Martin B. Bushman, No. 5594
David N. Wolf, No. 6688
Lance Sorenson, No. 10684
Assistant Attorneys General
160 E 300 S, Fifth Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0100
lancesorenson@agutah.gov

Attorneys for Defendant Utah Department of Natural Resources

This motion requires you to respond. Please See the Notice to Responding Party.

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, AMERICAN BIRD CONSERVANCY, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and UTAH RIVERS COUNCIL, *Plaintiffs*, v. UTAH DEPARTMENT OF NATURAL RESOURCES; UTAH DIVISION OF WATER RIGHTS; and UTAH DIVISION OF FORESTRY, FIRE AND STATE LANDS, *Defendants*.	**DEFENDANT DEPARTMENT OF NATURAL RESOURCES' MOTION TO DISMISS PURSUANT TO UTAH R. CIV. P. 12(b)(1) AND 12(b)(7)** **(Hearing Requested)** Case No. 230906637 Judge Laura Scott

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MOTION

The Utah Department of Natural Resources ("Department" or "DNR")[1] by and through its undersigned counsel, files this Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(7) of the Utah Rules of Civil Procedure. For the reasons stated below, the Court should dismiss the Complaint because it lacks subject matter jurisdiction. The Court lacks jurisdiction under political question and standing doctrines – both of which serve to preserve the separation of government powers. Further, Plaintiffs' claim is barred by res judicata and laches. All these important legal doctrines dictate dismissal for lack of jurisdiction. Even without them, the Court should decline jurisdiction in a declaratory judgment action such as this where the declaration would not resolve the controversy or uncertainty between the parties.[2] Finally, Plaintiffs have failed to join necessary parties as required by rule and statute.

JOINDER

DNR joins in full the Motions to Dismiss filed by Defendant Division of Water Rights ("DWR") and Defendant Division of Forestry, Fire, and State Lands ("FFSL"), filed simultaneously herewith, and incorporates by reference the arguments made therein.

MEMORANDUM

INTRODUCTION

The Utah Legislature and the Governor have determined that the "long-term health of the Great Salt Lake" ("the Lake") is important enough that it warrants significant investment by the

[1] State agency Defendants, including DNR, the Division of Forestry, Fire, & State Lands and the Division of Water Rights, as well as other Executive Branch subdivisions, are collectively referred to herein as "the State."

[2] *See* UTAH CODE § 78B-6-404 (providing the Court with discretion to "refuse to render or enter a declaratory judgment or decree where a judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding").

State.[3] In just the last two years, the Legislature has appropriated approximately $500 million toward protecting and improving the Lake. Much of this money is designated for the Great Salt Lake Watershed Enhancement Program, the purpose of which is "retain or enhance water flows to sustain the Great Salt Lake and the Great Salt Lake's wetlands and improve water quality and quantity for the Great Salt Lake within the Great Salt Lake watershed."[4] The Watershed Enhancement Program includes a Water Trust to support the purposes of enhancing the Lake. The Water Trust can be used in multiple ways to serve its purposes, including buying and leasing water rights that will be dedicated to the Lake. Some water users have worked with the Water Trust to donate significant water shares for the benefit of the Lake.[5]

The Legislature has also created the office of the Great Salt Lake Commissioner, whose duties include the development of a strategic plan for the Great Salt Lake and whose authority extends to coordinating (and compelling, if necessary) efforts among multiple state agencies to "take action, or refrain from acting, to benefit the health of the Great Salt Lake[.]"[6] The Commissioner is charged with developing a "strategic plan on a holistic approach that balances the diverse interests related to the health of the Great Salt Lake."[7] The Commissioner must consider the following when doing so: (a) coordination of efforts; (b) a sustainable water supply for the Lake, while balancing competing needs; (c) human health and quality of life; (d) a

[3] UTAH CODE § 73-32-202(1)(a). The State's recent efforts to bolster the Great Salt Lake are recounted more fully in Part III of the Background section, herein.
[4] UTAH CODE § 65A-16-201(a). This sections lists ten other noteworthy policies all aimed to "enhance, preserve, or protect the Great Salt Lake." *Id*. at 201(1)(k).
[5] *See, e.g.*, https://naturalresources.utah.gov/dnr-newsfeed/church-donates-water-to-benefit-great-salt-lake.
[6] UTAH CODE § 73-32-203(2); *see also* UTAH CODE § 73-32-302(1)(a) & (b) ("The commissioner shall . . . prepare an approved strategic plan for the long-term health of the Great Salt Lake and update the strategic plan regularly [and] oversee the execution of the plan by other state agencies").
[7] UTAH CODE § 73-32-204(2).

healthy ecosystem; (e) economic development; (d) water conservation, including municipal, industrial, and agricultural uses; (g) water and land use planning; and (h) regional water sharing.[8]

All these statutorily mandated programs underscore three important points as the Court considers its jurisdiction to adjudicate this lawsuit: (1) the political branches of the State of Utah are proactively working and investing significant resources to benefit and protect the Lake; (2) there are multiple avenues available to achieve that worthwhile goal; and (3) the political branches must take into consideration all the interests of the citizens of Utah. Those interests are not limited to a particular lake elevation; they are broader. They include a healthy lake level as well as other beneficial uses of water, such as agricultural, industrial, and municipal. Plaintiffs' proposed remedy for the Lake does not balance interests at all; rather, it targets a particular lake level at the expense of all other beneficial uses and public interests.

Plaintiffs' myopic approach to bolstering the Lake lacks legal foundation, rendering it subject to dismissal pursuant to the State's Rule 12(b)(6) motions filed simultaneously herewith. But before even reaching the merits of Plaintiffs' claim, the Court must determine whether it has jurisdiction in the first place.

In our state constitutional system, like the federal one, the separation of government powers serves the interests of the people by ensuring that "no person charged with the exercise of powers properly belonging to one of these [government] departments, shall exercise any functions appertaining to either of the others."[9] Utah courts have long honored that command, resisting "arguments. . . [which] might with propriety be addressed to a legislative assembly," and has "decline[d] to resolve [the judiciary] into a law-making body, even though it may be

[8] *See id*.
[9] UTAH CONST., Article V; *see also Patterson v. State*, 2021 UT 52, ¶ 167, 504 P.3d 92.

considered . . . more enlightened to do so."[10]

To help ensure that courts do not overstep their judicial bounds, the Utah Supreme Court has developed a political question doctrine, which mirrors the one used in federal courts. Here, the court should conclude it lacks jurisdiction under the political question doctrine because: (1) there are no judicially discoverable and manageable standards for resolving Plaintiffs' claim; (2) to grant Plaintiffs' requested relief, the Court would need to wade into policy considerations regarding water use, water management, and competing public interests in the State of Utah; and (3) granting Plaintiffs' requested relief would demonstrate a lack of respect for the myriad efforts the State is already taking to enhance the Lake. Other courts have applied the political question doctrine in cases identical or nearly identical to this one.[11]

The Court is also without jurisdiction for a separate, but related reason: Plaintiffs lack standing because the remedy they propose is unworkable as a matter of law and would cause the Court to exceed its judicial role.[12] Plaintiffs' proposed remedy (curtailing perfected water rights) would run roughshod over prior appropriation principals and statutes that have been recognized and administered since before statehood and have been enshrined in the Utah Constitution. Plaintiffs effectively ask this Court to act both as a super-Legislature and a super-State Engineer, judicially creating new water distribution and use rules and then overseeing their implementation. The constitutional separation of powers doctrine dictates that this Court dismiss the Complaint under these circumstances. Even if no such constitutional directive could be

[10] *Larson v. Salt Lake City*, 97 P. 483, 489 (1908).
[11] *See, e.g., White Bear Lake Restoration Association v. Minnesota Department of Natural Resources*, 946 N.W.2d 373, 386 (Minn. 2020) and *Iowa Citizens for Community Improvement v. State of Iowa*, 962 N.W. 2d 780 (Iowa 2021); *see also* Part I.A. of the Argument section, herein.
[12] *See, e.g., Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

found, state law provides the Court discretion to decline jurisdiction in a case such as this.[13]

Thousands of water rights within the Great Salt Lake drainage have been perfected and adjudicated. Those actions created vested property rights and reliance interests on the part of water rights holders. According to well-established case law, efforts to revisit and upend those water rights should be dismissed under the doctrines of res judicata and laches.[14]

Finally, Plaintiffs ask this Court to order the curtailment of water diversions that are vested property interests of non-parties. Under the Constitution's standing doctrine, under Utah R. Civ. P. 19, and under the Utah Code,[15] Plaintiffs should have joined those water right holders and water users to this action to give them a fair opportunity to respond to Plaintiffs' claim. They are necessary parties.

Water law, especially in Utah, is complex. Plaintiffs' blunt proposed remedy (mandatory upstream curtailments) would undermine prior appropriated rights (enshrined in the Constitution) and directly impair the State's myriad efforts, already in the works, to bolster the Lake. This case is exactly the type for which the political question doctrine has been developed. The Court should dismiss the Complaint for lack of jurisdiction.

BACKGROUND

I. The legal framework of the public trust doctrine and prior appropriation

A. The two sources of public trust principles and their relationship to land and water

1. The common law public trust doctrine

Four years prior to Utah's statehood, the United States Supreme Court articulated what

[13] UTAH CODE § 78B-6-404.
[14] *See, e.g., EnerVest, Ltd. v. Utah State Eng'r*, 2019 UT 2, 435 P.3d 209 and *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, ¶ 20, 79 P.3d 945.
[15] UTAH CODE § 78B-6-402(1).

has become known as the public trust doctrine in *Illinois Cent. R. Co. v. State of Illinois*.[16] The Court determined that a "legislature [cannot] divest the state of the control and management of [its navigable waterways] and vest it absolutely in a private corporation [by] transferring title to its submerged *lands*[.]"[17] "[S]uch property," the Court continued, "cannot be alienated" if so doing would be detrimental to the public interest.[18] The public trust doctrine as set forth in *Illinois Central*, then, concerns the disposition of land under and around public waterways.

With the subsequent demise of federal common law,[19] the question arose whether the public trust doctrine announced in *Illinois Central* was based in state common law or federal constitutional law. The Supreme Court answered this question in *PPL Montana, LLC v. Montana*.[20] "Unlike the equal-footing doctrine . . . which is the constitutional foundation for the navigability rule of riverbed title,[21] the public trust doctrine remains a matter of state law."[22]

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[16] 146 U.S. 387 (1892).
[17] *Id*. at 454-55 (emphasis added).
[18] *Id*. at 455-56.
[19] *See, e.g., Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).
[20] 565 U.S. 576 (2012).
[21] States maintain title to land beneath waterways that are navigable as a matter of federal constitutional law. *See, e.g., Shively v. Bowlby*, 152 U.S. 1 (1894).
[22] *PPL Montana*, 565 U.S. at 603-04 (internal citation omitted). Plaintiffs, in their Complaint, assert that multiple cases stand for the proposition that the public trust doctrine in Utah extends to water. *See* Pls.' Compl., Dckt. No. 1, ⁋⁋ 77, 79, 80. However Plaintiffs misrepresent these cases. In *Utah v. U.S.*, 403, U.S. 9, (1972), the United State Supreme Court held, under the *equal footing doctrine*, that the bed of the Great Salt Lake is vested in the State. The phrase "public trust" does not appear in the opinion. *Utah State Road Commission v. Hardy Salt Co.*, 486 P.2d 391 (Utah 1971), a Utah Supreme Court case, similarly holds. Again, the phrase "public trust" is not found within the opinion. *Morton Intern., Inc. v. Southern Pac. Transp. Co*., 495 P.2d 31 (Utah 1972) concerns ownership of salt and does not discuss any public trust duty related to water. The case also does not mention the public trust doctrine. Plaintiffs cite to *PPL Montana* and *Illinois Central* for the proposition that "the public trust doctrine's scope includes . . . navigable inland rivers and lakes and their beds." Pls.' Compl., Dckt. No. 1, ⁋ 79. However, those cases are all about *lands* under and around waterways, not the water itself. Further, *PPL Montana* stands for the proposition that states may determine through legislation the scope of the common law public trust doctrine in their respective states. *See PPL Montana*, 565 U.S. at 603-04. Finally, *Utah Stream Access Coalition v. VR Acquisitions, LLC*, 439 P.3d 593 (Utah 2019) concerns access to land, not water.

Thus, while it is certainly true that a "state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of peace,"[23] it is also true that "[u]nder accepted principles of federalism, the states retain residual power to determine the *scope* of the public trust over waters within their borders[.]"[24]

The common law public trust doctrine thus has two limiting principles: (1) the rule as announced in *Illinois Central* is confined to prohibiting the disposal of submerged *lands* beneath navigable waters; and (2) the scope of a state's common law public trust, especially as it pertains to water itself, remains a matter of state law, to be determined by the people of the State acting through publicly accountable elected officials charged with balancing competing interests.

The common law public trust doctrine in Utah does not extend to water. And where states such as Utah have enacted comprehensive water management statutes, rules, and programs,[25] courts have chosen not to expand the public trust doctrine to create unprecedented obligations on states. For example, the Minnesota Supreme Court, in *White Bear Lake*, said it is "generally reluctant to extend the common law unless there is a compelling reason to do so. And we tend to proceed cautiously when a subject is extensively regulated by statutes and rules." [26] The Iowa Supreme Court reached a similar conclusion in *Iowa Citizens*,[27] where it declined, on political question grounds, to impose new water management requirements on Iowa. To be certain, some states have extended the public trust doctrine beyond the limited holding of *Illinois Central*.[28]

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[23] *See Illinois Central*, 146 U.S. at 454.
[24] *PPL Montana*, 565 U.S. at 604 (emphasis added).
[25] An overview of Utah's water management plans, including for the Great Salt Lake, is set forth in Parts II and III of the Background section, herein.
[26] *White Bear*, 946 N.W.2d at 386.
[27] *Iowa Citizens*, 962 N.W. 2d 780.
[28] *See, e.g., National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983).

Our federalist system permits and even encourages different states to adopt different water management plans, which raises the second potential source of the public trust doctrine – our state Constitution.

2. The Utah Constitution

Article XX, sec. 1 of the Utah Constitution states:

> All *lands* of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and, except as provided in Section 2 of this Article, are declared to be the public *lands* of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired (emphasis added).

By its own terms, the constitutional trust obligations of the State apply to lands, not water. As with the common law public trust doctrine, no Utah court has extended this constitutional trust obligation to the management of water. For this reason, Plaintiffs' Complaint is subject to dismissal for reasons set forth in the other State Defendants' Motions to Dismiss filed simultaneously herewith.

B. Utah's constitutionally mandated recognition of prior appropriation rights

Like other arid western states, Utah has adopted a prior appropriation system for water rights. Prior appropriation means first in time, first in right; essentially, the first user to take a quantity of water and put it to beneficial use has a higher priority than a subsequent user.[29] Congress recognized prior appropriated rights even before statehood.[30] And when the people of Utah ratified the Constitution in 1896, they included a provision that expressly recognizes and

[29] *See, e.g.*, UTAH CODE § 73-3-1; *see also Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 174 P. 852, 854 (Utah 1918) ("In Utah the doctrine of prior appropriation for beneficial use is, and has always been, the basis of acquisition of water rights").
[30] *See* Mining Act of 1866, sec. IX, 14 Stat. 251; *see also* Desert Land Act of 1877, 19 Stat. 377, and *California Oregon Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142 (1935).

affirms prior appropriated water rights. Article XII, sec. 1 states, "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." A person who has a prior appropriated right has the right "to insist as against the public that his quantity come to him."[31]

II. Utah's comprehensive regulation and management of water resources[32]

Utah's statutory framework for managing its water resources is largely found in Title 73 of the Utah Code, which contains 32 chapters addressing a wide range of policies, procedures, and uses, as well as chapter 16 of Title 65A. There, the Legislature declares that the waters of the state are public, and to be managed for beneficial use.[33] Under Utah law, a water appropriation may be made "only for a useful and beneficial purpose."[34] Any person may protest an application for appropriation pursuant to procedures set forth in the Water Code.[35]

The Legislature has also created the office of State Engineer who is "responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters."[36] The State Engineer also "secure[s] the equitable apportionment and distribution of the water according to the respective rights of appropriators."[37] The State Engineer is the director of the Division of Water Rights.[38]

The State Engineer has authority to promulgate rules pursuant to the Utah

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[31] *Adams v. Portage Irr., Reservoir & Power Co.*, 73 P.2d 648 (Utah 1937).
[32] The Court may take judicial notice of legislative enactments and executive records and proclamations. *See* Utah R. Evid. 201; *see also State v. Chadwick*, 2021 UT App 40 (the sort of acts subject to judicial notice are matters of common and general knowledge); *see also Consolidated Mills & Feed Yards Co. v. Patterson*, 221 P. 159 (Utah 1923).
[33] UTAH CODE §§ 73-1-1, 3.
[34] UTAH CODE §§ 73-3-1(4).
[35] UTAH CODE §§ 73-3-7.
[36] UTAH CODE §§ 73-2-1 (3)(a).
[37] UTAH CODE §§ 73-2-1 (3)(b).
[38] UTAH CODE §§ 73-2-1.2.

Administrative Procedures Act.[39] Those rules are found in Utah Admin. R655 *et seq*. and cover a variety of administrative topics related to water. The State Engineer, among others, has responsibility to implement the many recent policies the Legislature has enacted to enhance agriculture and municipal water conservation and the Great Salt Lake.

III. The State's efforts to bolster the Great Salt Lake

In 2013, Defendant FFSL completed a three-year process to revise the State's decades-old Comprehensive Management Plan ("CMP") for the Great Salt Lake. The 391-page CMP may be accessed at https://ffsl.utah.gov/state-lands/great-salt-lake/great-salt-lake-plans/. FFSL acted pursuant to its authority set forth in Utah Code § 65A-10-1 to manage sovereign lands. In the CMP, the State recognized that the Great Salt Lake is "a unique and complex ecosystem of regional and hemispheric importance. . . FFSL will coordinate, as necessary, to ensure that the management of these resources is based on a holistic view of the lake-wide ecosystem – including the use of adaptive management, as necessary – to ensure long-term sustainability."[40] The CMP articulated 12 public policies to implement in management of the lands under and around the Great Salt Lake.[41]

In 2022, the Utah Legislature enacted the Great Salt Lake Watershed Enhancement Program.[42] The Legislature appropriated $40,000,000 for a water trust, the purpose of which is to retain or enhance water flows to the Great Salt Lake, improve water quality, attract or leverage other public or private funding to enhance and preserve the Great Salt Lake watershed, and to otherwise enhance, preserve, and protect the Great Salt Lake.[43] The Watershed Enhancement

[39] UTAH CODE §§ 73-2-1 (4).
[40] CMP, p. xii.
[41] CMP, p. 1-1.
[42] *See* UTAH CODE § 65A-16-1 *et seq*.
[43] *See* UTAH CODE § 65A-16-201.

Program also seeks to conserve and restore upstream habitats that are key to protecting the hydrology and health of the Great Salt Lake's surrounding ecosystem.[44]

Also in 2022, the Legislature appropriated $5,000,000 to DNR to develop and implement an integrated surface and ground water assessment for the Great Salt Lake watershed, the purpose of which is, among other things, to assess the amounts and quality of available water resources, assess and forecast the quantity of water available for human, agricultural, and economic development, investigate the potential benefits of forest management and watershed restoration in improving snowpack retention and increasing soil moisture, identify and evaluate the best management practices that may be used to provide a reliable water supply that provides adequate flow to sustain the Great Salt Lake and its watershed.[45] Further, the Legislature appropriated $5,000,000 to a "turf buy-back" program that incentivizes residents to replace heavy water use landscapes with less thirsty alternatives.[46]

Also in 2022, the Legislature modified Title 73 to permit Utah farmers to sell unused appropriated water to the State and not lose their rights to it in the future. On November 3, 2022, Governor Cox issued a proclamation suspending any new water appropriations within the Great Salt Lake Basin.[47]

The Legislature continued its efforts in the 2023 general session, further loosening the "use it or lose it" rule to encourage leaving unused water "in stream,"[48] adding another $427 million to Great Salt Lake Enhancement and other programs,[49] and enacting the Great Salt Lake

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[44] *Id*.
[45] *See* UTAH CODE § 73-10g-402.
[46] *See* UTAH CODE § 73-10-6.
[47] *See* https://governor.utah.gov/2022/11/03/gov-cox-issues-proclamation-closing-great-salt-lake-basin-to-new-water-right-appropriations/.
[48] *See* UTAH CODE § 73-10g-204 *et seq.*
[49] *See id.*; *see also* UTAH CODE § 73-10-102.

Commissioner Act.[50] The Great Salt Lake Commissioner, who assumed office on July 1, 2023, has authority to, *inter alia*, prepare a strategic plan for the long-term health of the Great Salt Lake and update the plan regularly, oversee the execution of the plan by other state agencies, maintain information that measures the overall health of the lake, and develop cooperative agreements among government agencies.[51] With respect to the strategic plan, the Legislature has directed the Commissioner to implement "a holistic approach that balances the diverse interests related to the health of the Great Salt Lake."[52] The strategic plan must include provisions concerning a sustainable water supply for the Great Salt Lake, human health and quality of life, a healthy ecosystem, economic development, water conservation, water and land use planning, and regional water sharing.[53] Importantly, the Commissioner has authority to require state agencies to take action, or refrain from acting, to benefit the health of the Great Salt Lake.[54] Additionally, in 2023 the Utah Legislature appropriated $5,000,000 in ongoing and $13,000,000 in one-time funding to help increase precipitation and snow pack in Utah through expanded cloud seeding efforts in FY2023 and FY2024.[55]

The executive and legislative actions pursued in recent years demonstrate both a commitment to bolstering the Great Salt Lake as well as the variety of efforts that may be taken to do so. Plaintiffs' myopic focus on one legally dubious remedy – judicially enforced mandatory upstream curtailments – completely ignores the numerous and comprehensive efforts the State is already taking to bolster the lake.

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[50] *See* UTAH CODE § 73-32-101 *et seq.*
[51] *See* UTAH CODE § 73-2-202.
[52] UTAH CODE § 73-2-204(1)(b).
[53] *Id*. at § 204(2).
[54] *Id*. at § 203 (2).
[55] 2023 General Legislative Session, S.B. 2-Item 176, S.B. 3-Item 437, and H.B. 3-Item 121.

STANDARD OF REVIEW

Rule 12(b)(1) directs dismissal of a case where there is "lack of jurisdiction over the subject matter." Here, the Court lacks jurisdiction pursuant to the political question doctrine, the standing doctrine, and the doctrines of res judicata and laches. "[I]n Utah, as in the federal system, standing is a jurisdictional requirement."[56] Additionally, pursuant to Rule 12(b)(7), the case cannot proceed in the absence of necessary parties as required by Rule 19 and Utah Code §78B-6-403. Further, the Court has discretion (and should exercise it here) to decline to issue a declaratory judgment where such judgment will not terminate the controversy.[57] In reviewing a motion to dismiss, the Court need not rely only on the facts as alleged in the Complaint but may also rely on all documents adopted by reference in the complaint, documents attached to the complaint, or facts that may be judicially noticed.[58]

The Court should also be mindful that the remedy Plaintiffs seek – a mandatory injunction – is a "harsh" remedy that will "never be granted where it might operate inequitably and oppressively."[59] This is particularly so where plaintiffs have delayed an "unreasonable length of time in bringing the suit[.]"[60] A mandatory injunction, by which a court compels action and changes the status quo, is a harsh remedy that is particularly disfavored and should not be issued in doubtful cases.[61]

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[56] *Brown v. Div. of Water Rights of the Dep't of Natural Res*., 2010 UT 14, ¶ 12, 228 P.3d 747.
[57] *See* UTAH CODE § 78B-6-404.
[58] *See* Utah R. Civ. P. 10(c).
[59] *Salt Lake County v. Kartchner*, 552 P.2d 136, 138-40 (Utah 1976).
[60] *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ⁋ 32, 289 P.3d 502 (internal citation omitted).
[61] *Kartchner*, 552 P.2d at 138; *see also Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181 (E.D. Cal. 2010) and *Verizon Wireless Personal Communications LP v. City of Jacksonville, Fla*., 670 F. Supp. 2d 1330 (M.D. Fla 2009).

ARGUMENT

I. Plaintiffs' claim presents a non-justiciable political question

Article V, section 1 of the Utah Constitution (the "Separation of Powers Clause") provides that the "powers of the government of the State of Utah shall be divided into three distinct departments . . . and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." The Utah Supreme Court has articulated doctrines that safeguard the separation of powers; one of these is the political question doctrine. The Separation of Powers Clause and the political question doctrine "focus on the proper roles of each branch of government and aim to curtail the interference of one branch in matters controlled by the others."[62] The political question doctrine is a "tool for maintenance of government order."[63]

To apply the political question doctrine, the Utah Supreme Court follows the test outlined in the United States Supreme Court case of *Baker v. Carr*.[64] It asks whether the claim involves:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or* a lack of judicially discoverable and manageable standards for resolving it; *or* the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; *or* the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.[65]

"To find a political question, [courts] need only conclude that one [of these] factor[s] is present, not all."[66] Here, Plaintiffs' claim presents a non-justiciable political question because: (1) there

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[62] *Matter of Childers-Gray*, 2021 UT 13, 487 P.3d 96 (citing *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995)).
[63] *Id*. (quoting *Baker v. Carr*, 369 U.S. 186, 215 (1962)).
[64] 369 U.S. 186, 215 (1962).
[65] *Matter of Childers-Gray*, 2021 UT at ⁋ 64 (quoting Baker, 369 U.S. at 217) (emphasis added).
[66] *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

are no judicially discoverable and manageable standards for resolving Plaintiffs' claim, which implicates thousands of perfected water rights; (2) the Court cannot resolve Plaintiffs' claim without making a policy decision about how to best balance water usage in the State of Utah – the kind of policy determination that is clearly reserved for nonjudicial discretion; and (3) granting the relief Plaintiffs request would demonstrate a lack of respect for the many efforts the political branches are already making to preserve the Lake.

A. There are no judicially discoverable and manageable standards for resolving Plaintiffs' claim

Plaintiffs allege that the public trust doctrine requires Defendants to "protect the Great Salt Lake's waters and underlying lands."[67] Plaintiffs further allege that Defendants have the authority to curtail upstream diversions for the purpose of maintaining a minimum lake level.[68] For relief, Plaintiffs ask this Court to: (1) order Defendants to "take action sufficient to ensure that any further decline in the Lake's average annual elevation ceases within two years of the Court's judgment;"[69] (2) order Defendants to "take action sufficient to restore the Great Salt Lake to at least . . . 4,198 feet;"[70] (3) order Defendants to "modify any diversions that are inconsistent with the restoration and maintenance of the Lake;"[71] (4) order Defendants to "monitor water usage" and "manage water diversions as necessary to protect the public trust;"[72] and (5) order Defendants to "facilitate public involvement in the identification and implementation of these modifications through the maintenance of a public record, the establishment of a process for public comment, and the publication of documents describing state

[67] Pls.' Compl., Dckt. No. 1, ¶ 107.
[68] *Id*. at ¶ 109.
[69] *Id*. at p. 27, ¶ 2.a.
[70] *Id*.
[71] *Id*. at p. 27, ¶ 2.b.
[72] *Id*. at p. 27, ¶ 2.c.

activities in a medium accessible to the general public."[73]

In a case markedly similar to this one, the Iowa Supreme Court invoked the political question doctrine and declined to exercise jurisdiction over a claim in which two social justice organizations sought to compel state agency defendants, under the public trust doctrine, to "take steps that will have the effect of significantly reducing levels of nitrogen and phosphorus in the Raccoon River."[74] Like Utah, Iowa courts follow the *Baker* test to determine whether a claim presents a political question.[75]

The court first noted that the plaintiffs, like Plaintiffs here, sought to "expand the traditional . . . public trust doctrine."[76] "Historically," the court said, state agencies invoked the public trust doctrine to prevent or "remove private obstructions or interferences. These types of disputes are susceptible to judicial resolution using principles of property law."[77] This is the context in which the United States Supreme Court articulated the public trust doctrine in the seminal case of *Illinois Central* – where Illinois invoked ownership of submerged lands to ensure the navigation of the waters "freed from the obstruction or interference of private parties."[78] The plaintiffs in *Iowa Citizens* (like the Plaintiffs here), however, "argue[d] that the doctrine imposes a duty on the State . . . to regulate those waters in the best interests of the public."[79] "Under those circumstances," the Iowa Supreme Court determined, "we perceive a lack of judicially

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[73] *Id*. at p. 27, ¶ 2.d.
[74] *See Iowa Citizens*, 962 N.W. 2d at 796.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Illinois Central*, 146 U.S. at 452. This is also the context in which Defendants FFSL and DNR denied an application last year to dredge Utah Lake and build islands on it, which project would have necessitated transferring the title of sovereign lands. *See https://www.fox13now.com/news/great-salt-lake-collaborative/utah-dnr-director-again-rejects-utah-lake-islands-project*. FFSL rejected the application based, in part, on its trust duties for public *lands*. As set forth elsewhere herein, the public trust doctrine does not apply to *water*.
[79] *Iowa Citizens*, 962 N.W. 2d at 796. *See also* Pls.' Compl., Dckt. No. 1, p. 26.

discoverable and manageable standards. In our view, stating that the legislature must broadly protect the public's use of navigable waters provides no meaningful standard at all."[80]

On the surface, Plaintiffs' request for a particular outcome – a lake level of at least 4,198 feet in elevation – may seem like an easily applied standard. However, the plaintiffs in *Iowa Citizens* asked for similar relief, and the Iowa Supreme Court identified the problem. "The suggestion is made that this court could simply tell our legislature to pass laws that would bring nitrate levels in the Raccoon River consistently below 10 mg/l. That's a specific outcome. But there are no judicially manageable standards to aid a court in deciding whether that outcome is better than any other outcome."[81] The court continued, "Even if courts were capable of deciding the correct *outcomes*, they would then have to decide *the best ways to get there.* Should incentives be used? What about taxes? Command-and-control policies? In sum, these matters are not 'claims of *legal* right, resolvable according to *legal* principles, [but] political questions that must find their resolution elsewhere.'"[82]

In the same vein here, even if the Court were to determine as a matter of law that a lake elevation of 4,198 feet is appropriate (which it should not do), how is the Court to determine the best way to get there? Why would mandatory upstream curtailment (which flies in the face of prior appropriation laws that are embedded in the Utah Constitution) be judicially preferable to the numerous actions the State is already taking? Why would the legally dubious stick be favored over the carrot?

Further, Plaintiffs' preferred resolution – mandatory upstream curtailment – would open the door to a cascade of litigation between water rights holders and the State, necessitating the

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[80] *Id*.
[81] *Id*. at 797.
[82] *Id*. (quoting *Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2494, 204 L.Ed.2d 931 (2019)).

creation of new judicial rules to determine how to balance their interests against each other. Who would be the first to lose water under mandatory curtailment? How much? Would everyone lose the same percentage at once? Would the most junior holder lose 100% before the next junior holder lost anything? Would the State Engineer be required to curtail water rights by priority for the goal of reaching a certain lake level? Does anyone have a higher beneficial use than the Lake that would insulate them from mandatory curtailment? These are all questions a court would need to answer in order to grant the relief Plaintiffs request.

This raises the real question – is the judiciary really the best branch of government to decide all these questions? The Iowa Supreme Court said no, as have other state courts around the country in environmental contexts such as this. In *Juliana*, the Ninth Circuit Court of Appeals found that, even accepting the plaintiffs' contention that an atmospheric carbon level of 350 parts per million is necessary to stabilize the global climate, "some questions – even those existential in nature – are the province of the political branches."[83] The Washington Court of Appeals likewise determined that allegations the State of Washington injured plaintiffs by creating, operating, and maintaining a fossil fuel-based energy and transportation system to be a nonjusticiable political question.[84] And in *Sagoonick v. State*, the Alaska Supreme Court held that claims for injunctive relief seeking to compel the State of Alaska to take steps to address climate change were nonjusticiable political questions.[85]

The court in *Juliana* determined that there were no "constitutional directives or legal standards" that could "guide the courts' exercise of equitable power" for "redressing the asserted

[83] *Juliana*, 947 F.3d at 1173.
[84] *Aji P. by and through Piper v State,*16 Wash. App. 2d 177, 480 P.3d 438 (Wash. Ct. App. 2021).
[85] *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022).

violation."[86] The court concluded, "Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that a . . . court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation . . . We doubt that any such plan can be supervised or enforced by a . . . court."[87]

Here, too, Plaintiffs ask this Court to issue extraordinarily broad injunctive relief and force the State to promulgate a plan utilizing involuntary water curtailments to raise lake levels, but they ignore the lack of judicially manageable standards to supervise such an effort. However beguiling it might be to order the State to raise the lake level by curtailing water right uses, the Court should decline the request.

B. To grant Plaintiffs' requested relief, the Court would necessarily need to wade into policy determinations

The Iowa Supreme Court recognized that the third independent prong of the *Baker* test is implicated in these types of natural resource cases – the impossibility of deciding the case without a policy determination of a kind clearly for nonjudicial discretion. "The third factor [of the *Baker* test] focuses . . . on priority. Is there a required policy determination that is more appropriate for another branch that sets the stage for everything else? If so, courts should not get involved."[88] The Court further noted that "[d]ifferent uses matter in different degrees to different people. How does one balance farming against swimming and kayaking? How should additional costs for farming be weighed against additional costs for drinking water?"[89] These are policy determinations left to the politically accountable representatives of the people.

Water is a scarce resource in the State of Utah, used for a variety of beneficial purposes.

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[86] *Juliana*, 947 F.3d at 1173.
[87] *Id*.
[88] *Iowa Citizens*, 962 N.W. 2d at 798.
[89] *Id*. at 796-97.

Plaintiffs' proposed "lake elevation trumps all other uses" policy (including agricultural, municipal, and industrial uses confirmed by administrative process or judicial decree) is just that – a policy. Is it really for the Court to say that the lake level is more important than these other water uses? What if there is an extreme drought and the only way to maintain a lake level of 4,198 feet is to curtail all or almost all upstream diversions? Is that in the public's interest? Such a determination would constitute a judicial policy decision that the lake level is more important than other beneficial uses. And, as set forth above, simply declaring that 4,198 feet is optimal would not absolve the judiciary of the responsibility to determine, in the inevitable battles between water rights holders, whose use is more beneficial and whose rights will be sacrificed.

Plaintiffs would have the courts closely supervise water use management, effectively taking over the jobs of the Legislature and the State Engineer. In order to do that, the courts would need to determine the best policy for the State of Utah. But such policy determinations, under our constitutional system, are left to the elected officials in political branches. Such is the primary principle behind the separation of powers and the political question doctrine.

C. Plaintiffs' requested relief, if granted, would demonstrate a lack of respect due the coordinate branches of government for their efforts to bolster the Great Salt Lake

Plaintiffs adopt an "our way or the highway" posture in this litigation. According to Plaintiffs' theory, the *only* way to bolster the Great Salt Lake is for State Defendants to exercise a heretofore unknown and non-statutory legal authority to involuntarily curtail upstream water right use, many of which existed prior to statehood and thousands of which are made pursuant to adjudicated rights, upon which water users have relied to structure their lives. For that reason, Plaintiffs request from this Court a declaration and an injunction that "Defendants must . . . modify any diversions that are inconsistent with the restoration and maintenance of the Lake" and "must manage water diversions as necessary to protect the public trust," all under the

watchful eye of the judiciary.[90] Yet the State of Utah, through its politically accountable branches, (1) already manages its water resources in the public interest by priority beneficial use, and (2) is already undertaking many efforts to put more water into the Great Salt Lake specifically.

The Utah Code provides that "all waters in this state . . . are hereby declared to be the property of the public, subject to all existing rights to the use thereof" and that the "Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private party."[91] Further, "[b]eneficial use shall be the basis, the measure and the limit of all rights to use of water in this state."[92] Utah's extensive water policy is codified in Title 73 of the Utah Code and seeks to promote multiple objectives including beneficial use, sustainability, water quality, food production, economic growth, and the public health among other things. State agencies have promulgated rules to implement these policies.[93]

With respect to the Great Salt Lake in particular, the State's efforts are set forth in Part III of the Background section herein. These programs demonstrate the proactive actions the political branches are taking to achieve the same general goal Plaintiffs desire. Plaintiffs' requested relief, if granted, would demonstrate a lack of respect for the active role of the political branches, contrary to the principle of separation of powers as set forth in the *Baker* test. Indeed, Plaintiffs' lawsuit may undermine the State's efforts. Water right holders who may respond (and are already responding) to the State's "carrot" by selling or leasing water rights to the State may dig in their heels and resist Plaintiffs' proposed "stick," choosing instead to engage in lengthy litigation to protect their rights from mandatory curtailment. Which approach to implement is

[90] Pls.' Compl., Dckt. No. 1, p. 27, ¶ 2 (b) & (c).
[91] UTAH CODE § 73-1-1(1) & (3).
[92] *Id*. at § 73-1-3.
[93] *See* Utah Admin Code R.653 *et seq*. and R.655 *et seq*.

best left to the legislature.

Other state courts have abstained from adjudicating similar cases for this very reason. As the Iowa Supreme Court noted, "even if a court could decide that the public trust doctrine mandated a particular outcome, the question would immediately arise how to get there. In that regard, it seems *impossible* for a court to grant meaningful relief without expressing a lack of the respect due coordinate branches of government."[94]

Similarly, the Minnesota Supreme Court declined to extend the public trust doctrine in the way that Plaintiffs request here. In *White Bear Lake,* the plaintiff, a nonprofit corporation dedicated to preserving a lake, brought an action against the Minnesota Department of Natural Resources ("Minnesota DNR") alleging violation of the common law public trust doctrine for issuing groundwater appropriation permits that allegedly caused the lake levels to drop.[95] The court first noted, as set forth herein, that the common law public trust doctrine articulated in *Illinois Central* recognizes a state has the "right as trustee to dispose of beneficial interest in such lands provided that in doing so it: (a) act[s] for the benefit of all citizens, and (b) [does] not violate the primary purposes of its trust, namely, to maintain such waters for navigation and other public uses."[96]

The court then declined "to extend the public trust doctrine to this situation" – the situation being one where the plaintiffs asked the court to wield the doctrine as a sword and compel the state to alter its issuance of water use permits.[97] The court noted that the plaintiffs had not alleged that the Minnesota DNR had "violated its duty as trustee to protect public use

[94] *Iowa Citizens*, 962 N.W. 2d at 797 (emphasis added).
[95] *White Bear Lake*, 946 N.W.2d at 373.
[96] *Id.* at 386 (internal citation omitted).
[97] *Id*.

from private interruption and encroachment, which is the core rationale of the doctrine."[98]

The court continued, "We are generally reluctant to extend the common law unless there is a compelling reason to do so. And we tend to proceed cautiously when a subject is extensively regulated by statutes and rules."[99] The court noted the extensive way water is regulated in Minnesota, like it is in Utah.[100] The court concluded, "Because the Legislature has established structures within which public water use priorities are to be balanced, and no private encroachment or diversion to another state has been alleged, we see no need to extend the judiciary's common-law role in this instance."[101]

Here, Utah already extensively regulates water, and has enacted numerous water conservation programs for the Great Salt Lake specifically. To undercut all that in favor of Plaintiffs' proposed solution, of dubious legality and speculative practical consequences, would demonstrate a lack of respect due to the politically accountable branches, in violation of the political question doctrine.

[98] *Id*. (internal citations omitted).
[99] *Id*.
[100] *Id*. *See also* Utah Code Title 73.
[101] *Id*.

II. Plaintiffs lack standing because their claim is not redressable

"Standing comprises three components: injury, causation, and redressability."[102] Each component "must be demonstrated in order to confirm standing."[103] An individual lacks standing where his injury "is not redressable by a favorable ruling from [the] court" because the court "simply [cannot] grant the relief" requested.[104] This includes cases where a plaintiff asks the court to infringe on the rights of those who "are not parties" to the proceeding.[105]

A. Plaintiffs' claim is not redressable because their requested relief exceeds the equitable power of the Court

Returning to *Juliana,* the court there found that although the plaintiffs possibly could demonstrate an injury traceable to defendants, they nevertheless lacked standing because their claims were not redressable by the court. It said, "There is much to recommend the adoption of a comprehensive scheme to reduce fossil fuel emissions . . . But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan [that would] necessarily require a host of complex policy decisions."[106]

Part of the problem for the *Juliana* court was the nature of the injunction requested. The plaintiffs requested an order requiring the government "not only to cease permitting . . . fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions."[107] Here, too, Plaintiffs request that the Court order a mandatory injunction that the State "modify any diversions that are inconsistent with the restoration and maintenance of the Lake" and "facilitate public involvement" through "maintenance of a public record, the

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[102] *Carlton v. Brown*, 2014 UT 6, ⁋ 31, 323 P.3d 571.
[103] *Southern Utah Wilderness Alliance v. Kane County Commission*, 2021 UT 7, ⁋ 23, 484 P.3d 1146 (internal citation omitted).
[104] *Carlton*, 2014 UT 6 at ⁋ 32.
[105] *Id*.
[106] *Juliana*, 947 F.3d at 1171.
[107] *Id*. at 1170.

establishment of a process for public comment, and the publication of documents describing state activities"[108] all under the supervision of the judiciary. At this point, the judiciary would "cease to be a coequal branch of government. Instead [it would] be asserting superiority."[109] And that would violate the Separation of Powers Clause and standing doctrine in Utah.

B. Plaintiffs' claim is not redressable in the absence of parties whose rights would be adversely affected by the requested relief

In *Carlton,* a putative biological father sought to challenge the constitutionality of the Utah Adoption Act after the adoption of the child had been finalized in a lawsuit brought against the biological mother and the adoption agency. The Utah Supreme Court determined that the father lacked standing because his alleged injury could not be redressed unless the adoptive parents were made party to the lawsuit. "This is so because Mr. Carlton's constitutional arguments and proposed remedies do not implicate the rights of [the named defendants] – they implicate the rights of the Adoptive Parents."[110] The Court continued, "So despite the fact that Mr. Carlton's constitutional claims may have merit, he lacks standing to bring them because they are not redressable by this court until the Adoptive Parents are added to the action."[111]

In reaching this decision, the Court confirmed two important principles relevant to this action. First, a plaintiff who satisfies the first two elements of standing (injury and causation) but not the third (redressability) does not have standing. "Although Mr. Carlton has adequately shown the former two, he cannot show the latter. . ."[112] Second, even if a plaintiff could demonstrate that a law or executive action is unconstitutional (which Plaintiffs cannot do here), the action must still be dismissed for lack of jurisdiction if the court cannot grant the requested

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[108] *See* Pls.' Compl., Dckt No. 1, p. 27.
[109] *Iowa Citizens*, 962 N.W. 2d at 797.
[110] *Carlton*, 2014 UT 6 at ⁋ 28.
[111] *Id*.
[112] *Id*. at ⁋ 31.

relief. "This is so because even if we were to agree with Mr. Carlton's arguments against the unconstitutionality of the Act, we simply could not grant the relief he requests. . . we certainly do not have authority to infringe upon the Adoptive Parents' rights to the child since they are not parties to this proceeding."[113]

Here, Plaintiffs seek a remedy from this Court – a declaration and an injunction that the State can and must curtail upstream diversions – that affects the constitutional and common law rights of individuals and entities who are not party to this lawsuit. These parties are those who have appropriated water rights. The Utah Constitution guarantees that all "existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."[114] Just as the Court in *Carlton* could not redress the putative father's claim in the absence of the adoptive parents who had vested parental rights, this Court cannot grant Plaintiffs the relief they request in the absence of all parties who have vested water rights tributary to the Lake.

III. Plaintiffs' claim seeking to redetermine water rights is barred by statute and the doctrines of res judicata and laches

All water rights in the tributaries of the Great Salt Lake have been judicially decreed or are under review in the adjudication process that will result in a judicial decree under Utah Code Title 73, Chapter 4. Plaintiffs' attempt to insert a legally unfounded public trust doctrine concept into Utah's water right regime would bypass and tread on the jurisdiction of various district courts that are currently adjudicating or have entered decrees determining the water rights of the Great Salt Lake Basin. As comprehensive suits that bind all parties in a geographic area,

[113] *Id*. at ¶ 32. This holding from the Court was made pursuant to the constitutional requirements of standing, and not the related rule-based requirement that indispensable parties be included in actions that affect their rights. The State advances that argument as well herein.
[114] Utah Const. Art. XVII, sec. 1.

Plaintiffs had an opportunity to participate in general adjudications and assert their claim to accomplish a certain elevation of the Great Salt Lake, but they failed to do so and are now barred.

A. Plaintiffs' claim is barred by res judicata

General adjudications establish a binding and exclusive determination of the rights to use water in an area pursuant to Utah Code Title 73, Chapter 4 "and not otherwise."[115] These actions serve as the "exclusive statutory method provided for the determination of relative rights in a river system."[116] The actions are essentially large-scale quiet title actions to determine the property rights to water in an area.[117] The purpose of this process "is to prevent piecemeal litigation regarding water rights and to provide a permanent record of all such rights by decree."[118] The goal of a general adjudication "is to record all water claims from a particular source,"[119] and "to remove doubts about the validity of water rights."[120] Participation in a general adjudication is absolutely necessary if a party wishes for a water right to be recognized because "[a] party who fails to timely file a claim 'shall be forever barred and *estopped* from subsequently asserting any rights, and shall be held to have forfeited all rights to the use of the water theretofore claimed by him."[121]

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[115] *See* UTAH CODE § 73-4-3(10).
[116] *Second Big Springs Irrigation Co. v. Granite Peak Properties LC*, 2023 UT App 22, ¶ 16, 526 P.3d 1263, 1271, *cert. denied* (quoting *Salt Lake City v. Anderson*, 106 Utah 350, 148 P.2d 346, 349 (1944)).
[117] *In re Bear River Drainage Area*, 271 P.2d 846, 848 (stating "water rights are property rights, and a general determination is in essence an action to quiet title to property rights").
[118] *Olds*, 2004 UT 106, ¶ 5 (quoting *In re San Rafael River Drainage Area*, 844 P.2d 287, 289 (Utah 1992).); *see also EnerVest*, 2019 UT 2, ¶ 5.
[119] *Johnson*, 2018 UT App 109, ¶ 18 (quoting *Provo River Water Users' Ass'n v. Morgan*, 857 P.2d 927, 935 (Utah 1993)).
[120] *Olds*, 2004 UT 106, ¶ 5.
[121] *EnerVest*, 2019 UT 2, at ¶ 5 (quoting *Utah State Eng'r v. Johnson*, 2018 UT App 109, ¶ 19, 427 P.3d 558) (emphasis added).

The importance of certainty in water rights adjudication and resulting decrees cannot be understated. It serves as a critical tenet of western water law recognized by our nation's highest court.[122] Plaintiffs' claim seeks to force the State to employ a new water rights procedure that sidesteps judicial decrees in general adjudications, a practice that our Supreme Court has stated "would leave these decrees without any solid foundation; the private water rights [formerly] adjudicated could be made a shambles of; and the principle of res adjudicata defeated."[123] The relief requested by Plaintiffs would require this court to undercut approved water rights and the decrees and pending adjudications by altering the legally settled determination of water rights in the drainage, a request that is plainly barred by the principles of res judicata.

B. Plaintiffs' claim is barred by laches

"The equitable doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights."[124] This is because delay in seeking "some right or remedy to which [a plaintiff] would otherwise be entitled. . . operate[s] to the prejudice of another."[125] Further, the "fact that a plaintiff presents a meritorious claim against a defendant does not preclude the application of the doctrine of laches."[126] Laches has two elements: "(1) lack of diligence on the part of the claimant and (2) an injury to the defendant because of the lack of diligence."[127]

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[122] *See Arizona v. California*, 460 U.S. 605, 619 (1983) ("Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights"); *see also Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983).
[123] *Green River Adjudication v. United States*, 17 Utah 2d 50, 52, 404 P.2d 251, 252 (1965).
[124] *Estate of Price v. Hodkin*, 2019 UT App 137, ¶ 14, 447 P.3d 1285.
[125] *Id.*
[126] *Id.* at ¶ 15.
[127] *Matter of Utah Lake and Jordan River*, 2018 UT App 109, ¶45, 427 P.3d 558.

The Utah Supreme Court has applied the laches doctrine in water rights cases, finding that when a plaintiff "failed to timely contest [claims to water], it took on the status of a defaulting party in the general adjudication. . . [the plaintiff] cannot defeat this [water] right through a collateral attack in a separate lawsuit."[128] Here, water rights in the Great Salt Lake drainage have been or are being adjudicated through the statutory process set forth in Title 73. Plaintiffs cannot sit on their hands during those adjudications and then seek to collaterally attack water rights established through those adjudications that have created reliance interests. Laches prevents it.

IV. Plaintiffs failed to exhaust administrative remedies

Plaintiffs asks this Court to reevaluate appropriations of water approved by the State Engineer, but this Court lacks subject matter jurisdiction to reassess because Plaintiffs failed to exhaust administrative remedies. These claims must be dismissed because Plaintiffs did not pursue them for relief in the administrative proceedings and they are not preserved.

As administrative agencies of the State, State Defendants' administrative processes are subject to and governed by the Utah Administrative Procedures Act ("UAPA").[129] UAPA allows those dissatisfied with administrative decisions to seek judicial review but "only after exhausting all administrative remedies …."[130] So, "[a]s a general rule, 'parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review.'"[131] "[T]he requirement that

[128] *United States Fuel Co. v. Huntington-Cleveland Irrigation Co*., 2003 UT 49, ⁋ 20, 79 P.3d 945.
[129] *See* UTAH CODE § 63G-4-102(1) ("[T]he provisions of this chapter apply to every agency of the state ....").
[130] *See id.* § 63G-4-401; *Christensen v. Utah State Tax Comm'n*, 2020 UT 45, ¶ 16, 469 P.3d 962.
[131] *Christensen*, 2020 UT 45, ¶ 16 (quoting *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 14, 34 P.3d 180).

a party exhaust administrative remedies before seeking judicial review is a matter of subject matter jurisdiction."[132]

Since 1903, water right appropriations have been regulated under an administrative permitting system with opportunities for affected parties to participate and protest. As administrative adjudications, the appropriation process and authority for the courts to weigh in on the State's action in the process is governed by UAPA.[133] This provision allows a person aggrieved by a State Engineer's order concerning an application to appropriate water to seek review de novo.[134]

The ability to seek judicial review does not last in perpetuity as an aggrieved party must file their petition within 30 days after the final agency action, serving the State Engineer and serving notice to other required parties within the time limits established under Utah Rules of Civil Procedure, Rule 4(b).[135] Here, Plaintiffs' claims for relief would require this Court to ignore the requirement to exhaust administrative remedies and allow for judicial review of applications to appropriate approved by the State Engineer outside the procedures and filing deadlines established in statute. Instead, this Court should dismiss the Complaint because the Court lacks subject matter jurisdiction due to failure to exhaust.

This is true even if Plaintiffs were to frame their allegations regarding the public trust doctrine as constitutional in nature – something they have not done.[136] In *Nebeker v. Utah State Tax Com'n*, the plaintiff claimed "exhaustion would serve no useful purpose because the only

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[132] *Ramsay v. Kane Cnty. Human Res. Special Serv. Dist.*, 2014 UT 5, ¶ 8, 322 P.3d 1163.
[133] *See* Title 63G, Chapter 4 of the Utah Code; *see also* UTAH CODE § 73-3-14.
[134] *Heal Utah v. Kane Cnty. Water Conservancy Dist.*, 2016 UT App 153, ¶ 10, 378 P.3d 1246.
[135] *See also* UTAH CODE § 73-3-14(5).
[136] Plaintiffs have framed their claim as a breach of trust duty, not a constitutional claim. *See* Pls.' Compl., Dckt No. 1, p. 24. Notably, the statutory authority they cite – Utah Code § 75-7-1001 – for their requested relief has no application. That provision is part of the Utah Uniform Trust Code that applies only to specifically defined trusts.

claims he raised before the district court were constitutional."[137] The Supreme Court responded: "the mere introduction of a constitutional issue does not obviate the need for exhaustion of remedies[.] . . . The rationale for this rule is that if a case involves issues other than the constitutional claim, then pursuit of administrative remedies might obviate the need of addressing a constitutional claim."[138] Here, as in *Nebeker*, Plaintiffs were required to have pursued administrative remedies first.

V. Plaintiffs failed to join necessary and indispensable parties pursuant to Rule 19

Utah Rule of Civil Procedure 19 provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

Application of Rule 19 involves three potential steps. First, the court determines if there are necessary parties to the action who are not currently before the court. Second, if there are necessary parties, the court determines whether joinder is feasible. If it is feasible, the court orders their joinder; if it is not, the court proceeds to the third step which is to ask whether the parties are indispensable. If they are indispensable, the court must dismiss the case.[139]

Here, water rights holders are necessary parties for both of the reasons outlined in clause

[137] 2001 UT 74, ¶ 15, 34 P.3d 180.
[138] *Id*. at ¶ 16 (cleaned up).
[139] *See, e.g.*, *Mower v. Simpson*, 2012 UT App 149, 278 P.3d 1076.

2 of the Rule. First, water rights holders claim an interest in this action – the constitutional and common law right to appropriated water that Plaintiffs seek to have curtailed. Those water right holders are so situated that disposition of this action in their absence would impair their ability to protect their interest. After all, Plaintiffs seek a declaration from this Court that the public trust doctrine must be expanded at the expense of Article XVII, section 1 of the Utah Constitution and the common law prior appropriation doctrine, legal rules water right holders have relied upon. If Plaintiffs prevail, water rights holders will be exposed to curtailment without ever having had the opportunity to present their arguments as to the merits of Plaintiffs' theories.

In *Bonneville Tower Condominium Management Committee v. Thompson Michie Associates, Inc.*, the Supreme Court held that a "plaintiff may not obtain relief adverse to the property rights of others who are not adverse parties to the case without bringing them before the court." [140] The Court cited its own prior decision finding that "a court cannot dispose of or adjudicate property rights of others who are not made parties to the action and are total strangers to the record."[141] If this Court were to proceed to grant Plaintiffs' requested relief, it would be adjudicating the property rights of water users who are not parties to the action and strangers to the record.

Further, Defendants who are already parties to the lawsuit will be at substantial risk, in the absence of water rights holders, of incurring inconsistent obligations by reason of the claimed interest. If Plaintiffs obtain the relief they request, then the State will be under inconsistent obligations. Under Plaintiffs' theory, State Defendants must curtail upstream diversions in furtherance of the public trust. But such curtailments would run counter to established rules of

[140] *Bonneville Tower Condominium Management Committee v. Thompson Michie Associates, Inc.*, 728 P.2d 1017, 1019 (Utah 1986).
[141] *Id*. (citing *Houser v. Smith*, 56 P. 683 (1899)).

appropriation. Plaintiffs' requested relief would set off waves of litigation between and among the State and water rights holders, to re-establish (under new, judicially created rules) priority in water rights. Such drastic relief and its attendant consequences should not be granted in the absence of parties with a direct vested interest.

Once it determines under Rule 19(a) that there are necessary parties to this action, the Court should continue its inquiry by asking whether joinder of these parties is feasible and, if not, whether the parties are indispensable such that the case must be dismissed.

VI. The Utah Declaratory Judgments Act requires all persons who have or claim an interest in the proceedings to be made parties to the proceedings

Not only does the Constitution (in its redressability requirements) and the Utah Rules of Civil Procedure (in Rule 19) require that persons with an interest in the subject matter of the case be made parties to it, so does the Utah Code. "When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and a declaration may not prejudice the rights of persons not parties to the proceeding."[142] The mandatory language "shall" indicates that joinder of those persons is not discretionary.

The Utah Court of Appeals has held that joinder under the Declaratory Judgments Act is required "where a party has an 'interest' that may be impaired by the litigation."[143] For reasons set forth above, water rights holders have vested interests that would be impaired by a declaratory judgment and injunction in favor of Plaintiffs. Their joinder is required under Utah Code § 78B-6-403(1).

[142] *See* UTAH CODE 78B-6-403(1).
[143] *Canyon Meadows Homeowners Ass'n v. Wasatch County*, 2001 UT App. 414, ¶ 26, 40 P.3d 1148.

VII. The Court should exercise its discretion under the Utah Declaratory Judgments Act to refuse to enter a declaratory judgment because it would not terminate the uncertainty or controversy

A declaratory judgment is not a cause of action, but a form of relief.[144] The Utah Code outlines the manner in which it is to be exercised.[145] Utah Code § 78B-6-404 states, "The court may refuse to render or enter a declaratory judgment or decree where a judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." When a declaratory judgment will not terminate and afford relief from the uncertainty giving rise to the proceedings, courts should decline to render it.[146]

Water is transient and the Great Salt Lake level fluctuates due to a variety of factors, mostly environmental. Plaintiffs' proposed declaration that the State has a public trust duty toward this one particular body of water would not, by itself, raise the lake level. Even Plaintiffs' proposed injunction forcing the State to curtail upstream diversions would not guarantee a particular lake level in any particular year in the arid southwest. In one colorful opinion from the Idaho Supreme Court from 1891, the Court scoffed at the idea that judicial decrees could solve difficult water management questions and mocked a district court judge who had attempted to ignore prior appropriation water rules:

> Heroically setting aside the statute, the decisions, and the evidence in the case, [the district court judge] assumes the role of Jupiter Pluvius, and distributes the waters of Gooseberry creek with a beneficent recklessness, which make the most successful efforts of all the rain wizards shrink into insignificance, and which would make the hearts of the ranchers on Gooseberry dance with joy, if only the judicial decree could be supplemented with a little more moisture. The individual who causes two blades of grass to grow where but one grew before is held in highest emulation as a benefactor of his race. How then shall we rank him who,

[144] *See Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983).
[145] *See* UTAH CODE 78B-6-401 *et seq*.
[146] *See Gray v. Defa*, 135 P.2d 251 (Utah 1943); *see also Miller v. Weaver*, 2003 UT 12, 66 P.3d 592 ("Judicial adherence to the doctrine of separation of powers preserves the courts for the decision of issues between litigants capable of *effective* determination") (emphasis added) (internal citation omitted).

> by judicial fiat alone, can cause 400 inches of water to run where nature only put 100 inches? (We veil our faces, we bow our heads, before this assumption of judicial power and authority.)[147]

While wise water management can certainly help more water flow to the lake, Plaintiffs' blunt remedy that it seeks to force on the State is not a panacea.

The State has an obligation to manage its water resources for a variety of purposes that meet the needs of its citizens, beyond Plaintiffs' myopic focus on the elevation level of the Great Salt Lake. The remedy proposed by Plaintiffs would force the State to re-prioritize its water uses to the detriment of what it has already been determined beneficial water use. Such a remedy would raise more issues than it would solve. How is the State supposed to pick winners and losers among those thousands who already have perfected rights? What would the State do with previously appropriated water? Is the State required to offer just compensation? What do we do about Idaho and Wyoming water rights in the Bear River? The Court doesn't have the power to terminate those rights. Must the State curtail water in good water years since it is impossible to predict what the weather might do in the following years? What happens if, despite the State's best efforts, the lake level drops below its target? Is there a penalty? How is it enforced? With all these challenges and uncertainties, a declaratory judgment does not put an end to the uncertainty giving rise to Plaintiffs' Complaint in the first place. This is precisely the context for which the statutory discretion to refuse to hear the request for declaratory relief was created. For these reasons, the Court should exercise its statutory discretion and decline to adjudicate this case.

CONCLUSION

Utah's separation-of-powers guarantee "render[s] it imperative that courts resist efforts to use them for the purpose of interfering with or attempting to control matters of judgment

[147] *Hillman v. Hardwick*, 3 Idaho 255 (Idaho 1891).

and determination of policy within other departments of government."[148] Here, balancing a multitude of beneficial and sometimes competing water uses is an act of policymaking that the Utah Constitution commits to the Legislature and puts beyond the "judicial role."[149] Granting Plaintiffs' requested relief would only draw the Court into the "inappropriate realm of 'legislative policymaking.'"[150] For the reasons set forth herein, "[c]ourts are ill-suited for such ventures."[151]

The Court should dismiss Plaintiffs' Complaint for any or all of the following reasons: the political question doctrine removes jurisdictions from the court; Plaintiffs lack standing because the remedy they request is beyond the judicial power; Plaintiffs' claim is barred by res judicata and laches; and Plaintiffs failed to exhaust administrative remedies.

DATED: December 20, 2023.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ *Lance Sorenson*
Martin B. Bushman
David N. Wolf
Lance Sorenson
Assistant Utah Attorneys General
Attorneys for Defendant Utah Department of Natural Resources

[148] *Ricker v. Bd. of Educ. of Millard Cnty. Sch. Dist.*, 396 P.2d 416 (1964).
[149] *Schroeder Investments, L.C. v. Edwards*, 2013 UT 25, ¶ 23, 301 P.3d 994.
[150] *State v. Davis*, 2011 UT 57, ¶ 33 n.57, 266 P.3d 765.
[151] *Id.* ¶ 36.

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- at least 14 days before the hearing, if the motion will be decided by a commissioner.

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CERTIFICATE OF SERVICE

I hereby certify that on **December 20, 2023** the foregoing **DEFENDANT DEPARTMENT OF NATURAL RESOURCES' MOTION TO DISMISS PURSUANT TO UTAH R. CIV. P. 12(b)(1) AND 12(b)(7)** was filed using the court's electronic filing system. I further certify that a true and correct copy was served, via email, to the following:

Troy L Booher
LaShel Shaw
ZIMMERMAN BOOHER
tbooher@zbappeals.com
lshaw@zbappeals.com

Timothy Preso
Heidi McIntosh
Stuart Gillespie
Scott W. Stern
EARTHJUSTICE
tpreso@earthjustice.org
hmcintosh@earthjustice.org
sgillespie@earthjustice.org
sstern@earthjustice.org

Attorneys for Plaintiff

Sarah M. Shechter
Gordon H. Rowe
Michael B. Ferguson
Utah Attorney General's Office
sshecter@agutah.gov
growe@agutah.gov
mbferguson@agutah.gov

Attorneys for Utah Division of Water Rights

Michael Begley
Emma K. Whitaker
Madeline Whittier
UTAH ATTORNEY GENERAL'S OFFICE
mbegley@agutah.gov
emmawhitaker@agutah.gov
mwhittier@agutah.gov

Attorney for Utah Division of Forestry, Fire and State Lands

UTAH ATTORNEY GENERAL'S OFFICE

/s/ Seth A. Huxford
SETH A. HUXFORD
Legal Secretary