No. 75917

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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MINERAL COUNTY, et al.,

Appellants

vs.

LYON COUNTY, et al.,

Respondents.

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

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# BRIEF *AMICUS CURIAE* OF LAW PROFESSORS IN SUPPORT OF APPELLANTS

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record hereby certifies that amici parties are individuals and therefore there is no parent corporation of amici, and no publicly held corporation for amici which owns 10% or more of the stock of amici. This disclosure is made in order for this Court to evaluate possible disqualification or recusal.

Respectfully submitted this 6th day of December, 2018

*/s/ Bret C. Birdsong*

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## THE INTEREST OF AMICI LAW PROFESSORS

Amici are professors and scholars who teach, research, and write on water and property law. Amici teach courses that cover the public trust doctrine and the constitutional issue of takings of property. As a group, the amici have decades of experience studying and teaching water and property law and have published numerous books and articles about those areas, including leading casebooks. Many amici also have written articles, books, and other scholarly works specifically about the public trust doctrine and the federal takings clause. Because of their expertise, amici can inform the Court about the relationships among takings doctrine, the public trust doctrine, and water law. Those relationships are, of course, the central focus of the certified questions before the Court in this case.

Amici are listed in the appendix attached to this brief. They are joined and represented by their undersigned counsel, Bret Birdsong, Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Professor Birdsong teaches water law, including Nevada water law, and has written and edited articles and book chapters involving water and other natural resources.

## SUMMARY OF ARGUMENT

The public trust doctrine, like the prior appropriation doctrine of water law, has been definitively established by this Court as Nevada law. In answering the certified questions from the United States Court of Appeals for the Ninth Circuit

("Ninth Circuit"), this Court should hold that the public trust doctrine applies to the water rights determined by the Walker River Decree to the extent necessary to protect the commercial, recreational, and ecological values in the navigable Walker Lake. It should also hold that the application, by a court, of the public trust doctrine to appropriative water rights to ensure the ecological integrity of Walker Lake would not constitute a taking under the Nevada Constitution.

This Court established in *Lawrence v. Clark Cty.*, 127 Nev. 390, 254 P.3d 606 (2011), that the public trust doctrine in Nevada is an essential limit on the state's sovereign power to transfer public trust assets. The reasoning of *Lawrence*, finding the source of the public trust doctrine in the Nevada Constitution and inherent limits on sovereign authority, applies with equal force in this context of appropriative water rights to use water from tributaries of Walker Lake. Applying the public trust doctrine to the decreed rights is consistent with the historical development of Nevada water law, which has historically evolved to fit the conditions of society in this arid state.

Neither a decision by this Court that the public trust doctrine applies to appropriative water rights, nor one by the Decree Court to apply the doctrine to curtail the exercise of appropriative water rights in order to protect trust values, would effect a taking under the Nevada Constitution. First, a declaration by this Court that the public trust limits the power of the state to create and enforce

appropriative water rights – and an application of that principle by the Decree Court to curtail any such water rights – would be no more than an expression of a background, indeed a fundamental, principle of state water law reflecting inherent limitations in the appropriative water right. Second, this Court should hold that the doctrine of judicial takings is not established under Nevada law and that, given the serious questions about its validity, the takings doctrine is inapplicable to a decision in this case that merely reveals limitations that are inherent in the state's authority to create appropriative water rights.

## ARGUMENT

This Court has accepted two questions certified by the Ninth Circuit regarding the extent to which the public trust doctrine applies to water rights established under the doctrine of prior appropriation and the takings implications under Nevada law of any such application to "settled" water rights. Fundamentally, these questions ask this court to determine the relationship between these two established doctrines in Nevada law. In light of the recognized basis of the public trust doctrine in Nevada's constitution, we urge the court to find an accommodation that gives full recognition to both doctrines. This is best done by recognizing that the public trust doctrine applies to appropriative water rights in the Walker River Basin and advising the Ninth Circuit that the federal Decree Court should hold further proceedings to determine whether, and the extent to

which, the doctrine requires any adjustment to water use from the Walker River in order to protect public trust values. Doing so would align Nevada law with the most closely analogous factual and legal situation – Mono Lake in California – which similarly involved the impacts of appropriating water from tributary streams of a rare and ecologically imperiled desert terminal lake.[1] *See National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (1983) (accommodating the public trust and prior appropriation doctrines by holding that the public trust doctrine applied to established appropriative water rights for which no state official or agency had ever considered their effects on public trust values).[2]

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[1] Walker Lake and Mono Lake are two of only a handful desert terminal lakes in North America. *See Conservation Assessment for Walker Lake in Mineral County, Nevada,* THE NATURE CONSERVANCY 12 (2013) (https://static1.squarespace.com/static/550a1fc8e4b0e1de27f15703/t/595334361b10e384f55ca5ab/1498625081190/Walker_Lake_Conservation_Assessment_FINAL_13_0524.pdf). Each of these lakes is fed by streams originating in the Sierra Nevada mountains and has no outlet, and the ecological integrity of each is determined by the balance of inflows and evaporation. *Mineral Cty. v. Walker River Irr. Dist.*, 900 F.3d 1027, 1028-29, 1033-34 (9th Cir. 2018); *National Audubon Society*, 33 Cal.3d at 429, 658 P.2d at 715.

[2] It is beyond the scope of this brief, though perhaps of interest to this Court, that academic research has shown that, in the aftermath of the Mono Lake decision by the California Supreme Court in *National Audubon*, there has been no flood of litigation in California seeking to reallocate water under the public trust doctrine. David Owen, *The Mono Lake Case, The Public Trust Doctrine, and the Administrative State*, 45 U.C. Davis L. Rev. 1099, 1122-29 (2012). Professor Owen's empirical review of the public trust doctrine in California shows that the court's recognition of the doctrine has had a greater impact in the administrative agency responsible for recognizing new rights or approving proposed changes of existing rights than in the courts. *Id.* at 1139.

### A. The Public Trust Doctrine, like the Prior Appropriation Doctrine of Water Rights, is Definitively Established in Nevada Law and should be Applied to Water Rights in Streams Tributary to Navigable Waters

The starting point for consideration of the certified issues in this case is this Court's opinion in *Lawrence v. Clark Cty.*, 127 Nev. 390, 254 P.3d 606 (Nev. 2011). That seminal case definitively recognized the public trust doctrine in Nevada law and grounded it in the state's constitution and inherent limitations on the state's sovereign power. Appropriative water rights, like other property, are creatures of positive law, defined as matter of state law through the exercise of the state's sovereign authority. As such, they are limited in their definition by the essential limits on the state's sovereignty, including the public trust doctrine.

In *Lawrence*, this Court expressly adopted the public trust doctrine and traced its roots in Nevada law. *Lawrence*, 127 Nev. at 391-399-405, 254 P.3d at 607, 612-16. *Lawrence* recognized, as have numerous scholars,[3] that the doctrine originated in Roman law, was carried forward in the English common law, and has been recognized by many American states and the United States Supreme Court.

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[3] Robin K. Craig, *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 (2010); Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 Se. Envtl. L. J. 47, 50-54 (2006); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-78 (1970).

*Id*., 127 Nev. at 392-94, 254 P.3d at 608-09. In accordance with many other states, this Court, "expressly adopt[ed] the doctrine and . . . its application in Nevada, given the public's interest in Nevada's waters." *Id*., 127 Nev. at 391, 254 P.3d at 607. Under the doctrine, Nevada holds trust assets – in *Lawrence*, the banks and beds of navigable waterways – "in trust for the public and subject to restraints on alienability" in order to safeguard the public's interest in those assets. *Id*., 127, Nev. at 391, 254 P.3d at 607. In exercising rights of trusteeship, the state "has the power only to act as a fiduciary of the public in its administration of trust property." *Id*., 127 Nev. at 401, 254 P.3d at 613.

That the public trust doctrine applies to appropriative water rights is an inescapable conclusion from this Court's analysis in *Lawrence*, which found that "the doctrine constitutes an inseverable restraint on the state's sovereign power," *id*. 127 Nev. at 401, 254 P.3d at 613, not just on the alienation of state-owned property. The basis for and contours of each state's public trust doctrine, of course, is a matter of state law, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 604 (2012), and *Lawrence* is especially compelling for its studious and careful analysis of the doctrine's grounding in Nevada law. *Lawrence* emphasized that the doctrine exists in Nevada not only because this Court has embraced its principles in cases several times, *Lawrence*. 127 Nev. at 393-402, 254 P.3d at 609-612, or because the Nevada legislature has incorporated the principles in statutes, including NRS

533.025 (2017) (providing that water from all sources within the state "belongs to the public," not the state); *id*. ,127 Nev. at 398-401, 254 P.3d at 612-13. The public trust doctrine is even more foundational in Nevada law, according to *Lawrence*, because it is "based on a policy reflected" in the gift clause of the Nevada Constitution, *id*., 127 Nev. at 399, 254 P.3d at 612, and "arises from the inherent limitations on the state's sovereign power," *id*., 127 Nev. at 400, 254 P.3d at 613 (citing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892)).

This Court's analysis of the public trust doctrine in *Lawrence* compels its application to appropriative water rights for several reasons. First, as noted above, water rights themselves are artifacts of state sovereignty; they are created, enforced, and governed in all respects by the exercise of that sovereignty. But the state's sovereign power is inherently limited by the fiduciary obligation to protect the public's interest in navigable waters subject to the trust. Put simply, the state lacks the sovereign power under *Lawrence* to create water rights that can be exercised in derogation of the public's interest in trust resources, which include the navigable Walker Lake.

Second, as Justice Rose so eloquently stated in his concurrence in *Mineral Cty. v. Dep't of Conservation,* 117 Nev. 235, 246, 20 P.3d 800, 807 (2001), "all of a state's navigable waterways are held in trust by the state for the benefit of the people and . . . a state official's control of those waters is forever subject to the

trust." *Lawrence*'s recognition that the statutory pronouncement of public ownership of water in NRS 533.025 – the basis for all statutory water law in Nevada – invokes public trust principles and indicates that the public trust must constrain state action with respect to any waters that impact navigable waterways. As Justice Rose stated, joined by Justice Shearing, the extension of the doctrine to non-navigable tributaries of Walker Lake "is natural and necessary where, as here, the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated." *Mineral Cty*., 117 Nev. at 247, 20 P.3d at 808.

### B. The Public Trust Doctrine Applies to the Water Rights Determined by the Walker River Decree.

The reasoning of *Lawrence* commands an answer in the affirmative to the question whether the public trust doctrine can be applied to "already adjudicated and settled" water rights in the Walker basin, as the Ninth Circuit has framed the question. *Mineral Cty. v. Walker River Irrig. Dist.*, 900 F.3d 1027 at 1034. The Decree Court in this litigation determined those water rights by application of Nevada law to the appropriators' claims in this litigation. *See id*. at 1029. But the Decree Court did so without reference to the public trust doctrine or to the impacts of its adjudication on public trust resources. Under the reasoning of *Lawrence*, the Decree Court decreed water rights beyond the state's sovereign authority to the extent the exercise of those decreed water rights would contravene the public trust.

It thus cannot be said to have created reasonable settled expectations. *Cf*., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992) ("And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless.").

Water rights characterized by the Ninth Circuit as "settled" by the decree are, as a matter of law and fact, subject to significant uncertainty, as are all water rights in Nevada, which are merely usufructuary. As an initial matter, Nevada law does not provide for private "ownership" of water in the conventional sense of complete dominion and control. As statutory law has provided since 1913, water from all sources "belongs to the public," NRS. 533.025 (2017). And Nevada's sovereign power to create water rights, as shown above, has always been subject to the public trust. Rather, one can obtain a private right only to use water for beneficial purposes, a usufructuary right that encompasses the right to temporarily use water for specified beneficial purposes, as well the right to have water for that limited use flow to the point of diversion, if such water exists in the stream. *See* Samuel C. Wiel, *Running Water*, 22 Harv. L. Rev. 190, 202 (1908-1909) (distinguishing the usufruct from the ownership of water itself); *Lobdell v. Simpson*, 2 Nev. 274 (1866). As such, no vested right can be acquired against the paramount right of the public.

Further, as a physical matter, a private right to use water is conditional upon the water being there. Prior appropriation establishes only a priority to use water for beneficial purposes as against other users. Nevada law prioritizes a right to use water beneficially, without waste, as against later appropriators; it does not, nor could any legal doctrine, ensure that water will actually flow as a matter of nature's law. *See Desert Irrigation Ltd. v. Nevada,* 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997). In the arid West, seasonal and annual variations in natural flow mean that many appropriators, even those whose rights are senior to others, are frequently unable to actually use the water expected by their right.

Indeed, hydrological uncertainty and legal flux are hallmarks of American water law, particularly in the arid West, and the history of water law in Nevada and other western states has been one of change as much as continuity. Water law in Nevada has seen dramatic change several times, as this Court and the legislature have exercised the state's sovereignty to define water rights in accordance with public values, and this has occurred to the disadvantage of some Nevadans whose expectations were unsettled in order to accommodate the evolving norms. To the extent the application of the public trust doctrine to adjudicated rights in the Walker Basin results in unsettling expectations, it may be more in than out of line with the arc of water law history.

Perhaps the best example of historical change in Nevada is the rise of the appropriation doctrine itself and the concomitant demise of riparianism. With the expansion of the United States, the western states and territories, like their eastern counterparts, incorporated the common law as their own. That common law included the doctrine of riparianism, under which the owners of riparian land could use water on such land correlative to the rights of other riparian owners. Because of the scarcity of water and the manifest need to use water distant from its sources, riparianism, though inherited from the common law, made little sense in Nevada. As Sylvia Harrison has described, this Court ""struggled for several decades to harmonize the common law with common sense." Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. Denv. Water L. Rev. 148, 154 (2001). In *Vansickle v. Haines*, 7 Nev. 249 (1872), the Court subordinated the rights of a prior appropriator to the subsequent riparian user, adhering to common law riparianism, even after having recognized a right of nonriparians to obtain a right to use water through appropriation. *See Ophir Silver Mining Company v. Carpenter*, 4 Nev. 534 (1869). Years later, the Court sounded the death-knell for riparianism, upholding a senior appropriation over a junior riparian right, concluding that riparianism never had a place in the law of such an arid state. *Reno Smelting, Milling and Reduction Works v. Stephenson*, 20 Nev. 269, 280, 21 P. 317, 321 (1889) ("The condition of the country, and the necessities of the situation, impelled settlers upon the public

lands to resort to the diversion and use of waters. This fact of itself is a striking illustration, and conclusive evidence, of the inapplicability of the common-law rule."). After *Reno Smelting*, even those owners of riparian land who had expected that their land title included an appurtenant common law right to reasonably use water could only acquire water rights under prior appropriation.

The advent of statutory water law once again brought about significant change, establishing administrative agency oversight of water rights, including a permit system to establish rights, and imposing upon water users the obligation to prove up their rights upon the petition to the state engineer by other water users. *See* James Davenport, Nevada Water Law, 12-15 (2003), Harrison, *The Historical Development of Nevada Water Law*, 5 U. Denv. Water L. Rev. at 167-69. Following these developments, this Court rejected numerous challenges to the constitutionality of the changes ushered in by the statutory era. *E.g*., *Ormsby Cty. v. Kearney*, 37 Nev. 314, 142 P. 803 (1914), *Vineyard Land and Stock Co. v. Fourth Jud. Dist. Ct.*, 42 Nev. 1, 171 P. 166 (1918). Although these challenges mostly involved procedural aspects of water rights administration, the Court's rejection of them was based on the recognition that the public interest, including economical development of water resources, would best be served through the state engineer's supervision over the water in the state. *Vineyard Stock*, 42 Nev. at 13-14, 171 P. at 174.

Yet another example of evolution in Nevada's water law is reflected in this Court's decision in *State v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988), which held that a diversion of water from its natural course is not a requirement for establishing an appropriative right for *in situ* public recreational use. The court departed from the rule, applicable in the pre-statutory era of Nevada water law, that a diversion was an absolute requirement. *Id.* at 713-14, 766 P.2d at 266 (citing *Prosole v. Steamboat Canal Co*., 37 Nev. 154, 140 P. 720 (1914)). The Court recognized that it comported with the public interest to reject the traditional, absolute diversion requirement in the context of the granting of a water right to a public agency for "public recreation purposes," a statutorily recognized beneficial use. *Id*. at 715, 766 P.2d at 267.

This history reflects that substantial uncertainty and flux, at least as much as settled expectation, flow within the main channel of Nevada water law. The recognition here that water rights are inherently subject to the public trust, like the Nevada legislature's pronouncement since 1913 that water from all sources in the state "belongs to the public," NRS 533.025 (2017), does not infringe upon legitimate expectations of water users.

### C. A Judicial Determination that Appropriative Water Rights, even those Recognized in a Prior Court Decrees, Must Be Adjusted to Accommodate Public Trust Values will not Effect a Taking.

Neither a ruling by this Court that the public trust doctrine can be applied to limit the exercise of appropriative rights determined by the decree, nor the application of that ruling in the federal proceedings to allocate water to Walker Lake – what the Ninth Circuit panel describes as "the abrogation of [] adjudicated or vested rights" – would constitute a taking under the Nevada Constitution. The takings clause of the Nevada Constitution provides: "Private property shall not be taken for public use without just compensation having first been made, or secured." Nev. Const., art. I, § 8(6). In construing the meaning of this provision, this Court has often cited and followed federal cases interpreting the nearly identical takings clause in the United States Constitution. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661-62, 137 P.3d 1110, 1167 (2006).

As an initial matter, it bears emphasis that the Ninth Circuit's framing of the question mistakenly seems to presuppose a "taking" or "abrogation" of some vested water right if water is allocated from a decreed user to Walker Lake. But the nature of the appropriative right is itself contingent and contextual. It is essentially limited by notions of "beneficial use," *Application of Fillipini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949), reasonable use, NRS 533.070 (2017), and the imperative

not to waste water, *Barnes v. Sabron*, 10 Nev. 217, 244, 246 (1875), and other concepts of prior appropriation. These concepts all recognize collective values in water and that context always matters. The application of these concepts or the public trust doctrine to ensure that the public's interest in Walker Lake is protected is not so much a reallocation of water rights as the expression of their essential limitations in light of the changing context. *See* Eric Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan. L. Rev. 1529, 1541-42 (1989) (describing accommodation and temporal dynamism in water law); Robin Kundis Craig, *Drought and Public Necessity: Can a Common-Law "Stick" Increase Flexibility in Western Water Law?*, 6 Tex. A&M L. Rev. 401, 424 (2018 forthcoming) (describing the contextual and contingent nature of prior appropriation rights).

Further, the question of whether ensuring water for Walker Lake constitutes a taking is simply not suitable for this Court's determination in the factual vacuum at this stage in the case, which is akin to a facial challenge to the constitutionality of a statute. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) (declining to decide takings assertion when the "claim arose in the context of a facial challenge, [and] it presented no concrete controversy concerning . . . [the statute's] effect on any specific parcels of land."). Even if this Court holds that the public trust doctrine can be applied to limit the exercise of

appropriative rights, the precise impact of such a holding on any particular water users cannot be known until the Decree Court completes the process of applying the public trust doctrine to water rights in the Walker River basin. As noted above, the Decree Court could determine, in its public trust review, that certain water rights could be exercised in a manner that preserves much or all of their economic value while still providing for sufficient flows to protect trust values in Walker Lake.

Nonetheless, the Court could determine categorically, as a matter of law, that the application of the public trust doctrine by the Decree Court would not effect a taking, even if such a ruling later results in the adjustment of appropriative rights. As described below, there are good reasons to do so.

**1. Because the Public Trust Doctrine Places an Inherent Limit on Nevada's Authority to Recognize Rights to use Water and a Background Principle of Property Law, its Application in this Case Cannot Effect a Taking.**

Assuming, arguendo, that the judicial articulation of a constitutional or common law rule limiting the recognition of property could amount to a taking, no taking would result here because the public trust doctrine, as this Court recognized in *Lawrence*, is an inherent limitation on the sovereign authority of the state to create and recognize property interests in water. Accordingly, a decision by this Court, implemented by the Decree Court, to ensure water is available for Walker

Lake under the public trust doctrine would not eliminate any property right held by appropriators. It would merely clarify that appropriators' rights – and the state's authority to recognize and enforce those rights – have always been so limited in order to protect resources that belong to the public.

The United States Supreme Court has long recognized that governmental actions that express limitations on property that, as a matter of state law, are inherent in the property right itself. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). *Lucas* established a categorical rule that a regulation is a taking if it renders property economically "worthless." *Id*. at 1028. It emphasized, however, that, even in such extreme circumstances, no taking would occur if the regulation carried into action limitations that "inhere in the title itself, in the restrictions that the background principles of the State's law of property . . . already place upon . . . ownership." *Id*. at 1029. The court offered further explanation by citing two examples of common law nuisance. The use of land 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." *Id*. at 1030 (emphasis supplied). The court has subsequently noted that "public trust" principles, like common law nuisance, are background principles that constitute inherent limitations in property, and that judicial pronouncements that

apply them are not takings. *See Stop the Beach Renoursihment, Inc. v. Fla. Dep't of Envtl. Protection* , 560 U.S. 702, 731 (2010) (addressing the filling of submerged land owned by the state in trust for the public).

*Lucas'*s "background principle" notion perfectly describes this case. Appellants are asking this Court to recognize that the public trust doctrine places an inherent limitation on appropriative water rights, one which inheres in the right itself, to ensure that the public's interest in the ecological integrity of the state's navigable waters is not destroyed. This Court decision in *Lawrence* leaves no doubt that the public trust is an inherent limitation on the state's authority to create and recognize property rights and thus on the appropriative water right itself. *See generally Lawrence*, 127 Nev. 390, 254 P.3d 606. A judicial application of the public trust doctrine to prior appropriation rights in a manner that curtails their use would merely make explicit the limitations that have always been inherent in the water right. It would "expressly prohibit[]" no more than what "was always unlawful." *Lucas*, 505 U.S. at 1030.

Holding that no taking can occur by the application of the public trust doctrine would also accord with analogous cases involving the effect of interstate compacts on state-recognized water rights. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 US. 92 (1938), holders of judicially decreed water rights challenged a decision by the Colorado state engineer to curtail water rights

in order to meet the state's obligations to New Mexico under an interstate compact adopted after the adjudication of rights in the stream. The U.S. Supreme Court rejected the due process challenge because "the apportionment [in the compact] is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Id*. at 106. Last year, in *Hill v. State*, 296 Neb. 10, 19-20, 22, 894 N.W. 2d 208, 215, 217 (Neb. 2017), the Supreme Court of Nebraska relied on *Hinderlider* when it held that no taking occurred as a result of state-imposed limits on diversions made to fulfill requirements of an interstate compact entered into after the diversions began. The court reasoned that "the appropriators right to use water is subject to the superior obligation of the state to ensure compliance with the Compact." *Id*. 296 Neb. at 22, 894 N.W.2d at 217; *see also Cappel v. State Dep't of Natural Resources*, 298 Neb. 445, 452-53, 456, 905 N.W.2d 38, 46, 48 (Neb. 2017) (emphasizing the public nature of water in the state). If a subsequent interstate compact can limit water rights without the state owing compensation, certainly this Court can apply the antecedent public trust, a sovereign limit imposed at least since the Nevada Constitution, if not before, without effecting a taking.

Accordingly, this Court should advise the Ninth Circuit that the application of the public trust doctrine to appropriative water rights to ensure the ecological

integrity of Walker Lake does not constitute a taking under the Nevada Constitution.

### 2. No Prior Decision of this Court or the U.S. Supreme Court has Found that Judicial Decisions can Effect Takings, and the Court Should Not Do So Here.

Neither this Court, nor the United States Supreme Court, has ever found that the exercise of judicial authority to adjust the nature of common law rights constitutes a taking. Given serious questions about the validity of the doctrine of judicial takings, the Court should not do so in this abstract context.

The takings clause operates as a limited check on the exercise of state sovereignty to commandeer private property for pubic use. It generally does not prohibit the governmental action, but requires that just compensation be paid if property is taken. State sovereign authority may be applied to take private property either affirmatively, through eminent domain, or inversely, "when the government regulates or physically appropriates an individual's private property." *ASAP Storage v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). The traditional remedy for an inverse taking by physical occupation or regulation is the payment of just compensation.

The theory of "judicial takings" is that decisions of a court, like actions of the legislature or executive, can amount to a taking if they meet otherwise applicable takings standards. This remarkable proposition failed to garner a

majority of the United States Supreme Court and sparked two separate rejoinders in its only case that has addressed it. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection*, 560 U.S. 702 (2010). In that case, only a plurality of four justices joined Justice Scalia's assertion in dicta that a judicial ruling interpreting common law rules of state property could effect a taking. *Id*. at 707, 713-728 (plurality opinion).

The concurrences by Justices Kennedy and Breyer reveal much about the complexity of the theory and raised a litany of "difficult questions" about the validity of the doctrine. *Id*. at 739 (Kennedy, J., concurring, joined by Justice Sotomayor). Justice Breyer voiced caution about the number of cases that might brought by losing parties in state property disputes, as well as affected nonparties, alleging that a judicial determination in a specific case effects a taking. *Id*. at 745 (Breyer, J., concurring, joined by Justice Ginsburg). And he raised the alarm that such a theory applied to the federal Constitution could "open the federal-court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to the state, but not federal judges." *Id*. at 746. Justice Kennedy noted other potential problems, including the nature of the remedy for a judicial taking, *id*. at 740-41 (Kennedy, J., concurring), and the manner in which courts can appropriately review assertions of judicial takings or that affected parties could seek such review. Justice Kennedy further noted that the Due Process

clause provides an appropriate and apparently adequate limit on judicial authority with respect to property rights. *Id*. at 735, 742. These uncertainties counsel caution here, for, in Justice Kennedy's words, "[s]ince this case does not require those questions to be addressed . . . the Court should not reach beyond the necessities of the case to announce a sweeping rule that judicial decisions can be takings." *Id*. at 737.

The theory of judicial takings also raises difficult institutional and separation of powers issues. These include the nature of the remedy for a judicial taking, if such a thing exists. The takings clause was not intended to be a prophylactic limitation on governmental authority. Acts of the sovereign that take property are not forbidden; rather, when (or in the case of the Nevada Constitution, before) such acts take private property, compensation must be paid, in accordance with a judicial finding of taking. As Justice Kennedy points out, "the power to select what property to condemn and the responsibility to ensure that the taking makes financial sense from the State's point of view . . . are matters for the political branches – the legislatures and the executive – not the courts." *Stop the Beach*, 560 U.S. at 735.

Alternatively, if the remedy for a judicial taking is to invalidate the judicial ruling, as Justice Scalia suggests for the plurality, *Stop the Beach*, 560 U.S. at 723, another problem arises from the solution to the separation of powers issue. It is a

core feature of the common-law system that rules of law evolve, through iterative judicial decisions, each discerning, adjusting and applying the law, in light of specific facts and evolving societal conditions. A doctrine of judicial takings would threaten to ossify the common law by imposing a barrier to such judicial adjustment. The common law would lose its ability to evolve though considered judicial determination, and property rules could be adjusted only through legislative action.

For these reasons, this Court should find that a judicial decision applying the public trust doctrine to appropriative water rights cannot effect a taking under the Nevada Constitution.

## CONCLUSION

For the reasons set forth above, this Court should advise the Ninth Circuit that the public trust doctrine applies to the appropriative water rights under the Walker River decree to the extent necessary to ensure the basic integrity of Walker Lake for commercial, recreational and ecological purposes. It should also advise the Ninth Circuit that applying the public trust doctrine for such purposes would not constitute a taking under the Nevada Constitution.

Respectfully submitted this 6th day of December, 2018,

*/s/ Bret C. Birdsong*

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## ATTORNEY'S CERTIFICATE PURSUANT TO RULE 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(2), the typeface requirements of NRAL 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with a 14-point typeface Times New Roman font and is double spaced.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because, excluding the parts of the brief exempted from the word count, it contains 5,697 words.

Finally, I hereby certify that I have read this 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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.

December 6, 2018 __*/s/ Bret C. Birdsong*_____
Bret C. Birdsong

## CERTIFICATE OF SERVICE

I hereby certify that the BRIEF OF *AMICUS CURIAE* LAW PROFESSORS IN SUPPORT OF APPELLANTS was filed electronically with the Nevada Supreme Court on the 6th day of December, 2018. Electronic Service of the BRIEF OF *AMICUS CURIAE* LAW PROFESSORS IN SUPPORT OF APPELLANTS shall be made in accordance with the Master Service List as follows:

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