No. 75917

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY, et al.,

Appellants,

vs.

LYON COUNTY, et al.,

Respondents.

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

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that neither Appellant Mineral County, Nevada, nor Appellant Walker Lake Working Group is owned by a parent corporation and that no publicly held company owns 10% or more of either Appellant's stock as described in NRAP 26.1(a). This representation is made in

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order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted this 26th day of November, 2018,

/s Simeon Herskovits
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JURISDICTIONAL STATEMENT

The United States District Court for the District of Nevada ("district court" or "decree court") has jurisdiction over this matter pursuant to 28 U.S.C. § 1345, and pursuant to its ongoing and continuing jurisdiction over the final decree entered in *U.S. v. Walker River Irrigation District, et al.*, in Equity No. C-125 (D. Nev. 1936) (ER 1319-1399).

On May 28, 2015, the district court entered an order dismissing Mineral County's public trust claim in that case. Order, *United States v. Walker River Irrigation District*, In Equity No. C-125, subproceeding C, Case No. 3:73-cv-128-RCJ (May 28, 2015) (ER 0111-30).[1] Mineral County and the Walker Lake Working Group timely appealed the Order to the United States Court of Appeals for the Ninth Circuit on June 29, 2015. Plaintiff-Intervenor Mineral County's and Defendant Walker Lake Working Group's Notice of Appeal and Representation Statement, *United States v. Walker River Irrigation District*, In Equity No. C-125, subproceeding C, Case No. 3:73-cv-128-RCJ (D. Nev. June 29, 2015) (ER 0053-

[1]"ER" refers to Mineral County and Walker Lake Working Group's "Excerpts of Record" which were submitted to the United States Court of Appeals for the Ninth Circuit in case 15-16342, and which were transmitted to this Court by the 9th Circuit Court Clerk pursuant to the 9th Circuit's two certification orders. *See* Order Certifying a Question to the Supreme Court of Nevada, *Mono County v. Walker River Irrigation District*, 890 F.3d 1174 (9th Cir. May 22, 2018); Order and Amended Order Certifying Questions to the Supreme Court of Nevada, *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. Aug. 20, 2018).

59). The United States Court of Appeals for the Ninth Circuit has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

This Court has jurisdiction over two questions of law certified to it by the United States Court of Appeals for the Ninth Circuit in orders issued on May 22, 2018, and August 20, 2018, pursuant to NRAP 5 governing certified questions of law by federal courts. *See* Order Certifying a Question to the Supreme Court of Nevada, *Mono County v. Walker River Irrigation District*, 890 F.3d 1174 (9th Cir. May 22, 2018); Order and Amended Order Certifying Questions to the Supreme Court of Nevada, *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027, 1034 (9th Cir. Aug. 20, 2018); *see also* NRAP 5. This Court issued two orders accepting the certified questions on July 18, 2018, and September 7, 2018. (Order Accepting Certified Question and Directing Briefing (July 18, 2018) (Doc. 18-27461)); (Order Accepting Second Certified Question and Modifying Briefing Schedule (Sept. 7, 2018) (Doc. 18-35022)).

ROUTING STATEMENT

This case is before this Court as the result of two Ninth Circuit Court of Appeals orders which certified two questions of Nevada state law to this Court for decision pursuant to NRAP 5. Thus, pursuant to NRAP 17(a)(6), the case is retained by this Court.

STANDARD OF REVIEW

Questions of state law certified to this Court pursuant to NRAP 5 are reviewed *de novo*. *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 572, 289 P.3d 1199, 1209 (2012).

STATEMENT OF THE ISSUES

The questions of Nevada state law certified by the United States Court of Appeals for the Ninth Circuit for decision by this Court in its orders of May 22, 2018, and August 20, 2018, include: (1) "[d]oes the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?"; and (2) "[i]f the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?" (Order Accepting Second Certified Question and Modifying Briefing Schedule (Sept. 7, 2018) (Doc. 18-35022)).

STATEMENT OF THE CASE

On May 28, 2015, the district court in the Walker River Decree proceedings ("decree court") issued an order dismissing Mineral County's long-standing public trust claim which seeks minimum inflows for the preservation of Walker Lake. Order, *United States v. Walker River Irrigation District*, In Equity No. C-125, subproceeding C, Case No. 3:73-cv-128-RCJ (D. Nev. May 28, 2015) (ER 0111-30). Mineral County and the Walker Lake Working Group appealed that order to the United States Court of Appeals for the Ninth Circuit to correct fundamental errors of law contained in the order. Plaintiff-Intervenor Mineral County's and Defendant Walker Lake Working Group's Notice of Appeal and Representation Statement, *United States v. Walker River Irrigation District*, In Equity No. C-125, subproceeding C, Case No. 3:73-cv-128 (D. Nev. June 29, 2015) (ER 0053-59). Following briefing and oral argument, the Ninth Circuit certified the above two questions of Nevada state law to this Court for decision.

Mineral County's public trust claim, which was dismissed by the May 28, 2015, decree court order, is part of litigation over water rights on the Walker River system that commenced in 1924, when upstream users prevented water from reaching the Walker River Paiute Reservation. This conduct prompted the United States to sue to determine a water right for the reservation and the relative rights to water of parties in Nevada and California. On April 14, 1936, the United States

District Court for the District of Nevada issued Decree C-125 ("Walker River Decree" or "Decree"). *See United States v. Walker River Irrigation Dist.*, 11 F. Supp. 158 (D. Nev. 1935); *United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10 (D. Nev. 1936). The Decree was amended on April 24, 1940, to conform with the court's decision in *United States v. Walker River Irrigation Dist.*, 104 F.2d. 334 (9th Cir. 1939). The district court retained jurisdiction "for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . ." Walker River Decree, at ¶XIV (ER 1392-93). Over the years, the district court has exercised ongoing authority over and supervision of these proceedings, including approving rules to implement the Decree, addressing requests to amend the Decree, and appointing Water Masters and the United States Board of Water Commissioners. In addition, it has designated three subproceedings, including C-125-C, Mineral County's public trust claim.[2]

[2] Subproceeding C-125-A, 3:73-cv-0126, involved a 1991 petition for declaratory and injunctive relief filed by WRID challenging restrictions placed on WRID's water licenses by the California State Water Resources Control Board. That subproceeding was dismissed by the district court after stipulation by the parties on June 3, 1996. Final Order Pursuant to Stipulation, *United States v. Walker River Irrigation District*, 3:73-cv-0126 (D. Nev. June 3, 1996). Subproceeding C-125-B, 3:73-cv-0127, is designated as the Walker River Paiute Tribe and United States' claims for additional water rights for the Walker River Paiute Tribe's reservation as well as additional federal claims for various federal interests in the Walker River Basin. That subproceeding was dismissed by the district court on the same day that Mineral County's public trust doctrine claim in subproceeding C was dismissed. Order, *United States v. Walker River Irrigation District*, 3:73-cv-0127

Mineral County intervened in the Walker Decree proceedings in 1994 to enforce the State of Nevada's and the decree court's public trust doctrine obligation to maintain minimum inflows from the Walker River system into Walker Lake in order to sustain Walker Lake's environmental, wildlife, recreational and aesthetic values.[3] Mineral County is the political subdivision that completely contains Walker Lake, and the health of Walker Lake directly and dramatically affects the quality of life, general welfare, and the economic, aesthetic, and recreational wellbeing of the County itself and of its residents. The Walker Lake Working Group ("Working Group") is a 501(c)(3) non-profit citizen's organization formed to advocate for and educate the public about the need to restore and protect Walker Lake's ecological health and aesthetic and recreational values. The Working Group is a defendant party to the proceedings below as the owner of Water Right Claim 149, which is listed on page 43 of the Walker River Decree. Walker River Decree, at ¶ II (ER 1361) (Spragg-Woodcock Ditch Company); *see also* Application 69762,

(D. Nev. May 28, 2015), which decision was overturned by the United States Court of Appeals for the Ninth Circuit on May 22, 2018. *United States v. Walker River Irrigation District*, 890 F.3d 1161 (9th Cir. 2018). Consequently, subproceeding B is again pending in the decree court.

[3] Mineral County's motion for intervention was granted by the district court in 2013. Minutes of Proceedings, *United States v. Walker River Irrigation District*, In Equity No. C-125, subproceeding C, Case No. 3:73-cv-128 (Dist. Nev. Sept. 23, 2013) (ER 0743).

http://water.nv.gov/data/permit/permit.cfm?page=1&app=69762. The Working Group always has supported efforts to transfer water rights for use in Walker Lake in order to increase flows of water from the Walker River system into Walker Lake and advance the Working Group's conservation goals for the lake, and has supported the enforcement of the public trust doctrine for the same purpose. The Working Group was a mediating party during the mediation process in the decree court. Order Governing Mediation Process, *United States v. Walker River Irrigation District*, In Equity No. C-125, subproceeding C, Case No. 3:73-cv-128 (Dist. Nev. May 27, 2003) (ER 1029-0132). The Working Group also was the co-petitioner with Mineral County in the Petition for Writ of Mandamus and Prohibition before this Court for enforcement of the state's public trust duty to ensure minimum flows to Walker Lake. This petition resulted in this Court's opinion *Mineral County v. State*, 117 Nev. 235, 20 P.3d 800 (Nev. 2001), which was heavily relied on by this Court in its 2011 *Lawrence v. Clark County* decision in which the Court formally recognized the existence of the public trust doctrine in Nevada. 127 Nev. 390, 254 P.3d 606 (Nev. 2011).

Five issues were before the 9th Circuit Court of Appeals in the appeal of the decree court's May 28, 2015, order, filed by Mineral County and the Walker Lake Working Group, namely: (1) whether the district court erred in dismissing the public trust claim on the ground that Mineral County lacks standing to bring such

claims; (2) whether the district court erred in finding that the public trust doctrine does not apply to Walker Lake and the Walker River system; (3) whether the district court erred in dismissing the public trust claim on the ground that it cannot be applied to existing water rights without constituting an unconstitutional takings; (4) whether the district court erred in dismissing the public trust claim on the ground that enforcement of the public trust doctrine is a purely political, non-justiciable question; and (5) whether the district court erred in holding that Walker Lake is not within the Walker River Basin and dismissing the public trust claim on the ground that decreed water rights cannot be transferred outside the Basin. In an order issued on May 22, 2018, the 9th Circuit reversed the district court's holding that Mineral County did not have standing to bring its public trust claim in the Walker River proceedings. Memorandum, *Mono County v. Walker River Irrigation District*, 735 Fed. Appx. 271, No. 15-16342, at 3-6 (9th Cir. May 22, 2018). Further, the 9th Circuit confirmed that Walker Lake is within the Walker River Basin and as such, Mineral County's claim should not have been dismissed on the ground that water cannot be transferred outside the basin pursuant to the Walker River Decree. *Id*. at 7.

Concurrently with the order reversing the district court's holding on the standing issue, the 9th Circuit issued a second order certifying the following question of Nevada state law to this Court: "[d]oes the public trust doctrine apply

to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Order Certifying a Question to the Supreme Court of Nevada, *Mono County v. Walker River Irrigation District*, 890 F.3d 1174 (9th Cir. May 22, 2018). On July 18, 2018, this Court issued an *Order Accepting Certified Question and Directing Briefing* accepting the certified question. (Doc. 18-27461). On August 20, 2018, the 9th Circuit issued an amended certification order which certified the following additional question to this Court for decision: "[i]f the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?" Order and Amended Order Certifying Questions to the Supreme Court of Nevada, *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027, 1034 (9th Cir. Aug. 20, 2018). On September 7, 2018, this Court issued an Order Accepting Second Certified Question and Modifying Briefing Schedule. (Doc. 18-35022).

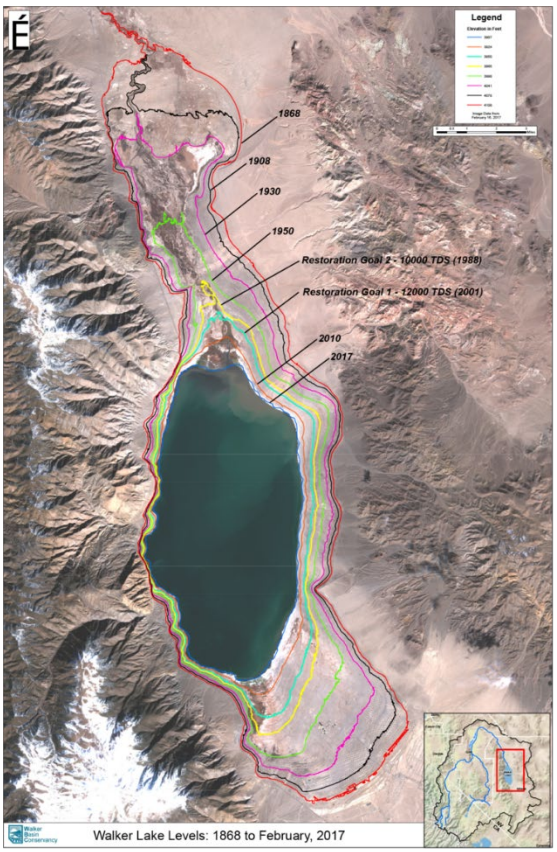
STATEMENT OF THE FACTS

I. The Decline of Walker Lake

Walker Lake is a rare desert terminus lake located in Mineral County, Nevada, that is one of Nevada's and the western United States' precious natural public water resources. Its primary source of water is inflow from the Walker

River. Dr. Saxon E. Sharpe, Dr. Mary E. Cablk, & Dr. James M. Thomas, Desert Research Institute, *The Walker Basin, Nevada and California: Physical Environment, Hydrology, and Biology, Publication No. 41231*, at 13-14 (May 2008), available at https://www.dri.edu/images/publications/2007_sharpes_cablkm_etal_wbncpehb.pdf. The only additional inflow into Walker Lake consists of relatively minor amounts of local groundwater, local surface water runoff, and precipitation on the Lake surface. Walker Lake has no outlet. Historically, the lake has supported a balance of algae, zooplankton, small crustaceans, insects, and four native fish species: the tui chub, Lahontan cutthroat trout, speckled dace, and Tahoe sucker. Sharpe, et al., *supra*, at 36. The Lahontan cutthroat trout is listed as threatened under the federal Endangered Species Act. 40 Fed. Reg. 29,864 (1975). The tui chub is identified as a "subspecies of concern" by the American Fisheries Society. Walker Lake also has provided important, scarce habitat for a variety of migratory birds, including American white pelicans, common loons, snowy plovers, long-billed curlews, double crested cormorants, gulls, herons, terns, grebes, avocets, and many others. *See* Sharpe, et al., *supra*, at 27, 32, & 39.

As upstream appropriations of water from the Walker River and its tributaries increased over the 20th Century, the natural flow of water into Walker Lake was effectively cut off. The figure to the left is a map depicting historical lake levels as well as lake level goals and is available on the Walker Basin Conservancy's website, https://www.walkerbasin.org/history-of-walker-lake/. In 1882, the level of Walker Lake was 4,082 feet above sea level. *See* U.S. Geological Survey, Scientific Investigations Report No. 2007-5012 ("USGS SIR 2007-5012") at 1 (available at https://pubs.usgs.gov/sir/2007/5012/pdf/sir20075012.pdf). As of November 1, 2018, the Lake's elevation had receded to approximately 3,917 feet above msl, a decline of 165 feet in elevation. USGS Station 10288500, Walker Lake near Hawthorne, NV, http://waterdata.usgs.gov/nv/nwis/uv/?site_no=10288500&agency_cd=USGS&amp. This drop in elevation resulted in a decrease in Lake volume from



approximately 9.0 million acre feet to 1.224 million acre feet. *See id*.; *see also* USGS SIR 2007-5012, App. A.

As water volume decreased, salinity and total dissolved solids in the Lake increased. In 1882, the salinity of Walker Lake as measured by total dissolved solids (TDS) was 2,500 milligrams per liter. USGS Scientific Investigations Report 2007-5012 at 1. By 2007, the salinity of Walker Lake had increased to 16,000 milligrams per liter TDS, USGS Scientific Investigations Report 2007-5012 at 1, and as of August 2018, the salinity had increased to 21,100 milligrams per liter TDS.[4] This impact to water quality has severely degraded the entire ecosystem of Walker Lake, resulting in a devastating loss of biodiversity. What had been a healthy Lahontan cutthroat trout fishery, that was maintained by stocking after dams on the River prevented natural spawning, has been eliminated for the time being by the diminished inflows to Walker Lake and resulting degraded water quality in the Lake. Thus, the tragic effect of upstream overappropriation has been to strangle the Lake, devastate its once-thriving fisheries, eliminate the once-spectacular flocks of migratory birds that depended on the Lake, and, perhaps most importantly, drive away the many Nevadans and other Americans who used Walker Lake for recreational enjoyment and economically productive activities.

[4] Data available at https://nwis.waterdata.usgs.gov/usa/nwis/qwdata/?site_no=384200118431901.

The severity and continued worsening of the damage to Walker Lake due the inadequacy of inflows from the Walker River has caused the near total loss of the Lake's environmental, economic, recreational, and aesthetic values to the public at large, Nevadans in particular, and Mineral County residents most egregiously. Walker Lake has long supported the economy of Mineral County as a fishery and recreation area. Maintenance of a healthy fishery and recreation area at Walker Lake is critical to Mineral County's tax base and economy.

II. Walker River Decree Administration

Water rights on the Walker River system are administered under the continuing exclusive jurisdiction of the United States District Court for the District of Nevada pursuant to the Walker River Decree entered by that Court in 1936 and modified in 1940 (the "Walker River Decree"). The Walker River Decree fails to make any provision for inflows to Walker Lake. Mineral County and Walker Lake Working Group maintain that this omission constitutes a failure to fulfill the obligation under the public trust doctrine to provide for Walker Lake's continued health and the maintenance of Walker Lake's important environmental, economic, recreational, and aesthetic values for the benefit of current and future generations. Rather than managing the waters of the Walker River system in trust for the public, the State of Nevada and the decree court have managed the Walker River system for the exclusive benefit of private appropriators, and in a manner that has caused

and continues to cause the substantial impairment of Walker Lake. The result of this imbalanced management has been a devastating reduction of average annual inflows from the Walker River system to Walker Lake described above, which for some time now have been grossly insufficient to sustain the Lake's continued ecological health and or its important environmental, economic, recreational, and aesthetic values and uses. *See* Sharpe, et al., *supra*, at 13-14.

SUMMARY OF ARGUMENT

This case arose because of the failure on the part of the state to acknowledge and enforce the public trust with regard to Walker Lake which, as described above, is a rare and precious public trust water resource of the State of Nevada. As a consequence of the historic failure to fulfill the State's fiduciary obligation to protect Walker Lake under the doctrine, Walker Lake has been progressively and severely degraded to the point where a number of the Lake's core public trust uses and values have been lost for the time being. Only by recognizing and enforcing the trust duty to Walker Lake under the doctrine can Walker Lake's public trust uses and values be restored and protected for current and future generations of Nevadans, as the public trust doctrine requires and always has required under Nevada law.

Given this backdrop, this Court should answer the Ninth Circuit's first certified question in the affirmative and recognize that the public trust doctrine

applies to rights already adjudicated and settled under the doctrine of prior appropriation. Specifically, the Court should recognize that the public trust doctrine inheres in water rights themselves and always has acted as a constraint on the use of water in a way which would harm public trust values. In this way, the doctrine operates as a constraint on the use of water in the Walker River Basin, much like the general availability of water might constrain use from year to year. Further, this Court should answer the Ninth Circuit's second certified question in the negative, based on a finding that water rights do not constitute property protected by the Fifth Amendment in the context of the state's assertion of its public trust doctrine duties. More specifically, the public trust doctrine is a background principle of state law which precludes a takings claim, because the holder of a water right never had the right to use water in a way that is harmful to the public trust values to begin with. Consequently, enforcement of the State's fiduciary duty under the public trust doctrine does not implicate any property right protected by the Fifth Amendment. Not only can there be no takings arising from limitations placed on the use of water by the public trust doctrine, application of the doctrine by the Walker River decree court could not result in a taking, under a novel theory of judicial takings, because the Takings Clause applies to the legislative and judicial branches of government only. Finally, such a claim necessarily must be based on the facts of the particular case and would not be ripe

until the public trust doctrine actually is applied to restrict an appropriative water use in a specific way.

ARGUMENT

I. Roots of the Public Trust Doctrine

The public trust doctrine is an ancient, bedrock principle of law that always has inhered in the water law of Nevada and its sister states. *See Lawrence v. Clark County,* 127 Nev. 390, 394, 254 P.3d 606, 608 (Nev. 2011)*; Nat'l Audubon Soc'y v. Sup. Ct. of Alpine County,* 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). The doctrine is "thought to be traceable to Roman Law and the works of Emperor Justinian." *Lawrence*, 127 Nev. at 394, 254 P.3d at 608 (citing *State v. Sorensen,* 436 N.W.2d 358, 361 (Iowa 1989)). "Justinian derived the doctrine from the principle that the public possesses inviolable rights to certain natural resources, noting that '[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.'" *Id*. (citing The Institutes of Justinian, Lib. II, Tit. I, § 1 (Thomas Collett Sandars trans. 5th London ed. 1876)). "He also stated that 'rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.'" *Id.* (citing The Institutes of Justinian, Lib. II, Tit. I, § 2). *This fundamental legal doctrine was incorporated into the common law of England, and at the time of first the British colonization of North America and by the time of the United States' independence*

from Great Britain the public trust doctrine already was a long-established fundamental component of the common law. See Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892); *Shively v. Bowlby,* 152 U.S. 1, 11 (1894); *Lawrence*, 127 Nev. at 394, 254 P.3d at 608; *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.,* 671 P.2d 1085, 1087 (Idaho 1983); *Nat'l Audubon Soc'y,* 658 P.2d at 718-19; *Arnold v. Mundy*, 8 N.J.L. 1, 76-78 (N.J. 1821). The doctrine holds that water resources such as Walker Lake, Walker River, and their tributary water sources are inherently the property of the public at large, including future generations. *See Nat'l Audubon Soc'y*, 658 P.2d at 721; *Lawrence*, 127 Nev. at 405, 254 P.3d at 610-11. Because of the inherent public ownership of such waters, the public trust doctrine imposes a permanent affirmative duty on the State as trustee to regulate those waters so as to protect the public's long-term interests in them. *Lawrence*, 127 Nev. at 397-98, 254 P.3d at 610-13.

As the United States Supreme Court explained more than a century ago, the public's interest in waters subject to the public trust is perpetual, and therefore the State can never abdicate ownership or control and must manage them in the public's long-term interest. *Illinois Central*, 146 U.S. at 452-56. Further, the Supreme Court made clear that the trust prohibits states from allowing or facilitating the substantial impairment of trust resources, including navigable waters:

> The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police power in the administration of government and the preservation of the peace.

Id. at 453. Mineral County's public trust claim maintains that the State of Nevada and the district court in its administration of the Walker River Decree have failed to meet this public trust obligation with respect to Walker Lake.

The United States Supreme Court has noted that "Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders..." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012); *Shively*, 152 U.S. at 26. While some states have found a constitutional or statutory basis for the public trust doctrine, *e.g.*, *In re Water Use Permit Applications (Waiāhole Ditch System)*, 9 P.3d 409, 440-45 (Haw. 2000), the doctrine is merely ratified and strengthened by constitutional or statutory provisions and exists independent of such sources, and states cannot abdicate their basic trust responsibilities. *Illinois Central,* 146 U.S. at 453. In other words, while states may expand the scope of the public trust doctrine, *Illinois Central* prevents states from allowing or facilitating the substantial impairment of the public's interest in navigation, commerce, and fishing. *See Waiāhole Ditch*, 9 P.3d at 445, 447, 453. As a leading commentator has stated, "[n]either the Supreme Court nor any state courts have disavowed the prohibition of 'substantial impairment' of public rights of navigation, commerce, and fishing announced in *Illinois Central*

and *Shively v. Bowlby*." Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine,* 19 Envtl. L. 425, 463-64 (1989). "The standards for the trust, then, are best understood as having very broad parameters set as a matter of federal mandate ..." *Id*. at 464. Indeed, many western states apply the public trust doctrine much more broadly than the Supreme Court recognized in *Illinois Central*. *See Lawrence*, 127 Nev. at 399, 254 P.3d at 612-13 (noting that Nevada water law declares that all water of the State belongs to the public); *National Audubon Soc'y,* 658 P.2d at 712 (applying doctrine to nonnavigable waters that are tributary to navigable waters); *Envtl. Law Found. v. Cal. State Water Res. Control Bd.,* 237 Cal.Rptr.3d 393 (Cal. Ct. App. 2018) (applying the doctrine to tributary groundwater); *Waiāhole Ditch*, 9 P.3d 409 (applying doctrine to groundwater).

The public trust doctrine has been recognized widely as an inherent component of state law and applied to protect trust resources by the great majority of states in the West, including Nevada, California, Hawaii, Idaho, Montana, Oregon, Utah, Arizona, Washington, Wisconsin, North Dakota, and Alaska. *See, e.g., Lawrence,* 127 Nev. at 406, 254 P.3d at 617*; Waiāhole Ditch*, 9 P.3d at 445 ("[U]nder [the· Hawai'i Constitution] article XI, sections 1 and 7 and the sovereign reservation, the Public Trust Doctrine applies to all water resources without exception or distinction."); *Nat'l Audubon Soc'y*, 658 P.2d at 728 (non-navigable

tributary waters); *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1095 (Idaho 1983) ("The Public Trust Doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."); *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984) ("[U]nder the Public Trust Doctrine and the Montana Constitution, any surface waters capable of use for recreational purposes are available for such purposes by the public, irrespective of streambed ownership."); *Morse v. Or. Div. of State Lands*, 581 P.2d 520, 523-4 (Or. Ct. App. 1978), aff'd, 590 P.2d 709 (Or. 1979); *Conater v. Johnson*, 194 P.3d 897, 899-900 (Utah 2008); *Nat'l Parks & Conservation; Ass'n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1993); *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (“The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people.”); *Rettkowski v. Dep’t of Ecology*, 858 P.2d 232,239 (Wash. 1993) ("The [public trust] doctrine has always existed in the State of Washington."); *Vander Bloeman v. Dep’t of Natural Res.*, 551 N.W.2d 869 (Wis. 1996) (statute codifies, pursuant to public trust doctrine, that the public is the owner of the water); *United Plainsmen Ass'n v. N.D. State Water Conservation Comm’n*, 247 N.W.2d 457,460 (N.D. 1976) ("We agree with United Plainsmen that the discretionary authority of state officials to allocate vital state resources is not without limit but is circumscribed by

what has been called the Public Trust Doctrine."); *Pullen v. Ulmer*, 923 P.2d 54, 60-61 (Alaska 1996) (holding that common use rights recognized in the Alaska Constitution are a form of public trust); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 93-196 (2010). Thus, the public trust doctrine is an ancient and fundamental background principle of law that has been recognized and applied consistently by states throughout the West.

II. The Public Trust Doctrine Under Nevada Law

The State of Nevada was admitted to the Union on October 31, 1864 (13 Stat. 30, 1864), and under the federal constitutional principle of equality among the several states (also known as the equal footing doctrine), the title to Walker Lake and the bed of Walker Lake passed to the State. *See State v. Bunkowski*, 88 Nev. 623, 628, 503 P.2d 1231, 1234 (1972). Title to the lands under Walker Lake carries with it control over the water above these lands. *Illinois Central*, 146 U.S. at 452. As this Court has recognized, that title is held in trust for the people of Nevada so "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Id.*; *see also Lawrence,* 127 Nev. at 394, 254 P.3d at 610; *Bunkowski*, 88 Nev. at 627-28, 634, 503 P.2d at 1233-34, 1237.

In *Lawrence v. Clark County* this Court expressly recognized the existence of the public trust doctrine in Nevada with regards to the waters and submerged lands of the State. 127 Nev. at 396-401, 406, 254 P.3d at 610-13, 617. The Court in *Lawrence* undertook a detailed examination of the history and underpinnings of the public trust doctrine, examining its contours in Nevada, and left little question that the doctrine applies to resources such as Walker Lake and its tributaries. As recognized and confirmed in *Lawrence*, the state owns the beds and banks as well as the waters of navigable lakes. *Id*. at 395, 254 P.3d at 610 (citing *State Engineer v. Cowles Bros., Inc.,* 86 Nev. 872, 478 P.2d 159 (1970)). Further, the Court in *Lawrence* noted that in Nevada, all sources of water supply whether ground or surface water, belong to the public. *Id.* at 396-97, 400, 254 P.3d at 610-11, 612-13; *Bergman v. Kearney*, 241 F. 884, 893-94 (D. Nev. 1917); NRS 533.025. In *Lawrence* the Court quoted extensively with approval from Justice Rose's concurrence in *Mineral County v. State,* noting that:

> "those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times 'forms the outer boundaries of permissible government action with respect to public trust resources.' In this manner, then, the Public Trust Doctrine operates simultaneously with the system of prior appropriation."

Lawrence, 127 Nev. at 397, 254 P.3d at 611 (quoting *Mineral County v. State*, 117 Nev. 235, 247, 20 P.3d 800, 808 (Nev. 2001) (Rose, J., concurring)). This

statement of law comports with Nevada's longstanding rule that water rights always remain subject to state control and regulation under the state's police power "as is necessary for the general welfare." *Town of Eureka v. State Engineer*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992); *Bergman*, 241 F. at 893-94. This public ownership of water is the "'most fundamental tenet of Nevada water law.'" *Lawrence*, 127 Nev. at 397, 254 P.3d at 611 (citations omitted). The court in *Lawrence* recognized that the public ownership provision of Nevada's water law effectively confirms the public trust doctrine in Nevada. *Id.* at 400, 254 P.3d at 613 (citing NRS 321.0005 & NRS 533.025). .

As further recognized in *Lawrence*, this Court's decision in *State v. Bunkowski* confirmed that the state holds these publicly owned resources in trust for the people of the State of Nevada. *Id.* at 395-96*,* 254 P.3d at 610. It appears clear, therefore, that Nevada law imposes a public trust duty to manage water resources, including Walker Lake, to preserve the public's interest in the waters of the State.

Given the incorporation of public trust values in Nevada's statutory water law and this Court's recognition and examination of the public trust doctrine's origins and role in Nevada law in *Lawrence*, Appellants respectfully urge the Court to recognize that the doctrine applies to Walker Lake and its tributary waters, and

imposes a perpetual governmental duty to preserve the same in trust for the people of Nevada.

III. The Public Trust Doctrine Applies to and Co-Exists with Nevada's System of Prior Appropriative Water Rights

After this Court's decision in *Lawrence v. Clark County* it appears to be settled that the public trust doctrine applies to appropriative water rights in Nevada and that Nevada law imposes a continuing duty to ensure that its public trust obligations are fulfilled. This Court, in *Lawrence v. Clark County*, made clear that the public trust doctrine and Nevada's system of prior appropriation operate together, just as is the case in Nevada's sister state of California. The Court in *Lawrence* stated that a water right "is forever subject to the public trust, which at all times 'forms the outer boundaries of permissible government action with respect to public trust resources.' In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation." *Lawrence*, 127 Nev. at 397, 254 P.3d at 611 (citing *Mineral County v. State*, 117 Nev. 235, 246, 20 P.3d 800, 807 (2001) (Rose, J., concurring)).

Under Nevada law the public's rights in public waters cannot be alienated or impaired by estoppel growing out of past failure to object to encroachment. *See Bunkowski*, 88 Nev. at 634-635, 503 P.2d at 1238. Thus the State, in its fiduciary capacity with regard to trust waters, has not only the authority but also the

obligation to reconsider past allocation decisions that, in light of new information, may be inconsistent with the State's obligations as trustee of the State's waters. The sovereign administrator of the public trust always retains continuing supervisory control over its navigable waters and the lands beneath those waters. *See Nat'l Audubon Soc'y*, 658 P.2d at 712, 723, 726-28; *Illinois Central*, 146 U.S. at 453. In exercising its sovereign power and obligation to allocate water resources in the public interest, the State of Nevada and the Walker River decree court are not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. *Nat'l Audubon Soc'y*, 658 P.2d at 728-29. The State of Nevada and the Walker River decree court have the power and affirmative obligation to reconsider past allocation decisions. *Id*.

Recognition and application of the public trust doctrine to existing appropriative rights under Nevada law does not conflict with recognition of such rights under Nevada's appropriative water rights system because the doctrine has inhered in Nevada law since the State's inception. *Lawrence*, 127 Nev. at 610, 254 P.3d at 610. Accordingly, the public trust doctrine has inhered in every appropriative right as a basic background principle qualifying and limiting every appropriative right.

The fact that appropriative water rights under Nevada law are not, and never have been, unrestricted or free from regulation by the State to protect the general

public welfare is not a novel concept. In the early days of Nevada's adoption of the prior appropriation doctrine, Chief Justice Hawley held that the law of appropriative rights always "confined such rights within reasonable limits." *Barnes v. Sabron*, 10 Nev. 217, 244 (1875) (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)). In so holding, this Court embraced the rule articulated by the United States Supreme Court in *Basey v. Gallagher*, namely that appropriative water rights are "not unrestricted . . . [and] must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use . . . ." 87 U.S. at 683. The imposition of a reasonableness restriction on appropriative water rights, "with reference to the general condition of the country and the necessities of the community" and a proscription against the exercise of such a right in an unreasonably wasteful or inefficient manner was reiterated by then-Federal District Judge Hawley in *Union Mining Co. v. Danberg*, 81 F. 73, 95, 97 (C.C.D. Nev. 1897); *cf. Anderson v. Bassman*, 140 F. 14, 24, 26-27 (C.C.N.D. Cal. 1905) (applying the same limitations on West Fork of Carson River); s*ee also* A. Dan Tarlock*, Prior Appropriation: Rule, Principle, or Rhetoric?,* 76 N.D. L. Rev. 881, 896-899 (2000) (discussing intrinsically correlative nature of and inherent limitations in usufructuary appropriative water rights); Samuel C. Wiel, *"Priority"*

in Western Water Law, 18 Yale L.J. 189 (1909) (examining emergence of reasonableness limitation in early appropriative water right case law).

This backdrop of the early development of Nevada's prior appropriation water rights system helps explain why express recognition of the public trust doctrine and the obligation to ensure that the State's trust duties are fulfilled does not represent a deviation from the basic structure and contours of Nevada's longstanding water law. Express recognition and enforcement of the public trust doctrine is consistent with the longstanding fundamental tenet of Nevada water law that water rights are subject to continuous regulation by the State under its police power to safeguard the broad long-term public welfare. The prudential requirement of reasonableness and proscription against wasteful beneficial use of an appropriative right have been incorporated into Nevada's statutory water law. *See* NRS 533.060(1) (limiting right to use water to amount "reasonably and economically" necessary); NRS 533.070 (reasonableness limitation on quantity of water that may be appropriated). Nevada courts also have confirmed that the State's police power to protect the public health, safety, and welfare inherently gives the State the authority and obligation to exercise regulatory oversight and control over the waters of the State and the exercise of appropriative rights for those purposes. *Town of Eureka v. State Engineer*, 108 Nev. 163, 167, 826 P.2d

948, 950-951 (1992); *In re Manse Spring*, 60 Nev. 280, 108 P.2d 311, 314-315 (Nev. 1940).

The fact that an appropriative right has vested or been adjudicated under Nevada law does not render it absolute and immune from limitation or regulation to protect the public welfare. *Town of Eureka*, 108 Nev. at 167, 826 P.2d at 950-951; *In re Manse Spring*, 60 Nev. 280, 108 P.2d at 315. Under Nevada law the nature of an adjudication of appropriative water rights on a stream system is most accurately characterized as being in the nature of a settlement of the relative priority of rights and quantitative shares of each claimant, in relation to each other, to the water that is available for appropriation from that stream system. NRS 533.090 (adjudication as determination of "relative rights"). This comports with the general observation by the eminent water law scholar, Dan Tarlock, that appropriative water rights are correlative and not exclusive. *See* A. Dan Tarlcok *Law of Water Rights and Resources* § 7.2 at 7-3 (2009) (recognizing correlative nature of water rights); Tarlock, *Prior Appropriation*, *supra*, at 897.

In examining the proper relationship between the inherent underlying trust obligation owed by the government with regard to the waters of the State, which always have been owned or held by the public, and the prior appropriation system of allocating water rights among claimants to the waters of a stream system in Nevada, it is important to recall that appropriative water rights in Nevada, as in

California and the rest of the West, always have been defined as "usufructuary" rights which allow the holder of the right a certain type and maximum amount of use of the waters of a stream system but do not carry with them any claim of actual ownership of the stream system or the water in the stream system itself. Samuel C. Wiel, 1 *Water Rights in the Western States* § 18 (3d ed. 1911). To understand this concept more precisely, we should recall that "usufruct" is (and was at the time of Nevada's adoption of the prior appropriation system) a legal term and concept from Roman and Civil Law meaning: "In civil law, the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing." Black's Law Dictionary (5th ed. 1979); *see also* XIX Oxford English Dictionary at 361 (2d ed. 1989) ("Usufruct . . . The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to this.").

From these considerations, it is clear that expressly recognizing and requiring enforcement of the State's public trust obligations does not conflict with the prior appropriations system of water rights under Nevada law. Rather, the public trust doctrine antedates and underpins the entire water rights system in Nevada law. As a fundamental background principle in the common law since Nevada's earliest days, the public trust doctrine inheres in every water right under

Nevada water law as a constraint on the use of water and a condition or qualification of the right subjecting it to perpetual oversite and curtailment to protect public trust values in and uses of navigable streams and water bodies in the State, and waters tributary to those navigable waters of the State.

However, the fact that the doctrine always has inhered in the water law of Nevada, and existed as a qualification or constraint in every appropriative right, does not alter the fact the Nevada State Engineer historically has not recognized or fulfilled the obligation imposed by the public trust to continuously examine both new and existing appropriations for potential unreasonably harmful impacts to public trust uses and values in the waters of the State. In fact, as the history of the Walker River system's overappropriation and Walker Lake's progressive destruction demonstrate, the State Engineer historically has been captive to the interests of irrigators and other powerful appropriators. Consequently, the State Engineer historically has been gravely delinquent in recognizing the State's fiduciary duties to protect public trust waters and unwilling to enforce the State's public trust authority to protect those waters, including Walker Lake. In light of the State Engineer's historical failure to safeguard Nevada's public trust values in and uses of Walker Lake, it ultimately has fallen to this Court to require enforcement of the State's public trust obligations and vindicate the long-term public trust uses and values of Walker Lake and the Walker River stream system.

As noted above, this Court has indicated that the public trust doctrine applies to appropriative water rights, and there is no conflict between recognition and enforcement of the public trust and the appropriative water rights system under Nevada law. This consonance of the public trust doctrine with the appropriative water rights system is borne out by the experience of at least two of Nevada's sister states in the West. In Nevada's closest sister state of California, both "[t]he public trust doctrine and the appropriative water rights system are parts of an integrated system of water law." *National Audubon*, 33 Cal.3d at 452. In *National Audubon*, the California Supreme Court very logically laid out how the public trust doctrine and prior appropriation system of water rights could be implemented in conjunction to both protect the appropriative use right and protect important public trust values. *See* 33 Cal. 3d at 445-448, 658 P.2d at 727-729; *see also, e.g., People v. Murrison*, 124 Cal.Rptr.2d 68, 73-77 (Ct. App. 3d Dist. 2002) (combining consideration of State's "substantial public interest" under *National Audubon* with detailed consideration of statutory provisions limiting and regulating usufructuary water rights); *El Dorado Irr. Dist. v. State Water Resources Control Bd*., 48 Cal.Rptr.3d 468, 490-491 (Ct. App. 3d Dist. 2006) (explaining importance of and approach to maintaining priorities under the rule of priority, subject to limitation when necessary under the rule against unreasonable use and the public trust doctrine).

Like California, Hawaii has recognized that the public trust doctrine and a state's statutory water law function together as a shared, integrated, body of law controlling the management of the state's waters along with the status and regulation of water rights under state law. *See Matter of Contested Case Hearing Re Conservation Dist. Use App. HA-3568*, 2018 WL 5623442, *35 (Haw. 2018) (citing *Waiāhole Ditch*, 9 P.3d at 458) ("This court has indicated that an agency's public trust obligations may overlap with the agency's statutory duties, and it would follow that they may similarly overlap with duties imposed by an administrative rule."). Thus, given that the public trust doctrine always has operated as a constraint on the use of the waters of the State of Nevada and given that Nevada's sister states have explicitly applied the doctrine to limit the use of appropriative water rights with little difficulty, this Court should hold that the public trust doctrine may be applied to water use in the Walker River Basin to ensure adequate inflows to Walker Lake.

IV. Application of the Public Trust Doctrine to Require Minimum Inflows to Walker Lake Would Not Amount to a Taking of Property Under Either the United States or Nevada Constitution

"The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use without just

compensation. Article 1, Section 8(6) of the Nevada Constitution states '[p]rivate property shall not be taken for public use without just compensation having been first made, or secured.'" *McCarren Intl. Airport v. Sisolak*, 122 Nev. 645, 661-62, 137 P.3d 1110, 1167 (2006). Nevada courts follow federal takings jurisprudence in analyzing whether a taking has occurred. *See id.* Both this Court and the United States Supreme Court have long recognized that a vested property right is a precondition for a valid takings claim. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-61 (1980); *McCarren International Airport v. Sisolak,* 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2013). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (citing *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972)). It is well settled that where a government regulation is grounded in a state's background principles of property law, no taking can occur, because the property owner never had the regulated right to begin with. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

If the court confirms that a protected property right exists, a "taking" can arise either from an actual physical occupation of protected property by the

government, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or "if regulation goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Traditionally, courts have applied the Takings Clause to actions taken by the legislative and executive branches of government. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 560 U.S. 702, 739 (2010) (Kennedy, J. concurring). In determining whether a regulation by one of those branches has gone "too far," courts consider three factors: (1) the economic impact of the regulation; (2) the regulation's interference with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In addition, in *Lucas v. South Carolina Coastal Council*, the Supreme Court held that a *per se*, "categorical" taking occurs if an "owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." 505 U.S. at 1015, 1019. In such a case, the court does not apply the *Penn Central* balancing test, because a *per se* categorical taking has occurred. *Id.* The inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. *Penn Central*, 438 U.S. at 124; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

A. Water Rights are Not Vested Property Rights Against the State's Enforcement of Its Public Trust Duties

Nevada law defines the nature and scope of property interests in water for the purpose of determining whether a water right constitutes property protected by the Fifth Amendment. *See Lucas*, 505 U.S. at 1030; *Vandevere v. Lloyd*, 644 P.3d 957, 963 (9th Cir. 2011) ("[W]e look to state law to determine what property rights exist and therefore are subject to 'taking' under the Fifth Amendment."). As described above, Sections B and C, *supra*, water in Nevada is public trust property. *See Lawrence*, 127 Nev. at 397, 254 P.3d at 611 (citing *Mineral County v. State*, 117 Nev. 235, 246, 20 P.3d 800, 807 (2001) (Rose, J., concurring)). As such, while appropriative water rights in Nevada are considered real property, *Carson City v. Estate of Lompa,* 88 Nev. 541, 542, 501 P.2d 662 (1972), they are not vested property rights against the State's reasonable regulation consistent with its public trust duties. *See Vineyard Land & Stock Co. v. District Court,* 42 Nev. 1, 171 P. 166, 173-174 (1918); *Town of Eureka v. State Engineer*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992); *National Audubon*, 658 P.2d at 712. Thus, an appropriative water right cannot be the basis for a takings claim under either the United States or Nevada Constitution in the context of such state regulation, because a water right does not include the right to use water in a manner that harms

public trust values and is not immune from reasonable regulation in furtherance of those values.

While the right to use water may be gained by appropriation, in Nevada, "[t]he water of all sources of water supply within the boundaries of the State … *belongs* to the public." NRS 533.025 (emphasis added); *In re Manse Spring and Its Tributaries*, 60 Nev. 280, 108 P.2d 311, 314 (1940) (water belongs to the state). Indeed, this Court has consistently held that this public ownership of water is the "most fundamental tenet of Nevada water law." *Lawrence*, 127 Nev. at 397, 254 P.3d at 611 (citing *Mineral County v. State,* 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring)). Consistent with Nevada law's recognition of state ownership of water, this Court has noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. *Id.* Vested water rights in Nevada are defined simply as "'water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation.'" *Jackson v. Groenendyke*, 132 Nev. Adv. Op. 25, 369 P.3d 362 (2016) (citing *Waters of Horse Springs v. State Eng'r,* 99 Nev. 776, 778, 671 P.2d 1131, 1132 (1983) (internal quotations omitted)). Thus, while water rights may be considered vested as against other private appropriators, the term "vested," when used to describe an appropriative water right, does not indicate any vested right against reasonable state regulation of that water right

pursuant to its public trust duties. *Vineyard Land & Stock Co. v. District Court,* 42 Nev. 1, 171 P. 166 (1918)*; Town of Eureka v. State Engineer,* 108 Nev. 163, 167, 826 P.2d 948, 950 (1992); *National Audubon*, 658 P.2d at 712; *Murrison*, 124 Cal.Rptr.2d at 70, 76.

Because water is the property of the state, in all prior appropriation states including Nevada, water rights are usufructuary in nature, or in other words the interest "incorporates the needs of others,"[5] and is defined as the "right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing." Black's Law Dictionary 1384 (5th ed. 1979). As usufructuary rights, water rights always are subject to reasonable government regulation, including regulation consistent with the state's public trust duties. *Vineyard Land & Stock Co.,* 42 Nev. 1, 171 P. 166*; Town of Eureka,* 108 Nev. at 167, 826 P.2d at 950; *In re Manse Spring*, 60 Nev. 280, 108 P.2d at 315 ("[w]ater being state property, the state has a right to prescribe how it may be used, and the Legislature has stated that the right of use may be obtained in a certain way."); *Application of Filippini*, 66 Nev. 17, 21-22, 27, 202 P.2d 535, 537, 540 (1949) ("the owner of a water right does not acquire a property in the water as such, at

[5] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 485 (1969-1970).

least while flowing naturally, but a right gained to use water beneficially which will be regarded and protected as real property."); *Desert Irrigation, Ltd. v. Nevada*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (water rights subject to availability); NRS 533.070 (quantity of water appropriated is limited to amount reasonably required for the intended beneficial use); *see also National Audubon*, 658 P.2d at 712; *Murrison*, 124 Cal.Rptr.2d at 75-76, 77-78.

Appropriative water rights are, by definition, conditional and relative, and consequently appropriative water rights holders do not have any reasonable expectation of certainty that the any particular quantity of water will be delivered, but gain a right only against subsequent appropriators. *See Desert Irrigation, Ltd.,* 113 Nev. at 1051 n.1, 944 P.2d at 837 n.1. Unlike a property right in land, by its very nature a water right carries with it a certain level of uncertainty and related expectation that it will be regulated by the state. *See id.; Vineyard Land & Stock Co.,* 42 Nev. 1, 171 P. 166. For example, water rights always are subject to water availability, and so it has been held that curtailment of those rights when water is not available does not constitute a taking under the Fifth Amendment. *See Kobobel v. State, Dep't of Natural Res.*, 249 P.3d 1127, 1129-30, 33 (Colo. 2011); *see also* NRS 534.030 (Nevada water law does not provide for compensation in the context of priority administration, or curtailment). Thus, while the Nevada State Engineer may issue permits for the appropriation of water, a water right permit or

license does not confer upon the holder a permanent, unconditional right to appropriate a specific quantity of water. Rather, those permits are at all times subject to regulation, including curtailment in times of drought or shortage. *See* NRS 534.030; *Town of Eureka,* 108 Nev. at 167, 826 P.2d at 950. Thus, water availability is never guaranteed, and the State Engineer has the power as well as the duty to continually manage Nevada's water resources and regulate water use, including rights already permitted, to ensure that those resources are preserved for future generations. Because regulation of water rights by the State Engineer for the purpose of conserving the resource is an expected component of any water right, regulation of Nevada water rights consistent with the state's public trust duties does not implicate or damage any property interest in water that otherwise would be guaranteed or protected under Nevada law.

B. The Public Trust Doctrine Is a Background Principle of Nevada Law Which Precludes a Takings Claim

It is well settled that where it is claimed that a state's regulation deprives a property owner of beneficial use of that property, no Fifth Amendment taking occurs if the deprived interest was not part of the property owner's title to begin with. *Lucas,* 505 U.S. at 1027; *see also id*. at 1029 ("the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by … 'existing rules or understandings.'"). Thus, where "background

principles" of Nevada law limit the use or contours of a particular property right such as a water right, those background principles may preclude the assertion of a property entitlement in the context of the Fifth Amendment. *See id.* at 1027-31. Although the Supreme Court in *Lucas* did not provide explicit guidance regarding what constitutes a background principle, it noted that restrictions premised upon such principles are ones that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[6] *See id*. at 1029. In other words, a regulation depriving the owner of a claimed property interest which already was limited by a background principle of state law does not take any right that the owner ever had to lose.

Following *Lucas*, the Supreme Court in *Stop the Beach Renourishment v. Florida Department of Environmental Protection* recognized the public trust doctrine as a background principle. 560 U.S. at 731. The Court in that case held that the filling of submerged beachfront public trust property by the State of Florida did not amount to a taking of a protected property right claimed by property owners whose beachfront status was altered, because the public trust doctrine, a background principle of state law, already placed such restrictions on

[6] *See also Lucas*, 505 U.S. at 1030 (noting that "[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.").

the property at issue in the case. *Id.* at 707, 731, 733. The Court noted that "[i]n Florida, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line)." *Id.* at 707. The Court thus upheld the lower court's decision because it was consistent with background principles of state property law, including the public trust doctrine. *See id*. at 731; *see also id*. at 733 (holding that "[b]ecause the Florida Supreme Court's decision did not contravene the established property rights of the petitioner's Members, Florida has not violated the Fifth and Fourteenth Amendments.").

Additionally, courts in Nevada's sister western states and around the country have found that the public trust doctrine is a background principle of state law that precludes a takings claim. Applying Washington law, the United States Court of Appeals for the Ninth Circuit found that the public trust doctrine "reserves a public property interest, the *jus publicum*, in [public trust property], despite the sale of these lands into private ownership." *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002). The court went on to state that "[i]t is beyond cavil that 'a public trust doctrine has always existed in Washington.'" *Id*. Thus, the court held that the public trust doctrine constitutes a background principle of Washington law that barred a takings claim arising from the government's regulation of land use. *Id*.

Similarly, the California Supreme Court has held that "parties acquiring rights in trust property [including appropriative water rights] generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." *Nat'l Audubon Soc'y,* 658 P.2d at 721. The court in that case elaborated, noting that recognition of the public trust did not amount to a taking of property for which compensation was required, and further that the "continuing power of the state as administrator of the public trust [is] a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust." *Id*. at 723.

The Hawaii Supreme Court in the *Waiāhole Ditch* case similarly held that

> the reserved sovereign prerogatives over the waters of the state precludes the assertion of vested rights to water contrary to public trust purposes. This restriction preceded the formation of property rights in this jurisdiction; in other words, the right to absolute ownership of water exclusive of the public trust never accompanied the 'bundle of rights' conferred.

In re Water Use Permit Applications (Waiāhole Ditch System), 9 P.3d 409, 494 (Haw. 2000). The court stated further that "the government assuredly can assert a permanent easement that reflects a pre-existing limitation upon the landowner's title." *Id*. (citing *Public Access Shoreline Hawaii v. Hawaii Planning Comm'n,* 903 P.2d 1246, 1273 (Haw. 1995), *cert. denied,* 517 U.S. 1163 (1996); cf. *Mississippi State Highway Comm'n v. Gilich,* 609 So.2d 367, 375 (Miss. 1992) (holding that

landowners had no right to compensation with respect to beach land held in trust by the state for public use); *Wilson v. Commonwealth,* 583 N.E.2d 894, 901 (Mass. App. 1992) (noting that, if the public trust were found to apply, "plaintiffs, from the outset, have had only qualified rights to their shoreland and have no reasonable investment-backed expectations under which to mount a taking challenge"), *aff'd in part and rev'd in part,* 597 N.E.2d 43 (Mass. 1992); *State v. Slotness,* 289 Minn. 485, 185 N.W.2d 530, 533 (Minn. 1971) ("Riparian rights ... are held subject to the stated public rights in navigable waters, and the mere exercise of those public rights does not constitute a taking of riparian property.")).[7]

Similarly, in *McQueen v. South Carolina Coastal Council*, a landowner claimed a taking after the South Carolina Coastal Council prevented him from filling two coastal pieces of property which had slowly turned into submerged land as a result of erosion after the landowner purchased the property. 580 S.E.2d 116, 119-20 (S.C. 2003). The South Carolina Supreme Court in that case held that once land becomes submerged it is subject to the public trust doctrine, barring a takings claim, because no compensation is due "for the denial of permits to do what he

[7] Consistent with the *Waiāhole Ditch* decision, several years later, the Hawaii Court of Appeals found in *Maunalua Bay Beach Ohana 28 v. Hawaii* that no compensation was due to a landowner when the high water mark at the property's seaward boundary changes and as a consequence the state retakes title to additional land that has become public trust land by virtue of such boundary shift. 222 P.3d 441, 461 (Haw. Ct. App. 2009).

cannot otherwise do." *Id*. (citing *Esplanade Properties, Inc*., 307 F.3d 978). The Michigan Supreme Court also found the public trust doctrine barred a taking claim. *Glass v. Goeckel*, 703 N.W.2d 58, 78 (Mich. 2005), *cert. denied*, 546 U.S. 1174 (2006) ("As trustee, the state has an obligation to protect the public trust. The state cannot take what it already owns. Because private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine.").

The Court of Federal Claims has held that the public trust doctrine is a background principle of state law which precluded a takings claim. *Rith Energy, Inc. v. United State*s, 44 Fed. Cl. 108, 113-15 (1999) (holding that, because a state water quality control statute which codified the public trust doctrine provided a background principle of state law, a denial of a mining permit "represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject"). Thus, courts around the country have recognized the public trust doctrine is a background principle of state law which limits and defines property interests in such a way that precludes a takings claim resulting from its enforcement.[8]

[8]*See also Orion Corp. v. State,* 747 P.2d 1062, 1072-73 (Wash. 1987) (comparing the public trust doctrine to a "covenant running with the land.").

The public trust doctrine constitutes a background principle of Nevada state law which precludes a takings claim under the United States or Nevada Constitution. The public trust doctrine is a settled rule of law in Nevada and its sister states that always has underpinned and inhered in appropriative water rights. *See* Sections A, B, and C, *supra*; *Lawrence*, 127 Nev. 390, 254 P.3d 606; *see also* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 93-196 (2010). Given this relationship, an appropriative water right in public trust property does not carry with it the right to prevent the state's fulfillment of its public trust duties. *See Lawrence,* 127 Nev. at 397, 254 P.3d at 611 (citing *Mineral County v. Nevada*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., Concurring)); *Esplanade Properties*, 307 F.3d at 986. While appropriative water rights may be final and "vested" as to other appropriative water rights, they are not vested property rights against the state for the purpose of the state's exercise of its public trust duty. *Lawrence*, 127 Nev. at 397, 254 P.3d at 611 (noting that vested water rights are "forever subject to the public trust, which at all times 'forms the outer boundaries of permissible government action with respect to public trust resources.'") (quoting *Mineral County v. Nevada*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring)). These vested water rights are, by definition, conditional and always have been subject to and limited by the public

trust, and thus, water rights owners' title never included the right to use water in a way that is inconsistent with the public trust. *See id.*

Because the public trust doctrine always has inhered in and defined the boundaries of appropriative water rights in Nevada, a state's exercise of its public trust duties does not limit or change the nature a property interest in a water right. The public trust doctrine is one of the inherent limitations on the nature, scope and exercise of water rights in Nevada. Thus, the public trust doctrine exists, and always has existed as a constraint on the entire Walker River system. It is not a water right which would require reprioritization or alteration of water permits, but rather a foundational limitation on water availability in a given system that precedes and constrains allocation decisions and water rights.[9] *See* Section C, *supra*. It is a basic legal principle which inheres in each appropriative water right in the Walker River system, and thus application of the doctrine does not take away, reallocate, or abrogate any property right to which a water right holder ever was entitled.

[9] The constraint placed on the Walker River system by the public trust doctrine is fundamentally different in nature from the imposition of a new appropriative water right. The application of the public trust doctrine simply helps to define the amount of water that properly and reasonably is available for the state to allocate to water rights holders in any given year, in order to preserve its public trust interests and carry out its public trust duties.

C. The Decree Court's Application of the Public Trust Doctrine to Require Minimum Flows to Walker Lake Would Not Result in a "Judicial Taking" Under Either the United States or Nevada Constitution

While the Takings Clause itself does not specify which branch of the government it applies to, traditionally it has only been applied to the legislative and executive branches through the practice of eminent domain. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,* 560 U.S. 702, 739 (2010) (Kennedy, J. concurring). In fact, the Supreme Court has never held that a judicial decision effected a taking of property, and has repeatedly declined to review cases involving judicial takings arguments. *See*, *e.g., L.D. Drilling, Inc. v. Northern Natural Gas Co.,* 138 S. Ct. 747 (2018); *Nies v. Town of Emerald Isle,* 138 S. Ct. 75 (2017); *Edwards v. Blackman,* 137 S. Ct. 52 (2016); *Shinnecock Indian Nation v. New York,* 136 S. Ct. 2512 (2016). The only Supreme Court case squarely addressing the potential for a judicial takings theory, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,* 560 U.S. 702, was a plurality decision which addressed the issue in dicta, and consequently carries no precedential value on the validity of a judicial takings theory. *See Texas v. Brown,* 460 U.S. 730, 737 (1983) (stating that a position not adopted by a majority of the deciding justices is not binding precedent). While the Supreme Court in *Stop the Beach* unanimously found that no taking had occurred

because the plaintiffs had no established property rights in the public trust property allegedly taken, *id*. at 733, the Court was deeply divided as to whether such a thing as a judicial taking exists at all. *See id.* at 713-715 (plurality opinion). Even the plurality opinion authored by Justice Scalia in *Stop the Beach* noted that where "courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right." *Id*. at 727. Moreover, the concurrence authored by Justice Kennedy in that case makes the stronger, more analytically sound argument against the existence of a judicial takings theory. *Id.* at 733-39 (Kennedy, J., concurring). In recognition of the fact that *Stop the Beach* carries no precedential value on the issue of the existence of a judicial takings theory, federal court of appeals decisions since *Stop the Beach* similarly have rejected judicial takings arguments. *See*, *e.g., PPW Royalty Trust v. Barton,* 841 F.3d 746, 756 (8th Cir. 2016), *cert denied*, 137 S. Ct. 1596 (2017); *Gibson v. American Cyanamid Co.,* 760 F.3d 600, 626 n.10 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2311 (2015). Not only is there no controlling precedent that would validate, much less require, the application of a judicial takings theory, this Court should decline to recognize such a theory here, because it would threaten the evolution of state common law by upsetting long-recognized constitutional principles and would run afoul of principles of federalism and separation of powers, as argued persuasively by Justice Kennedy in his concurrence in *Stop the*

Beach.

First, Justice Kennedy argued, the Due Process Clause, rather than the Takings Clause, has long been the recognized restraint on court action with regard to property rights, and replacement of the Due Process Clause's protections on judicial interpretation or modification of property rights with a Takings Clause analysis would have damaging effects on the evolution of state property law. *Stop the Beach*, 560 U.S. at 737-39 (Kennedy, J., concurring) ("the Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause.") (citing *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 542 (2005)). Justice Kennedy argued further that should a judicial taking theory be embraced by the Supreme Court, the Due Process Clause's limitations on a court's changes in property law might be replaced by payment for such "takings," which could lead to an unintended increase in the power of the courts. *Id*. at 738-39. Thus, he argued that the Due Process Clause, and not the Takings Clause, is the proper limitation on the power of the courts with regard to property rights. *Id*.

Kennedy further argued that applying a judicial takings theory to state court decisions construing state property law would threaten state common law evolution and the function of state courts themselves as interpreters of state property law. *Id.*

at 737-39; *see also Phillips Petroleum v. Mississippi*, 484 U.S. 469, 484 (1988) ("We see no reason to disturb the 'general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer.'") (citing *Hughes v. Washington,* 389 U.S. 290 (1967) (Stewart, J., concurring)). As the Supreme Court long ago stated:

> [t]he process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681 n.8 (1930). Because property rules have generally evolved incrementally through the case-specific application of common law, imposing a theory of judicial taking on each and every shift would undermine that state-based system of common law property rulemaking and likely would clog the court system. *Stop the Beach*, 560 U.S. at 737-39 (Kennedy, J., concurring); *id*. at 744 (Breyer, J., concurring) ("the approach the plurality would take today threatens to open the federal-court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct

possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.").

As noted above, recognition of a judicial takings theory also would raise separation of powers concerns, as the Takings Clause traditionally has been applied only to the executive and legislative branches of government. *See Stop the Beach,* 560 U.S. at 739 (Kennedy, J., concurring). As Justice Kennedy noted in his *Stop the Beach* concurrence, "[a]s a matter of custom and practice, these [takings, or eminent domain, decisions] are matters for the political branches—the legislature and the executive—not the courts. *Id*. at 735 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 321, 314–315 (1987) ("[T]he decision to exercise the power of eminent domain is a legislative function")). Justice Kennedy also noted that it likely was the intent of the framers of the Constitution that the Takings Clause be applied in the context of eminent domain exercised by the legislative or executive branches. *Id*. at 739. Further "[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power." *Id*. at 735 (citations omitted); s*ee also* Williamson B.C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?,* 2 U.

Haw. L. Rev. 57, 90-91, 95-96 (1979) ("Courts do not take; they declare").[10] However, the Supreme Court has made clear there is "no constitutional right to have all general propositions of law once adopted remain unchanged" by the courts" and such changes do not violate the Due Process Clause. *Patterson v. Colorado*, 205 U.S. 454, 461 (1907); *see also Stop the Beach*, 560 U.S. at 738 (Kennedy, J. concurring) (noting that "incremental modification under state common law [] does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law. The usual due process constraint is that courts cannot abandon settled principles.") (citations omitted); *see also, e.g.,* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 517 n. 10 (1986) (asserting that "it is well accepted that no right to compensation exists" where a court changes the common law) (citing Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 51-52 (1964)).

Given the skepticism expressed by numerous courts, including the United States Supreme Court, as to the validity of a judicial takings theory and given the concerns associated with its recognition and application, this Court should decline to apply a judicial taking theory to the application of the public trust doctrine in the Walker River Basin, but should find instead that no property right to use water in a

[10] Justice Kennedy also raised the additional difficulties associated with how a judicial claim might be raised as well as what the remedy might be in the event that a court changes property law. *Stop the Beach*, 560 U.S. at 740-41.

way that is inconsistent with the public trust exists, and thus a takings claim is unavailable under any theory.

D. The Question of Whether Some Application of the Public Trust Doctrine to Require Minimum Flows to Walker Lake Could Constitute a Taking Is Not Ripe

A takings claim is not ripe unless "the government entity charged with implementing the [challenged] regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985). This is necessarily the case because the inquiry into whether a taking has occurred is essentially an "ad hoc, factual" inquiry. *Penn Central*, 438 U.S. at 124; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). Indeed, until it is known how the public trust doctrine is to be applied and how it might specifically restrict the use of a particular piece of constitutionally protected property, it is not even possible to determine which takings analysis would be most appropriate – that articulated by the United States Supreme Court in *Loretto*, in *Lucas*, or in *Penn Central*, as described above. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1019 (1992); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978).

Until it is known how, in fact, the public trust doctrine is to be applied in the particular circumstances of this case, it is impossible to know the extent to which and how water rights might be impacted in the Walker River Basin. Thus, until a property owner actually is impacted, or imminently impacted, by application of the public trust doctrine in a specifically identifiable manner in the Walker River Basin and asserts a takings claim, the question is not ripe for decision.

Additionally, even assuming that application of the public trust doctrine hypothetically could result in a compensable takings, that possibility would raise a remedial question,[11] and would not be a justification for the dismissing Mineral County's public trust claim. *See Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323-29 (2002); *Casitas Muni. Water Dist. v. United States*, 708 F.3d 1340, 1358-1360 (Fed. Cir. 2013); *Murrison*, 124 Cal.Rptr.2d at 77-78 (holding that water rights takings claim was not ripe because the challenged restriction on diversion of stream flows had not yet been applied to the water rights in question). Thus, even if this Court finds that Walker River Basin water rights are protected property against enforcement of the public trust

[11] *See Lingle v. Chevron, U.S.A., Inc.,* , 544 U.S. 528, 537 (2005) (the Takings Clause is "designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking").

doctrine by a court such that the Fifth Amendment might be implicated, the takings question is not ripe for a decision until such a claim has been made.

CONCLUSION

For the reasons set forth above, Mineral County and the Walker Lake Working Group respectfully urge this Court to find that the public trust doctrine applies to water rights already adjudicated and settled under the doctrine of prior appropriation and requires the Walker River decree court to administer water rights in the Walker River Basin in such a way as to ensure adequate flows to Walker Lake. Mineral County and the Working Group further request that this Court hold that such administration of water rights would not constitute a "taking" under the United States or Nevada Constitution requiring payment of just compensation.

Respectfully submitted this 26th day of November, 2018,

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,796 words.

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

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

Dated this 26th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that **APPELLANTS' OPENING BRIEF** and **ADDENDUM** were filed electronically with the Nevada Supreme Court on the 26th day of November, 2018. Electronic Service of **APPELLANTS' OPENING BRIEF** and **ADDENDUM** shall be made in accordance with the Master Service List as follows:

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I further certify that on the 26th day of November, 2018, I served, via USPS first class mail, complete copies of **APPELLANTS' OPENING BRIEF** and **ADDENDUM** on the following attorneys of record who are not registered for electronic service:

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ADDENDUM

ADDENDUM

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NRS 321.0005 Legislative declaration: Policy regarding use of state lands.

1. The Legislature declares the policy of this State regarding the use of state lands to be that state lands must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes. In determining the best uses of state lands, the appropriate state agencies shall give primary consideration to the principles of multiple use and sustained yield as the status and the resources of the lands permit.

2. As used in this section:

(a) "Multiple use" includes:

(1) The management of state lands and their various resources so that they are used in the combination which will best meet the needs of the residents of this State;

(2) The use of state lands and some or all of their resources or related services in areas large enough to allow for periodic adjustments in the use of the lands to conform to changing needs and conditions;

(3) The use of certain state lands for less than all of their available resources;

(4) A balanced and diverse use of resources which takes into account the long-term needs of residents of this State for renewable and nonrenewable resources, including, but not limited to, recreational areas, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historic areas; and

(5) The harmonious and coordinated management of state lands and their various resources without the permanent impairment of the productivity of the lands and the quality of the environment, with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will produce the greatest yield or economic return for each parcel of land.

(b) "Sustained yield" means the maintenance of a high-level annual or other periodic yield from the various renewable resources of state lands consistent with multiple use.

(Added to NRS by 1987, 400)

NRS 533.023 "Wildlife purposes" defined.

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

(Added to NRS by 1989, 1733; A 2009, 596)

NRS 533.0243 Temporary conversion of agricultural water for certain purposes:

Legislative declaration; requirements; duration.

1. The Legislature hereby finds and declares that it is the policy of this State to allow the temporary conversion of agricultural water rights for wildlife purposes or to improve the quality or flow of water.

2. If a person or entity proposes to temporarily convert agricultural water rights for wildlife purposes or to improve the quality or flow of water, such temporary conversion:

(a) Must not be carried out unless the person or entity first applies for and receives from the State Engineer any necessary permits or approvals required pursuant to:

(1) The provisions of this chapter; and
(2) Any applicable decisions, orders, procedures and regulations of the State Engineer.

(b) Except as otherwise provided in this paragraph, must not exceed 3 years in duration. A temporary conversion of agricultural water rights for wildlife purposes or to improve the quality or flow of water may be extended in increments not to exceed 3 years in duration each, provided that the person or entity seeking the extension first applies for and receives from the State Engineer any necessary permits or approvals, as described in paragraph (a).

(Added to NRS by 2007, 1510)

NRS 533.025 Water belongs to public.

The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.

[1:140:1913; 1919 RL p. 3225; NCL § 7890]

NRS 533.030 Appropriation for beneficial use; use for recreational purpose, developed shortage supply or intentionally created surplus declared beneficial; limitations and exceptions.

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

(a) "Developed shortage supply" has the meaning ascribed to it in Volume 73 of the Federal Register at page 19,884, April 11, 2008, and any subsequent amendment thereto.

(b) "Intentionally created surplus" has the meaning ascribed to it in Volume 73 of the Federal Register at page 19,884, April 11, 2008, and any subsequent amendment thereto.

[2:140:1913; 1919 RL p. 3225; NCL § 7891]—(NRS A 1969, 141; 1981, 658; 1985, 1301; 1989, 535, 1444; 1995, 2659; 2009, 643; 2011, 1293)

NRS 533.060 Right to use limited to amount necessary; loss or abandonment of rights; no acquisition of prescriptive right; reservation of rights by State.

1. Rights to the use of water must be limited and restricted to as much as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch. The balance of the water not so appropriated must be allowed to flow in the natural stream from which the ditch

draws its supply of water, and must not be considered as having been appropriated thereby.

2. Rights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose.

3. A surface water right that is appurtenant to land formerly used primarily for agricultural purposes is not subject to a determination of abandonment if the surface water right:

(a) Is appurtenant to land that has been converted to urban use; or

(b) Has been dedicated to or acquired by a water purveyor, public utility or public body for municipal use.

4. In a determination of whether a right to use surface water has been abandoned, a presumption that the right to use the surface water has not been abandoned is created upon the submission of records, photographs, receipts, contracts, affidavits or any other proof of the occurrence of any of the following events or actions within a 10-year period immediately preceding any claim that the right to use the water has been abandoned:

(a) The delivery of water;

(b) The payment of any costs of maintenance and other operational costs incurred in delivering the water;

(c) The payment of any costs for capital improvements, including works of diversion and irrigation; or

(d) The actual performance of maintenance related to the delivery of the water.

5. A prescriptive right to the use of the water or any of the public water appropriated or unappropriated may not be acquired by adverse possession. Any such right to appropriate any of the water must be initiated by applying to the State Engineer for a permit to appropriate the water as provided in this chapter.

6. The State of Nevada reserves for its own present and future use all rights to the use and diversion of water acquired pursuant to chapter 462, Statutes of Nevada 1963, or otherwise existing within the watersheds of Marlette Lake, Franktown Creek and Hobart Creek and not lawfully appropriated on April 26, 1963, by any person other than the Marlette Lake Company. Such a right must not be appropriated by any person without the express consent of the Legislature.

[8:140:1913; A 1917, 353; 1949, 102; 1943 NCL § 7897] — (NRS A 1979, 1161; 1999, 2631)

NRS 533.070 Quantity of water appropriated limited to amount reasonably required for beneficial use; duties of State Engineer in connection with water diverted or stored for purpose of irrigation.

1. The quantity of water from either a surface or underground source which may hereafter be appropriated in this state shall be limited to such water as shall reasonably be required for the beneficial use to be served.

2. Where the water is to be diverted for irrigation purposes, or where the water is to be stored for subsequent irrigation purposes, the State Engineer in determining the amount of water to be granted in a permit to appropriate water shall take into consideration the irrigation requirements in the section of the State in which the appropriation is to be made. The State Engineer shall consider the duty of water as theretofore established by court decree or by experimental work in such area or as near thereto as possible. The State Engineer shall also consider the growing season, type of culture, and reasonable transportation losses of water up to where the main ditch or channel enters or becomes adjacent to the land to be irrigated, and may consider any other pertinent data deemed necessary to arrive at the reasonable duty of water. In addition, in the case of storage of water, reservoir evaporation losses should be taken into consideration in determining the acre-footage of storage to be granted in a permit.

[11:140:1913; A 1945, 87; 1943 NCL § 7899]

NRS 533.090 Determination of relative rights of claimants to water of stream or stream system: Petition; order of State Engineer.

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

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

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

[18:140:1913; 1919 RL p. 3227; NCL § 7905] — (NRS A 2017, 706)

NRS 533.370 Approval or rejection of application by State Engineer: Conditions; exceptions; considerations; procedure.

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

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

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

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

(d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and

(e) Any other factor the State Engineer determines to be relevant.

[63:140:1913; A 1945, 87; 1947, 777; 1949, 102; 1943 NCL § 7948]—(NRS A 1959, 554; 1973, 865, 1603; 1977, 1171; 1981, 209, 359; 1989, 319; 1991, 759, 1369; 1993, 1459, 2082, 2349; 1995, 319, 697, 2523; 1999, 1045; 2001, 552; 2003, 2980; 2005, 2561; 2007, 2017; 2009, 597; 2011, 758, 1566; 2013, 499, 3679)

NRS 534.030 Administration by State Engineer: Petition by appropriators in basin; hearing in absence of petition; certain artesian water, underground aquifers and percolating water; advisory services of governing bodies of water districts and water conservation boards.

1. Upon receipt by the State Engineer of a petition requesting the State Engineer to administer the provisions of this chapter as relating to designated areas, signed by not less than 40 percent of the appropriators of record in the Office of the State Engineer, in any particular basin or portion therein, the State Engineer shall:

(a) Cause to be made the necessary investigations to determine if such administration would be justified.

(b) If the findings of the State Engineer are affirmative, designate the area by basin, or portion therein, and make an official order describing the boundaries by legal subdivision as nearly as possible.

(c) Proceed with the administration of this chapter.

2. In the absence of such a petition from the owners of wells in a groundwater basin which the State Engineer considers to be in need of administration, the State Engineer shall hold a public hearing:

(a) If adequate facilities to hold a hearing are available within the basin; or

(b) If such facilities are unavailable, hold the hearing within the county where the basin lies or within the county, where the major portion of the basin lies,

 to take testimony from those owners to determine whether administration of that basin is justified. If the basin is found, after due investigation, to be in need of administration the State Engineer may enter an order in the same manner as if a petition, as described in subsection 1, had been received.

3. The order of the State Engineer may be reviewed by the district court of the county pursuant to NRS 533.450.

4. The State Engineer shall supervise all wells tapping artesian water or water in definable underground aquifers drilled after March 22, 1913, and all wells tapping percolating water drilled subsequent to March 25, 1939, except those wells for domestic purposes for which a permit is not required.

5. Within any groundwater basin which has been designated or which may hereafter be so designated by the State Engineer, except groundwater basins subject to the provisions of NRS 534.035, and wherein a water conservation board has been created and established or wherein a water district has been created and established by law to furnish water to an area or areas within the basin or for groundwater conservation purposes, the State Engineer, in the administration of the groundwater law, shall avail himself or herself of the services of the governing body of the water district or the water conservation board, or both of them, in an advisory capacity. The governing body or water board shall furnish such advice and assistance to the State Engineer as is necessary for the purpose of the conservation of groundwater within the areas affected. The services of the governing body or water conservation board must be without compensation from the State, and the services so rendered must be upon reasonable agreements effected with and by the State Engineer.

[4:178:1939; A 1947, 52; 1949, 128; 1953, 188] — (NRS A 1957, 715; 1961, 489; 1967, 1052; 1981, 916, 1841; 1983, 534)