a)(7)(A)(ii), because, in light of the large number of opposing briefs and arguments, totaling hundreds of pages and more than one hundred thousand words, to which Appellants must respond, Appellants respectfully consider an enlargement necessary for them to respond to those briefs in their Reply Brief. Further, due to the importance of the issues raised in the answering briefs and their supporting amicus briefs, Appellants consider an enlargement necessary for them to adequately address the issues raised in those briefs.

II. LEGAL DISCUSSION

NRAP 32(a)(7)(A)(ii) provides that an "opening or answering brief is acceptable if it contains no more than 14,000 words . . . A reply brief is acceptable if it contains no more than half the type-volume specified for an opening or answering brief." Pursuant to 32(a)(7)(D)(i), "[a] motion to file a brief that exceeds the applicable page limit or type-volume limitation will be granted only upon a showing of diligence and good cause." Good Cause has generally been defined as "a 'substantial reason; one that affords a legal excuse.'" *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing *Colley v. State*, 105 Nev.

235, 236, 773 P.2d 1229, 1230 (1989)).

The United States Court of Appeals for the Ninth Circuit certified two questions of law to this Court for decision in this case. The certified questions are of enormous import to the parties, their respective constituents, and to the State of Nevada as a whole. Thus, it is critical that each party be afforded the opportunity to fully and adequately brief the issues. In addition to three Answering Briefs and two neutral amicus briefs, eleven Amicus briefs in support of Respondents were filed, to all of which Mineral County and Walker Lake Working Group also need to respond. Because the State Engineer's Amicus Brief raised arguments in opposition to Appellants' positions, to which Appellants must respond, and because of the number of issues and arguments raised in the multiple briefs filed by Respondents and their supporting Amici, Mineral County and Walker Lake Working Group request that the word limit for their Reply Brief be enlarged from 7,000 words to 11,986 words.

Appellants are cognizant of the limitations set forth in NRAP 32(a)(7)(A)(ii), and have attempted to be concise in their Reply Brief; however, due to the statewide importance of the issues before the Court, and due to the fact that Answering Briefs, neutral Amicus Briefs, and Amicus Briefs in support of Respondents to which the Reply Brief responds totaled over one hundred thousand

words and hundreds of pages, any further reduction would be detrimental to the arguments advanced by the Appellants.

Mineral County and Walker Lake Working Group assert that this Motion is sought in good faith, not for the purpose of delay, and that good cause exists to grant the motion. Counsel for Mineral County and Walker Lake Working Group are aware of no prejudice to any party resulting from the requested enlargement of type-volume limitation. Counsel for all parties, and the State Engineer and Walker River Paiute Tribe, have been contacted and do not oppose this motion.

III. CONCLUSION

For the reasons set forth above, Appellants Mineral County and Walker Lake Working Group respectfully assert that the enlargement of type-volume limitation requested herein is reasonable and warranted in this matter. As such, Appellants Mineral County and Walker Lake Working Group respectfully request that the Court enlarge the word limit set by NRAP 32(a)(7)(A)(ii) by 4,986 words for a total of 11,986 words for Appellants' Reply Brief.

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Attached hereto as Exhibit 1, pursuant to NRAP 32(a)(7)(D)(ii), is a Declaration of Simeon M. Herskovits in support of this Unopposed Motion to Exceed Type-Volume Limitation. A copy of Appellants' Reply Brief, containing 11,986 words, is filed concurrently herewith pending the Court's permission to file.

Respectfully submitted this 26th day of June, 2019,

/s Simeon Herskovits

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Attorneys for Appellants Mineral County, Nevada and Walker Lake Working Group.

CERTIFICATE OF SERVICE

I certify that I am an employee of the Advocates for Community and Environment, and that on this 26th day of June, 2019, I served a copy of the foregoing **UNOPPOSED MOTION TO EXCEED TYPE-VOLUME LIMITATION**, by electronic filing to:

Gordon DePaoli
K. Kevin Benson
Brett C. Birdsong
Robert L. Eisenberg
Aaron D. Ford
Steven G. Martin
Nhu Q. Nguyen
Stephen B. Rye
Jerry M. Snyder
Bryan L. Stockton
Tori N. Sundheim
Therese A. Ure
Roderick E. Walston
Wes Williams, Jr.

I further certify that on the 26th day of June, 2019, I served, via USPS first class mail, a complete copy of the foregoing **UNOPPOSED MOTION TO EXCEED TYPE-VOLUME LIMITATION** on the following attorneys of record who are not registered for electronic service:

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/s/ Iris Thornton

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EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; and WALKER LAKE WORKING GROUP, Appellants, vs. LYON COUNTY; CENTENNIAL LIVESTOCK; BRIDGEPORT RANCERS; SCHROEDER GROUP; WALKER RIVER IRRIGATION DISTRICT; STATE OF NEVADA DEPARTMENT OF WIDLIFE; and COUNTY OF MONO, CALIFORNIA, Respondents.	)	Case No. 75917

DECLARATION OF SIMEON M. HERSKOVITS PURSUANT TO NRAP 32(A)(7)(D)(II) IN SUPPORT OF APPELLANTS' UNOPPOSED MOTION TO EXCEED TYPE-VOLUME LIMITATION

I, SIMEON M. HERSKOVITS, hereby state that the assertions of this declaration are true:

1. I am currently the President and Managing Attorney at Advocates for Community and Environment. I am counsel for Appellants Mineral County and Walker Lake Working Group in this case.

2. Appellants Mineral County and Walker Lake Working Group filed the accompanying Unopposed Motion to Exceed Type-Volume Limitation, respectfully requesting that this Court permit them to exceed the 7,000 word limitation set in NRAP 32(a)(7)(A)(ii) by 4,986 words, and file a Reply Brief that is 11,986 words long.

3. The Appellants' deadline to file their Reply Brief is June 26, 2019.

4. Appellants contacted counsel of record for Respondents, the State Engineer, and the Walker River Paiute Tribe, and none oppose this Motion to Exceed Type-Volume Limitation.

5. The questions certified by the Ninth Circuit Court of Appeals, as decided by this Court, are of enormous import to the parties, their respective constituents, and to the State of Nevada as a whole. Thus, it is critical that each party be afforded the opportunity to fully and adequately brief the issues. This request is necessary to fully inform this Court of the status of the law in the context of the issues and arguments presented by the certified questions.

6. Appellants are cognizant of the limitations set forth in NRAP 32(a)(7)(A)(ii), and have attempted to be concise in the Reply Brief; however, due to the statewide importance of the issues before the Court, and due to the fact that Answering Briefs, neutral Amicus Briefs, and Amicus Briefs in support of Respondents to which the Reply Brief responds totaled over one hundred thousand words and hundreds of pages, any further reduction would be detrimental to the arguments advanced by the Appellants. Accordingly, Mineral County and Walker Lake Working Group respectfully request permission to submit a non-conforming Reply Brief.

Pursuant to NRS 53.045, I hereby certify, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 26th day of June, 2019.

/s Simeon M. Herskovits
SIMEON M. HERSKOVITS

No. 75917

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY, et al.,

Appellants,

vs.

LYON COUNTY, et al.,

Respondents.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Case No. 15-16342

APPELLANTS' REPLY BRIEF

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CORRECTIONS TO RESPONDENTS AND SUPPORTING AMICI STATEMENTS OF THE CASE

I. RESPONDENTS AND SUPPORTING AMICI REPEATEDLY ENGAGE IN ALARMIST AND SPECULATIVE ARGUMENTS REGARDING THE POTENTIAL REMEDY IN THIS CASE WHICH ARE UNSUPPORTED BY THE LAW OR THE FACTS

Respondents and supporting Amici ("Respondents"), including the State Engineer ("SE"),[1] spend significant energy attempting to convince the Court that Mineral County's claim is either unworkable, would cause chaos in Nevada water law, destroy the prior appropriation system, undermine certainty in water rights, upend all adjudications, destroy property rights, shut down all irrigation in the Walker Basin, and cause significant financial harm. *See* Walker River Irrigation District ("WRID") Brief, at 11-12; Nevada Department of Wildlife ("NDOW") Brief, at 10; Carson City and City of Fernley ("CC&CF") Brief, at 3, 6, 12; Pacific Legal Foundation ("PLF") Brief, at 3; Peri & Sons Brief, at 11-12. Such concerns are completely unfounded and Respondents have cited no evidence that any of the circumstances they envision are likely.

The Public Trust Doctrine ("PTD") requires a recognition and awareness of public values relating to water use and simply seeks balance so that upstream

[1] While the SE filed a purportedly neutral Amicus Brief, the position the office has taken is consistent with its opposition to Mineral County's claim for twenty five years.

appropriators do not continue to be the only members of the public who benefit from the use of waters in the Walker Basin, a benefit to which Walker Lake and the public is entitled.[2] Restoration of this balance may be accomplished in a number of ways, including changes in flood water management, channel restoration, crop conversion, and changes to upstream water management. *See also* NDOW Brief, at 20 (quoting *Mineral County*, 117 Nev. 235, 247 (2001) (Rose, J. concurring) (envisioning an approach which would restore Walker Lake while accommodating appropriators)). Some of these remedies already are contemplated and being implemented as pilot projects. Additionally, the Walker Basin Restoration Program ("WBRP") already has acquired almost half of the water necessary to restore Walker Lake,[3] without causing any of the harms alleged

[2] On this point, WRID's Brief is telling. In listing the communities which are dependent on water in the Walker Basin, WRID has not included the towns of Hawthorne, Schurz, or Walker Lake in Mineral County. WRID Brief, at 8.

[3] Respondents suggest Mineral County's claim is unnecessary, because the WRBP provides the requested relief. While the Program to date has acquired almost half of the water necessary to restore Walker Lake, not a drop of that water has reached the Lake due to obstruction by upstream parties and the water master. Without judicial mandate to apply the PTD in the Walker Basin, such obstruction will continue to frustrate the purpose of the WBRP. *See* Exhibit A, NFWF Petition for Writ of Mandamus, *United States v. Walker River Irrigation District*, 3:73-cv-0125 (Dist. Nev. Apr. 24, 2019); Exhibit B, MC/WLWG Joinder to NFWF Petition for Writ of Mandamus, *United States v. Walker River Irrigation District*, 3:73-cv-0125 (Dist. Nev. Apr. 30, 2019); Exhibit C, Objection of Walker Basin Conservancy to Petition for Approval of Special Assessment, *United States v. Walker River Irrigation District*, 3:73-cv-0125 (Dist. Nev. May 20, 2019); Exhibit D, MC/WLWG Joinder to Objection of Walker Basin Conservancy to Petition for

by Respondents.[4] It is likely that a remedy can be crafted that balances all needs in the basin in an equitable and environmentally sound manner. So, Respondents' alarmist statements have no basis in the record or the law.

A review of the impact of California's *National Audubon Soc'y v. Superior Court of Alpine County,* 658 P.2d 709 (Cal. 1983) ("*Audubon*" or "*Mono Lake*"), case confirms that the parade of horrors envisioned by Respondents has not come to pass in California. David Owen, *The Mono Lake Case, The Public Trust Doctrine, and the Administrative State*, 45 U.C. Davis L. Rev. 1099, 1122-29 (2012). "Courts applying the Mono Lake doctrine demand all feasible accommodations to preserve and protect trust assets, but they do not attempt to eliminate private property. In fact, virtually all applications of the public trust doctrine leave possession of private property unchanged." Michael C. Blumm, *Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 Pace Envtl. L. Rev. 649, 651 (2010).[5] WRID acknowledges that "*Audubon*

Approval of Special Assessment, *United States v. Walker River Irrigation District*, 3:73-cv-0125 (Dist. Nev. May 21, 2019).

[4] https://www/walkerbasin.org/newsandupdates.

[5] Michael C. Blumm, Harrison C. Dunning, & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 Ecol. L. Quarterly 461, 478 (1997) ("Of course, application of the public trust doctrine to state land and water use allocation does not mean that environmental considerations will invariably trump economic concerns . . . [T]he Mono Lake court made clear that the state may authorize economic uses despite unavoidable harm to trust values, because accommodation of both economic concerns and environmental values is at the core of the public trust doctrine.").

expressly states that it does not require any reallocation of water at all." WRID Brief, at 46 (citing *Audubon*, 658 P.2d at 732). Respondents' focus on these improbable outcomes is a mere distraction, intended to dissuade the Court from applying the PTD in this case. Even were these concerns well-founded, this Court in *Lawrence v. Clark County* made clear that "the public trust doctrine is rooted in our constitutional and statutory law and inherent limitations on the state's power and, thus, cannot be relaxed simply because it may present courts with difficult factual questions." 127 Nev. 390, 401 (2011).

II. WRID'S ATTEMPT TO DENY THAT UPSTREAM OVERAPPROPRIATION HAS STRANGLED WALKER LAKE IS CONTRADICTED BY HISTORICAL ACCOUNTS

WRID attempts to sidestep Mineral County's claim by suggesting that the strangulation of Walker Lake is not the result of upstream overappropriation, but is due to natural variation. WRID Brief, at 11-12. While WRID is correct that natural variation does occur in the Walker Basin, the Lake's unprecedented decline over the past century can only be accounted for by upstream overappropriation. WRID's assertion is belied by numerous historical accounts and hydrological assessments of the Basin by the USGS and the Nevada State Engineer. According to the USGS, "[b]etween 1882 and 2008, upstream agricultural diversions resulted in a lake-level decline of more than 150 feet and storage loss of 7,400,000 acre-feet. Evaporative concentration increased dissolved solids from 2,500 to

17,000milligrams per liter." Thomas L. Lopes & Kip K. Allander, Water Budgets of the Walker River Basin and Walker Lake, California and Nevada, USGS Scientific Investigations Report 2009–5157, at 1 (2009);[6] *see also* Kip K. Allander, J. LaRue Smith, & Michael J. Johnson, Evapotranspiration from the Lower Walker River Basin, West-Central Nevada, Water Years 2005-2007, USGS Scientific Investigations Report 2009-5079, at 1 (2009).[7] The SE's Walker River Chronology,[8] cited by WRID to support its natural variation argument, confirms that agricultural demands exceed supply even in normal years, and has had a detrimental impact on Walker Lake. Walker River Chronology, at I-1, I-3, I-8; *id.* §§ II & III (discussing effects of dramatic increase of agriculture in 19th and early 20th Centuries).

SUMMARY OF ARGUMENT

As explained in Mineral County and Walker Lake Working Group's ("Mineral County's") Opening Brief, the PTD always has been a component of Nevada law imposing a fiduciary duty on the sovereign, which ordinarily would be the State but here is the Walker River Decree Court exercising exclusive

[6]https://pubs.usgs.gov/sir/2009/5157/pdf/sir20095157.pdf.
[7]https://pubs.usgs.gov/sir/2009/5079/pdf/sir20095079.pdf.
[8]Gary A. Horton, Nevada State Engineer's Office, Walker River Chronology, at I-1, I-3, I-8 (1996), http://images.water.nv.gov/images/publications/River%20Chronologies/Walker%20River%20Chronology.pdf.

jurisdiction over and applying Nevada law to the waters of the Walker Basin. MC/WLWG Opening Brief, at 42. That duty is to maintain the public trust uses and values of public trust resource for the long-term benefit of the whole public, future as well as present generations. While the precise contours of public uses and values that are protected under the doctrine have evolved historically, in contemporary times it generally has been understood to protect navigation, fisheries, environmental uses, recreational uses, and scenic or aesthetic values. *See Lawrence*, 127 Nev. at 406; *Nat'l Audubon v. Superior Court of Alpine County*, 658 P.2d 709, 712 (Cal. 1983) ("*Audubon*" or "*Mono Lake case*"). The public trust uses and values of Walker Lake include its once outstanding fisheries (especially its Lahontan cutthroat trout fishery), swimming and other forms of recreational use, navigation, its extraordinary scenic beauty, and environmental uses including serving as once important migratory bird habitat along the Pacific Flyway. *See* MC/WLWG Opening Brief, at 7.

Some Respondents concede that under Nevada law and this Court's opinion in *Lawrence* the PTD requires the State to regulate water in the public interest rather than in the private interest of water users, *e.g.,* LC Brief, at 3, but all of them and many of their supporting Amici focus on what amounts to a straw man, or misunderstanding of the nature of the PTD. This argument is that the PTD does not authorize a reallocation of adjudicated water rights, assuming that the relief

sought in this case is the creation of a new right comparable to the appropriative usufructuary rights held under the prior appropriation system, only with greater priority. Mineral County does not argue for a reallocation of adjudicated rights and does not maintain that the doctrine calls for a new senior right for the Lake. Rather the doctrine acts as a constraint on the availability of water for appropriation from the public trust water resource, which is Walker Lake and the Walker River system that supplies virtually all of the Lake's water. As such, application of the PTD to require minimum flows to Walker Lake also would not and could not constitute a taking under the Nevada Constitution.

The issue in this case is not whether a new water right should be created for the benefit of the Lake, but rather a recognition that the PTD imposes a binding fiduciary duty on the sovereign to manage the system to provide adequate inflows to Walker Lake to restore the Lake over time to a reasonable level of health that will support its public trust uses and values. This management objective could be achieved in a variety of ways, although it certainly is true that more water must be allowed to flow, on average, into Walker Lake and less water made available for diversion upstream than the Decree, which overallocated the system, permits. Such an order is required because the original Decree Court failed to consider Walker Lake's public trust uses and values or the sovereign's fiduciary duty with regard to the Lake.

Respondents also mischaracterize this Court's analysis of the PTD and its sources in a way that is heavy-handedly skewed to support an interpretation of the doctrine that is oriented completely in favor of private appropriative water rights, which never has been adopted by any court and which is intrinsically antithetical to the fundamental notion of public ownership of water and the sovereign's public trust duty to maintain the trust values and uses of its water resources. On the basis of their strained interpretation, Respondents assert that the adoption and implementation of Nevada's Water Act of 1913, codified at NRS 533.010, et seq., fulfilled the State's fiduciary duty with regard to the State's public trust water resources and conclusively disposed of those resources in favor of private appropriative usufructuary rights. As explained below, neither the statutory language itself nor the case law construing that law supports this position.

A proper reading of Nevada law and the law of sister western states confirms that the PTD requires a modification of the Walker River Decree to ensure that public trust values are considered and a balance is restored in the Basin between prior appropriative uses and public trust values at Walker Lake.

ARGUMENT

I. CERTIFIED QUESTION 1: THE PTD APPLIES TO WATER RIGHTS IN THE WALKER BASIN AND REQUIRES THAT THE DECREE COURT PROVIDE FOR MINIMUM INFLOWS TO WALKER LAKE

Respondents present a disjointed and inconsistent approach to the first question certified by the Ninth Circuit. While all Respondents insist that the PTD should not be applied in the Walker Basin, their reasons are varied and inconsistent with one another. Some Respondents claim the PTD doesn't apply to water at all; others concede that the doctrine applies to water, but not to vested or adjudicated water rights; others argue that even if the doctrine applies to adjudicated water rights, it does not authorize "reallocation"; and still others argue that while the PTD applies to water rights, the State's duty is satisfied by virtue of the permitting requirements of NRS 533.370.[9] NDOW, the supposed guardian of the State's wildlife resources which depend on Walker Lake, even goes so far as to suggest that the State has fulfilled its public trust duties by elevating the importance of private upstream appropriations above the economic, recreational, and environmental trust uses of Walker Lake in the lower part of the Walker Basin.

[9] *See* WRID Brief, at 26; NDOW Brief at 15, Lyon County Brief ("LC Brief"), at 2, 13-27; SE Brief, at 2, 17-18, 20-21; Peri & Sons Brief, at 7; CC&CF Brief, at 8-17; PLF Brief, at 9; SNWA Brief, at 8; PCWCD Brief, at 5; TMWA Brief, at 10; Carson Water Subconservancy District Brief, at 13-14.

NDOW Brief, at 12. Finally, both WRID and the Walker River Paiute Tribe ("WRPT") speculate that Walker Lake may not be subject to the PTD, because the Tribe may claim title to it in the future.[10] WRID Brief, at 30; WRPT Brief, at 6.

A. The PTD Applies to All Water Rights Under Nevada Law, and Nevada's Appropriative Rights System Does Not By Itself Fulfill the State's Public Trust Obligations With Regard to the State's Public Trust Water Resources

From its earliest days, Nevada has followed California's approach to water law generally and the doctrine of prior appropriation, in particular, viewing that doctrine as one setting relative priority among claimants to usufructuary water rights. *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866) ("The first appropriator of the water of a stream has undoubtedly a right under the decisions in California to the quantity of water actually appropriated by him as against any one subsequently appropriating any of the water of the same stream."). As explained below, this

[10] It is undisputed that the WRPT Reservation does not encompass the Lake, that the State of Nevada owns title to the bed and banks of the Lake and has jurisdiction to manage wildlife and recreation at the Lake, and there is no pending claim challenging the State's title. *See* NDOW Walker Lake Website, http://www.ndow.org/Bodies_Of_Water/Walker_Lake/. Respondents also raise a number of doubts about whether Walker Lake is properly considered a public trust water resource, but it is undisputed that the Lake is navigable and supported a thriving fishery until it was devastated by upstream overappropriation and overconsumption of water from the system. As such, Walker Lake is one of very few natural water courses and bodies in Nevada that clearly meet even the narrowest of tests for protection by the PTD. As noted in our Opening Brief, Walker Lake also is recognized as a precious gem of extraordinary environmental, recreational, and scenic value in our very arid State.

understanding of the prior appropriation doctrine in Nevada has remained consistent since then and does not support an interpretation that grants appropriative usufructuary water rights free from the State's public trust duty to regulate and restrict such use rights as deemed necessary to protect the water resources of the State. *See* MC/WLW Opening Brief, at 14, 18.

Nevada's statutory water law established a system for permitting, adjudicating, and administering appropriative usufructuary rights in the waters of the State, while affirming that those waters are owned by the public and are to be managed by the State in the interests of future as well as present generations. Nowhere in the statutory law did the Legislature make a disposition of the public's ownership of its public trust water resources. Nonetheless, Respondents argue that the Legislature's enactment of the Water Law of 1913 in itself fulfilled the State's public trust duty with regard to any and all water in the state because the Legislature acted in the public interest when it adopted the statutory system. While the Legislature did act in the public interest when it enacted the Water Law of 1913, that in no way amounts to a determination of any sort to permanently dispose of the public's ownership of the State's waters or a decision to terminate or cede the State's duty to regulate or restrict usufructuary water rights to protect the long-term uses and values of the State's public trust water resources. There is nothing in either statutory or case law construing it that would support such a reading. To

the contrary the sweeping language of the law's public ownership provision and the decisional law consistently holding that the State retains ownership and a public trust duty to regulate and restrict appropriative water rights to safeguard the public interest demonstrate that the contrary is true. *See* MC/WLWG Opening Brief, at 14, 15, 22.

Perhaps recognizing the implausibility of arguing that State has no continuing PTD fiduciary duty, Respondents alternatively argue that any continuing public trust responsibilities on the part of the State have been fulfilled by virtue of the fact that NRS 533.370 includes a public interest criterion. NRS 533.370(2). This criterion is much like public interest or welfare provisions in virtually every western state's statutory water law, and such provisions have not been held to fulfill the state's public trust duties. *E.g., Audubon*, 658 P.2d at 726-728. The existence of a statutory public interest criterion is distinct from whether or not the sovereign actually acted consistent with its public trust duty in allocating water resources. Similarly, Respondents' arguments that recently added statutory provisions allowing water to be appropriated for environmental or recreational uses, *e.g.,* NRS 533.023, 533.030(2), further fulfill the public trust obligations of the State are implausible, because relying on potential water rights applicants to seek water rights to supply those uses is not a reliable way for the State to fulfill its trust duty, and because essentially all of the surface waters of the State were

appropriated long before those permissive use provisions were added to the statutory law.

The ineffectiveness or inadequacy of Nevada's prior appropriation system to protect the public trust uses and values of the State's public trust water resources, such as Walker Lake, is reflected in the result of that system's application. The proof is in the pudding, it might be said, and the pudding in this case is the devastation of Walker Lake's fisheries, wildlife habitat, recreational, and scenic trust values and uses due to the overappropriation of the system. As the Walker Decree itself reflects through omission, the Decree Court understood its role as simply determining rights in a relative sense as between water right claimants. *See* Walker River Decree, Article XI (enjoining the claimants and their successors from claiming "any rights in or to the waters of the Walker River and/or its branches and/or its tributaries, except the rights set up and specified in this decree . . . having due regard to the relative rights and priorities herein set forth . . . ."). ER 1391. The Decree Court's approach was consistent with the nature of water rights adjudications under Nevada law, namely the judicial determination of the relative rights among competing claimants to appropriative usufructuary rights from the system without regard to public trust values or duties.

B. Recognition and Enforcement of the Sovereign's PTD Duty to Walker Lake Would Not Involve Abrogation or Reallocation of Appropriative Usufructuary Water Rights

Respondents repeatedly mischaracterize the first certified question as being whether the PTD authorizes the abrogation or reallocation of appropriative water rights to provide water to Walker Lake. *E.g.,* LC Brief, at 11. The question actually is whether and how the PTD applies to adjudicated appropriative water rights under Nevada law. As explained in our Opening Brief and below, this mischaracterization represents a basic misunderstanding of the trust duty imposed on the sovereign by the PTD and the authority of the sovereign to manage, regulate, or restrict usufructuary rights to use water from a public trust water resource in order to protect the resource's trust values and uses.

In actuality, the reallocation of water rights, adjudicated or permitted, is not truly an issue in this case. An adjudicated water right is a right to use up to a maximum amount depending on water availability, which water always belongs to the public and is held and managed by the State in trust for future as well as present generations of Nevadans. Properly assessed and managed, a water resource like the Walker River and Lake system has certain basic intrinsic requirements for a minimum average flow through the system into the Lake to keep the system and the Lake functioning on some minimally reasonable level of health to maintain the resource's ability to fulfill its public trust uses and values.

That is what actually is at issue in this case, and an order affirming and requiring compliance with the public trust duty to manage the system in order to satisfy that minimum requirement is what Mineral County seeks. This does not require any reallocation of appropriative rights under the Decree. Rather, it requires the Decree Court to modify the Decree to correct its original error of failing to consider the sovereign's fiduciary duty to maintain Walker Lake's public trust uses and values at some minimum reasonable level.

Respondents nonetheless argue against a "reallocation" of water rights on the basis of the premise that vested and adjudicated water rights are final and conclusive. *See, e.g.,* WRID Brief, at 33, 39. However, under Nevada water law adjudicated water rights are vested, final, and conclusive only relative to each other and to later competing claimants under the priority system. NRS 533.090, 533, 240. Such rights have not been held to be final and conclusive in any sense that removes them from the public's ultimate ownership of Nevada's waters or the State's public trust duty and authority regulate, restrict, or curtail appropriative usufructuary rights as necessary to protect the public's long-term interests in its waters. *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803, 810 (1914); *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650, 654 (Dist. Nev. 1926); *Bergam v. Kearney*, 241 F. 884, 891, 893 (Dist. Nev. 1917). Indeed**,** Nevada law is not unique in its articulation of the nature of vested water rights. California, which

applies the PTD to permit reconsideration of water rights allocation decisions, also has described the nature of vested water rights. *United States v. State Water Res. Control Bd.,* 182 Cal.App.3d 82, 101 (1986). So the vested nature of water rights with regard to their relative priorities does not impact the application of the PTD in this case.

Certainty and finality in the relative rights that vest among competing claimants to appropriative usufructuary rights are legitimate concerns, but they do not obviate the State's obligation to fulfill its public trust duty. The former and the latter must be balanced, and a way to address the latter need at a reasonable level must be found while permitting private profit from the use of water from the resource to the greatest degree that is consistent with the fulfillment of the public trust. The problem in the Walker Basin is that the needs of Walker Lake and the requirements of the PTD never were considered when the waters of the system were over-appropriated, which resulted in the most extreme of imbalances. The consequence of failing to account for the natural needs of the system and allowing it to be over-appropriated is that eventually the State will have to curtail certain water rights or force the water rights holders to come up with their own plan for a reduction of usage in order to bring the system back into some reasonable balance, as is being done in Diamond Valley.

Further, under Nevada law, the nature of an appropriative usufructuary right and its being subject to public ownership and state regulatory control to protect the public interest is not affected by the manner in which the right is acquired or becomes vested, regardless of whether it vests under an adjudication, via permitting under the statutory system, or under common law prior to enactment of the water code. *Application of Filippini*, 66 Nev. 17, 22 (1949) (treating different types of vested water rights the same). Neither the date nor the manner by which a water right vests affects the public's ownership and control over the water resource from which the usufructuary right is derived. *Desert Irr. Ltd. v. State*, 113 Nev. 1049, 1059 (1997) ('those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use.").

Respondents also point to statutory provisions that prohibit the SE from acting in a way that conflicts with a water rights decree, NRS 533.0245, 533.3703, as the basis for arguing that adjudicated rights are beyond the purview of the PTD. This argument is misplaced, as those provisions relate to the hierarchy in which adjudications by a court are of superior authority to determinations of relative rights by the SE, and not to the PTD, which neither implicates nor conflicts with a determination of the relative rights and priorities between competing water rights claimants.

Despite Respondents' repeated mischaracterization of the relief sought by Mineral County's claim, the PTD does not require and we have not sought any reallocation of water rights. Rather, the PTD requires a change in the management of the system to ensure that adequate inflows reach Walker Lake to, over time, bring the Lake to a reasonable state of health and functionality in terms of its trust uses and values. A recognition of this public trust obligation may lead to an order requiring the fulfillment of that duty. Such an order might involve, without limitation: (1) a change in how surplus waters are managed in wet years and how flows outside of the irrigation season are managed; (2) mandating efficiency improvements with a requirement that water saved thereby be released to the Lake; (3) curtailment of the most speculative junior rights on the system; (4) a mandate that the State provide both a plan for fulfilling its public trust duty to Walker Lake and the funding necessary to effectuate that plan; and/or (5) an order requiring water rights holders to come up with a plan to reduce consumptive water use in the Basin as was done by the SE in Diamond Valley. While fulfilling the PTD duty to Walker Lake would involve some reduction in the availability of water in the system for irrigation, in this regard the PTD would be like any other natural constraint on the already variable availability of water to supply private appropriations and would not constitute a modification of water rights.

C. The PTD as Articulated by the Supreme Courts of Nevada's Sister States Supports Mineral County's Claim

Mineral County's claim is consistent with the public trust jurisprudence in Nevada's fourteen sister western states. Respondents attempt to characterize Mineral County's claim as a radical expansion of the PTD in Nevada by misconstruing of Nevada and her sister states. *See* WRID Brief, at 22-24; Lyon County Brief, at 28-31; SE Brief, at 30; CC&CF Brief, at 18-19. Respondents also attempt to distinguish California's articulation of the PTD using invented distinctions that are irrelevant to PTD jurisprudence. A succinct review of the law of Nevada's sister western states, the majority of which recognize that a state's public trust responsibilities extend to management of a state's water resources, supports Mineral County's claim.

While states around the West have developed their PTDs to different extents, California law as articulated in *Audubon* is well within the scope of the doctrine recognized by other states. Every western state's Supreme Court but Colorado's has recognized that the PTD applies to navigable waterways such as Walker Lake,[11] and while California has recognized that the PTD applies to waters

[11] *In re Water Use Permit Applications*, 9 P.3d 409, 445, 453 (Haw. 2000) ("*Waiahole Ditch*"); *United Plainsmen Assn. v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457, 460-61 (N.D. 1976) (first decision to apply the PTD to water rights); *San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (invalidating statute which exempted

that are tributary to navigable waters,[12] an additional eight states, four of which are pure prior appropriation states, have gone further to recognize that the doctrine applies to all water resources regardless of navigability.[13] Seven states, two of which are pure prior appropriation states, recognize that the doctrine applies to the allocation of water resources, [14] and the Supreme Courts of California, Hawaii, and Idaho affirmatively have held that doctrine may be used to revoke or limit previously granted rights.[15] Because the doctrine is largely undeveloped in

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adjudications from PTD); *Defenders of Wildlife v. Hull*, 18 P.3d 722, 726 (Ariz. Ct. App. 2001); *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983); *Montana Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 185-86 (Mont. 2011); *Parks v. Cooper*, 676 N.W.2d 823, 837-39 (S.D. 2004); *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998); *State ex rel. Bliss v. Dority,* 225 P.2d 1007 (N.M. 1950); *Day v. Armstrong*, 362 P.2d 137, 145 (Wy. 1961); *Morse v. Or. Div. of State Lands*, 581 P.2d 520, 524, 525 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 709 (Or. 1979); *Rettkowski v. Dep't of Ecology*, 858 P.2d 232, 239, n.5 (Wash. 1993); *Colman v. Utah State Land Bd*., 795 P.2d 622, 635-36 (Utah 1990).

[12] *Audubon*, 658 P.2d at 721; *Envtl. Law Found. v. State Water Res. Control Bd.,* 26 Cal.App.5th 844 (2018) (holding PTD also applies to tributary groundwater).

[13] *Waiahole Ditch*, 9 P.3d at 445, 453; *United Plainsmen,* 247 N.W.2d at 460-61; *Kootenai Envtl. All.,* 671 P.2d at 1094 (adopting *Audubon* rule); *Idaho Conservation League v. Idaho*, 911 P.2d 748, 750 (1995); *Montana Trout Unlimited*, 255 P.3d at 185-86; *Parks*, 676 N.W.2d at 837-39; *Baxley*, 958 P.2d at 434; *Bliss,* 225 P.2d at 1010; *Day*, 362 P.2d at 145.

[14] *Audubon*, 658 P.2d at 732; *Waiahole Ditch*, 9 P.3d at 445, 453; *United Plainsmen*, 247 N.W.2d at 460-61; *Kootenai,* 671 P.2d at 1094; *Montana Trout Unlimited*, 255 P.3d at 185-86; *Parks*, 676 N.W.2d at 837-39; *Baxley*, 958 P.2d at 434.

[15] *Audubon*, 658 P.2d at 732; *Waiahole Ditch*, 9 P.3d at 445, 453; *Kootenai,* 671 P.2d at 1094.

Arizona, another pure prior appropriation state, application to water rights arguably remains an open question. However, twenty years ago, the Arizona Supreme Court unhesitatingly rejected the Arizona legislature's attempt to abolish the PTD in the context of water rights adjudications. *San Carlos Apache Tribe v. Super. Ct. ex rel. Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (invalidating as unconstitutional Arizona Revised Statute § 45-263(B)). As discussed below, while the legislatures of Idaho and Montana have attempted to limit the judiciary's articulation of the scope of the PTD, the limitations in those states have been criticized as unconstitutional and ineffective.[16] Four states with fairly undeveloped public trust jurisprudence, New Mexico, Oregon, Washington, and Wyoming, have not yet addressed the question of whether the PTD applies to water rights. Thus, California's public trust jurisprudence is far from an outlier and Respondents' argument that California is an outlier is misplaced.[17] *See* WRID Brief, at 14; PLF

[16] The Utah legislature also has attempted to limit Utah's PTD to exclude water rights by statute. Because the Utah Supreme Court has articulated a narrow scope of the PTD which is limited to navigable waters and has carved out a separate trust relationship for other public resources, the Court recently upheld statutory limitations on the state's trust duties which are outside the scope of *Illinois Central*. *See Utah Stream Access Coalition v. VR Acquisitions, LLC,* 439 P.3d 593, 611 (Utah 2019).

[17] Additionally, multiple states in the west have recognized that the PTD applies to wildlife resources, and South Dakota has applied the doctrine to air resources, making Respondents' argument that California and Hawaii are outliers even less appropriate. *In re Sanders Beach*, 147 P.3d 75, 85 (Idaho 2006) (citing *Kootenai*, 671 P.2d 1085); *Wash. State Geoduck Harvest Ass'n*, 101 P.3d 891, 895 (Wash.

Brief, at 20-21. Inherent in the recognition of water resources as public trust property, is the ability of the state to restrict or regulate rights to use water consistent with the rule articulated in *Illinois Central R.R. Co. v. Illinois*. *See* 146 U.S. 387 (1892); *Audubon*, 658 P.2d at 728 (state is not confined by past allocation decisions that violated the public trust). As noted above, seven other western states join California in holding that the PTD applies to the allocation of water resources. Inherent in this recognition is the ability to regulate or curtail rights granted by the state in those water resources.

Beyond being one of seven western states joined in applying the PTD to water rights, California's *Audubon* case is generally recognized as the leading authority on the application of the PTD in the West. The Supreme Courts of Hawaii and Idaho expressly followed *Audubon's* articulation of the PTD, several additional western state courts have cited *Audubon* with approval,[18] and this Court referenced *Audubon* in its articulation of the PTD in *Lawrence*. 127 Nev. at 397. While Lyon County and the SE try to make much of the dissent in a Colorado case,

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App. 2004); *State ex rel. Bliss,* 225 P.2d 1007; *Pullen v. Ulmer*, 923 P.2d 54, 60-61 (Alaska 1996); *Parks*, 676 N.W.2d at 838.

[18] *CWC Fisheries, Inc. v. Bunker,* 755 P.2d 1115, 1118 (Alaska 1988) (citing *Audubon*, 658 P.2d at 723)(adopting approach taken in California to PTD's imposition of a continuing duty on the state once public trust property is granted); *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 956-57 (Mont. 1985) (citing *Audubon*) (title to water rights on trust land vest in state and are subject to continuing trust duty); *Parks*, 676 N.W.2d at 838 (citing *Audubon*) (PTD exists independent of statute).

suggesting that Colorado and unidentified "other states" have declined to follow *Audubon*, the fact is that no state court has considered and declined to apply that case. *See* LC Brief, at 29 (citing *In re Title, Ballot Title & Submission Clause for 2011–2012 No. 3*, 274 P.3d 562, 573 (Colo. 2012) (Hobbs, J. dissenting); SE Brief, at 30 (same). In truth, Colorado never has considered *Audubon* at all, because it alone among western states denies that it is subject to or bound by the PTD. *See City of Longmont v. Colo. Oil and Gas Ass'n*, 369 P.3d 573, 586 (Colo. 2016).

Respondents attempt to distinguish the water law of California, where the prior appropriation doctrine originated, because it is not a pure prior appropriation state. WRID Brief at 26; SE Brief, at 30. It is unclear why this distinction has any relevance whatsoever to the application of the PTD in Nevada as the reasoning applied by the California Supreme Court in *Audubon* is equally applicable to water as a public trust resource in Nevada. Moreover, the California Constitution arguably puts greater emphasis on the importance of putting water to beneficial use than Nevada law does, providing that "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." Cal. Const. art. 10, § 2. Interestingly, this constitutional provision has not prevented application of the PTD to both appropriative water rights and riparian water rights in California. In fact, application of the PTD to water resources is seen as particularly appropriate in

prior appropriation states, where water is declared a public resource. *See Farm Inv. Co. v. Carpenter*, 61 P. 258, 265 (Wyo. 1900) ("There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the state…the sovereign is trustee for the public.").[19] Again, the supreme courts of a number of pure prior appropriation states including Idaho, Montana, New Mexico, Wyoming, and arguably Arizona,[20] have recognized that the PTD applies to all water resources.

The California Supreme Court's explication of the PTD provides useful guidance to this Court in answering the certified questions before it. Since Nevada's seminal prior appropriation case, *Lobdell v. Simpson*, 2 Nev. 274, 277 (1866), Nevada courts have looked to California in the development of Nevada water law, and consistent with that tradition this Court in *Lawrence* relied on California's *Audubon* case in the context of the PTD.[21] 127 Nev. at 397; *see also*

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[19] Respondents also attempt to distinguish Nevada from its sister states by emphasizing Nevada's aridity. LC Brief, at 4, 13; SE Brief, at 30, n. 95. It is unclear why such a characteristic would support narrowing the state's duty to protect water as a public resource, since the drier the state the more precious a resource water may be said to be.

[20] *See, supra,* Argument, p. 21.

[21] "Nevada looks to the law of other jurisdictions, particularly California, for guidance." *JPMorgan Chase Bank, N.A. v. KB Home*, 740 F. Supp. 2d 1192, 1198 (D. Nev. 2010); *see also Commercial Standard Ins. Co. v. Tab Constr.,* 94 Nev. 536 (1978) (following California precedent in case without guiding Nevada

State v. Bunkowski, 88 Nev. 623, 633 (1972). So, while the SE is correct that Nevada courts will not incorporate statutory law of other states into Nevada law, SE Brief, at 29, it is routine for Nevada courts to look to California jurisprudence in construing the common law.

Nonetheless, Respondents insist that this Court look to Colorado law for guidance in this case. Carson City and City of Fernley acknowledge that, unlike Nevada, Colorado's Supreme Court has rejected the PTD in its entirety, CC&CF Brief, at 18, and yet Respondents argue that this Court should follow Colorado. Not only is Colorado alone with regard to the PTD, its outright rejection of the doctrine is inconsistent with the United States Supreme Court's PTD jurisprudence and with public trust jurisprudence dating to Roman law. While states may expand the scope of the PTD, the Supreme Court's articulation of the PTD in *Illinois Central* prevents states from allowing or facilitating the substantial impairment of the public's interest in navigation, commerce, and fishing. *See Waiāhole Ditch*, 9 P.3d at 445, 447, 453; MC/WLWG Opening Brief, at 15-16.

Not only does the judiciary in this state follow California rather than Colorado, as early as the adoption of the Water Law of 1913, Nevada's Legislature

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precedent); *Zurich Am. Ins. Co. v. Coeur Rochester, Inc*., 720 F. Supp. 2d 1223, 1234 n.11 (D. Nev. 2010) (noting "[i]n the context of interpreting insurance policy terms, the Nevada Supreme Court has often looked to persuasive precedent from other jurisdictions, especially California.").

declined to follow Colorado's approach to the management of its water resources. In enacting the Water Law of 1913, the Nevada Legislature pointedly chose not to follow the narrow approach to public ownership of water that had been adopted in Colorado's Constitution, which was an alternative model that the Legislature had been aware of for some time. The Water Law of 1913 clearly and simply provides that "The 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." NRS 533.025. This language differs markedly from the language in the Colorado Constitution, which had been adopted some years earlier and which provides that "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Colo. Const. art. 16, § 5. That the Legislature intentionally excluded the Colorado exception for water previously appropriated may be inferred from the fact that the Legislature chose to exclude such language from the Water Law of 1913 after having included just such language in prior versions of its water law. Compare the language of NRS 533.025, *Nevada Water Act of 1913* (March 22, 1913), § 1, with the language of Nevada's most recent preceding attempt at a water law, which emulated Colorado and provided that "all natural watercourses and natural lakes and the waters thereof *which are not held in private*

ownership, belong to the State and are subject to appropriation for beneficial use." Act of Feb. 26, 1907, ch. 18, § 1 1907 Nev. Stat. 30 (repealed 1913).

Moreover, in response to the Colorado Supreme Court's refusal to recognize the existence of a PTD in Colorado, there have been numerous attempts to insert the doctrine into the state's constitution, although they have not been successful to date.[22] That level of internal controversy surrounding the Colorado Supreme Court's rejection of the PTD counsels strongly against following its lead. Outliers like Colorado historically have not served as guides for Nevada courts in the development of Nevada law, and it would not be advisable to follow Colorado's anomalous approach to the PTD.

D. It Is Proper for the Court to Construe the Scope and Nature of the Fiduciary Duty Imposed on the Sovereign With Regard to the State's Public Trust Water Resources, Including Walker Lake

Respondents argue that separation of powers principles prevent the Court from construing the PTD and the statutory water law to allow a change in the management of the Walker River system to protect the public trust uses and values of Walker Lake. This argument is based on a profound misunderstanding of the judiciary's role. This case calls for the Court to construe the nature and scope of

[22] *See, e.g., Ballot Title*, 274 P.3d 562; *see also* Robin Kundis Craig, *A Comparative Guide to the Western States Public Trust Doctrines: Public Values, Private Rights, and the Evolution Towards an Ecological Public Trust,* 37 Ecology L.Q. 53, 116 n. 351 (2010) (referencing multiple Colorado PTD ballot initiatives).

the fiduciary duty imposed by the PTD on the State, as the sovereign, to maintain the trust uses and values of a public trust water resource. Determining whether a trust relationship exists and the nature and scope of the fiduciary duty is well within the scope of matters properly and routinely considered by courts of general jurisdiction, such as Nevada's Supreme Court and district courts. *See* Nev. Const. art. 6, §§ 4, 6. The interpretation or construction of statutory laws like Nevada's statutory water law also traditionally is a routine, core part of the judiciary's function in Nevada and the Nation.

The depth of Respondents' confusion about separation of powers and the role of the judiciary is reflected in their reliance on *Commission on Ethics v. Hardy*, in which this Court articulated Nevada separation of powers principles and then proceeded to review and invalidate the Legislature's own delegation of its power to discipline members of the Legislature to a legislatively created commission. *See* 125 Nev. 285, 291-300 (2009) (cited in LC Brief, at 23). That Nevada's courts can and routinely do interpret statutory law, common law, and equitable principles and doctrines such as the PTD is not unusual or controversial. As Hamilton wrote regarding the role of the judiciary within the American separation of powers system of government, "The interpretation of the laws is the proper and peculiar province of the courts." Alexander Hamilton, John Jay & James Madison, The Federalist, No 78 at 498 (Robert Scigliano ed., 2001) (also

opining that "the courts were designed to be an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority").

Additionally, this Court in *Lawrence* clearly stated that, "although the public trust doctrine has roots in the common law, it is distinct from other common law principles because it is based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the State's sovereign power, as recognized by *Illinois Central."* 127 Nev. at 401. As this Court stated in *Lawrence*, "[u]nder the public trust doctrine, the Legislature has the power only to act as a fiduciary of the public in its administration of trust property. The public trust doctrine is thus not simply common law easily abrogated by legislation; instead, the doctrine constitutes an inseverable restraint on the state's sovereign power." 127 Nev. at 401 (also noting "[i]t is for the courts to decide whether the public trust doctrine is applicable to the facts. The Legislature cannot by legislation destroy the constitutional limits on its authority."). In other words, the trust relationship and duty may not be modified by the state, as trustee. *See id*. (citing *San Carlos Apache Tribe,* 972 P.2d at 199; *see also Illinois Central Railroad*, 146 U.S. at 453).[23] Thus, "instead of being subject to displacement by

[23] Peri & Sons, in its Amicus Brief, acknowledges that the Legislature is without power to modify the PTD by statute. Peri & Sons Brief at 9 (citing *Illinois*

statute, the converse is actually true: because of the priority of constitutional norms the public trust doctrine can be used to curb invalid legislative actions." Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J.L. & Pol'y 281 (2014). Consistent with this understanding of the doctrine, the analyses in *Audubon* and *Lawrence* recognized that the PTD and system of prior appropriation operate simultaneously. *See* 658 P.2d at 726-29; 127 Nev. at 397 (citing *Mineral County*, 117 Nev. at 247 (Rose, J. concurring)). Thus, Respondents' reliance on *Lawrence* to suggest that only the Legislature may define and apply the PTD is misplaced.

Just as the Legislature may not by statute override the constitution, it also may not diminish or define away its public trust responsibilities. While a state has the authority to codify the PTD's scope as explained by its judiciary, which some states have done, a state's legislature does not itself have the authority to define that scope. *See Lawrence*, 127 Nev. at 399-400 (NRS 533.025's public ownership provision "evinces" the PTD). That task is reserved for the judiciary, which properly may define and apply the PTD on a case by case basis regardless of whether the legislature has codified its principles. Thus, Respondents' arguments

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Central, 146 U.S. at 400-01) ("the public trust doctrine was a limit on the state's sovereign power to dispose of certain lands; thus, the legislature could not abolish the limits of its authority through legislation.").

that NRS 533.370 completely fulfills the PTD and limits its scope such that the Court may not apply it in this case is mistaken.

Respondents make a number of attempts at equating the adoption of Nevada's Water Act of 1913 with a statewide wholesale disposition of any and all public trust water resources and arguing that the Legislature's enactment of that Act is the only valid object of this Court's public trust review. But any honest reading of the Act reveals none of the elements necessary for a disposition of public trust property. Nowhere does the Water Act mention any public trust property or resources meant to be disposed of by the Act's mere enactment. In contrast, in *Lawrence*, the legislation at issue was an express dispensation of specific property, and so the legislation and dispensation of public trust property were one in the same. Here, however, the government action that is subject to review is the Decree Court's dispensation of usufructuary rights in public trust property under the Walker River Decree without considering the public trust requirements or values of Walker Lake. Accordingly, Respondents' attempt to limit this Court's review to Nevada's statutory water law, which provided only for the dispensation of usufructuary rights, misses the mark.

In *San Carlos Apache Tribe*, cited in *Lawrence*, the Arizona Supreme Court struck down legislation that would have exempted water rights adjudications from

public trust review.[24] The court in that case described the PTD as a constitutional limitation on legislative power to give away resources held by the state in trust for its people. *San Carlos Apache Tribe*, 972 P.2d at 199. As such, "[t]he Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings." *Id.* at 199. Given this Court's reliance on Arizona precedent along with the Nevada Constitution's Gift Clause and constitutional separation of powers principles in *Lawrence*, there should be no doubt that the question of whether the PTD requires minimum flows to Walker Lake is properly before this Court and would not properly be left to either the Legislature or the Executive.

Numerous other courts in the West have affirmed that the PTD properly is to be construed and applied by the judiciary. *See, e.g., Audubon,* 658 P.2d at 727-28; *Waiahole Ditch,* 9 P.3d at 455; *Kootenai,* 671 P.2d at 1092 (stating that "[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary"); *Chelan Basin Conservancy v. GBI Holding Co.,* 413 P.3d 549, 555 (Wash. 2018) ("Because of the doctrine's constitutional underpinning, any legislation that impairs the public trust remains subject to judicial review."); *Parks*, 676 N.W.2d at 837 (Water

[24] Arizona courts consistently have invalidated legislative attempts to restrict the applicability and scope of the PTD. *San Carlos Apache Tribe*, 972 P.2d at 199; *Arizona Ctr. for Law in the Public Interest v. Hassell,* 837 P.2d 158, 174 (Ariz. Ct. App.1991); *Defenders of Wildlife v. Hull*, 18 P.3d 722, 739 (Ariz. Ct. App. 2001).

Resources Act "does not override the public trust doctrine or render it superfluous. History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority"); *Galt v. Montana,* 731 P.2d 912, 920 (Mont. 1987) (Hunt, J., dissenting) ("legislation which failed to abide by [Montana Supreme Court public trust] decisions and the Montana Constitution would probably be declared void"). Thus, although they have yet to be tested in court, statutes intended to limit the application of the PTD in the area of water rights, including those passed in Arizona, Montana, and Idaho, almost certainly are properly viewed as unconstitutional legislative acts under this Court's and its sister western courts' explications of the bases for the PTD.[25]

Further, the history of this case underscores the fact that fulfillment and oversight of the state's public trust duty may not be left to the legislative or executive branches. The Decree Court and state have applied the doctrine of prior appropriation without regard to their public trust duty and as a result have permitted the severe overappropriation of the Walker Basin, elevating the interests of upstream users above the requirements of Walker Lake and the interests of the public in the Lake's trust values and uses. For years the federal water master, a

[25] As noted above, because the Utah Supreme Court has articulated a narrow scope of the PTD which is limited to navigable waters and has carved out a separate trust relationship for other public resources, the Court has upheld statutory limitations on the state's trust duties outside the scope of *Illinois Central*. *See Utah Stream Access Coalition v. VR Acquisitions, LLC,* 439 P.3d 593, 611 (Utah 2019).

supposed neutral arm of the Decree Court, has engaged in obstruction designed to prevent flow to Walker Lake, including her most recent pretextual refusal to deliver water purchased for Walker Lake under the WBRP and attempted assessment of an exorbitant special assessment on deliveries of such water to the Lake.[26] *See supra*, n. 2. Additionally, NDOW, an arm of the State of Nevada, has steadfastly opposed Mineral County's public trust claim for a mandate to increase inflows to Walker Lake since this case was filed a quarter of a century ago. NDOW's unreliability as a steward of the public trust is further demonstrated by the fact that despite owning a flood water right for the benefit of Walker Lake since the early 1970s, NDOW never exercised that right until 2010. Meanwhile, NDOW argues that its artificially-created Mason Valley Wildlife Refuge effectively is entitled to a greater degree of protection under the PTD than Walker Lake, one of Nevada's very few precious natural water bodies. *See* NDOW Brief, at 22.

Mineral County instituted its PTD claim because of the SE's and Decree Court's failure to fulfill the public trust duty to Walker Lake by permitting the

[26] This history also underscores why statutory provisions such as Nevada's beneficial use, public interest, and instream flow provisions referenced by Respondents are insufficient to protect the public trust. Inclusion of a provision in statutory law does not ensure execution of that provision in satisfaction of the State's public trust duties. For the same reason, WRID's suggestion that because water rights are conditional under the law, the existence of a public interest criterion in NRS 533.370 by itself fulfills the PTD is equally unavailing.

Lake's depletion from severe over-appropriation of the Walker Basin. Accordingly, the suggestion that application of the PTD should be left to the SE's administering of the statutory water law flies in the face of the SE's historical dereliction of duty in this regard and likely would render the doctrine a dead letter. The Walker Basin provides a textbook example of the reason that the appropriative water rights system, or reliance on the executive and legislative and executive branches alone, is insufficient to ensure compliance with the State's public trust responsibilities.

II. CERTIFIED QUESTION II: APPLICATION OF THE PTD IN THE WALKER BASIN TO GUARANTEE MINIMUM FLOWS TO WALKER LAKE WOULD NOT RESULT IN A TAKING UNDER THE NEVADA CONSTITUTION[27]

A. Application of the PTD to Ensure Minimum Flows to Walker Lake Would Not Result in a "Judicial Taking"

This Court has never held that court action may result in a taking of private property for which just compensation is required under the Fifth Amendment, and the United States Supreme Court is deeply divided over whether such a doctrine

[27] As noted above, for years, Mineral County has made clear that it does not seek a reallocation of vested rights in the Walker Basin. Thus, Mineral County believes the Ninth Circuit's second certified question is improperly framed and should be rephrased as follows: If the PTD applies to Walker Lake and water rights on the Walker River system, would such application result in a taking under the Nevada Constitution requiring just compensation? As explained above, Mineral County does not seek, and enforcement of the PTD to restore and maintain Walker Lakes trust uses and values would not require, any reallocation of appropriative water rights in the basin. *Audubon*, 658 P.2d at 732.

exists. *See Stop the Beach Renourishment, Inc. v. Florida DEP,* 560 U.S.702 (2010). While WRID attempts to rephrase the Court's second question to avoid the judicial takings issue, Lyon County argues that the Supreme Court has, in fact, endorsed a judicial takings theory. LC Brief, at 40; *see also* PLF Brief, at 30. Not only do none of the cases relied on by Lyon County articulate the existence of the judicial takings theory, they all engage in unclear mixed discussions of due process and takings. These ambiguous precedents carry considerably less weight than the Court's much more recent intensely divided debate over the existence of the judicial takings theory in *Stop the Beach*. 560 U.S. 702.[28] It is clear after *Stop the Beach* that a judicial takings theory is at best debatable. In any event, for the reasons articulated in Mineral County and WLWG's Opening Brief, a judicial takings theory would not apply to this case. *See* MC/WLWG Brief, at 44-50.

B. The PTD is a Background Principle of Nevada Law Which Precludes a Takings Defense

All parties agree that where a government regulation is grounded in a state's background principles of property law, no taking can occur because the property

[28] Lyon County suggests that the plurality in *Stop the Beach* would have supported the argument that Mineral County's public trust claim constitutes a judicial taking. LC Brief, at 41. Regardless of whether a judicial takings theory exists, however, Lyon County is mistaken because the Supreme Court in *Stop the Beach* also recognized that the PTD is a background principle of state law, which precludes any takings claim. *Stop the Beach,* 560 U.S. at 731.

owner never had the asserted right to begin with. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). There is broad agreement that the PTD is a background principle of state law which limits property rights and may preclude a takings claim.[29] *See Stop the Beach,* 560 U.S. at 731; *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (S.C. 2003); Sean B. Hecht, *Taking Background Principles Seriously In the Context of Sea-Level Rise*, 39 Vt. L. Rev. 781, 784 (2015) (noting such broad agreement). This is in part due to the fact that, as this Court noted in *Lawrence*, the PTD has its roots in sixth-century Roman law which asserted 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." 127 Nev. at 393 (citing The Institutes of Justinian, Lib. II, Tit. I, § 1). Further, "its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country." *PPL v. Montana*, 565 U.S. 576, 603 (2012) (citations omitted).

While the Supreme Court in *Illinois* central had occasion to apply the PTD to land, water always has been considered a public resource subject to the doctrine.

[29] SNWA agrees that water rights are subject to background principles of law, including the PTD. SNWA Brief, at 15-16. WRID mistakenly suggests that the PTD may only constitute a background principle if supported by nuisance law. WRID Brief, at 59. Nuisance is but one background principle. The PTD is a background principle in its own right and does not depend on nuisance law.

See Lawrence, 127 Nev. at 393. In *Lawrence* this Court recognized that the PTD has been embodied in Nevada caselaw and reflected in statutory law related to water rights for over 100 years, long before the Walker River Decree was entered. 127 Nev. at 398-400. As the Court observed in *Lawrence,* a water right "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.'" *Id*. at 397 (quoting *Mineral County*, 117 Nev. at 247 (Rose, J. concurring)). Thus, it simply is not credible to suggest that application of the PTD to water rights would constitute a radical expansion of the doctrine, which always has applied to such rights.[30] Application of the doctrine to water resources is hardly new, and the Decree Court's failure to apply the doctrine at the time of the Walker River Decree does not excuse its failure to ensure that the sovereign's public trust duties with regard to Walker Lake were fulfilled.

Respondents also ignore the fact that Nevada's water law is not static. It has evolved over the last 150 years, including an abandonment of the riparian doctrine

[30] For this reason, Respondents' suggestion that even if application of the PTD in the Walker Basin could not result in a taking, it would result in a due process violation also is misplaced. No court ever has held that the Due Process Clause was violated by virtue of a state's confirmation that water rights fall within the scope of the PTD. Not even the seven of Nevada's sister western states which have held that the PTD applies to all water resources and to the allocation of those water resources have entertained any possibility that such an interpretation could constitute a due process violation. *See supra,* Argument § I(C).

and enactment of the statutory system. Never has this evolution been held to result in a taking or due process violation under the Nevada Constitution. *See Reno Smelting, Milling & Reduction Works v. Stephenson*, 20 Nev. 269, 280 (1889); *Ormsby Cty. v. Kearney*, 37 Nev. 314 (1914), *Vineyard Land and Stock Co. v. Fourth Jud. Dist. Ct.*, 42 Nev. 1 (1918). Thus, water rights holders are not entitled to a preserve an outdated or past erroneous interpretation of water law. *See Lucas,* 505 U.S. at 1035 (Kennedy, J. concurring). While the scope of the PTD has evolved over time to meet changing public understanding and needs, that evolution does not alter the fact that the PTD is a background principle of state law. *See Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."). It is recognized that in addition to the PTD, other background principles of law, such as nuisance law, also evolve. *See* Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Envtl. Aff. L. Rev. 89, 89-92 (1998); *see also Stop the Beach,* 560 U.S. at 736-67 (Kennedy, J. concurring).

WRID offers no rational explanation for why the PTD background principle cases involving land cited by Mineral County should not apply equally to water as a public trust resource. *See* WRID Brief, at 56. Land ownership carries a more

substantial property interest than a usufructuary water right. Since the PTD has been held to support a state's decision to rescind title in public trust land based on a background principles theory, and the law clearly indicates that the PTD applies to water as a public trust resource, it follows that a right in public trust water also is subject to modification under the doctrine, regardless of whether it vested by virtue of an adjudication or statutory permitting. By this argument WRID seems to be trying to convert the conditional, uncertain character of a usufructuary right into a novel basis for enhanced protection beyond that enjoyed by fee simple real property. WRID also attempts to distinguish cases cited by Mineral County because they did not involve an "existing use." WRID does not cite any legal authority for its new theory for the simple reason that there is none.

While Mineral County does not dispute that water rights are property rights,[31] as articulated in our Opening Brief, vested rights are correlative rights under Nevada law, and while they may be protected by the Fifth Amendment for purposes of the exercise of a state's power of eminent domain or police power, a takings claim cannot be made against the limitation placed on a water right by the PTD, because the right never included the privilege of using water in a manner that

[31] NDOW appears to misunderstand Mineral County's argument. *See* NDOW Brief, at 22. Mineral County has never suggested that water rights are not considered property rights under Nevada law. However, those property rights are defined, in part, by the limitations placed on them by the PTD, just as the reasonable use doctrine limits those rights.

is destructive of a public trust resource. *Stop the Beach*, 560 U.S. at731; *Lucas*, 505 U.S. at 1027; *Audubon*, 658 P.2d at 723. Like Nevada, California courts have held that "once rights to use water are acquired, they become vested property rights, and as property rights . . . cannot be infringed by others or taken by governmental action without due process and just compensation." *United States v. State Water Res. Control Bd.,* 182 Cal.App.3d 82, 101 (1986). However, the California Supreme Court has drawn a clear distinction between constitutional limits placed on a state's police power with regard to vested water rights and action pursuant to the PTD that affects such rights. *Audubon*, 658 P.2d at 723 ("We rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required: 'We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish*, hold it subject to the public trust.'").[32] Under California PTD jurisprudence, then, restriction and even reallocation of water rights pursuant to the PTD has been held not to constitute a taking under the California Constitution because a water right in California does not include the

[32] Even if the PTD were to operate to divest a private title to public trust property, a taking would not occur because, as the Supreme Court held in *Illinois Central*, any grant of public trust property which is not in the public interest is void or subject to revocation. 146 U.S. at 453, 456-57.

right to use water inconsistently with the public trust. *Id*. In other words, the PTD is a background principle of law that limits the property right.

Accordingly, WRID's reliance on *Town of Eureka v. State Engineer,* 108 Nev. 163, 167 (1992), for the proposition that while water rights are subject to reasonable regulation, the state may not exercise its police power in a manner which divests vested water rights is misplaced. WRID Brief, at 52. *Town of Eureka* dealt with the State's regulation of water rights under its police power, not the fulfillment of the state's duties under the PTD, which itself defines the boundaries of the water right.[33] Similarly, WRID confuses a state's exercise of public trust duties with condemnation when discussing the judicial takings theory. WRID cites Justice Kennedy's concurrence in support of its argument that the Court's application of the PTD would be a condemnation of property that should be left to the Legislature. WRID Brief, at 60. Justice Kennedy's comment, however, simply confirms that when a court articulates the contours of a property right, it does not condemn (or take) property.

PLF cites *Opinion of the Justices,* 313 N.E.2d 561, 566 (Mass. 1974) and *Bell v. Town of Wells*, 557 A.2d 168, 179-80 (Me. 1989), for the proposition that an expansion of the PTD may result in a taking. PLF Brief, at 27. However, those cases both were decided on the basis of the courts' holdings that legislation which

[33] PLF similarly focuses on eminent domain cases. PLF Brief, at 24.

put limitations on private property in excess of those imposed by the PTD was unconstitutional. *See Justices*, 313 N.E.2d at 566-67; *Bell*, 557 A.2d 168. PLF's reliance on the Utah *Colman* case is similarly misplaced. In that case, the government argued that no taking could occur when it impaired a canal which it had granted private rights to, because in granting the property the state violated the PTD, and as such the grant was void. *See Colman v. Utah State Land Bd.*, 795 P.2d 622, 635-36 (Utah 1990). The court did not dismiss the state's argument, but rather stated that there was no evidence for the state's claim that the grant violated the PTD at the time the state granted rights in the canal, which, contrary to PLF's argument, suggests that had there been evidence of a violation of the PTD when the state granted the property right, as is the case here, the Court would have entertained the state's PTD defense to the takings claim.

Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1385 (Fed. Cir. 2000), also does not support PLF's argument. *See* PLF Brief, at 27. The court in *Palm Beach* acknowledged that the navigation servitude, or public trust, "may constitute part of the 'background' principles to which a property owner's rights are subject, and thus may provide the Government with a defense to a takings claim [as a] 'pre-existing limitation on the landowner's title.'" 208 F.3d at 1384. The court in that case simply noted that to avoid a takings defense, the government

regulation must be consistent with the purpose of the navigational servitude, or public trust easement. *Id.* at 1384-85.

PLF's reliance on the *Casitas* case in support of its background principles argument also is unavailing. PLF Brief, at 27-28. The court in that case based its holding on the fact that the defendant failed to make a showing that regulation was necessary to fulfill public trust duties, and thus could not avail itself of a background principles argument under *Lucas*. *Casitas Mun. Water Dist. v. United States,* 102 Fed. Cl. 443, 460 (2011). Accordingly, the Court held that the defendant's background principles argument under *Lucas* failed. *Id*. Additionally, the court in *Casitas* noted that the state could revisit a water rights license at any time and could limit it consistent with its public trust duties. *Id.* at 473-74. Specifically, the court explained that:

> Should the SWRCB ultimately find that flows of 50 cfs or more are necessary to protect the steelhead, then any prospect plaintiff may have had for pursuing a takings claim in this court will be eliminated. We reach this conclusion for two reasons. First, we would view such a pronouncement by the Board as a determination that the public trust doctrine strikes the balance between consumptive and environmental needs in this case in favor of the fish. That conclusion would be enough for defendant to succeed in a background principles of state law defense under *Lucas*.

Id. at 474.

Thus, none of the cases cited by Respondents support the position that a takings defense may be asserted against the state's public trust duty with regard to the public trust property. To the contrary, *Stop the Beach,* 560 U.S. at 731, *McQueen,* 580 S.E.2d at 120, *Esplanade*, 307 F.3d at 985, and numerous other cases confirm the opposite to be true. *See* MC/WLWG Brief, at 37-43.

C. Because a Remedy Has Not Yet Been Crafted In This Case, No Takings Claim Is Ripe

Regardless of whether a judicial takings theory exists or is precluded by background principles of state law, the question of whether an actual taking will occur is not ripe. While it is appropriate for this Court to consider the takings question by virtue of the fact that it was certified by the Ninth Circuit, a takings claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *RB Properties, Inc. v. Clark County*, 128 Nev. 928 (2012). Because the PTD has not been applied to the Walker Basin and no specific remedy has been proposed, the facts before the Court are insufficient to assess whether or how water rights would be impacted by virtue of application of the PTD to the Walker Basin. As noted above, "virtually all applications of the public trust doctrine leave possession of private property unchanged," Blumm, *The Public Trust Doctrine and Private Property*, 27 Pace Env. L. Rev. 649. So it is highly

speculative to suggest that water uses in the basin will be impacted in a way that implicates the Takings Clause.

CONCLUSION

For the reasons set forth above, Mineral County respectfully urges the Court to hold that the PTD applies to water rights adjudicated under the doctrine of prior appropriation and requires the Walker River Decree Court to administer water rights in the Walker Basin in such a way as to ensure minimum adequate flows to Walker Lake to restore and maintain the Lake's public trust uses and values at a reasonable level. Mineral County further requests that the Court hold that

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application of the PTD to the Walker Basin would not, as a matter of law, constitute a taking under the United States or Nevada Constitution requiring payment of just compensation.

Respectfully submitted this 26th day of June, 2019,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

2. I further certify that this brief complies with the requested enlargement of page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,986 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of June, 2019.

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ADDENDUM

Addendum - 1

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Cal. Const. Art. 10, § 2 Conservation of water resources; restriction on riparian rights

Sec. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Colo. Const. Art. 16, § 5 Water of streams public property

The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Nevada Const. Art. 6, § 4 Jurisdiction of Supreme Court and court of appeals; appointment of judge to sit for disabled or disqualified justice or judge

1. The Supreme Court and the court of appeals have appellate jurisdiction in all civil cases arising in district courts, and also on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts. The Supreme Court shall fix by rule the jurisdiction of the court of appeals and shall provide for the review, where appropriate, of appeals decided by the court of appeals. The Supreme Court and the court of appeals have power to issue writs of *mandamus, certiorari,* prohibition, *quo warranto* and *habeas corpus* and also all writs necessary or proper to the complete exercise of their jurisdiction. Each justice of the Supreme Court and judge of the court of appeals may issue writs of *habeas corpus* to any part of the State, upon petition by, or on behalf of, any person held in actual custody in this State and may make such writs returnable before the issuing justice or judge or the court of which the justice or judge is a member, or before any district court in the State or any judge of a district court.

2. In case of the disability or disqualification, for any cause, of a justice of the Supreme Court, the Governor may designate a judge of the court of appeals or a district judge to sit in the place of the disqualified or disabled justice. The judge designated by the Governor is entitled to receive his actual expense of travel and otherwise while sitting in the supreme court.

3. In the case of the disability or disqualification, for any cause, of a judge of the court of appeals, the Governor may designate a district judge to sit in the place of the disabled or disqualified judge. The judge whom the Governor designates is entitled to receive his actual expense of travel and otherwise while sitting in the court of appeals.

Nev. Const. Art. 6, § 6 District Courts: Jurisdiction; referees; family court

1. The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges

thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

2. The legislature may provide by law for:

(a) Referees in district courts.

(b) The establishment of a family court as a division of any district court and may prescribe its jurisdiction.

A.R.S. § 45-263 State law applicable; public trust inapplicable

A. State law, including all defenses available under state law, applies to the adjudication of all water rights initiated or perfected pursuant to state law.

B. The public trust is not an element of a water right in an adjudication proceeding held pursuant to this article. In adjudicating the attributes of water rights pursuant to this article, the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source.

N.R.S. 533.010 "Person" defined
Effective: July 1, 2009

"Person" includes the United States, this State and any political subdivision of this State.

N.R.S. 533.023 "Wildlife purposes" defined
Effective: July 1, 2009

"Wildlife purposes" includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats.

N.R.S. 533.025 Water belongs to public

The 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.

N.R.S. 533.030 Appropriation for beneficial use; use for recreational purpose, developed shortage supply or intentionally created surplus declared beneficial; limitations and exceptions
Effective: July 1, 2017

1. Subject to existing rights, and except as otherwise provided in this section and NRS 533.027, all water may be appropriated for beneficial use as provided in this chapter and not otherwise.

2. The use of water, from any stream system as provided in this chapter and from underground water as provided in NRS 534.080, for any recreational purpose, or the use of water from the Muddy River or the Virgin River to create any developed shortage supply or intentionally created surplus, is hereby declared to be a beneficial use. As used in this subsection:

(a) "Developed shortage supply" has the meaning ascribed to it in Volume 73 of the Federal Register at page 19884, April 11, 2008, and any subsequent amendment thereto.

(b) "Intentionally created surplus" has the meaning ascribed to it in Volume 73 of the Federal Register at page 19884, April 11, 2008, and any subsequent amendment thereto.

3. Except as otherwise provided in subsection 4, in any county whose population is 700,000 or more:

(a) The board of county commissioners may prohibit or restrict by ordinance the use of water and effluent for recreational purposes in any artificially created lake or stream located within the unincorporated areas of the county.

(b) The governing body of a city may prohibit or restrict by ordinance the use of water and effluent for recreational purposes in any artificially created lake or stream located within the boundaries of the city.

4. In any county whose population is 700,000 or more, the provisions of subsection 1 and of any ordinance adopted pursuant to subsection 3 do not apply to:

(a) Water stored in an artificially created reservoir for use in flood control, in meeting peak water demands or for purposes relating to the treatment of sewage;

(b) Water used in a mining reclamation project; or

(c) A body of water located in a recreational facility that is open to the public and owned or operated by the United States or the State of Nevada.

N.R.S. 533.090 Determination of relative rights of claimants to water of stream or stream system: Petition; order of State Engineer
Effective: May 26, 2017

1. Upon a petition to the State Engineer, signed by one or more water users of any stream or stream system, requesting the determination of the relative rights of the various claimants to the waters thereof, the State Engineer shall, if upon investigation the State Engineer finds the facts and conditions justify it, enter an order granting the petition and shall make proper arrangements to proceed with such determination.

2. The State Engineer shall, in the absence of such a petition requesting a determination of relative rights, enter an order for the determination of the relative rights to the use of water of any stream selected by the State Engineer. As soon as practicable after the order is made and entered, the State Engineer shall proceed with such determination as provided in this chapter.

3. A water user upon or from any stream or body of water shall be held and deemed to be a water user upon the stream system of which such stream or body of water is a part or tributary.

N.R.S. 533.0245 State Engineer prohibited from carrying out duties in conflict with certain decrees, orders, compacts or agreements
Effective: July 1, 2007

The State Engineer shall not carry out his or her duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for the interstate allocation of water pursuant to an act of Congress.

N.R.S. 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure
Effective: October 1, 2013

1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:

(a) The application is accompanied by the prescribed fees;

(b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and

(c) The applicant provides proof satisfactory to the State Engineer of the applicant's:

(1) Intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and

(2) Financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

2. Except as otherwise provided in subsection 10, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit. If a previous application for a similar use of water within the

same basin has been rejected on those grounds, the new application may be denied without publication.

3. In addition to the criteria set forth in subsections 1 and 2, in determining whether an application for an interbasin transfer of groundwater must be rejected pursuant to this section, the State Engineer shall consider:

(a) Whether the applicant has justified the need to import the water from another basin;

(b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;

(c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;

(d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
(e) Any other factor the State Engineer determines to be relevant.

4. Except as otherwise provided in this subsection and subsections 6 and 10 and NRS 533.365, the State Engineer shall approve or reject each application within 2 years after the final date for filing a protest. The State Engineer may postpone action:

(a) Upon written authorization to do so by the applicant.

(b) If an application is protested.

(c) If the purpose for which the application was made is municipal use.

(d) In areas where studies of water supplies have been determined to be necessary by the State Engineer pursuant to NRS 533.368.

(e) Where court actions or adjudications are pending, which may affect the outcome of the application.

(f) In areas in which adjudication of vested water rights is deemed necessary by the State Engineer.

(g) On an application for a permit to change a vested water right in a basin where vested water rights have not been adjudicated.

(h) Where authorized entry to any land needed to use the water for which the application is submitted is required from a governmental agency.

(i) On an application for which the State Engineer has required additional information pursuant to NRS 533.375.

5. If the State Engineer does not act upon an application in accordance with subsections 4 and 6, the application remains active until approved or rejected by the State Engineer.

6. Except as otherwise provided in this subsection and subsection 10, the State Engineer shall approve or reject, within 6 months after the final date for filing a protest, an application filed to change the point of diversion of water already appropriated when the existing and proposed points of diversion are on the same property for which the water has already been appropriated under the existing water right or the proposed point of diversion is on real property that is proven to be owned by the applicant and is contiguous to the place of use of the existing water right. The State Engineer may postpone action on the application pursuant to subsection 4.

7. If the State Engineer has not approved, rejected or held a hearing on an application within 7 years after the final date for filing a protest, the State Engineer shall cause notice of the application to be republished pursuant to NRS 533.360 immediately preceding the time at which the State Engineer is ready to approve or reject the application. The cost of the republication must be paid by the applicant. After such republication, a protest may be filed in accordance with NRS 533.365.

8. If a hearing is held regarding an application, the decision of the State Engineer must be in writing and include findings of fact, conclusions of law and a statement of the underlying facts supporting the findings of fact. The written decision may take the form of a transcription of an oral ruling. The rejection or approval of an application must be endorsed on a copy of the original application, and a record must be made of the endorsement in the records of the State Engineer. The copy of

the application so endorsed must be returned to the applicant. Except as otherwise provided in subsection 11, if the application is approved, the applicant may, on receipt thereof, proceed with the construction of the necessary works and take all steps required to apply the water to beneficial use and to perfect the proposed appropriation. If the application is rejected, the applicant may take no steps toward the prosecution of the proposed work or the diversion and use of the public water while the rejection continues in force.

9. If a person is the successor in interest of an owner of a water right or an owner of real property upon which a domestic well is located and if the former owner of the water right or real property on which a domestic well is located had previously filed a written protest against the granting of an application, the successor in interest must be allowed to pursue that protest in the same manner as if the successor in interest were the former owner whose interest he or she succeeded. If the successor in interest wishes to pursue the protest, the successor in interest must notify the State Engineer in a timely manner on a form provided by the State Engineer.

10. The provisions of subsections 1 to 9, inclusive, do not apply to an application for an environmental permit or a temporary permit issued pursuant to NRS 533.436 or 533.504.

11. The provisions of subsection 8 do not authorize the recipient of an approved application to use any state land administered by the Division of State Lands of the State Department of Conservation and Natural Resources without the appropriate authorization for that use from the State Land Registrar.

12. As used in this section, “domestic well” has the meaning ascribed to it in NRS 534.350.

N.R.S. 533.3703 Consideration of consumptive use of water right and proposed beneficial use of water
Effective: July 1, 2011

1. The State Engineer may consider the consumptive use of a water right and the consumptive use of a proposed beneficial use of water in determining whether a proposed change in the place of diversion, manner of use or place of use complies with the provisions of subsection 2 of NRS 533.370.

2. The provisions of this section:

(a) Must not be applied by the State Engineer in a manner that is inconsistent with any applicable federal or state decree concerning consumptive use.

(b) Do not apply to any decreed, certified or permitted right to appropriate water which originates in the Virgin River or the Muddy River.

CERTIFICATE OF SERVICE

I hereby certify that **APPELLANTS' REPLY BRIEF AND ADDENDUM** was filed electronically with the Nevada Supreme Court on the 26th day of June, 2019. Electronic Service of **APPELLANTS' REPLY BRIEF AND ADDENDUM** shall be made in accordance with the Master Service List as follows:

Gordon DePaoli
K. Kevin Benson
Brett C. Birdsong
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Aaron D. Ford
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Nhu Q. Nguyen
Stephen B. Rye
Jerry M. Snyder
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Tori N. Sundheim
Therese A. Ure
Roderick E. Walston
Wes Williams, Jr.

I further certify that on the 26th day of June, 2019, I served, via USPS first class mail, complete copies of **APPELLANTS' REPLY BRIEF AND ADDENDUM** on the following attorneys of record who are not registered for electronic service:

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EXHIBIT A

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, vs. WALKER RIVER IRRIGATION DISTRICT, *et al.*, Defendants.	IN EQUITY NO. C-125 CASE NO.: 3-73-CV-00125-MMD-WGC **PETITION FOR WRIT OF MANDAMUS DIRECTING CHIEF DEPUTY WATER COMMISSIONER OF THE UNITED STATES BOARD OF WATER COMMISSIONERS TO COMPLY WITH WALKER RIVER DECREE** **AND** **REQUEST FOR ORDER SHORTENING TIME**

The National Fish and Wildlife Foundation ("Petitioner") hereby petitions the Court, pursuant to 28 U.S.C. § 1361 and 28 U.S.C. § 1651, for the issuance of a writ of mandamus directing the Chief Deputy Water Commissioner of the United States Board of Water Commissioners (the "Federal Water Master") to comply with the Court's April 15, 2019, Order Modifying the Walker River Decree to Conform With State Engineer Ruling No. 6271 Re Instream Flow Water Rights Permit No. 80700 (ECF No. 1548) (the "Order"). As of the filing of this request, the Federal Water Master continues to refuse to administer and/or deliver the water for instream use as set forth in the Walker River Decree as modified by the Order.

Upon issuance of the Order, a formal request was sent from a representative of the Petitioner[1] to the Federal Water Master requesting administration of the instream flow water rights pursuant to the terms of the Order. The Federal Water Master immediately responded that Petitioner's instream flow water rights would not be administered by the Federal Water Master until additional terms and conditions imposed by the Federal Water Master—which are not part of the Order or the related Nevada State Engineer Ruling No. 6271 or the related opinion of the U.S. Court of Appeals for the Ninth Circuit[2]—are satisfied. The Federal Water Master's placement of additional impediments upon the administration of Petitioner's instream flow water rights are in violation of the Order, and Petitioner requests the issuance of a writ of mandamus from the Court directing the Federal Water Master to comply with the Order and to administer the instream flow water rights.

Petitioner also requests, pursuant to Local Rule IA 6-1(d), that the Court shorten the time for the Federal Water Master to respond to this request, from the fourteen day period set forth in Local Rule II 7-2(b) to eight calendar days, and shorten the time for Petitioner to submit its reply from seven days to four calendar days, for the reasons set forth in the accompanying Declaration of Christopher Mixson, Esq., attached hereto as Exhibit 1.

I. BACKGROUND

A. Almost a Decade to Secure Final Approval for Instream Flows

Petitioner, in furtherance of the Walker Basin Restoration Program established by the United States Congress as a policy directive to reverse the ecological decline of Walker Lake, filed water rights change application number 80700 ("App. 80700") with the Nevada State Engineer in March 2011 to change all or a portion of six decreed water rights claims from their original

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[1] The National Fish and Wildlife Foundation ("NFWF") purchased the decreed water rights at issue in this Petition in the course of its administration of the Walker Basin Restoration Program ("Program"), created pursuant to federal law. The Walker Basin Conservancy ("Conservancy") was formed in 2014 to promote and further the restoration and maintenance of Walker Lake, and operates the Program under the authority of a systematic management agreement with NFWF, which includes provisions relating to the payment of all necessary operation and maintenance fees that may become due for the water rights.

[2] *United States and Nat'l Fish & Wildlife Found., et al. v. U.S. Board of Water Commissioners, et al.*, 890 F.3d 1134 (9th Cir. 2018) (hereafter, the "Ninth Circuit Opinion").

irrigation use to instream use in the Walker River. After a full evidentiary hearing in July 2013, the Nevada State Engineer granted Petitioner's water rights change application in his Ruling No. 6271 on March 20, 2014, over the objections and protests of the Federal Water Master and various junior water rights users. ECF No. 1235-30 at 10–61.

Pursuant to the relevant regulations governing Walker River decreed water rights, Petitioner moved this Court for approval of State Engineer Ruling No. 6271 and modification of the Walker River Decree on April 4, 2014. ECF No. 1221. On May 28, 2015, the Walker River Decree court, after briefing from Petitioner and others, including opposition briefing from the Federal Water Master, denied Petitioner's motion for approval and "rejected" Ruling No. 6271 based primarily upon the erroneous legal objections of the Federal Water Master, including the ridiculous assertion that Walker Lake is not located within the Walker River Basin as that term is used in the Decree. ECF No. 1340. Thereafter, Petitioner appealed the denial of its request for approval of Ruling No. 6271 to the United States Court of Appeals for the Ninth Circuit on June 29, 2015. ECF No. 1344. After full written briefing and oral argument, on May 22, 2018, the Ninth Circuit issued is opinion, fully reversing the district court and directing this Court to grant Petitioner's petition to confirm Ruling No. 6271. ECF No. 1507.

This Court thereafter granted Petitioner's petition to confirm Ruling No. 6271 on July 20, 2018, and on February 6, 2019, Petitioner submitted its Proposed Order Modifying the Walker River Decree to Conform with Ruling No. 6271. ECF Nos. 1517 and 1541. The Federal Water Master objected to the Court issuing an order conforming the Decree to Ruling No. 6271 upon the ground that owners of portions of water rights claims remaining under irrigation should be provided with separate, individual notice of the proposed modification of the Decree. The Court therefore directed Petitioner to provide notice to those owners of remaining portions of water rights claims remaining under irrigation. ECF No. 1542. Petitioner prepared such notices and provided them to all such owners. Not a single owner submitted any comments on the proposed order modifying the Decree. *See* Status Report, ECF No. 1546. Finally, over 8 years after Petitioner filed App. 80700 with the Nevada State Engineer, on April 15, 2019, this Court signed the Order modifying the Decree so that Petitioner could begin calling for the instream flow water

rights to conserve Walker Lake. ECF No. 1548 (entered on the Court's docket April 16, 2019).

B. The Federal Water Master Places Additional Conditions on Petitioner's Instream Flow Water Rights

The Federal Water Master takes the position that she can impose additional conditions, which are not found in the Order or State Engineer Ruling No. 6271, on Petitioner's ability to receive the water to which it is entitled. This is just another in a long line of efforts by the Federal Water Master to obstruct Petitioner's use of water rights for instream purposes instead of agricultural purposes in the Walker River Basin. At some point, the Court must put a stop to the Federal Water Master's obstruction.

On November 20, 2018, the Federal Water Master sent a letter to the Walker Basin Conservancy outlining additional terms and conditions the Federal Water Master was placing on the exercise of Petitioner's instream flow water rights. *See* Nov. 20, 2018 Letter, attached hereto as Exhibit 2. Therein, the Federal Water Master set forth a list of terms and conditions that would be required of Petitioner before it could receive its instream flow water rights:

> 1. A final Order from the United States District Court regarding the confirmation of the Nevada State Engineer Ruling #6271 along with any other necessary approvals.
>
> 2. Certifiable instream measuring devices must be installed and maintained at the point of Non-Diversion (the Weir structure) and at all points where flows historically return to the river above the Wabuska gage, specifically, the East drain and the Wabuska drain. These devices are essential for administration and determining the amount of program water at the Wabuska gage.
>
> 3. All measuring devices listed above must meet the approval of the Chief Deputy Water Commissioner and shall be at the expense of Walker Basin Conservancy. Efforts should be made to have all devices installed and maintained by USGS.
>
> 4. Assurance to the U.S. Board of Water Commissioners and the Water Master that all requirements of the Lower Walker River Conveyance Protocol are in place and operational.
>
> 5. Upon final order of the court, the U.S. Board of Water Commissioners may deem additional requirements necessary prior to implementing program water deliveries.
>
> **No water deliveries will be made during the 2019 irrigation season until all requirements have been completed.**

Exh. 2 at 1–2 (emphasis in original). The terms and conditions with respect to additional

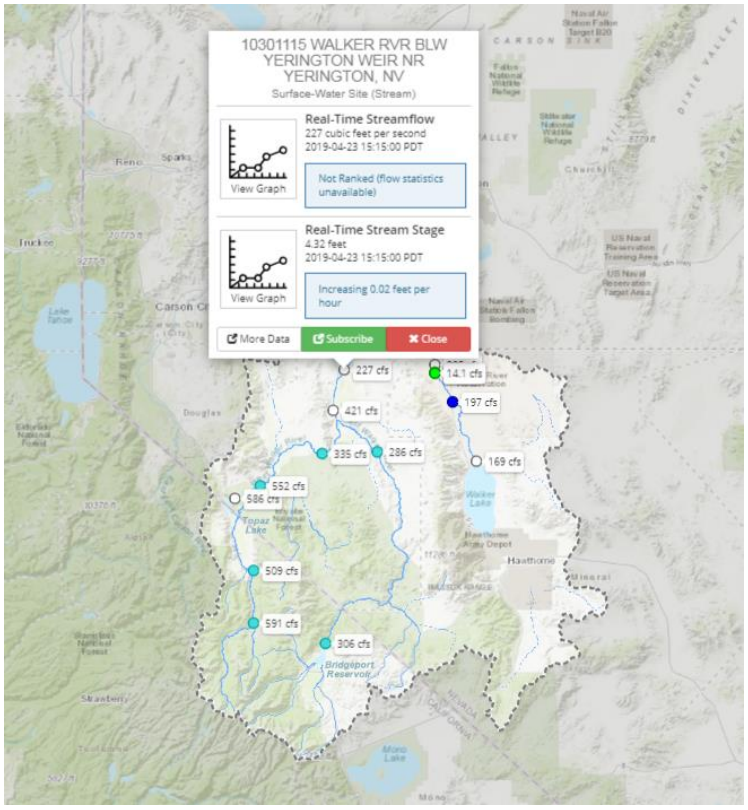
"instream measuring devices" are in contradiction of the findings and determinations of Ruling No. 6271, as set forth in detail below.

Nonetheless, in an effort to better understand the Federal Water Master's refusal, in advance, to comply with the Decree, a representative of the Walker Basin Conservancy undertook a series of meetings with the Federal Water Master. On February 27, 2019, the Conservancy met with the Federal Water Master to discuss the Conservancy's position that, not only are the Federal Water Master's requirements not consistent with Ruling No. 6271 and the Ninth Circuit's opinion upholding the ruling, but they are not necessary as a technical matter for administration of Petitioner's instream flow water rights. Conservancy staff also met with the Federal Water Master on April 4, April 8, and April 24, 2019, to continue to discuss the Federal Water Master's administration of Petitioner's instream flow water rights. The April 8, 2019, meeting also included a site visit to some of the areas in question. A representative of Petitioner also sent a letter to the Federal Water Master on April 19, 2019, requesting one more time that the Federal Water Master reconsider its refusal to comply with the Order and instead administer the Program's instream flow water rights. Attached hereto as Exhibit 3. The Federal Water Master continues to refuse, as set forth in her April 23, 2019, response letter to the Conservancy. Attached hereto as Exhibit 4.

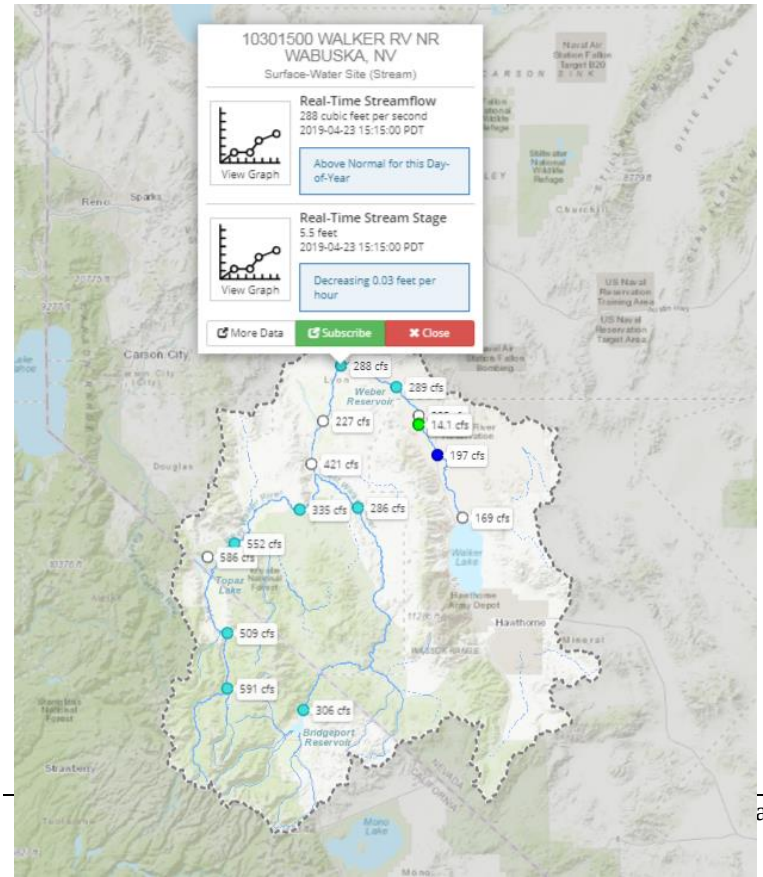
The Federal Water Master's April 23, 2019, letter correctly notes that the Walker River Decree requires measurement of a water right at the point of diversion from the river. That requirement is already satisfied here. Because the instream flow water rights are, by default, not diverted from the river, they are administered at the "point of non-diversion," which in this case is identical to the former point of diversion when they were diverted for irrigation. *See e.g.* Ruling 6271 at 1 (ECF No. 1235-30 at 10) ("The Applicant proposes to not divert the water at the former point of diversion, but rather to leave the water instream at the proposed place of use"). For the subject water rights, this point of non-diversion is at the Yerington Weir diversion structure.

The requirement that the instream flow water rights be measured at the point of non-diversion is already satisfied by the existence of a stream flow gage in the Walker River just downstream of the Yerington Weir, which measures the flow of the river at the point of non-

diversion. *See e.g.* U.S. Geological Survey, *Hydro Mapper* website,



https://webapps.usgs.gov/walkerbasinhydromapper/#viewer. Using the Hydro Mapper, the user can click on any stream gage and see real-time Walker River flow measurements. For example, the image to the right is a screenshot of the Hydro Mapper after clicking on the point at the Yerington Weir Gage (at approximately 4:30pm on April 23, 2019).



There is similarly an existing stream gage to measure water deliveries in the Walker River at the Wabuska Gage, which is also available in real time on the U.S.G.S. Hydro Mapper, as shown in the image below.

Because there are already gages at

both the point of non-diversion of instream flow water at the Yerington Weir, and the point of measurement of the consumptive use portion of instream flow water at the Wabuska Gage, the requirements to have accurate measuring devices for the instream flows is satisfied. Any other demands to install additional measuring devices are inconsistent with the Decree and Ruling 6271.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. Jurisdiction and Standard of Review

This Court has "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1631. Furthermore, this Court has the power to "issue all writs necessary or appropriate in aid of [its] respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. § 1651(a). To obtain a writ of mandamus, a petitioner must demonstrate that it has no other adequate means of attaining the desired relief. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). Mandamus is limited to the enforcement of nondiscretionary, plainly defined and purely ministerial duties. *Wilbur v. U.S.*, 281 U.S. 206, 218 (1930). A duty is ministerial if "the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command…." *Id.*

B. The Federal Water Master Misunderstands Ruling No. 6271

Based upon the discussions between Petitioner's staff and the Federal Water Master, it appears that the Federal Water Master's imposition of additional conditions upon the exercise of Petitioner's instream flow water rights is based upon the Federal Water Master's mistaken understanding of State Engineer Ruling No. 6271 and this Court's Order modifying the Decree, and is instead in furtherance of the position advocated by the Federal Water Master during the evidentiary hearing and ultimately rejected by the Nevada State Engineer.

Ruling No. 6271, and the Walker River Decree upon approval of the same by the Ninth Circuit and modification via this Court's Order, requires the Federal Water Master to administer Petitioner's instream flow water as follows:

First, the Federal Water Master must administer the ***full water duty of 7.745 cubic feet per second*** ("cfs"), when in priority, at the Point of Non-Diversion at the Yerington Weir on the

Walker River, which is the same location as the point of diversion from the river for the water rights claims under their former irrigation use. Ruling No. 6271, Attachment 1 at 3–4, Part 1(f).

Then, after administration of the full water duty of 7.745 cfs at the Yerington Weir, the water is effectively split into two components, the ***consumptive use portion of 4.122 cfs*** and the ***non-consumptive use portion of 3.623 cfs***.[3] The consumptive use portion is to be administered and protected instream in the Walker River from the Yerington Weir downstream to the Wabuska Gage, which is just downstream of the point of historic return flow back into the Walker River of the non-consumptive use portion of the water rights under their former irrigation use. Ruling No. 6271, Attachment 1 at 4–5, Parts 1(g) and (h) (ECF No. 1235-30 at 37–38) (the Federal Water Master "shall *administer and protect* from diversion by others at and downstream of the Point of Non-Diversion the consumptive use portion") (emphasis added). The protection of the consumptive use portion from the former point of diversion to the point of historic return flow is based on the fact that historically this portion of the water right was "consumed" by the crops and therefore not historically available in the river to serve other water rights, so as an instream flow it is now to be protected. *See e.g.* Ninth Circuit Opinion at 601 ("out of NFWF's total rights to 7.745 cfs, only 4.122 cfs—the consumptive use portion of the flow—would be used as program water.").

The non-consumptive use portion is to be used by the Federal Water Master downstream of the Yerington Weir to the Wabuska Gage, in her discretion pursuant to the Walker River Decree and relevant rules and regulations, to mitigate for any hydrologic losses and avoid any potential injury to other water rights. Ruling No. 6271, Attachment 1 at 5, Part 1(h) (ECF No. 1235-30 at 38) ("The remainder or non-consumptive use portion of the water rights . . . shall be administered by the Chief Deputy Water Commissioner in [her] discretion…, including to avoid conflict with and injury to existing water rights at and downstream of the Point of Non-Diversion and to mitigate hydrologic system losses, from the Point of Non-Diversion to the point or points

[3] The consumptive and non-consumptive use portions were described in the Ninth Circuit Opinion, 893 F.3d at 600 and 601–02.

where the non-consumptive use portion historically returned to the Walker river upstream of the Wabuska Gage."). *See also* Ninth Circuit Opinion, 893 F.3d at 600 ("NFWF agrees, consistent with the historic use of the prior rights holders, to divide its right into a consumptive use portion of 4.122 cfs to be used as program water, *and the remaining non-consumptive use portion of 3.623 cfs to be used to mitigate hydrological system loss*.") (emphasis added).

In this way, almost 47% (3.623 cfs ÷ 7.745 cfs) of the full duty of the water rights (the non-consumptive use portion) is used to offset any losses or impacts to others downstream of the point of non-diversion of the instream flow water rights; and only about 53% of the full duty is considered the consumptive use portion to be administered and protected from the point of non-diversion to the point of historic return flow at the Wabuska Gage. Both Ruling No. 6271 and the Ninth Circuit Opinion found that this arrangement was consistent with the Walker River Decree and would not harm any other users of water on the stream system. *See* Ruling No. 6271 at 22–23 (ECF No. 1235-30 at 31–32); Ninth Circuit Opinion, 893 F.3d at 602 ("the Nevada State Engineer properly found that a transfer limited to the consumption portion would avoid conflict and injury to other existing rights.") (quote cleaned up).

Finally, upon reaching the Wabuska Gage, the consumptive use portion of the instream flow water right is managed through the Walker River Paiute Tribal Reservation pursuant to the Lower Walker River Conveyance Protocols developed jointly by the Walker River Paiute Tribe and Petitioner. Ruling No. 6271 at Attachment 2 (ECF No. 1235-30 at 50).

At the end of the day, the Federal Water Master must administer Petitioner's full 7.745 cfs at the Yerington Weir when in priority, and then administer and protect only the consumptive use portion of 4.122 cfs—using the non-consumptive use portion of 3.623 cfs in her discretion, according to the Decree and relevant rules, to mitigate natural hydrologic losses or impacts to water rights, if any—downstream at the Wabuska Gage. This is what is required of the Federal Water Master according to Ruling No. 6271, the Ninth Circuit Opinion, and this Court's recent Order. Yet the Federal Water Master is refusing to comply with these authorities, instead creating additional and unnecessary impediments to the exercise by the Petitioner of the instream flow water rights that have taken almost a decade to be approved. As shown below, such impediments

were already rejected by the State Engineer in Ruling No. 6271.

C. Ruling No. 6271 Overruled the Federal Water Master's Claims that Petitioner's Instream Flow Water Rights are Unmanageable

During the evidentiary hearing before the Nevada State Engineer regarding Petitioner's App. 80700, there was considerable testimony and cross-examination of the Federal Water Master regarding the claim that it would not be possible to administer Petitioner's instream flows in the manner set forth above. *See generally* Oct. 28, 2013, Transc. at 125–199 (ECF No. 1235-22 at 25–99). For example, the Federal Water Master's testified:

> Q. Do you know how to manage an in stream use?
> A. No, ma'am.

Id. at 134 (ECF No. 1235-22 at 34);

> Q. Well, if the court orders you to implement a permit which delivers to seven-some-odd cubic feet per second to the weir, and then you use the non-consumptive part of that to get [the consumptive use portion] to Wabuska and then you manage that by letting it wind down the river, why is that so hard for you? You seem to be making it into a big difficult thing to do?
> A. Well, I think the reason that is really hard for me is because of the fact that that water would have been diverted normally into the ditch.

Id. at 146 (ECF No. 1235-22 at 46);

> Q. Okay. Then does not paragraph H use discretion to use the non-consumptive portion in whatever way you see fit to deal with system losses, transportation so that you get the 4.112 to Wabuska?
> [***]
> A. It doesn't say I will measure at Wabuska at all, the only water that I'm measuring at the present time at Wabuska is tribal water, unless the court directs me to do otherwise.
> Q. And is it not possible . . . [to use] the difference between the 7.745 and the 4.112 to get it from the weir to Wabuska?
> A. I don't think that's up to me.
> Q. Okay. But can you do that if the court orders you to do that?
> A. I—I will try. If the court orders me to do it I'll try, but it doesn't—doesn't help the situation and where we're at with all the losses that we have within the system. And at the preset time we only divert water at the point of diversion, period. That's what the decree reads. If the court decides something different, you bet. I'll do whatever the court tells me to do.

Id. at 149–151 (ECF No. 1235-22 at 49–51);

> A. The problem is, and I will say it again, your water stops at the weir. My measurement and your administration of that water stops at the weir. I don't go to Wabuska.
> [***]
> As long as your water is being measured at the weir then that's where I stop.
> Q. Okay

> A. Until which time the court tells me something different.
> HEARING OFFICER: Okay. We got that point.

Id. at 159–160 (ECF No. 1235-22 at 59–60);

> But additional waters that you're trying to put in, the program waters that you're trying to put in as far as I'm concerned, once that is measured, and I apologize, but once that's measured at the point of diversion then that doesn't include anything for me [to do].

Id. at 162 (ECF No. 1235-22 at 62);

> Q. [W]e're talking about the distance between the weir and Wabuska. You can use the non-consumptive use to mitigate any issue that arises to any extent of the non-consumptive use.
> A. No, it's not, because your measurement stops at the point of diversion, not at Wabuska.

Id. at 164 (ECF No. 1235-22 at 64);

> Q. And if the court approved a permit which incorporated these two stipulations you would do what the court told you to do?
> A. Yes, sir, that's my job.

Id. at 172 (ECF No. 1235-22 at 72).

In Ruling No. 6271, the Nevada State Engineer specifically and directly overruled these objections to the administration of the instream water rights, in large part because of the Federal Water Master's own testimony in which it was admitted that if required to administer Petitioner's instream flow water rights, it would be possible. Ruling 6271 at 20–22 (ECF No. 1235-30 at 29–31). Furthermore, the State Engineer specifically noted that according to the Federal Water Master during testimony at the hearing for App. 80700, "the Water Master has historically been able to serve the decreed right by diverting water at the [Point of Non-Diversion], when in priority," and now, under the administration of Petitioner's instream flow water rights, "the Water Master would be called upon to serve *the same decreed rights by leaving them in the river as instream flows*." *Id*. (emphasis added). Then, after administering 7.745 cfs at the Yerington Weir:

> [T]he accounting protocols require the Water Master to determine the amount of Program Water at the Wabuska Gage, [and] the Water Master testified that each day, he already completes a worksheet of gage reading, which includes the Wabuska Gage. Now, the Water Master is asked to determine the amount of Program Water at Wabuska Gage and to transmit this number daily to Petitioner, the Tribe, and BIA, for their purpose of implementing the accounting protocols. Absent any dispute that arises among the parties, the Water Master is not requested to perform any additional tasks concerning the Conveyance Agreement beyond determining the amount of Program Water at the Wabuska Gage to implement the

accounting protocols.

Ruling 6271 at 22 (ECF No. 1235-30 at 31).

As determined by the State Engineer, the only change required of the Federal Water Master's administration in order to serve instream flows is to ensure that the water rights are left in the river at the Yerington Weir—instead of being diverted into the West Highland Ditch as they had been when used for irrigation, and then the consumptive use portion must be added to the daily recordkeeping of the amount of water that reaches the Wabuska Gage. The Federal Water Master has nearly half of the original water right, in the form of the non-consumptive use, as a cushion for administering only the consumptive use portion at the Wabuska Gage.

The State Engineer determined, over strenuous objections of the Federal Water Master, that this could be accomplished—without the need for any additional gages or other resources. Based upon this understanding, the State Engineer "considered the issues raised by the Board and finds that the evidence presented is insufficient to cause the State Engineer to deny Application 80700." Ruling 6271 at 22 (ECF No. 1235-30 at 31). To date, the Federal Water Master has provided no reason whatsoever in support of her renewed claims that she needs additional measuring devices to undertake this simple administrative function. As set forth in her April 23, 2019, letter, she simply repeats the unfounded claim that she "is not able to deliver water to the Walker River Paiute Tribe . . . and comply with the requirements of the two Stipulations, without these 2 gages in the drain area." Exh. 4 at 2.

D. Mandamus is the Appropriate Remedy

As set forth above, mandamus will issue only to direct the fulfillment of a ministerial duty, defined as a duty for which the actor lacks any discretion. Here, the Federal Water Master lacks discretion in the administration of the consumptive use portion of Petitioner's instream flow water rights. If the full water duty of the water rights is in priority according to the rules in place for the Walker River Decree, it is the Federal Water Master's ministerial duty to administer the full water duty at the point of non-diversion and administer and protect the consumptive use portion at the Wabuska Gage, according to the plain language of the Decree as modified by this Court's Order, just as it is the Federal Water Master's ministerial duty to administer all other water rights as set

forth in the Decree. The Federal Water Master lacks any discretion in this regard—the water is simply administered pursuant to the Decree and the administrative rules.

As set forth in Ruling No. 6271, and approved by the Ninth Circuit Opinion, the Federal Water Master's only discretion with respect to Petitioner's instream flow water rights is in the use of the non-consumptive use portion downstream of the point of non-diversion to mitigate for any hydrologic systems losses and to address any impacts to other water rights. Ruling 6271, Attachment 1 at 5 (Part 1(h)) (ECF No. 1235-30 at 38) ("The remainder or non-consumptive use portion of the water rights…, shall be administered by the [Federal Water Master] in [her] discretion pursuant to the Walker River Decree and the 1953 Rules and Regulations for the Distribution of Water on the Walker River Stream System, including to avoid conflict with and injury to existing water rights at and downstream of the Point of Non-Diversion and to mitigate hydrologic system losses, from the Point of Non-Diversion to the point or points where the non-consumptive use portion historically returned to the Walker River upstream of the Wabuska Gage.").

Finally, Petitioner has no other remedy at law. As long as the Federal Water Master continues to refuse to administer and/or deliver Petitioner's instream flow water rights in the manner approved by the Nevada State Engineer, upheld by the Ninth Circuit, and incorporated into the Decree by this Court, Petitioner will continue to suffer the deprivation of its property right.

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III. CONCLUSION

The Federal Water Master's refusal to administer the consumptive use portion of Petitioner's instream flow water rights, as set forth in her November 2018 letter, is in violation of the terms of Ruling No. 6271, as upheld by the Ninth Circuit's Opinion, and is in violation of the Walker River Decree as modified by the Court's Order. Therefore, Petitioner respectfully requests that this Court issue a writ of mandamus directing the Federal Water Master to comply with the Walker River Decree by administering Petitioner's instream flow water rights as set forth in this Court's April 15, 2019, Order.

Respectfully submitted,

Dated: April 24, 2019

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Don Springmeyer*
DON SPRINGMEYER, ESQ.
CHRISTOPHER W. MIXSON, ESQ.

JAMIE MORIN, ESQ. (*pro hac vice*)
Mentor Law Group, PLLC
315 Fifth Ave. S., Suite 1000
Seattle, Washington 98607
Ph: (206) 838-7654
Attorneys for National Fish & Wildlife Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2019, a true and correct copy of **PETITION FOR WRIT OF MANDAMUS DIRECTING CHIEF DEPUTY WATER COMMISSIONER OF THE UNITED STATES BOARD OF WATER COMMISSIONERS TO COMPLY WITH WALKER RIVER DECREE AND REQUEST FOR ORDER SHORTENING TIME** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By */s/ Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Exhibit “1”

Declaration of Christopher W. Mixson in Support of Request for Order Shortening Time

Exhibit “1”

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, vs. WALKER RIVER IRRIGATION DISTRICT, *et al.*, Defendants.	IN EQUITY NO. C-125 CASE NO.: 3-73-CV-00125-MMD-WGC **DECLARATION IN SUPPORT OF REQUEST FOR ORDER SHORTENING TIME**

I, Christopher W. Mixson, Esq., declare as follows:

1. I am an attorney admitted to practice before this Court. I am a partner in the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP, attorneys of record for Petitioner National Fish and Wildlife Foundation ("Petitioner").

2. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

3. This declaration is submitted pursuant to Local Rule IA 6-1(d) in support of Petitioner's Request for an Order Shortening Time for the response(s) to the Petition for Writ of Mandamus Directing the Chief Deputy Water Commissioner of the U.S. Board of Water Commissioners to Comply with the Walker River Decree, from the fourteen day period set forth in Local Rule II 7-2(b) to eight calendar days, and shorten the time for Petitioner to submit its reply from seven days to four calendar days, for the reasons set forth herein.

4. Petitioner moves for an order of the Court shortening the time because the refusal of the Chief Deputy Water Commissioner of the United States Board of Water Commissioners (the "Federal Water Master") to administer Petitioner's instream flow water rights, which refusal and the reasons why it is adverse to the Walker River Decree are explained more fully in the Petition, denies Petitioner of the exercise and enjoyment of its private property rights.

5. Under Nevada law, water rights are real property, and ownership of water rights carries with it the attendant attributes of property ownership. *Application of Filippini*, 66 Nev. 17, 21–22 (Nev. 1949) (defining a water right as "a right gained to use water beneficially which will be regarded and protected as real property."). The Federal Water Master's refusal to administer Petitioner's instream flow water rights is therefore a denial of Petitioner's property rights.

6. Petitioner's purchase of the decreed water rights at issue in the Petition were under authority of the Walker Basin Restoration Program ("Program"), established by the United States Congress as a policy directive to reverse the ecological decline of Walker Lake. Therefore, not only does the Federal Water Master's refusal to administer Petitioner's water rights deny Petitioner of the enjoyment of its real property, but it also operates to deny the pursuit of policy goals set forth in Congressional directives.

7. Under the Walker River Decree, water rights are exercised during the irrigation season, which begins in March and concludes in October. The 2019 irrigation season is currently underway. Every day that the Federal Water Master refuses to administer the instream flows denies Petitioner the use of the water rights in the manner approved by the Nevada State Engineer, the Ninth Circuit and this Court. Therefore, Petitioner requests expedited briefing and consideration of its Petition in order to ensure it is not denied the exercise of its water rights during the current irrigation season.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

Dated April 24, 2019.

/s/ *Chris Mixson*
Christopher W. Mixson, Esq.

Exhibit “2”

November 20, 2018 Federal Water Master letter to the Walker Basin Conservancy

Exhibit “2”

U.S. BOARD OF WATER COMMISSIONERS

JOANNE SARKISIAN
WATER MASTER
410 N Main Street
Yerington, Nevada 89447
Phone: (775) 463-3540
Fax: (775) 463-7008

WALKER RIVER
In the District Court of the United States
In and For the District of Nevada
In Equity, Docket No. C-125
The United States of America, Plaintiff
vs

Walker River Irrigation District, et al

November 20, 2018

Walker Basin Conservancy
615 Riverside Dr., Ste C
Reno, NV 89503

Walker Basin Conservancy
1 Highway 95A East
Yerington, NV 89447

Re: 2019 WBC Program Water Deliveries

Based on our discussions of November 1, 2018 regarding WBC program water and in order to ensure proper deliveries and meet requirements of the Nevada State Engineer's ruling #6271 and stipulated conditions regarding permit #80700 the following items will need to be in place **prior to** any deliveries of program water for the 2019 irrigation season.

1. A final order from the United States District Court regarding the confirmation of the Nevada State Engineer ruling #6271 along with any other necessary approvals.

2. Certifiable instream measuring devices must be installed and maintained at the point of Non-Diversion (the Weir structure) and at all points where flows historically return to the river above the Wabuska gage, specifically, the East drain and the Wabuska drain. These devices are essential for administration and determining the amount of program water at the Wabuska gage.

3. All measuring devices listed above must meet the approval of the Chief Deputy Water Commissioner and shall be at the expense of Walker Basin Conservancy. Efforts should be made to have all devices installed and maintained by USGS.

4. Assurance to the U.S Board of Water Commissioners and the Water Master that all requirements of the Lower Walker River Conveyance Protocol are in place and operational.

5. Upon final order of the court, the U.S. Board of Water Commissioners may deem additional requirements necessary prior to implementing program water deliveries.

No water deliveries will be made during the 2019 irrigation season until all requirements have been completed.

By performing the above listed requirements during the off-season, you will ensure that the U.S. Board of Water Commissioners and its staff will be able to deliver the water in cubic feet per second to which you are entitled by Decree C-125. In addition all water orders placed shall be in cubic feet per second (CFS), for decree and/or storage water during the next irrigation season. Thank you for your continued cooperation with the water master's office. If you have any questions, please contact me.

Sincerely,

Joanne Sarkisian
Chief Deputy Water Commissioner/
Water Master
Cc: Walker River Irrigation District

Exhibit “3”

April 19, 2019 Walker Basin Conservancy Letter to the Federal Water Master

Exhibit “3”

Walker Basin Conservancy

April 19, 2019

U.S. Board of Water Commissioners
410 N Main Street
Yerington, Nevada 89447
c/o Ms. Joanne Sarkisian, Water Master

Dear Ms. Sarkisian,

In 2017 the Walker Basin Conservancy ("Conservancy") accepted the responsibility of implementing the Walker Basin Restoration Program ("Program") on behalf of the National Fish and Wildlife Foundation, including management and protection of assets previously acquired by the Program. On April 15, 2019, the United States District Court for the District of Nevada, sitting as the Walker River Decree Court with jurisdiction over Case No. 3:73-CV-00125-MMD (the Walker River Decree) issued its Order Modifying the Walker River Decree to Conform with State Engineer Ruling No. 6271 Re Instream Flow Water Rights Permit No. 80700 (signed April 15, 2019, ECF No. 1548).

On April 16, 2019, Mr. Silas Adams, Water Manager for the Conservancy, sent an email to you, as the Chief Deputy Water Commissioner of the U.S. Board of Water Commissioners (the "Federal Water Master"), making formal request for the administration of the water rights subject to Permit No. 80700 and the Walker River Decree Court's April 15, 2019, Order. You responded that you would not administer the Program's instream flow water rights, directing the Conservancy to a November 2018 letter from you in which you attempt to mandate additional terms and conditions on the exercise of the Program's instream water right that are in excess of the terms and conditions of Permit No. 80700, Ruling No. 6271 which approved, and the Walker River Decree Court's Order modifying the Decree to conform to Ruling No. 6271.

Since receiving that November 2018 letter, Mr. Adams and others have had multiple discussions with you in an attempt to better understand your position and to try to come to an agreement concerning the administration of the Program's instream flow water rights. The Conservancy's stance remains that requests made in your November 2018 letter are inconsistent with Permit No. 80700, Ruling No. 6271, and the Walker River Decree Court's Order.

By this letter, the Conservancy requests again that you, on behalf of the U.S. Board of Water Commissioners, administer the Program's instream flow water rights according to Permit No. 80700, State Engineer Ruling No. 6271, and the Walker River Decree as modified by the Court's April 15 Order.

Sincerely,

Jeff Bryant
Executive Director

615 Riverside Drive, Suite C - Reno, NV 89503 | (775) 463-9887

Exhibit “4”

April 23, 2019 Federal Water Master letter to Walker Basin Conservancy

Exhibit “4”

U.S. BOARD OF WATER COMMISSIONERS

JOANNE SARKISIAN,
WATER MASTER
410 N. Main Street
Yerington, NV 89447
Phone: (775) 463-3540
Fax: (775) 463-7008

WALKER RIVER
In the District Court of the United States
In and For the District of Nevada
In Equity, Docket No. C-125
The United States of America, Plaintiff
vs.
Walker River Irrigation District, et al.

April 23, 2019

Jeff Bryant
Executive Director
Walker Basin Conservancy
615 Riverside Drive, Suite C
Reno, Nevada 89503

VIA Email Only
jeff.bryant@walkerbasin.org

Dear Mr. Bryant:

Thank you for your letter dated April 19, 2019 and your email of April 22, 2019 regarding the Walker Basin Conservancy's ("WBC") request for administration of the water rights subject to Permit No. 80700. This letter is my response to your letter and email.

Please be advised there are no additional or inconsistent terms and conditions being imposed by me or the United States Board of Water Commissioners ("Board") on the exercise of the WBC's instream water rights. The requirements contained in my letter to the Walker Basin Conservancy dated November 20, 2018 are required by the Walker River Decree, the 1953 Rules and Regulations and/or Permit 80700.

Pursuant to Paragraph XIV of the Walker River Decree, a measuring device to be approved by the Water Master is required where water is diverted so the water diverted may be regulated and correctly measured. Upon the failure of any owner to install or maintain a measuring device, the Water Master shall cut off the water until the same shall be so installed and maintained. While the language of Paragraph XIV of the Walker River Decree uses the term "owner of a ditch or canal", the 1953 Rules and Regulations for the Distribution of Water on the Walker River Stream System ("1953 Rules and Regulations") state on page 4: "That pursuant to previous orders of this Board and in accordance with Paragraph 14 of the Decree it is required that at all diversions in Divisions Nos. 2, 3, 5, and 6, there shall be established at the owners own expense . . . a measuring device of a type that meets with the approval of the Board of Water Commissioners."

Page 4 of the 1953 Rules and Regulations further states: "Division No. 1 secures full decree rights through the discharge through the Yerington Weir and inflow from the drainage system of the Walker River Irrigation District. A gaging station at Parkers at the lower end of Mason Valley will measure the water for the Indian Service."

Permit 80700 issued by the State Engineer provides: "Daily records shall be kept of the amount of water from this source passing the original point of diversion, the amount that reaches the Wabuska Gage and the amount that reaches Walker Lake."

The requirement for a measuring device at the point of diversion (or non-diversion for instream use) is explicitly required by Paragraph XIV of the Decree and the 1953 Rules and Regulations. To comply with the two Stipulations which are referenced in Permit 80700, the Water Master needs the measuring devices at the East drain and the Wabuska drain. One of the Stipulations referenced in Permit 80700 requires the Water Master to use the non-consumptive use portion of the water rights administered to avoid conflict with and injury to existing water rights and to mitigate hydrologic system losses downstream of the point of non-diversion and the second Stipulation requires the Water Master to input on a daily basis the amount of Program Water that reaches the Wabuska gage. The Water Master is not able to deliver water to the Walker River Paiute Tribe, the most senior water right on the system, and comply with the requirements of the two Stipulations, without these 2 gages in the drain area. The Yerington Weir to the Wabuska gage is an approximately 10 mile stretch of the Walker River. You may be aware that the drain area has historically been a losing stretch of the Walker River.

My November 20, 2018 letter was essentially the standard letter sent to Decree water right holders who have outstanding items to resolve, such as installing headgates and measuring devices, before their water will be delivered during the next season. I sent the letter prior to the season so WBC would have enough time to get the gages in place before WBC requested delivery of its water once the Judge signed the order modifying the Decree. Honestly, I do not believe the WBC has tried to understand my and the Board's position on the need for the gaging devices since it received my November 20, 2018 letter. I do not see any provision that WBC's water rights are exempt from the requirements of the Decree or the 1953 Rules and Regulations. In fact, Permit 80700 specifically states the permit is issued subject to the terms and conditions of the Walker River Decree and subject to the continuing jurisdiction and regulation by the Board. One of the Stipulations requires the Water Master to perform duties in accordance with the Walker River Decree and the 1953 Rules and Regulations. The WBC has not addressed the Board's and my concerns and appears to me to desire preferential treatment under the Decree and the 1953 Rules and Regulations.

If you have any questions, please do not hesitate to contact me. It is my understanding we are going to meet tomorrow April 24, 2019 at 1:00 p.m. at my office to discuss this further.

Sincerely,

Joanne Sarkisian,
Chief Deputy Water
Commissioner/Water Master

cc: US Board of Water Commissioners
Karen Peterson, Esq.

4843-1571-2917, v. 1

EXHIBIT B

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Mineral County District Attorney
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Attorneys for Mineral County and Walker Lake Working Group

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125 CASE NO. 3:73-CV-00125-MMD-WGC **JOINDER TO NFWF PETITION FOR WRIT OF MANDAMUS**

COME NOW, Plaintiff-Intervenor Mineral County, Nevada, and Defendant Walker Lake Working Group, by and through counsel of record, Simeon Herskovits and Iris Thornton of Advocates for Community and Environment, and Sean Rowe, Mineral County District Attorney, and hereby join in the *Petition for Writ of Mandamus Directing Chief Deputy Water Commissioner of the United States Board of Water Commissioners to Comply with Walker River*

Decree filed by the National Fish and Wildlife Foundation ("NFWF"). That petition requests that the Court issue a writ of mandamus directing the Chief Deputy Water Commissioner of the United States Board of Water Commissioners (the "Federal Water Master") to comply with the Court's April 15, 2019, *Order Modifying the Walker River Decree to Conform With State Engineer Ruling No. 6271 Re Instream Flow Water Rights Permit 80700* (ECF No. 1548), which provided for the delivery of water to Walker Lake for instream use under Permit 80700. Mineral County and Walker Lake Working Group's shared interest in the restoration of Walker Lake is directly threatened by the Federal Water Master's improper refusal to deliver water to Walker Lake under Permit 80700.

In addition to the reasons articulated in NFWF's Petition, a writ of mandamus is necessary to force the Federal Water Master to properly perform his duties under the Walker River Decree, because his refusal to deliver water to Walker Lake under Permit 80700 is consistent with the improper advocacy position assumed by the Federal Water Master for years in this case which position consistently has been both contrary to the Walker River Decree and hostile to deliveries of water to Walker Lake. *See Plaintiff-Intervenor Mineral County's and Defendant Walker Lake Working Group's Opposition to United States Board of Water Commissioners' Verified Petition for Enforcement of the Walker River Decree and Supporting Points and Authorities*, at 3-5 (July 22, 2016) (ECF No. 1405) (noting that the Water Board's improper filing of a petition in opposition to the Nevada Department of Wildlife's Mason Valley Wildlife Management Area Pilot Channel Restoration Project created a conflict of interest); *Reply Brief of the United States Board of Water Commissioners* (Dec. 5, 2014) (ECF No. 1275); *Initial Brief of the United States Board of Water Commissioners in Support of its Petition for*

Judicial Review of Nevada State Engineer Ruling 6271 (Nov. 28, 2014) (ECF No. 1270); *Order* (Feb. 13, 1990) (ECF Doc. No. 162).

As the Court has previously confirmed, the United States Board of Water Commissioners ("Water Board") was created to "act as a board to constitute a water master or board of commissioners to apportion and distribute the waters of the Walker River, its forks and tributaries . . . ," and in that role "functions in a ministerial, as well as a quasi-judicial, capacity." *Order*, at 2 (Feb. 13, 1990) (ECF Doc. No. 162). As the Court further held, the Water Board is bound "in its capacity as a special master, to adhere to the Code of Judicial Conduct for United States Judges." *Id*. at 4. As such, the Water Board is subject to the requirement to "disqualify [itself] in a proceeding in which [the Water Board's] impartiality might reasonably be questioned," and "is obligated to conduct itself in an impartial, unbiased manner." *Id.* (quoting Code of Judicial Conduct Canon 3.C(1); *id*. at I-58; 28 U.S.C. § 455(a)).

In its February 13, 1990, *Order*, the Court was addressing the conflict of interest presented by the Water Board's representation by the same legal counsel as WRID, one among multiple Decreed water rights holders the Water Board is bound to serve impartially. Doc. No. 162. Because of this conflict the Court ended that historic practice of shared legal representation. In a more recent ruling the Court noted that the Administrative Rules and Regulations governing the functioning of the Water Board (the "Amended Rules"), permit the Water Board to participate "as a party in all proceedings concerning a change applications before [the state agencies serving as special masters for the Court in reviewing Decreed water right change applications]." *Order*, at 2 (Sept. 14, 2012) (Jones, J.) (ECF Doc. No. 1110) (quoting Amended Rules § 5.4 at 11). Pursuant to that express provision, the Court affirmed that the Water Board could "represent its own position" in a change application proceeding before the

Nevada State Engineer and "participate in the administrative hearing as a full party . . . ." *Id*. at 3-4. However, Judge Jones was later removed from this case by the Ninth Circuit Court of Appeals because, like the Federal Water Master, he displayed improper partiality for certain interests in the basin and animus towards others. *United States v. Walker River Irrigation District*, 890 F.3d 1161, 1173-74 (9th Cir. 2018). The Federal Water Master's bias in favor of upstream irrigation interests and against permitted environmental uses in the basin is inconsistent with the Walker River Decree as well as the Court's articulation of the proper role of the United States Board of Water Commissioners.

For the foregoing reasons as well as those stated in NFWF's *Petition for Writ of Mandamus Directing Chief Deputy Water Commissioner of the United States Board of Water Commissioners to Comply with Walker River Decree*, Mineral County and Walker Lake Working Group join in NFWF's *Petition* and respectfully request the Court to issue a Writ of Mandamus directing the Federal Water Master to comply with the Walker River Decree and the

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Court's *Order* of April 15, 2019, and administer the consumptive use portion of NFWF's instream flow water rights as set forth in that *Order* for the benefit of Walker Lake.

Respectfully submitted this 30th day of April, 2019,

/s/ Simeon Herskovits

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Iris Thornton, *pro hac vice*
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Attorneys for Mineral County and Walker Lake Working Group

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2019, on behalf of Mineral County and the Walker Lake Working Group, I filed the foregoing **JOINDER TO NFWF PETITION FOR WRIT OF MANDAMUS** 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 this case.

/s/ Simeon Herskovits
Simeon Herskovits

EXHIBIT C

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, vs. WALKER RIVER IRRIGATION DISTRICT, *et al.*, Defendants.	In Equity No..C-125 Case No.: 3-73-CV-00125-MMD-WGC **OBJECTION OF WALKER BASIN CONSERVANCY TO PETITION FOR APPROVAL OF SPECIAL ASSESSMENT**

The Walker Basin Conservancy (the "Conservancy") objects to the April 19, 2019, petition of the United States Board of Water Commissioners (the "Board") for approval of a special assessment to be levied against the Conservancy. ECF No. 1551. The Board requests approval of a regular assessment of $3.60 per acre for water rights holders (a reduction of $0.20 per acre from the prior assessment), and a new special assessment of $40.00 per acre for water rights holders of "Program Water."[1] *Id*. at 5–6.

[1] Program Water has been broadly defined to include "water acquired and/or secured, by purchase, lease or otherwise, under authority of the Walker Basin Restoration Program" to restore and maintain Walker Lake. *See e.g.* Ruling 6271, Attachment 2 at 1 (ECF No. 1235-30 at 55). In addition to the decree surface water rights which have been permanently changed to instream flow for wildlife purposes pursuant to Permit 80700, there is also a pilot program to lease stored water from the Walker River Irrigation District to be temporarily used as instream flow to Walker Lake, including during the time period of the Board's pending budget. However, it does not appear that the Board's instant Petition seeks a special assessment against Program Water from the Irrigation District's stored water rights, and instead only requests to specially assess a subset of Program Water, namely the water rights permanently changed to instream flow pursuant to Permit 80700.

The requested special assessment does not set forth any authority upon which the Board has requested the special assessment, and, to the contrary, the requested special assessment is in violation of the Walker River Decree and the 1953 Rules and Regulations which both prohibit such a special assessment against a single water user. Notwithstanding the lack of authority for such a special assessment, the Board's petition fails to demonstrate the need for such an assessment, and fails to adequately describe the bases for such an assessment beyond pure speculation.

1. The Walker River Decree, the Court's 1937 Order Establishing the Board, and the Board's Own Rules and Regulations All Mandate Equal Assessments for All Water Users

The Board's petition does not state or describe any authority upon which the Board relies to levy a special assessment against any single holder of decreed water rights. No such authority is found in the terms of the Walker River Decree, which states:

> The compensation of the Water Master and his assistants and all expenses connected with his employment *shall be apportioned among the several parties hereto. . .according the acreage of the lands irrigated* under this decree, including stored water….

Walker River Decree at ¶15 (ECF No. 1235-6 at 76:17–21) (emphasis added). Additionally, the Court's May 12, 1937, Order appointing the Board ordered that "the compensation of the chief deputy and his assistants and all expenses connected with said board… *shall be apportioned among the several parties to the said decree according to acreage of lands irrigated*…." At 3 (ECF No. 1235-11 at 3) (emphasis added).

Finally, and importantly, the Board's own 1953 Rules and Regulations expressly state that the Secretary-Manager of the Board "shall … assess *all users* ***at the same rate*** *per acre* within the system. . . ." At 5 (ECF No. 1235-16 at 119) (emphasis added).

The Board's attempt to levy a special assessment against the Conservancy, as a single water user, is therefore in violation of the Decree, the 1937 Order of the Court and the Board's own rules, all of which require that assessments shall be equally levied against all users based on

the acreage of land irrigated by them.[2] Although some of the water rights acquired by the Walker Basin Restoration Program have been severed from the formerly irrigated lands, in every case a binding agreement has been entered into with the Walker River Irrigation District for the payment of annual assessments based upon the acreage formerly irrigated. The result of which is that assessments for Program Water are paid just as they would have been, and in the same amounts, as if the water rights still used for irrigation.

The Board does not have authority to levy a special assessment against a single water rights holder under the Walker River Decree or the Board's own rules and regulations.

2. The Board's Petition Does Not Adequately Justify a $25,844 Special Assessment

Even if a special assessment was permitted under the Decree, the Federal Water Master has not demonstrated it is appropriate or necessary here. In situations when special assessments are allowed under Nevada law, the special assessment must result directly, uniquely and specifically to the assessed property. "A special assessment tax is predicated upon the theory that the proposed improvements of the assessment district will result in a benefit to those property owners included in the assessment. This is the very essence of and the only justification for the special assessment." *City of Reno v. Folsom*, 86 Nev. 39, 41, 464 P.2d 454, 455 (1970).

The Board's Petition includes only the following statement with respect to the alleged need for the special assessment against the Conservancy:

> The establishment of the special assessment totaling $25,844.00 for 646.16 assessed acres is necessary to pay the costs of additional administration by the Water Master's Office relative to the apportionment and distribution of Program Water and water rights for instream use. The Water Master is required to act as the river rider for Program Water, to provide additional duties contained in the Attachment 1 and 2 Stipulations to State Engineer Ruling 6271 relative to Program Water, and has incurred and expects to incur additional expenses, such as legal and engineering expenses, for administration and apportionment of the Walker Basin Conservancy's Program Water.

ECF No. 1551 at 5, para. 10. The Board and the Federal Water Master continue to inflate the difficulty of administration of instream flows under the Decree. If anything, administration of

[2] The Board's request for a special assessment also arguably in violation of Art. 10, Sec. 1(1) of the Nevada Constitution, which states: "[t]he Legislature shall provide by law for a uniform and equal rate of assessment and taxation. . . ."

instream flow is easier because it requires no diversion from the river.

Here, as evidenced by the modification of the Decree to incorporate the terms of Ruling 6271, the instream use approved by the State Engineer and Ninth Circuit requires, instead of diverting the water from the river into a ditch, that the water remain in the river and flow down to Walker Lake. The Federal Water Master needs only to monitor the flows using the existing flow gages, no head gates or diversion structures are opened and closed. Unlike an irrigator, the Water Master need not have continued discussions with the Conservancy throughout the irrigation season to determine if, when and for how long instream flows will be administered—the Conservancy has already called for administration and delivery of its instream flow water rights every day, for the duration of the irrigation season, when the water rights are in priority. Therefore, it is only monitoring and tracking the consumptive use portion of the Program Water at the Wabuska Gage that is needed to administer the instream water right.

As determined by the State Engineer in Ruling 6271, all that is required is for the Federal Water Master to include the instream flows, when in priority, on the daily gage worksheet that she already completes. As shown by that worksheet, the Federal Water Master simply reads the existing gages to determine the availability of flow in the river at each point of diversion. *See* Daily Worksheet, Exh. 1057 (ECF No. 1235-17 at 22). The Board has provided no support for the assumption that the Federal Water Master will expend an additional $25,000 in the 2019–2020 period on the administration of instream flows.

Additionally, the proposed budget supporting the special assessment states that the special assessment is necessary to pay for the Federal Water Master to "act as the river rider for Program Water and water rights for instream use." ECF No. 1551 at 5:23–24. However, as set forth in the Plan of Distribution provided to the Court with the Report and Petition, there are already river riders assigned to the entire Walker River system, including the "Main Fork"—which is the section downstream of the confluence of the East and West forks and is the only section of the river that has any approved instream flows to date. ECF No. 1551 at 25 ("There shall be five river riders for the season: one for the Antelope Valley Area, one for the Bridgeport Area, one for the East Fork of the Walker River, one for the West Fork of the Walker River, *and one for the Main*

Fork of the Walker River.”). Under the Decree and the current budget, to the extent a river rider is even necessary to administer instream flows, the Federal Water Master has not explained why the existing river riders are incapable of administering instream flows. The Federal Water Master’s Petition provides no support or reasoning for the claim that a river rider is even necessary for instream flows, or, if one is necessary, that she must undertake those functions instead of the existing river riders.

The Board’s request for a special assessment is also arbitrary and lacks transparency. It is not at all clear from the Petition how the Board determined the amount of additional funds that it argues are necessary for the Federal Water Master to administer Program Water. Even if such an assessment were appropriate, and the activities described by the Federal Water Master were actually necessary to administer Program Water, the Petition’s only explanation for the additional $25,844.00 it claims is necessary is based on round numbers of $4,000 for “engineering,” $10,000 for “legal” and $11,844 for “Water Master.” ECF No. 1551 at 6. In informal discussions, the Federal Water Master informed Conservancy staff that her portion of the proposed special assessment is based upon an estimated one hour of work per workday for administration of instream flows, but no such explanation has been provided to the Court. There is no explanation whatsoever for the estimated $4,000 engineer and $10,000 legal costs.

Finally, not only does the Board fail to justify the need for the special assessment, but it also fails to recognize the public, as opposed to individual, benefit of the Conservancy’s instream flows. The purpose of the Walker Basin Restoration Program is to arrest and reverse the decline of Walker Lake. One recognized cause, among many others, of the decline of Walker Lake is the diversion of water from the Walker River for irrigation. Years of protracted litigation under the Walker River Decree, including the Ninth Circuit’s recent certification to the Nevada Supreme Court with respect to the legal question whether Public Trust doctrine should operate to require reduced diversions so that additional water can reach Walker Lake, have not addressed or resolved the declining flows. In comparison, as recognized by the Ninth Circuit, the Conservancy is pursuing market-based transactions by purchasing water rights from willing sellers and transferring those water rights instream in the Walker River and Walker Lake while protecting

agricultural, environmental, and habitat interests in the Walker River Basin. Such instream flows enhance Nevada's water dependent ecosystem by providing economically and socially important instream benefits, including boating, fishing, hunting, and viewing wildlife, by increased access to the river corridor, generating revenue from recreational access, while firming up water supplies and reducing the liability for out of stream diversions. Such benefits are for and on behalf of the public as a whole, including all other holders of water rights under the Walker River Decree.

3. The Requested Special Assessment is Unduly Burdensome

The Conservancy currently manages approximately 12,343 acres of water rights acquired under authority of the Walker Basin Restoration Program in the Walker River Basin. For the 2018-2019 period, based upon the equal assessment of $3.80/acre, the Conservancy paid $42,918.50 in assessments on 11,294.34 acres, which was more than 7% of the Board's total revenues from assessments of $576,696 (ECF No. 1551 at 36). Under the Board's proposed special assessment for the 2019-2020 period, the Conservancy's obligation will increase substantially—instead of approximately $44,434.80 in assessments (based upon the proposed $3.60/acre reduced general assessment and 12,343 acres of water rights), the Conservancy would be required to pay an additional $25,846.40 (646.16 acres x $40.00/acre), bringing its total obligation for the regular and special assessments to $70,281.20. This is a nearly 50% increase in annual assessments from the prior year, while all other water users enjoy a reduction in their assessments.

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4. Conclusion

The Conservancy respectfully requests that the Court deny the Board's Petition for a Special Assessment of $40.00/acre against Program Water rights because such an assessment is prohibited by the provisions of the Walker River Decree, the Court's 1937 Order appointing the Board and the Board's own 1953 Rules and Regulations, and because such a burdensome and unsupported special assessment would set precedent of allowing the Board to discriminate against a single water rights user for unfair treatment.

May 20, 2019

Respectfully submitted,

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By: /s/ *Don Springmeyer*

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2019, a true and correct copy of the foregoing **OBJECTION OF WALKER BASIN CONSERVANCY TO PETITION FOR APPROVAL OF SPECIAL ASSESSMENT** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By /s/ *Christie Rehfeld*
Christie Rehfeld, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

EXHIBIT D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125 CASE NO. 3:73-CV-00125-MMD-WGC **JOINDER TO OBJECTION OF WALKER BASIN CONSERVANCY TO PETITION FOR APPROVAL OF SPECIAL ASSESSMENT**

COME NOW, Plaintiff-Intervenor Mineral County, Nevada, and Defendant Walker Lake Working Group ("WLWG"), by and through counsel of record, Simeon Herskovits and Iris Thornton of Advocates for Community and Environment, and Sean Rowe, Mineral County District Attorney, and hereby join in the *Objection of Walker Basin Conservancy to Petition for Approval of Special Assessment* ("*WBC's Objection*"). Doc. No. 1575. The United States Board

of Water Commissioners' ("U.S. Board's") *Petition* proposes to assess Decreed rights in general at the rate of $3.60 per acre, which represents a reduction from previous assessments. Doc. No. 1551, at 5. However, the *Petition* also proposes to impose a new assessment of $40.00 per acre on Walker Basin Restoration Program Water rights, an unjustified, selective, and discriminatory increase of more than ten-fold in the amount of the assessment proposed for all other Decreed rights. *Id*. at 5-6.

Because Mineral County and WLWG's shared interest in the restoration of Walker Lake is directly threatened by the U.S. Board's attempted imposition of an unfair, arbitrary, and burdensome additional assessment on Walker Basin Restoration Program water, because imposition of such additional fees appears to be ancillary to, and intended to fund litigation in support of, the Water Master's improper refusal to deliver water to Walker Lake under Permit 80700, *id*. at 6, and for the other reasons articulated in *WBC's Objection*, Mineral County and

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WLWG join in *WBC's Objection* and respectfully request the Court to deny the United States Board of Water Commissioners' Petition for Approval of Special Assessment of $40.00 per acre against Walker Basin Restoration Program water rights.

Respectfully submitted this 21st day of May, 2019,

/s/ Simeon Herskovits

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2019, on behalf of Mineral County and the Walker Lake Working Group, I filed the foregoing **JOINDER TO OBJECTION OF WALKER BASIN CONSERVANCY TO PETITION FOR APPROVAL OF SPECIAL ASSESSMENT** 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 this case.

/s/ Simeon Herskovits
Simeon Herskovits