IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER LAKE WORKING GROUP,

Appellants,

v.

LYON COUNTY; CENTENNIAL LIVESTOCK; BRIDGEPORT RANCHERS; SCHROEDER GROUP; WALKER RIVER IRRIGATION DISTRICT; STATE OF NEVADA DEPARTMENT OF WILDLIFE; AND COUNTY OF MONO, CALIFORNIA,

Respondents.

Supreme Court No. 75917

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

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA

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INTRODUCTION AND INTEREST OF AMICUS

The United States Court of Appeals for the Ninth Circuit certified to this Court questions concerning: 1) whether, and to what extent, Nevada's public trust doctrine applies "to rights already adjudicated and settled under the doctrine of prior appropriation" and 2) whether reallocation of water rights to accommodate public trust needs would constitute a taking without compensation under the Nevada Constitution. *Mineral County v. Walker River Irrig. Dist.*, 900 F.3d 1027, 1034 (9th Cir. 2018). Pursuant to Nevada Rules of Appellate Procedure (NRAP) Rule 29(a)(2), the State of California, on behalf of four state agencies with key responsibilities for protecting public trust resources in the Walker River Basin, submits this amicus brief to assist the Court in understanding how California's public trust doctrine applies to water rights in California.[1] California is interested in this case, as it anticipates that this Court, in response to the Ninth Circuit's suggestion, may look to California law in determining how the public trust doctrine in Nevada intersects with Nevada water rights, and whether any limits on Nevada water rights imposed by the public trust doctrine present constitutional concerns under the takings clauses of either the Nevada or U.S. Constitutions.

[1] The State of California submitted a similar amicus brief for the same purposes in the *Mono County* case before the Ninth Circuit.

California submits this brief to serve two primary purposes: 1) to ensure that this Court has a clear and authoritative statement of how the public trust doctrine applies to water rights in California; and 2) to articulate why a system of water law like California's would not present constitutional takings issues for Nevada, should this Court interpret Nevada's law to include similar legal principles. In addition, California takes the opportunity to correct misstatements of California law made by certain respondents in the briefs they filed in the Ninth Circuit, should similar misstatements be made in the briefs filed in this Court.[2] This amicus brief is not submitted in support of any party and focuses solely on California's public trust and water rights law; accordingly, this brief takes no position on Nevada's public trust and water rights law. NRAP 29(f).

As set out below, California's public trust doctrine constitutes an inherent limitation on all water rights in California, even on adjudicated water rights and water rights that pre-date the State's water right permit system. The California Supreme Court held in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 452 (1983) that California's public trust doctrine and state appropriative water rights "are parts of an integrated system of water law." Under the public trust

[2] While any discussion of California water law by this Court would not be binding in California or federal cases concerning questions of California law, any error in that discussion could create uncertainty, confusion and potential litigation regarding management of water and fishery resources in the Walker River Basin and other interstate waters in California.

doctrine, the State has the authority to curtail pre-existing water rights if the exercise of such rights may adversely affect the State's public trust resources. The State has authority to reconsider and alter past water allocation decisions as appropriate to protect public trust resources. The State's ongoing authority does not impair any vested water rights because, under California law, no person or entity can acquire a vested right to appropriate water in a manner that is harmful to the interests protected by the public trust, including instream fisheries. The State may, however, grant *non-vested* rights to appropriate water in a manner that may harm public trust resources after considering the effects of such appropriations on the public trust. *Id.* at 426, 446-48.

IDENTITY OF AMICUS

In California, four key state agencies are charged with carrying out the state's public trust responsibilities, both in general and as they relate to the interstate Walker River Basin: (1) State Water Resources Control Board ("Water Board"); (2) Department of Fish and Wildlife ("Wildlife Department"); (3) State Lands Commission ("Lands Commission"); and (4) Department of Parks and Recreation ("Parks Department"). This brief reflects these agencies' legal and practical experience in applying a water rights regime that recognizes the public trust doctrine. In particular:

The Water Board has primary authority to regulate the diversion and use of all surface waters in California. Cal. Water Code § 174(a). It also has exclusive authority to issue and administer water right permits and licenses for surface water appropriations initiated after December 19, 1914, the effective date of California's water right permit and license system. *Id.* §§ 1225, 1250; *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 26 Cal.3d 183, 195 (1980). The Water Board has "'broad,' 'open-ended,' [and] 'expansive' authority to undertake comprehensive planning and allocation of water resources." *National Audubon*, 33 Cal.3d at 449, citations omitted. It "has the duty and expertise to administer water appropriations in the public interest, which includes all beneficial uses, including preserving and enhancing fish and wildlife resources." *Siskiyou County Farm Bureau v. Dept. of Fish and Wildlife*, 237 Cal. App. 4th 411, 449 (2015). The Water Board also administers water rights on interstate streams such as the Walker River, and, in carrying out this responsibility, takes into account the water rights laws of other states sharing the stream. *See e.g.*, Cal. Water Code § 1231.[3]

The Wildlife Department is the lead trustee agency for California's fish and wildlife resources and is responsible for administering and enforcing the California

[3] In a related case, the Nevada federal district court appointed the Water Board as a Special Master to review changes in the exercise of California water rights that are subject to the Walker River Decree. *United States v. U.S. Bd. of Water Comn'rs*, 893 F.3d 578, 591 n.11 (9th Cir. 2018).

Fish and Game Code. Cal. Fish & Game Code §§ 702, 711.7(a), 1802. The Wildlife Department "protect[s] the fish and wildlife resources of this state [citation omitted], which are the property of the people of the state." *Siskiyou County Farm Bureau*, 237 Cal. App. 4th at 448. It also is responsible for recommending to the Water Board streamflows necessary to establish and maintain fisheries in the state. Cal. Pub. Res. Code § 10000 *et seq.*

The Lands Commission has exclusive jurisdiction to administer the sovereign lands that California acquired upon admission to the Union. State owned lands include ungranted tidelands and submerged lands, and the beds of all navigable waterways. Cal. Pub. Res. Code §§ 6216, 6301. Finally, the Parks Department has authority to administer, protect, and develop the state park system for the use and enjoyment of the public. Cal. Pub. Res. Code §§ 5001(b), 5003. It currently manages 279 park units in California, including the Bodie State Historic Park within the Walker River Basin.

STATEMENT OF THE CASE

The interstate Walker River stream system originates in Mono County in the eastern Sierra Nevada in California and ends in Walker Lake, a natural, terminal desert lake in Nevada. *Mineral County*, 900 F.3d at 1028.[4] Walker Lake is "a large lake by most any measure": about 13 miles long, 5 miles wide and 90 feet deep. *Id.* at 1029. However, "[b]y 1996, Walker Lake had retained just 50 percent of its 1882 surface area and 28 percent of its 1882 volume." *Id.* Walker Lake has "high concentrations of total dissolved solids (TDS) meaning it has a high salt content, low oxygen content and a high temperature. These conditions have drastically degraded the lake's environmental and economic well-being." *Id.; see also Mineral County v. State of Nevada*, 117 Nev. 235, 237-39 (2001). Walker Lake's decline has eliminated "much of the lake's fishing industry," threatening the lake's "status as an important shelter for migratory birds," and has "drive[n] away the many Nevadans and other Americans who used Walker Lake for recreational enjoyment and economically productive activities." *Mineral County*, 900 F.3d at 1029. As the Ninth Circuit noted, although the parties dispute the precise cause of the lake's decline, "*it seems clear that upstream appropriations play at least some part.*" *Id.*, emphasis added.

[4] Although "[t]he first quarter of the basin lies in California, and California accounts for a majority of the precipitation and surface water flow into the basin," "[t]he vast majority of the water is consumed across the border in Nevada." *Id.*

In 1936, following the United States' suit seeking to establish water rights for the Walker Lake Paiute Tribe, the Nevada federal district court entered the Walker River Decree. The Decree adjudicated the water rights of hundreds of water rights claimants in the Walker River. *Id.* Mineral County moved to intervene in the case in 1994, and after years of resolving service issues, the federal district court granted its motion in 2013. *Id.* at 1030. Mineral County's complaint seeks to "reopen and modify the final Decree to recognize the rights of Mineral County . . . and the public" under the Nevada public trust doctrine to minimum instream flows in the Walker River and minimum lake levels in Walker Lake to protect the lake's fish and wildlife resources and recreational and scenic values. *Id.*

The Walker River Irrigation District (WRID) moved to dismiss Mineral County's complaint on various grounds, including that Mineral County did not have standing to pursue its public trust claims. *Id.* The federal district court granted WRID's motion to dismiss, finding among other things, that the County lacked standing to assert the public trust and that the public trust doctrine could not be applied to existing, "vested" water rights in Nevada without effecting a taking under the federal and/or Nevada constitutions. *U.S. v. WRID*, 2015 WL 3439122, * 6 (D. Nev. 2015). In reaching this conclusion, the federal district court questioned the constitutionality of California's public trust doctrine, and opined that *National Audubon*'s holding raised "serious constitutional questions under

both state and federal takings law" and, if applied in Nevada, would constitute a compensable taking of "vested" water rights in Nevada. *Id*. at *7-10.

The Ninth Circuit reversed, holding that Mineral County has standing to pursue its public trust claims. *Mono County v. WRID*, 735 Fed. Appx. 271, 273-74 (9th Cir. 2018) (unpub. opn.). The Court "reserve[d] judgment on the remaining issues raised in this appeal pending certification to the Nevada Supreme Court" of the following questions:

1) Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?

2) If 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?

Id. at 273; *Mineral County*, 900 F.3d at 1034. The Court stayed all further proceedings in the case and is holding both the public trust and takings claims "in abeyance pending the result of certification." *Id.* at 1028, 1035.

LEGAL BACKGROUND: THE LONGSTANDING COMMON LAW BASIS FOR THE PUBLIC TRUST DOCTRINE

The public trust doctrine is an ancient common law doctrine that has applied to all states in the Union since statehood. In 1842, the U.S. Supreme Court held that the original thirteen states obtained title to lands underlying tide and submerged lands and inland navigable waterways within each state, because the

United States adhered to the common law of England. *Martin v. Lessee of Waddell*, 41 U.S. 367, 382-84 (1842). Under English common law, title to tide and submerged lands and inland navigable waterways, and the associated rights of commerce, navigation, and fishing, always remained with the Crown and could not pass into private ownership. *Id.; see also National Audubon*, 33 Cal.3d at 434. This ancient doctrine is based on the notion that "certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate." *Zack's Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1176 (2008).

Under the so-called "Equal Footing Doctrine," each state subsequently was admitted to the Union with the same rights, sovereignty and jurisdiction as the original thirteen states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590-91 (2012). Thus, at the time of admission into the Union, each state automatically obtained "absolute title" to all tide and submerged lands within the state, as well as to the navigable inland waterways of the state and lands underlying them. *Oregon v. Corvallis*, 429 U.S. at 370-74. This title was "conferred not by Congress but by the Constitution itself." *Oregon v. Corvallis*, 429 U.S. at 374; *PPL Montana*, 565 U.S. at 591.

Construing the nature of the state's title to lands and navigable waters acquired under the Equal Footing Doctrine, the United States Supreme Court in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), held such title is:

> different in character from that which the state holds in lands intended for sale…. It is a title *held in trust* for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.

Id. at 452, emphasis added; *see also National Audubon*, 33 Cal.3d at 437-38. While federal law determines whether a water body is considered "navigable" for purposes of determining whether a state obtained title pursuant to the Equal Footing Doctrine, "[u]nder accepted principles of federalism, the States retain residual power to determine the *scope* of the public trust over waters within their borders." *PPL Montana*, 565 U.S. at 603-04, emphasis added.

ARGUMENT

I. CALIFORNIA'S PUBLIC TRUST DOCTRINE INHERES IN ALL WATER RIGHTS IN CALIFORNIA

In California, the public trust doctrine is a well-established principle of law that has limited the nature, scope and exercise of water rights in California since the early decades of California's statehood. *See People v. Rinehart*, 1 Cal.5th 652, 661 (2016) (under the common law public trust doctrine, "California became trustee of the state's waters, with responsibility for their oversight, from the beginning of statehood"). Water users in California have never had a vested right to use water in a manner that will harm the State's interest in its navigable waters and fisheries, which California holds in trust for the benefit of the people of the State. *National Audubon*, 33 Cal.3d at 446-48.

Contrary to the mischaracterizations of California law made by the Nevada federal district court and respondents in the Ninth Circuit, the California Supreme Court in *National Audubon* did not create a new rule of prior appropriation in favor of public trust resources that cannot be "retroactively" applied to curtail pre-existing appropriative water rights without effecting a taking. *U.S. v. WRID*, 2015 WL 3439122, *6-9. Rather, all California water rights are held and exercised subject to the public rights doctrine. While the State has authority to grant *non-vested*, usufructuary rights to appropriate water in a manner that may harm public trust resources, the State, or a court applying state law, may curtail the diversions of existing water right holders at any time to prevent harm to public trust uses in navigable waters. *National Audubon*, 33 Cal.3d at 445-48. Such curtailments do not interfere with any vested water rights because the public trust doctrine constitutes an inherent, ongoing limitation on *all* water rights in California, even adjudicated rights. *Id.*

A. All Water Rights in California Are Conditional and Inherently Limited

While water rights in California are a type of property right, they are not "vested" in the same sense as rights to land. *See United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 104 (1986) ("*U.S. v. SWRCB*") ("usufructuary water rights are limited and uncertain"); *accord People v. Murrison*, 101 Cal. App. 4th 349, 359 (2002). A basic "rule of water law [is] that one does not own a

property right in water in the same way he owns his watch or his shoes"; rather, "he owns only an usufruct—an interest that incorporates the needs of others." *Zack's Inc.*, 165 Cal. App. 4th at 1176. "[A]ppropriative water rights are, by definition, conditional," and consequently, appropriative water rights holders do not "have any reasonable expectation of certainty" that they have a permanent, unconditional, vested right to appropriate a specific quantity of water for their own consumptive use. *U.S. v. SWRCB*, 182 Cal. App. 3d at 147. This is true for several reasons.

First, water rights are solely usufructuary "and confer no right of private ownership in the watercourse" or in the corpus of the water itself, which is owned in trust by the State for the benefit of all the people of the State. *People v. Shirokow*, 26 Cal.3d 301, 307 (1980); Cal. Water Code §§ 102, 1001; *see also Kidd v. Laird*, 15 Cal. 162, 179-80 (1860); *U.S. v. SWRCB*, 182 Cal. App. 3d at 100-01. Second, all water rights are subject to reasonable government regulation. *U.S. v. SWRCB*, 182 Cal. App. 3d at 106 ("no water rights are inviolable; all water rights are subject to governmental regulation"); *accord Murrison*, 101 Cal. App. 4th at 361; *Light v. State Water Res. Control Bd.*, 226 Cal. App. 4th 1463, 1487 (2014). Government may "regulate water uses for the general benefit of the community and . . . take account thereby of the public nature" of the resource. *Zack's Inc.*, 165 Cal. App. 4th at 1176. Third, and most importantly, water rights

in California have always been subject to, and qualified by, the inherent limitations of the reasonable and beneficial use doctrine and public trust doctrines, both of which restrict a water right holder's ability to divert, store and use any specific quantity of water for its own purposes on an ongoing basis. *See U.S. v. SWRCB*, 182 Cal. App. 3d at 105-06; *Murrison*, 101 Cal. App. 4th at 359-60; *Light*, 226 Cal. App. 4th at 1479-81; *Santa Barbara Channelkeeper v. City of San Buenaventura*, 19 Cal. App. 5th 1176, 1184 (2018).[5]

In California, a water right holder, regardless of priority, never has a right to use water in a manner inconsistent with these foundational state law principles. *See Siskiyou County Farm Bureau*, 237 Cal. App. 4th at 447 (water "belongs to the people" and "only becomes the property of users . . . after it is *lawfully* taken from the river or stream. Past practices, no matter how long-standing, do not alter current reality"), emphasis added.

[5] The court's statement in *U.S. v. SWRCB* that "once rights to use water are acquired, they become vested property rights," was referring the "first in time, first in right" foundational appropriative water right principle that water rights, once acquired, are vested *with respect to other water right holders*. *U.S. v SWRCB*, 182 Cal. App. 3d at 101-02. But water rights are not permanently vested for all purposes, a point the court unambiguously made clear in its subsequent discussion of the inherent limitations imposed on all water rights by the reasonable and beneficial use and public trust doctrines. *Id.* at 105-06; *see also Santa Barbara Channelkeeper*, 19 Cal. App. 5th at 1184 (while water rights are "vested" in some sense, "[t]hese property rights are not absolute"); *accord Light*, 226 Cal. App. 4th at 1489.

B. California's Public Trust Doctrine and Water Rights Are Parts of an Integrated System of Water Law

1. General principles governing application of the public trust doctrine to water rights

"[T]he public trust doctrine vests the state with sovereign authority over all navigable waterways." *Siskiyou County Farm Bureau*, 237 Cal. App. 4th at 423. California courts acknowledged the common law public trust doctrine as early as 1854, recognizing its applicability to all of the State's tidelands and navigable waters and lands underlying those waters. *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854). The doctrine originally applied to protect the public's right to use the State's tidelands and navigable waterways for purposes of commerce, navigation and fishing. *Colberg, Inc. v. State of Cal. Dept. of Pub. Works*, 67 Cal.2d 408, 416-17 (1967). Subsequently, the California Supreme Court recognized the doctrine also includes the public's right to use tidelands and navigable waters for hunting, bathing, swimming, boating, and other recreational purposes, as well as a wide variety of aesthetic and ecological purposes, including preservation of trust lands and waters "in their natural state." *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (1971).

In 1884, the California Supreme Court decided the epochal case of *People v. Gold Run Ditch*, 66 Cal. 138 (1884). In that case, California brought an action to enjoin the hydraulic mining of land adjacent to the non-navigable North Fork of

the American River as a public nuisance. The evidence showed this activity deposited approximately 600,000 cubic yards of material into the American and Sacramento Rivers annually, which interfered with downstream navigation and other beneficial uses of these rivers. *Id.* at 144-45. The Court upheld the trial court's issuance of the injunction, holding that "the people of the State have paramount and controlling rights" in the State's navigable waterways, which the State "holds as a trustee of a public trust for the benefit of the people." *Id.* at 146, 151. The Court held that "[a]n unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance," and that, as a consequence, there was no vested right to continue hydraulic mining, despite the longstanding existence of these practices in California. *Id*. The Court observed that the State "could not divest the people of the State of their rights in the navigable waters of the State for the use of a private business, *however extensive or long continued*." *Id.* at 151, emphasis added.

Then in 1901, in *People v. Russ and Sons Co.*, 132 Cal. 102 (1901), the California Supreme Court held that the construction of dams on non-navigable tributaries to a navigable river was an actionable public nuisance where the dams interfered with the navigability of that river. *Id.* at 105. The Court reasoned:

> There is no practical difference as to the results, if the owner of the land should place his dam upon the navigable stream itself, and not upon its tributary…. It is the result—the effect—of the act of a party that determines its character as a nuisance. The particular point of location

> where the act is done is not material in determining the character of the act.
>
> Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. *Neither may the waters of a navigable stream be diverted in substantial quantities by drawing upon its tributaries*. If those tributaries form the source of the stream, no private ownership in their beds justifies a damming of them, to the result of an obstruction to navigation in the stream below.

Id. at 105-06, emphasis added.

In 1983, the California Supreme Court, relying on *Gold Run Ditch and Russ and Sons*, held that that the public trust doctrine constrains diversions that harm public trust resources in navigable waterways. The Court held that, in 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; *accord Envtl. Law Foundation v. County of Siskiyou*, 26 Cal. App. 5th 844, 861-62 (2018). The public trust doctrine imposes a "significant limitation" that is "superimposed on" *all* water rights in California, even those that are not subject to the Water Board's permitting and licensing authority, such as riparian and pre-1914 appropriative water rights. *U.S. v. SWRCB*, 182 Cal. App. 3d at 106; *Santa Barbara Channelkeeper*, 19 Cal. App. 5th at 1184-85; *see also National Audubon*, 33 Cal.3d at 449; *In Re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 472

& n. 16 (1988); *Light*, 226 Cal. App. 4th at 1489.[6] The doctrine also applies to constrain appropriations from non-navigable streams that may adversely affect public trust resources in navigable water bodies. *National Audubon*, 33 Cal.3d at 436-37; *Santa Barbara Channelkeeper*, 19 Cal. App. 5th at 1186; *Envtl. Law Foundation*, 26 Cal. App. 5th at 858-60. The "determinative fact" is whether the diversion, regardless of its location, adversely affects a public trust resource in a navigable waterway. *Envtl. Law Foundation*, 26 Cal. App. 5th at 859.

The specific interests protected by the public trust doctrine are distinct from the more general "public interest," which the Water Board must consider in making an initial determination whether to permit an appropriation under California law. *Cf.* Cal. Water Code §§ 1253, 1255, 1256, 1257 and *National Audubon*, 33 Cal.3d at 434-35, 440, 444. Moreover, "a use does not qualify as a trust use simply because it might confer a public benefit" or "serve some public

[6] Citing *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 (1979), certain respondents argued in the Ninth Circuit that adjudicated or decreed water rights are somehow "ultra-vested." Lyon County Brf. at 24. *Long Valley* does not stand for this proposition. The opinion addressed the need to quantify dormant (unexercised) riparian water rights in a statutory stream adjudication and is irrelevant to the applicability of the public trust doctrine to appropriative water rights. *Long Valley*, 25 Cal.3d at 355-57.

purpose." *San Francisco Baykeeper, Inc. v. State Lands Comn.*, 242 Cal. App. 4th 202, 235 (2015).[7]

2. The California Supreme Court's application of the public trust doctrine to water rights in National Audubon

As mentioned, the early public trust cases laid the groundwork for the California Supreme Court's holding in *National Audubon* that the public trust doctrine limits property interests in flowing waters as well as interests in tidelands and submerged lands and overlying waters. At issue in *National Audubon* was whether the Los Angeles Department of Water and Power's (DWP's) diversion of water from four non-navigable tributaries to the navigable Mono Lake could be enjoined as a violation of the public trust doctrine due to the harm it was causing to public trust resources in Mono Lake. *National Audubon*, 33 Cal.3d at 424, 429-31. Similar to the present situation in Walker Lake, DWP's diversions had substantially diminished the size of Mono Lake and "drastically" increased its salinity, "diminish[ing] its value as an economic, recreational, and scenic resource," depressing the local shrimping industry, and adversely affecting the

[7] *National Audubon* expressly rejected the view that the concept of the public trust encompassed "all public uses, so that in practical effect the doctrine would impose no restrictions on the state's ability to allocate trust property." 33 Cal.3d at 440. The California Supreme Court stated that "[w]e know of no authority which supports this view of the public trust, except perhaps the dissenting opinion in *Illinois Central*." *Id.*; *accord San Francisco Baykeeper*, 242 Cal. App. 4th at 235-36.

lake's fish and wildlife resources. *Id.* at 429, 431. The Water Board had not considered the effect of DWP's diversions on the public trust resources of Mono Lake when it initially issued water rights permits to DWP in 1940, or when it issued water right licenses to DWP in 1974. *Id.* at 428 & n.8.

The National Audubon Society initially sued DWP in state court; DWP then cross-complained against 117 other Mono Basin water users and the federal cross-defendants removed the case to federal district court. *Id.* at 431. Similar to the Ninth Circuit's action here, the federal court then stayed the case and asked the California Supreme Court to determine, among other things, "the interrelationship of the public trust doctrine and the California water rights system," *i.e.* whether the public trust doctrine was "subsumed in" the water rights system or it "function[ed] independently of" that system. *Id.* at 431-32.

In answering this certified question, the California Supreme Court harmonized the public trust doctrine with the State's appropriative water rights system. The California Supreme Court rejected both the environmental groups' position that the public trust "is antecedent to and thus limits all appropriative water rights," and the DWP's starkly opposing position that it enjoyed "a vested right in perpetuity to take water without concern for the consequences to the trust." *Id.* at 445. Instead, the California Supreme Court adapted the "rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except

to serve trust purposes" to the unique circumstances of rights in flowing waters. *Id.* at 426.

The Court's approach sought "an accommodation which will make use of the pertinent principles of both the public trust doctrine and the appropriative water rights system." *Id.* at 445; *see also id.* at 452 (public trust doctrine is neither subsumed within the California water rights system, nor does it function independently of that system); *accord Envtl. Law Foundation*, 26 Cal. App. 5th at 861-62, 863-67 & n.7. "To embrace one system of thought and reject the other would lead to an unbalanced structure . . ." *National Audubon*, 33 Cal.3d at 445; *see also Mineral County*, 900 F.3d at 1033 (in *National Audubon*, "the California Supreme Court outlined the competing values underlying the public trust doctrine and doctrine of prior appropriation and, rather than deeming one doctrine supreme, balanced them").

Applying this balanced approach, the Court held that "some responsible body"—the Water Board, the Legislature or a court—was required to consider the effect on the public trust of DWP's authorized diversions and to determine whether the "needs of Los Angeles outweigh the needs of the Mono Basin" or whether a

reduced diversion "would better balance the diverse interests."[8] *National Audubon*, 33 Cal.3d at 447. The Court reasoned:

> [T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust.

Id. at 425-26; *see also id.* at 437 ("the dominant theme" of the public trust doctrine "is the state's sovereign power and duty to exercise continued supervision over the trust") and *id.* at 445 ("[t]he state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters," including "rights in flowing waters").

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[8] Before the Ninth Circuit, certain respondents argued that "the Legislature is responsible for administering the public trust and . . . its judgment is conclusive" and that "the state's legislative body is responsible for regulating water rights and determining the nature of the state's public interest in water." Lyon County Brf. at 40-41. The California Court of Appeal, Third District, expressly rejected this precise argument in *Envtl. Law Foundation*, 26 Cal. App. 5th at 867-69.

It is well-established that the Water Board and the courts have concurrent jurisdiction to consider the applicability of the public trust to appropriative water rights. *National Audubon*, 33 Cal.3d at 445 n. 24, 446-47, 451-52; *U.S. v. SWRCB*, 182 Cal. App. 3d at 105-06, 149-52. Furthermore, the common law public trust doctrine in navigable waters has not been superseded by statute and operates in harmony with applicable statutory law. *National Audubon*, 33 Cal.3d at 446 n. 27; *Envtl. Law Foundation*, 26 Cal. App. 5th at 863-66 (public trust in water is based on the common law).

Thus, "[o]nce the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of appropriated water." *Id.* at 447; *see also id.* at 452. In administering water rights, "the state has an affirmative duty to take the public trust into account" and whenever feasible, to protect public trust uses and avoid or minimize harm to those uses. *Id.* at 446, 426, 437. The State also has a continuing duty to seek an accommodation between competing interests and "to preserve, so far as is consistent with the public interest, the uses protected by the trust." *Id.* at 446-47. This includes protecting navigable waters from harm caused by diversions from non-navigable tributaries. *Id.* at 435-36, 446. In exercising its continuing supervisory power, "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." *Id.* at 447. The State has the inherent "power to reconsider allocation decisions," even those made "after due consideration of their effect on the public trust," and "[n]o vested rights bar such reconsideration." *Id.*; *see also id.* at 448, 452. "The case for reconsidering a particular decision…is even stronger when that decision failed to weigh and consider public trust uses" in the first instance. *Id.* at 447.

In reaching its holding, the California Supreme Court repeatedly made clear that "parties acquiring rights in trust property," including those who hold 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." *Id.* at 437. Nor can they claim a "vested right to bar recognition of the trust or state action to carry out its purposes." *Id.* at 440; *see also id.* at 425-26, 445, 452 (no party may acquire "a vested right to appropriate water in a manner harmful to the interests protected by the trust").[9]

Thus, the California Supreme Court forged a middle ground between the interests of prior appropriators and the interests protected by the public trust doctrine. Under the Court's compromise approach, the State may authorize "*nonvested* usufructuary rights to appropriate water even if diversions harm public trust uses" after giving due consideration to the impacts of diversions on public trust resources, and minimizing "so far as feasible" any associated harm to public trust resources. *National Audubon*, 33 Cal.3d at 426, emphasis added; *see also id*. at 446 ("[a]s a matter of current and historical necessity, . . . the Water Board, has the power to grant usufructuary licenses that . . . may unavoidably harm, the trust uses at the source stream"). The Court explained that, just as "appropriation may

[9] In support of this "no vested rights" conclusion, the Court relied on a long-established line of cases involving challenges to alleged State conveyances of tidelands free of the public trust. *Id.* at 437-40. The courts in those cases held that no taking occurred where the State later asserted a public trust interest in those lands, because the State had no power to convey the lands free of the trust in the first instance, and thus the grantee had always held the property subject to the public trust. See *Illinois Central*, 146 U.S. 387; *People v. California Fish Co.*, 166 Cal. 576 (1913); *City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980).

be necessary . . . despite unavoidable harm to public trust values," an appropriative water rights system "administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." *Id.* at 446. The Court also noted that all uses of water, including public trust uses, are subject to the overriding California constitutional policy of reasonable and beneficial use. *Id.* at 443.

At the same time, as discussed, because rights to use water are never unconditionally vested and are subject to continuing State supervision and authority to protect the public trust, the State can later revisit these decisions, should circumstances related to the public trust change, without impairing any vested rights. *Id.* at 447-48. Thus, the application of the public trust doctrine to an existing water right is not properly viewed as a newly-imposed right in favor of the environment that supersedes a pre-existing, vested water right. Rather, the public trust essentially functions as an inherent, ongoing reservation on the nature, scope and use of the water right, which may require a water right holder to alter or curtail previously authorized diversions if the State subsequently deems it necessary and feasible to protect public trust resources.

3. California courts continue to apply the principles enunciated in *National Audubon*

Subsequent California cases have confirmed these basic principles governing application of the public trust doctrine to water rights. In *U.S. v. SWRCB*, 182 Cal.

App. 3d at 149-52, the California Court of Appeal rejected the United States' arguments that the Water Board had no authority to modify an appropriative water right permit, once issued, and that imposition of new standards for fish and wildlife protection would impair the United States' claimed vested right to appropriate water. The Court of Appeal reasoned that, under *National Audubon*:

> [T]he state as trustee of the public trust retains supervisory control over the state's waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust…. This landmark decision directly refutes the [United States'] contentions and firmly establishes that the state, acting through the Board, has continuing jurisdiction over appropriation permits and is free to reexamine a previous allocation decision.

Id. at 149-50; *see also id.* at 106. Thus, the court concluded, "the Board unquestionably possessed legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife." *Id.* at 150. "*National Audubon* confirms the Board's power and duty to reopen the permits to protect fish and wildlife 'whenever feasible,' even *without* a reservation of jurisdiction" in the permits themselves. *Id.* at 152, emphasis in original.

Similarly, in *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 806 n.54 (2006), the court observed that "the rights of an appropriator are always subject to the public trust doctrine." And in *El Dorado Irrig. Dist. v. State Water Board*, 142 Cal. App. 4th 937 (2006), the court held that the public trust doctrine may override the rule of priority, as no one has a "vested right to

appropriate water in a manner harmful to the interests protected by the public trust." *Id.* at 966. Thus, "sometimes the use of water under a claim of prior right must yield to the need to preserve water quality to protect public trust interests," and the Water Board "has a legitimate interest in requiring [a diverter] to reduce its diversions to contribute towards the maintenance and improvement of water quality." *Id.* at 967. Most recently, in *Environmental Law Foundation,* 26 Cal. App. 5th 844, the court applied the holding and reasoning of *National Audubon* to hold that the public trust doctrine requires the State to consider whether extractions from groundwater basins harm public trust resources in hydrologically connected surface waterways.

II. APPLICATION OF THE PUBLIC TRUST DOCTRINE DOES NOT CONSTITUTE A TAKING OF WATER RIGHTS UNDER THE UNITED STATES OR CALIFORNIA CONSTITUTIONS

This Court undoubtedly is interested in construing Nevada water law in a way that will not create constitutional issues or concerns. Should it decide that under Nevada water law, like California water law, water rights have long been subject to the public trust limitations, this would not present a takings concern. The predicate determination in any takings case is whether "the proscribed use interests were not part of [the owner's] title to begin with," under applicable state laws defining the nature and scope of the property interest at issue. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). In *Lucas*, the U.S. Supreme Court held that

a regulation will not constitute a Fifth Amendment taking if it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon" the property. *Id.* at 1029. The determination of the nature and scope of the property interest at stake is normally a question of state property law. *Id.* at 1030. Thus, to determine whether "reallocation" of "settled" water rights under the public trust doctrine will "abrogate[e]" or otherwise impair "adjudicated or vested water rights" (*Mineral County*, 900 F.3d at 1034) and thereby effect a taking, it is first necessary to determine the nature and extent of the property at issue and whether the rights ever were truly "vested" to begin with. *Lucas*, 505 U.S. at 1027.

As discussed in Section I.B, in California, the State's application of the public trust doctrine to curtail the exercise of existing water right does not create any takings issue because water rights holders in California never had a vested right to use water in a manner that harms public trust resources to begin with. *Lucas*, 505 U.S. at 1029-30. Consequently, there necessarily cannot be a taking when the State or a court subsequently limits the exercise of those non-vested rights to protect public trust resources. *National Audubon*, 33 Cal.3d at 440 (establishment of the public trust does not constitute "a taking of property for which compensation was required" because property owner holds its property subject to the public trust). Thus, application of the public trust doctrine to water rights does not apply

a new rule of prior appropriation that "abrogates" existing "settled" or otherwise "vested" rights, because water rights in California have long been subject to this inherent common law limitation. *See Gold Run Ditch*, 66 Cal. at 151; *Russ and Sons*, 132 Cal. at 105-06; *People v. Glenn-Colusa Irrig. Dist.*, 127 Cal. App. 30, 34-36, 38 (1932) (enjoining unscreened diversion of water from Sacramento River that killed numerous fish).

CONCLUSION

In California, the public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. No water user, regardless of priority, has an unconditional vested right to use water in a manner that harms the public trust. With respect to California law therefore, the State's curtailment of water use to protect public trust resources does not constitute a taking.

Given California's significant interest in ensuring its state laws are properly and consistently interpreted and applied, particularly with respect to interstate waters such as the Walker River, the State of California respectfully requests the Nevada Supreme Court disregard any misinterpretations or mischaracterizations of California's public trust doctrine that may be offered.

Dated: December 4, 2018

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CERTIFICATE OF COMPLIANCE

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 2016 14 pt. Times New Roman type style.

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 6,982 words.

Finally, I hereby certify that I have read this Brief Amicus Curiae of the State of California, 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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the **BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA** was filed electronically with the Nevada Supreme Court on the 4th day of December, 2018. Electronic Service of the **BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA** shall be made in accordance with the Master Service List as follows:

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