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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 MINISTERIO ROCA SOLIDA)	Case No.: 2:12-cv-01488-RCJ-VCF
)	
13 Plaintiff,)	OPPOSITION TO
)	DEFENDANTS' MOTION TO
14 v.)	DISMISS U.S. FISH &
)	WILDLIFE SERVICE AND
)	SHARON MCKELVEY IN HER
)	OFFICIAL CAPACITY
15 UNITED STATES, UNITED STATES FISH)	
16 AND WILDLIFE SERVICE; and SHARON)	
17 MCKELVEY in her official and)	
individual capacities,)	
)	
18 Defendants.)	

19 COMES NOW, Plaintiff MINISTERIO ROCA SOLIDA (hereinafter SOLID ROCK), by
20 and through its attorney, NPRI CENTER FOR JUSTICE AND CONSTITUTIONAL
21 LITIGATION, and hereby respectfully requests that this Court deny DEFENDANTS' MOTION
22 TO DISMISS U.S. FISH & WILDLIFE and SHARON MCKELVEY in her Official Capacity,
23 based upon the following Memorandum of Points and Authorities and/or Plaintiff's First
24 Amended Complaint filed concurrently.

25 ...

26 ...

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF FACTS**

3
4 On August 22, 2012, Plaintiff SOLID ROCK filed a Complaint in this Court against
5 Defendants U.S. FISH & WILDLIFE SERVICE and SHARON MCKELVEY (in her official and
6 individual capacities) alleging the tort of negligence and a number of violations of its
7 constitutional rights by named Defendants.
8

9 On September 21, 2012, pursuant to FRCP 4(i)(1)(2), Counsel for Plaintiff served the
10 UNITED STATES, the U.S. FISH & WILDLIFE SERVICE, and SHARON MCKELVEY in her
11 official capacity, via U.S. certified mail to each, copies of the Summons and Complaint. (In
12 addition, a Request for Waiver of Service and Complaint was also sent by certified mail to
13 Sharon McKelvey (in her individual capacity) and accepted by her on September 27, 2012).
14

15 On November 20, 2012, the Defendants filed two MOTIONS TO DISMISS; the first to
16 dismiss U.S. Fish and Wildlife Service and Sharon McKelvey in her *official* capacity from all
17 claims and the second to dismiss Sharon McKelvey in her *individual* capacity (both motions
18 cited jurisdictional grounds and a lack of specificity of the Complaint). On that same date, the
19 United States also filed a NOTICE OF SUBSTITUTION, substituting THE UNITED STATES,
20 itself, for SHARON MCKELVEY with respect to the Federal Torts Claim Act (hereinafter
21 “FTCA”) claim in this action.
22

23
24 With respect only to the FTCA claim, Plaintiff believes Defendants’ Substitution of
25 “THE UNITED STATES” for SHARON MCKELVEY in her official capacity is appropriate and
26 warranted under the FTCA and Defendants’ request that this Court include THE UNITED
27 STATES as a named Defendant is unopposed. Plaintiff also believes that THE UNITED
28 STATES is the appropriate Defendant for the Takings Claim contained in the original Complaint

1 and is so referenced in Plaintiff's First Amended Complaint. Failing at the time to make the
2 distinction between THE UNITED STATES itself (and its agencies), THE UNITED STATES,
3 pursuant to FRCP 4(i)(1), was served with a copy of the original Summons and Complaint on
4 September 21, 2012 (as indicated above).

5 Plaintiff, however, takes issue with all Defendants' other challenges to jurisdiction and
6 lack of specificity in the original Complaint for the reasons specified below and/or as remedied
7 by Plaintiff's First Amended Complaint filed concurrently with this OPPOSITION.
8

9 II. INTRODUCTION

10 Pastor Victor Fuentes, (a Cuban political refugee who swam 7 miles in open ocean to
11 escape Fidel Castro's tyrannical regime) and his SOLID ROCK church, were harmed by
12 Defendants UNITED STATES, the U.S. FISH AND WILDLIFE SERVICE ("USF&W"), and its
13 employee, SHARON MCKELVEY when, without due process, MCKELVEY and USF&W
14 confiscated vested water rights belonging to SOLID ROCK by way of a water diversion project
15 that, as initially constructed, ultimately flooded and damaged SOLID ROCK's property with the
16 very water that was both illegally and unconstitutionally confiscated in the first place.
17
18

19 The government now hopes to evade (or delay) liability for its actions behind the cloak of
20 "sovereign immunity" and by claiming that the vagaries of SOLID ROCK's original Complaint
21 are such that the government is somehow deprived of "fair notice" as to why it is being sued.
22

23 In principle, Pastor Fuentes and SOLID ROCK, like many legal scholars,¹ believe that
24 the doctrine of "sovereign immunity" (i.e. "the King (or Dictator) can do no wrong") has no
25 place in a constitutional republic. In fact, Pastor Fuentes already suffered under just such a
26 regime until seeking political asylum in a most dramatic fashion.
27
28

¹ e.g. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201 (2001).

1 That an aggrieved citizen may not seek legal redress against a government violative of its
2 very own constitution in a constitutional republic is incomprehensible to Plaintiff. Fortunately
3 for SOLID ROCK, in addition to being dead-right on principle, there is more-than-ample legal
4 authority for this Court’s jurisdiction over all named Defendants in this case.

5 For each of the reasons listed below as well as those remedied by Plaintiff’s First
6 Amended Complaint (filed concurrently), Defendants' Motion to Dismiss U.S. FISH AND
7 WILDLIFE AND SHARON MCKELVEY IN HER OFFICAL CAPACITY should be denied.
8

9 **III. LEGAL ARGUMENT**

10 **A. This Court has Jurisdiction over THE UNITED STATES, the U.S. FISH AND**
11 **WILDLIFE SERVICE, and SHARON MCKELVEY in her Official Capacity on**
12 **Plaintiff’s Claims.**

13 To a great extent, government in its Motion to Dismiss construed the claims and
14 requested relief in an artificially narrow way and then relied upon its own narrow construction to
15 justify dismissal on jurisdictional grounds.
16

17 Although adequately specified in the original Complaint, it may be helpful to this Court
18 for Plaintiff to reiterate the claims and relief sought prior to identifying each Defendant and the
19 bases for jurisdiction.
20

21 As recited by Defendants, “Plaintiff alleges . . . Federal Defendants engaged in a water
22 diversion project which (1) deprived Plaintiff of its vested water rights, and (2) in conjunction
23 with rainfall, resulted in flooding and property damage.” Motion at p.2. From this short
24 synopsis, demonstrating understanding by Defendants, Plaintiff contends (1) its first and fifth
25 amendment rights to free exercise of religion were violated inasmuch as the vested water rights
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1 of which Plaintiff was deprived were used for religious purposes including baptisms;² (2) its
2 procedural and substantive due process rights under the fifth amendment were violated in the
3 removal of water to which Plaintiff has and had vested rights; (3) the means by which
4 Defendants carried out the water diversion project were deficient and done in such a way that it
5 resulted in Defendants flooding Plaintiff's property, thus committing a tort actionable under the
6 Federal Tort Claims Act;³ and (4) a "taking" under the fifth amendment has already occurred
7 given the ongoing deprivation of Plaintiff's water rights and, to the extent this Court does not
8 grant the declaratory and injunctive relief requested, a significant *permanent* taking will have
9 resulted from Defendants' actions.
10

11 As for relief requested, Plaintiff seeks declaratory relief from this Court against all
12 Defendants holding Defendants' actions unconstitutional and injunctive relief restoring the water
13 to which Plaintiff is constitutionally and legally entitled. Additionally, Plaintiff seeks monetary
14 damages against the UNITED STATES for the negligent flooding of Plaintiff's private property
15 resulting from Defendants' water diversion project and against the UNITED STATES for
16 Defendants' unconstitutional and ongoing (but, hopefully, temporary) "taking" of Plaintiff's
17 water rights without just compensation (or for public use). Absent injunctive relief restoring
18 Plaintiff's access to its water rights, relief for a permanent taking against the UNITED STATES
19 is also sought.
20
21

22 . . .

23 . . .
24

25
26 ² Plaintiff contends the church has a liberty interest to free religious exercise under the fifth
27 amendment of which Plaintiff was denied without substantive and procedural due process.

28 ³ Even if, *arguendo*, Plaintiff had no vested water rights, once undertaken, Defendants had a
legal duty to carry out the water diversion project in a way that did not result in the flooding of
Plaintiff's private property.

1 **1. This Court has Jurisdiction over THE UNITED STATES for Relief Sought by**
2 **Plaintiff under Plaintiff’s FTCA and Takings Claims and Plaintiff’s Takings**
3 **Claims are Properly Before This Court.**

4 As stated by Defendants in their Motion to Dismiss, the doctrine of “sovereign
5 immunity” does not preclude suits against governmental entities “when authorized by statute.”
6 Motion at 3-4 and *Block v. North Dakota*, 461 U.S. 273, 287 (1983). The government concedes
7 both in its Notice of Substitution at page 1-2 and Motion at page 8 that THE UNITED STATES
8 is the proper party in suits under the Federal Tort Claims Act. The government also concedes in
9 its Motion at page 6-7 that THE UNITED STATES is the proper party under the Big and Little
10 Tucker Acts. Thus, with respect to the Takings claim and the FTCA claim, the UNITED
11 STATES is subject to this Court’s jurisdiction and Defendants have seemingly admitted as much.

12 Insofar as THE UNITED STATES has already substituted itself for MCKELVEY with
13 respect to the FTCA Claim and SOLID ROCK has added the UNITED STATES in its First
14 Amended Complaint (for the Takings claim) filed concurrently with this Opposition, Plaintiff
15 believes and the government concedes that THE UNITED STATES is properly subject to the
16 jurisdiction of this Court on these claims.

17 On the matter of this Court’s jurisdiction for the takings claim, the government adroitly
18 points out that jurisdiction for takings claims over \$10,000 do not properly lie in this Court.
19 Motion at 6-7. This was not and is not lost on Plaintiff or Plaintiff’s counsel. However,
20 dismissing this claim from this Court at this time would be improper and premature because,
21 absent a decision by this Court on the equitable relief sought, the amount of the taking (be it
22 temporary or permanent) cannot be precisely ascertained.

23 Government also asserts that for a takings claim to be ripe, Plaintiffs must at this stage
24 specify the amount of the taking. However, for jurisdictional purposes, a property deprivation
25

1 has already occurred making the legal issue of whether a taking has occurred and whether a
2 public use justifies the use of eminent domain fully ripe for adjudication at the moment of
3 deprivation. Defendants would have this Court believe the precise amount of the taking must be
4 ascertained prior to this Court having jurisdiction to decide the issue of whether a taking has
5 occurred. However, on this point of law, the government is patently incorrect.

6
7 [T]he question of damages is discrete from the question of claim accrual.
8 As the court in *Fallini* stated, the obligation to sue arises once the
9 permanent nature of the government action is evident, regardless
10 of whether damages are complete and fully calculable.

11 *Goodrich v. U.S.*, 434 F.3d 1329, 1336 (Fed. Cir.)(2006) (quoting *Fallini v. United States*, 56
12 F.3d 1378, 1382–83 (Fed.Cir.1995)); *See also State of Alaska v. United States*, 32 Fed.Cl. 689,
13 700 (1995) (rejecting the argument that a claim does not accrue until the extent of the damages
14 has become manifest).

15 In fact, under the government’s legal construction, as with *State of Alaska*, Defendants
16 could, through tactical delays, place Plaintiff in a position where statutes of limitation have run
17 on their takings claim before the amount of the deprivation could ever be precisely measured,
18 thus making Plaintiff legally ineligible to recover. *Id.*

19 Thus, rather than Plaintiff “recognizing there is a jurisdictional problem with its takings
20 claim” as Defendants suppose, Motion at 6, Plaintiff pleads to protect itself against such a
21 circumstance of an expiring statute of limitations issue on the takings claim. And, as stated in
22 both the Original Complaint and Plaintiff’s First Amended Complaint, Plaintiff has also filed a
23 takings claim in the U.S. Court of Federal Claims and requested that proceedings therein be
24 stayed pending the outcome of this case because, *inter alia*, in the interest of judicial efficiency,
25 Plaintiff would prefer to fully resolve the takings matter in this Court, to the extent the temporary
26 taking amount falls within the jurisdictional limits of this Court.
27
28

1 **2. This Court has Jurisdiction over the United States Fish and Wildlife Service for**
2 **Relief Sought Under Plaintiff’s First and Fifth Amendment Claims.**

3 As stated by the government in their Motion to Dismiss, the doctrine of “sovereign
4 immunity” does not preclude suits against governmental entities “when authorized by statute.”
5 Motion at 3-4 and *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Plaintiff maintains that
6 USF&W is a proper party on the bases stated in the original Complaint with respect to
7 declaratory and injunctive relief sought to remedy constitutional violations of Plaintiff’s first
8 amendment rights to religious free exercise and fifth amendment rights to substantive and
9 procedural due process prior to the deprivation of its religious liberty and property interests
10 protected thereby.

11 It is well established that 28 U.S.C. § 1331, as pled in SOLID ROCK’s Original
12 Complaint, (although often used in tandem with the Administrative Procedures Act), gives this
13 Court jurisdiction over federal agencies with respect to declaratory and injunctive relief for
14 constitutional violations committed by agencies and their employees.

15 It is settled that provisions of the U.S. Constitution setting forth
16 individual rights generally also empower individuals to sue Federal
17 officers *and agencies* for violations of these rights, particularly if
18 (as here) the relief sought is injunctive.

19
20 *Thompson v. U.S. Dept. of Housing and Urban Development*, 348 F.Supp.2d 398, 420 (2005)
21 (*emphasis added*)(*citing Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)).

22 [A] federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over
23 challenges to federal agency action as claims arising under federal law,
24 unless a statute expressly precludes review. Thus, while the APA does
25 not confer a district court with jurisdiction, it does provide a waiver of
26 sovereign immunity in suits seeking judicial review of a federal agency
27 action under § 1331.

28 *Gallo Cattle Co. v. U.S. Dept. of Agriculture*, 159 F.3d 1194 (9th Cir. 1998)(*internal citations*
omitted).

1 To resolve any unnecessary and time-consuming debate as to the necessity to plead both
2 the Administrative Procedure Act along with 28 U.S.C. § 1331 for this Court to find jurisdiction
3 over Defendant USF&W, Plaintiff amended its original Complaint to include the Administrative
4 Procedures Act. 5 U.S.C. §§ 701, 702 and 703 *et seq.* and The Mandamus Act, which authorizes
5 actions in district court “to compel an officer or employee of the United States or any agency
6 thereof to perform a legal duty owed to the plaintiff.” 28 U.S.C. § 1361.
7

8 Along with 28 U.S.C. § 1331, these jurisdictional statutes bring Defendant U.S. Fish and
9 Wildlife squarely within the jurisdiction of this Court, especially with respect to the declaratory
10 and injunctive relief sought for this agency’s ongoing constitutional violations.
11

12 **3. This Court has Jurisdiction over SHARON MCKELVEY in her Official
13 Capacity for Relief Sought Under Plaintiff’s First and Fifth Amendment Claims.**

14 “The doctrine of sovereign immunity generally does not bar a claim under [28 U.S.C.] §
15 1331 for injunctive relief against a federal officer who has violated a duty imposed by federal
16 law while acting in [her] official capacity.” *Rael v. Apodaca*, 210 Fed.Appx 787 (10th Cir.
17 2006)(citing *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 565, 565-67 (10th Cir.
18 1981).

19 Of course, this is also the law of the Ninth Circuit.

20 An action in a court of the United States seeking relief other than
21 money damages and stating a claim that an agency or officer or
22 employee thereof acted or failed to act in an official capacity or
23 under color of legal authority shall not be dismissed nor relief
24 therein denied on the ground that it is against the United States or
that the United States is an indispensable party.

25 *Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989)(holding that 5 U.S.C.
26 § 702 waives sovereign immunity for suits properly brought against federal agencies and *federal*
27 *employees* on federal constitutional questions under 28 U.S.C. § 1331).
28

1 As maintained in Plaintiff's Original Complaint, Defendant MCKELVEY is subject to
2 the jurisdiction of this Court in her official capacity under 28 U.S.C. § 1331 in concert with 5
3 U.S.C. §§ 701, 702 and 703 *et seq.* because Plaintiff seeks injunctive relief for Defendants'
4 ongoing constitutional violations and for all those reasons stated in the previous section.

5 To resolve any unnecessary and time-consuming debate as to the necessity to plead both
6 the Administrative Procedure Act along with 28 U.S.C. § 1331 for this Court to find jurisdiction
7 over Defendant MCKELVEY in her Official Capacity, again, Plaintiff has augmented its First
8 Amended Complaint to include the Administrative Procedures Act. 5 U.S.C. §§ 701, 702 and
9 703 *et seq.* and The Mandamus Act, which authorizes actions in district court "to compel an
10 officer or employee of the United States or any agency thereof to perform a legal duty owed to
11 the plaintiff." 28 U.S.C. § 1361.
12

13 Because 28 U.S.C. § 1361 subjects employees in their official capacities and agencies of
14 the United States to the jurisdiction of federal district courts to perform duties owed to Plaintiffs
15 and because injunctive relief is sought to require Defendants to remedy ongoing constitutional
16 violations and restore Plaintiff's water, Plaintiff's First Amended Complaint, again, was
17 amended so as to include §1361 as an additional jurisdictional statute.
18

19 Along with 28 U.S.C. § 1331, these jurisdictional statutes bring Defendant MCKELVEY
20 in her Official Capacity squarely within the jurisdiction of this Court, especially with respect to
21 the declaratory and injunctive relief sought for the agency's ongoing constitutional violations.
22

23 **4. Additional Jurisdictional Matters.**

24 Defendants improperly took issue with SOLID ROCK's request for equitable relief
25 (Declaratory and Injunctive Relief). While Defendants' notion warrants consideration with
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1 respect to the FTCA claim and the Big and Little Tucker Act claims, this is seemingly another
2 example of Defendants construing Plaintiff's claims narrowly so as to thwart them.

3 This Court has the authority to declare unconstitutional actions as such and enjoin their
4 continuance. "Under our constitutional system, certain rights are protected against governmental
5 action and, if such rights are infringed by the actions of officers of the Government, it is proper
6 that the courts have the power to grant relief against those actions." *Larson v. Domestic &*
7 *Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).
8

9 Nevertheless, towards that end, Plaintiff has amended its Original Complaint to include
10 28 U.S.C. §§ 2201 and 2202 for Declaratory Relief.

11 **B. The Original Complaint was Adequate to Provide Fair Notice to Defendants,**
12 **"Plausibility of Relief" for the Court, and, Moreover, the First Amended Complaint**
13 **Provides Even More Specificity.**

14 Relying upon the very cases cited by Defendants, "Federal Rule of Civil Procedure
15 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled
16 to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon
17 which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) "and a complaint
18 must contain a 'short and plain statement of the claim showing that the pleader is entitled to
19 relief.' '[D]etailed factual allegations' are not required." *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64
20 (2009) (internal citations omitted). "When there are well-pleaded factual allegations, a court
21 should assume their veracity and then determine whether they plausibly give rise to an
22 entitlement to relief." *Id.*
23

24 **1. Plaintiff Has Provided Fair and Ample Notice to Defendants of its Bases For**
25 **Claims.**
26

27 As evidenced by its own Motion to Dismiss, the government has been provided "fair
28 notice" as to why it is being sued. Defendants' own words make it quite clear that Defendants

1 fully understand the thrust of the lawsuit having written: “Plaintiff alleges . . . Federal
2 Defendants engaged in a water diversion project which (1) deprived Plaintiff of water rights, and
3 (2) in conjunction with rainfall, resulted in flooding and property damage.” Defendants’ Motion
4 at 2. Plaintiff was, of course, much more factually and legally specific as to the basis for its
5 lawsuit and relief sought and easily satisfied the liberal notice pleading requirements of FRCP
6 Rule 8(a).
7

8 Instead, Defendants have seemingly reverse-engineered their motion by arbitrarily
9 labeling Plaintiff’s Complaint as containing “nothing more than conclusory allegations of law”
10 so as to invoke a prepared response which includes citations to a number of 9th Circuit case law
11 critical of complaints actually consisting of nothing more. Declaring twenty-five paragraphs of
12 factual allegations and claims for relief as mere “conclusory allegations” does not make them so.
13

14 As demonstrated below, the Original Complaint contains much more than “conclusory
15 allegations of law” and/or facts (completely devoid of law) as Defendants would have this Court
16 believe. Such facts include:
17

- 18 • That Plaintiff Church purchased a forty acre camp facility for \$500,000. ¶ 7.
- 19 • Structures on the forty acres made it well-suited for operation of a church camp. *Id.*
- 20 • Location of the parcel is within the Ash Meadows Wildlife refuge (in Nevada). *Id.*
- 21 • Appurtenant to the \$500,000, forty-acre property are [at least some] water rights to a
22 desert stream dating back to the year 1881. ¶ 8.
- 23 • The aforementioned water was used for baptisms, livestock watering, other religious
24 purposes, and recreational use by the church campers. *Id.*
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- 1 • In August 2010, Defendants engaged in a water diversion project denying Plaintiffs
2 access to these water rights by diverting water completely around their forty-acre parcel.

3 ¶ 9.

- 4 • Defendants' water diversion project harmed the Plaintiff including interference with
5 baptisms, recreation and livestock watering and other harmful effects. ¶ 10.

- 6
7 • In December of 2010, shortly after completion of the diversion project undertaken by
8 Defendants, the newly diverted water overflowed the Defendants' artificially created re-
9 routing channels and flooded Plaintiff's parcel as the water made its way back to its
10 historical path.⁴ ¶ 11.

- 11
12 • This flooding resulted in \$86,639.00 in damage to Plaintiff's Property. *Id.*

13 Under Defendants' cited authority, when, as here, "there are well-pleaded factual
14 allegations, a court should *assume their veracity* and then determine whether they plausibly give
15 rise to an entitlement to relief." *Ashcroft v. Iqbal* at 664.

16
17 **2. Plaintiff has met the Plausibility of Relief Standard For the Court**

18 Although again narrowly interpreted by Defendants in their Motion to Dismiss so as to
19 justify their dismissing certain claims, the grounds for relief are also well laid out in Plaintiff's
20 Claims for Relief in the Original Complaint.

21 From these aforementioned facts, Plaintiff asserts (1) its first amendment rights to free
22 exercise of religion were violated inasmuch as the water rights of which Plaintiff was deprived
23 were used for religious purposes including baptisms; (2) it's procedural and substantive due
24 process rights under the fifth amendment were violated in the removal of water to which Plaintiff
25

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28 ⁴ The Complaint alleges this diversion project was conducted negligently – a legal term of art and
therefore, arguably a legal conclusion.

1 has vested rights;⁵ (3) the means by which Defendants executed the water diversion project were
2 done in such a way that Defendants flooded Plaintiff's land and committed a tort⁶ actionable
3 under the Federal Tort Claims Act;⁷ and (4) a "taking" under the fifth amendment is already
4 ongoing given the so-far temporary deprivation of Plaintiff's water rights and, to the extent this
5 Court does not grant the declaratory and injunctive relief requested, a permanent taking will have
6 resulted from these actions.

7
8 **3. Even if, *arguendo*, Plaintiff's Original Complaint was Insufficient, Plaintiff's**
9 **First Amended Complaint Remedies Any Alleged Shortcomings.**

10 In addition to amending the Original Complaint with additional jurisdictional bases as
11 detailed in Section III (A)(1),(2),(3), and (4), Plaintiff, without conceding any shortcomings with
12 respect to alleged facts, law, or claims for relief in the Original Complaint, also amended the
13 Original Complaint in its First Amended Complaint in the following ways, thus, hopefully,
14 providing additional clarity to both the Court and Defendants.

- 15 • More specificity as to how the water diversion project was defective.
- 16 • More specificity as to Plaintiff's vested water rights.
- 17 • An allegation of illegal activity in Defendants' failure to obtain the required Army Corps
18 of Engineer permit(s).
- 19 • Allegation that Defendants in their submission of a Water Impact Statement to the
20 Nevada Division of Water Resources excluded any indication of the Plaintiff's existence.

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23
24 ⁵ Plaintiff also believes the church has a liberty interest to free religious exercise under the fifth
25 amendment of which Plaintiff was denied without substantive and procedural due process.

26 ⁶ Even without more the doctrine of *res ipsa locquitur* make these pleadings sufficient in Nevada
27 given that Defendants exercised exclusive control of the instrumentality causing harm, the
28 accident is one that does not ordinarily occur in the absence of negligence, and the defendant is
in a better position to explain the cause of the accident.

⁷ Even if, *arguendo*, Plaintiff had no vested water rights, Defendants had a legal duty to
administer the water diversion project in a way that did not result in the flooding of Plaintiff's
private property.

- Allegation that Defendants' took remedial action to prevent future flooding by altering the design of the initial (defective) water diversion channel.
- Allegation that four contractors who witnessed the extensive damage to Plaintiff's property provided estimates for repair.

IV. CONCLUSION

For the reasons explained above, Defendants' Motion to Dismiss United States Fish and Wildlife and Sharon MCKELVEY in her official capacity should be denied by this Court.

Respectfully submitted this 7th day of December, 2012.

/s/ Joseph F. Becker

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PROOF OF SERVICE

I, Joseph F. Becker, certify that the following individual(s) were served with copies of the foregoing **OPPOSITION TO DEFENDANTS' MOTION TO DISMISS U. S. FISH & WILDLIFE SERVICE AND SHARON MCKELVEY IN HER OFFICIAL CAPACITY**, by the below identified method of service:

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Dated December 7, 2012

/s/ Joseph F. Becker
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