IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; and WALKER LAKE WORKING GROUP,

Appellants,

vs.

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

Respondents.

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NEVADA STATE ENGINEER'S AMICUS BRIEF

AARON D. FORD
Attorney General
TORI N. SUNDHEIM
Deputy Attorney General
Nevada Bar No. 14156
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1219
E: tsundheim@ag.nv.gov
Attorney for Amicus Curiae,
Nevada State Engineer

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED

Cases

TABLE OF CASES AND AUTHORITIES CITED

Cases

TABLE OF CASES AND AUTHORITIES CITED

Cases

Statutes and Constitutional Provisions

TABLE OF CASES AND AUTHORITIES CITED

Statutes and Constitutional Provisions

Legislative History

State and Federal Acts

TABLE OF CASES AND AUTHORITIES CITED

State and Federal Acts

Agency and Executive Material

Other Authorities

I. STATEMENT OF INTEREST OF THE AMICUS CURIAE

Amicus Curiae, Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources (hereinafter State Engineer), respectfully submits the Nevada State Engineer's Amicus Brief, pursuant to NRAP 29(a).

The Nevada Division of Water Resources (NDWR) is an Agency of the State of Nevada responsible for administering Nevada's water laws. NDWR submits this amicus brief to present NDWR's perspective on the first question certified by the Ninth Circuit Court of Appeals in *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018).

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The public trust doctrine as articulated by this Court in *Lawrence v. Clark County*, is a state-based doctrine that requires the State, when making a dispensation of property it holds in trust for the public, to consider "(1) whether the dispensation was made for a public purpose, (2) whether the state received fair consideration in exchange for the dispensation, and (3) whether the dispensation satisfies 'the state's special obligation to maintain the trust for the use and enjoyment of

present and future generations.'"[1] Application of the public trust doctrine does not conflict with or disturb the law of prior appropriation. The public trust doctrine has not expressly been extended beyond lands beneath navigable waterways in Nevada, yet public trust values have long been acknowledged and incorporated into the administration and management of Nevada's water laws through Nevada's statutory law.

Chapter 533 of the Nevada Revised Statutes (NRS) directs the State Engineer to consider and incorporate public trust values through the public interest in water allocation decisions. As Nevadans' priorities and values evolve over time, Nevada's water laws have expressly responded to accommodate these evolving priorities and values.

Application of a higher public trust value in excess of the public interest values already incorporated into Nevada's water law should not retroactively reallocate existing property interests in the use of water, as "the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division

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[1] *Lawrence v. Clark Cnty.*, 127 Nev. 390, 405, 254 P.3d 606, 616 (2011).

of the public waters will be seriously jeopardized."[2] To the extent arguments are made that the law should provide something else, or that the prior appropriation doctrine cannot "solve the modern demands for water across our arid state," it is "the legislature—not this court—[that] must signal a departure from such long-recognized Nevada water policy."[3]

Accordingly, NDWR asserts that, since their inception, Nevada's water laws have reflected the public's values in the appropriation and use of the waters. While all water in the state belongs to the public, and thus is held in trust, the appropriation of the use of the water must be for a beneficial purpose. Accordingly, in addressing the first certified question, it would be appropriate for this Court to state with certainty that Nevada's water laws already reflect and incorporate the public trust values in the appropriation, use and management of the State's water resources.

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[2] *U.S. v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968).

[3] *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 749, 918 P.2d 697, 701 (1996) (hereinafter "*Honey Lake*" case).

III. PROCEDURAL HISTORY

Uses of the waters to the Walker River and its tributaries have been the subject of contention since before Nevada became a state. Litigation over the Walker River originated in the 1902 case *Miller & Lux v. Rickley*, 127 F. 573 (C.C.D. Nev. 1904).[4] The United States initiated a decree action of all claims to the Walker River and its tributaries before the United States District Court of the District of Nevada to satisfy federal reserve claims to Walker River and its tributaries, or *Winters*[5] rights claims, on behalf of the Walker River Paiute Tribe.[6] The federal district court issued the final decree in 1936, which was subsequently amended by the Ninth Circuit Court of Appeals in 1939.[7]

Since the Walker River Decree (the Decree) became final, it has served as the formal and settled determination of surface water rights to the Walker River and its tributaries. Claimants may only seek modifications to a decree within a reasonable period of time, subject to

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[4] *See* a*lso Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910) (The Nevada federal court has prior, exclusive jurisdiction, over appropriations claims to the Walker River).

[5] *See Winters v. U.S.*, 207 U.S. 564 (1908).

[6] *See U.S. v. Walker River Irr. Dist.*, 11 F. Supp. 158, 159 (D. Nev. 1935).

[7] *U.S. v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939).

basic statutes of limitation laws.[8] Despite this clear legal requirement, on October 25, 1994, nearly 60 years after the Decree was finalized, Mineral County and the Walker Lake Working Group (collectively Mineral County) sought to intervene in the United States District Court proceedings regarding claims of the Walker River Paiute Tribe.

Mineral County, through its motion to intervene, asserts that Walker Lake is held in trust by the State of Nevada, and that pursuant to the public trust doctrine, the Decree should be amended to secure a minimum delivery of water to Walker Lake.[9] Mineral County also seeks an appropriation of water to maintain a minimum lake elevation and to recognize that such is "required under the doctrine of maintenance of the public trust."[10] Mineral County further is pursuing an order requiring the State of Nevada to grant it a new water right certificate.[11]

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[8] *See generally* NRS Chapter 11, enacted by the Civil Practice Act of 1911, NCL § 8503, *et seq.*; *see also City of Sherrill, New York. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (Indian tribe barred from asserting sovereign dominion over land according to equitable considerations of laches, acquiescence, and impossibility).

[9] *U.S. v. Walker River Irr. Dist.*, No. 3:73-cv-00128-RCJ, 2015 WL 3439122, at *3 (D. Nev. May 28, 2015), *rev'd in part sub nom., Mono Cnty. v. Walker River Irr. Dist.*, 735 F. Appx. 271 (9th Cir. 2018).

[10] *Id.*

[11] *Id.*

The United States District Court granted Mineral County's intervention, yet on June 26, 2000, Mineral County filed a petition for writ of mandamus and writ of prohibition before this Court seeking an order requiring that the State of Nevada:

> [C]ease issuing water rights in the Walker River system, and to fulfill their affirmative and mandatory public trust obligation to manage the water of the Walker River system in a manner which ensures that flows reaching Walker Lake will be adequate to sustain the lake's public trust uses, including fisheries, recreation, and wildlife habitat.[12]

Mineral County further seeks an order requiring the State of Nevada to "reconsider past allocation and management decisions in the Walker River Basin to halt and reverse the ongoing, substantial impairment of Walker Lake and its public trust uses."[13]

Mineral County's writ petition was dismissed on the basis that "the federal court is the proper forum in which to resolve [the] dispute." This Court explained that, because the United States District Court was the first court to assume jurisdiction over the determination of the relative

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[12] Petition at 1; *Mineral Cnty. v. State, Dep't of Conservation & Nat'l Res.*, 117 Nev. 235, 20 P.3d 800 (2001) (No. 00-10926).

[13] *Id.*

rights to water from the Walker River, it was "entitled to maintain continuing and exclusive jurisdiction."[14]

On May 28, 2015, the United States District Court dismissed Mineral County's public trust action, finding that Mineral County lacked standing to assert the public trust doctrine, and that the "public trust doctrine does not contemplate retroactive re-prioritization."[15] Mineral County appealed the May 2015 decision to the Ninth Circuit Court of Appeals, which certified the two issues presented to this Court.[16]

IV. STATEMENT OF FACTS

A. Development of Nevada Water Law

Nevada, like many other western states, follows the doctrine of prior appropriation.[17] The common law doctrine of prior appropriation, which pre-dates statehood, is the manner by which Nevada manages its

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[14] *Id.* at 244, 20 P.3d at 806.

[15] *Walker River Irr. Dist.*, No. 3:73-cv-00128-RCJ, 2015 WL 3439122, at *10.

[16] *Mineral Cnty.*, 900 F.3d at 1034; *see also Mono Cnty.*, 735 F. Appx. at 271.

[17] The doctrine of prior appropriation assigns a priority to those who first place water to a beneficial use. *U.S. v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 598 (9th Cir. 2018). Later in time uses are only entitled to their use once senior uses have been fully satisfied. *Id.* Thus, the date of use, or priority, establishes the succession of uses. *Id.*

scarce water resources.[18] The prior appropriation doctrine was codified into Nevada's water laws with the establishment of the Office of the State Engineer in 1903.[19] By enacting a statutory appropriative process, the Nevada Legislature expressly replaced the common law. However, Nevada's water statutes acknowledged and ratified existing common law appropriations, or vested claims, in Nevada. The statute declared these vested claims to be in the public interest and incorporated them into the administration and management of Nevada's water resources through the organization of the Office of the State Engineer.[20]

The Nevada Legislature adopted a permit-based appropriative process to secure a water right in 1905, ending the common law manner of appropriation by application of water to beneficial use.[21] The 1905 law

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[18] *See Jones v. Adams*, 19 Nev. 78, 6 P. 442 (1885) (expressly finding that Nevada observes the doctrine of prior appropriation).

[19] Irrigation Law of Feb. 16, 1903, ch. 4, § 3, 1903 Nev. Stat. 25, *repealed by* Act of Feb. 26, 1907, ch. 18, § 32, 1907 Nev. Stat. 38.

[20] *Id.* at ch. 4, § 8, 1903 Nev. Stat. 21 ("That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the . . . control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . ."); *See also id.* at ch. 4, § 1, 1903 Nev. Stat. 21–22 ("the use of all water now appropriated, or that may hereafter be appropriated is hereby declared to be a public use.").

[21] Act of Mar. 1, 1905, ch. 46, 1905 Nev. Stat. 66, *repealed by* Act of Feb. 26, 1907, ch. 18, § 32, 1907 Nev. Stat. 38.

included a mandate that the State Engineer consider the "public welfare" prior to granting a permit to appropriate water.[22]

In 1913, Nevada adopted its first comprehensive water law governing the appropriation of both surface water and artesian underground sources of water.[23] The 1913 law also established the requirement that the State Engineer consider the public welfare and public interest when acting on an application to appropriate water.[24] While Nevada's water laws have been regularly amended over the past 100 years, the mandate that the State Engineer consider the public interest when acting on an application to appropriate water has remained.[25]

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[22] *Id.*

[23] Act of 1913, ch. 140, 1913 Nev. Stat. 192 (repealed and replaced, with few changes, prior water laws to create a comprehensive water law in Nevada).

[24] *Id.* at ch. 140, § 63, 1913 Nev. Stat. 211 ("It shall be the duty of the [S]tate [E]ngineer to approve all applications . . . where the proposed use or change . . . does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where there is no unappropriated water . . . or where its proposed use or change . . . threatens to prove detrimental to the public interests, it shall be the duty of the [S]tate [E]ngineer to reject said application and refuse to issue the permit asked for."); *see also* NRS 533.370(2).

[25] NRS 533.370(2).

1. Pre-Statutory Water Rights

Vested claims represent appropriations by early settlers on the public domain whose beneficial use of water predates Nevada's 1913 water statutes. These claims are recognized by the State Engineer as vested water rights with a priority senior to all statutorily appropriated water rights.[26] These acts of settlement were later codified through legislation by Congress.[27] Congress recognized appropriations of water on the public range for various beneficial uses, including agriculture, which had only been tacitly recognized before.[28] Vested claims are adjudicated in a final decree through a process of reviewing the evidence of historical water use by the claimant.[29] A decreed water right confirms

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[26] *Jackson v. Groenendyke*, 132 Nev. Adv. Op. 25, 369 P.3d 362, 366 (2016) (Vested water rights are "water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation.").

[27] Desert Land Act of 1877, 43 U.S.C. § 321.

[28] Mining Act of Jul. 26, 1866, 39 Cong. Ch. 262, 14 Stat. 251, § 9; Homestead Act of May 20, 1862, 37 Cong. Ch. 75, 12 Stat. 392; Desert Land Act of 1877, 43 U.S.C. § 321; Desert-Land Entries Act of 1964, 43 U.S.C. § 321, *et seq.*

[29] *See generally* NRS 533.087–NRS 533.320 (adjudication of vested water rights).

the priority, diversion rate or quantity of water, and place of use demonstrated by the claimant.[30]

Nevada law provides special protections to pre-statutory rights, stating that nothing within the water laws "shall impair the vested right of any person to the use of water."[31] The priority date of a vested right is established by the year in which a water source was initially diverted and beneficially used. For pre-statutory claims to surface water, water must have been diverted and beneficially used prior to March 1, 1905.[32] Pre-statutory claims to artesian underground sources must have been diverted and beneficially used prior to March 22, 1913; and prior to March 25, 1939 for percolating underground sources.[33]

2. Statutory Water Rights

The Nevada Legislature provided a statutory process for the appropriation of water rights within the state when it adopted Nevada's

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[30] *Id.*

[31] NRS 533.085; *see also* Act of Feb. 26, 1907, ch. 18, § 25, 1907 Nev. Stat. 36 ("But vested rights to the use of such waters shall in nowise be lost, prejudiced or impaired").

[32] *Supra*, fn. 21 at ch. 46, § 25, 1905 Nev. Stat. 66.

[33] *Supra*, fn. 23; Nevada's Underground Water Act of 1939, ch. 178, 1939 Nev. Stat. 139.

water laws in 1905.[34] These laws established an appropriation process that begins with an application, followed by the issuance of a permit, and—upon demonstration that the terms of the permit were satisfied and water applied to its permitted beneficial use—the issuance of a certificate.[35] The Legislature directed the State Engineer to make certain considerations when deciding whether to issue a permit to appropriate water, and requires the State Engineer to deny the application if the use proves detrimental to the public interest.[36]

B. The Walker River Basin and Decree

The Walker River Basin encompasses approximately 4,050 square miles and consists of two forks, the East Walker and West Walker Rivers both originating in the Sierra Nevada Mountain Range of California.[37] The two forks of the Walker River converge near Yerington, Nevada, and the river then continues through the Walker River Paiute Indian Reservation to its terminus, Walker Lake, near Hawthorne, Nevada.[38]

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[34] *See generally* NRS 533.324–NRS 533.435 (appropriation of public waters).

[35] *Id.*

[36] *See* NRS 533.370(2).

[37] *Mineral Cnty.*, 117 Nev. at 237–38, 20 P.3d at 801–02 (concurring opinion).

[38] *Id.*

The Decree is the result of the final adjudication of vested claims to waters of the Walker River and its tributaries. As discussed above, the rights of each of the appropriators to the Walker River and its tributaries were determined pursuant to the Decree before the United States Federal District Court for Nevada.[39] The Decree was amended in 1939.[40] While the Decree was brought before the Federal District Court, Nevada retains its sovereign jurisdiction to manage the waters of the State pursuant to NRS Chapters 533 and 534.[41]

The Decree, like all water decrees, provided certainty to water users regarding the legal entitlement to river flows subject to the river flow and priority of their water rights.[42] A prior decree is binding on all water

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[39] *U.S. v. Walker River Irr. Dist.*, 14 F. Supp. 10 (D. Nev. 1936).

[40] *U.S. v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939).

[41] *See Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939); *see also Walker River Irr. Dist.,* 14 F. Supp. at 10; *see*, *e.g.*, *Pacific Live Stock Co. v. Malone*, 53 Nev. 118, 294 P. 538 (1931) (The State Engineer acts as an officer of the court and is responsible for administering and enforcing adjudication decrees); *see also McCormick v. Sixth Jud. Dist. Ct. in and for Humboldt Cnty.*, 69 Nev. 214, 246 P.2d 805 (1952) (the State Engineer is available to the District Court to administer distribution of waters under a final decree).

[42] *See, e.g.*, *Nevada v. U.S.*, 463 U.S. 110, 124 (1983) (principles of res judicata prevent the Government from partially undoing a decree, and the United States "Government is not at liberty to simply reallocate water rights decreed to the Reservation and the Irrigation Project as if it owned those rights.").

users in the basin, and decreed rights holders "and their successors can rely on the decree."[43] Indeed, the entire purpose of settling water rights is to secure the many investments required for their use.[44] It was this very certainty, through the Decree, that facilitated the long-standing development of the Smith and Mason Valleys in Nevada as well as the Walker River Paiute Tribe.

C. The Walker Basin Restoration Program

Walker Lake has historically supported Lahontan cutthroat trout and other native fish populations.[45] However, because Walker Lake is a terminal lake, coupled with decreased flows due to upstream uses, Walker Lake has lost 80 percent of its volume and has had a five-fold increase in salinity, which has impaired the ability of the lake to support a viable fishery.[46]

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[43] *Id.*

[44] *See, e.g., Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. 770, 191 P.3d 1189 (2008) (water rights may be used as security interests for bank loans; they are freely alienable property interests that must be deeded and recorded).

[45] *See, e.g.*, 35 Fed. Reg. 16,047 (Oct. 13, 1970); 40 Fed. Reg. 29,863 (Jul. 16, 1975); 73 Fed. Reg. 52,257, 52,258 (Sept. 9, 2008).

[46] *See* Desert Research Institute, The Walker Basin, Nevada and California: Physical Environment, Hydrology and Biology 7 (2008), https://www.dri.edu/images/stories/editors/deeseditor/DEESdocs/Walker_River_Report_final_2008.pdf (last visited Jan. 14, 2019).

Congress enacted the Walker Basin Restoration Program (the Restoration Program) in order to restore the Walker River riparian and watershed and its tributaries, including Walker Lake.[47] The National Fish and Wildlife Foundation (NFWF)[48] administers the Restoration Program which, among other restoration activities, includes funding for the purchase of water rights "from willing sellers of land, water appurtenant to land, and related interests in the Walker River Basin, Nevada . . . ."[49] To date, the Restoration Program has acquired 40 percent of the water rights needed to restore Walker Lake:

> [M]ore than 98 cubic feet per second of natural flow decree water rights, 11,760 acre feet of storage water rights, 13,380 acre feet of groundwater rights, and over 15,700 acres of land from willing sellers. . . In addition, the program have [sic] expended nearly $21.8 million through

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[47] P.L. 107-171 § 2507, 16 U.S.C. § 3839bb-6 (2002) (in 2002, Congress appropriated funds "to provide water to at-risk natural desert terminal lakes"); *Id*. (in 2003, the Pyramid, Summit and Walker lakes in Nevada became eligible for funding); P.L. 109-103 § 208, 43 U.S.C. § 2211 (2005) (Congress passed "The Desert Terminal Lakes Program"); P.L. 111-85 § 207-8, 123 Stat. 2858, 43 U.S.C. § 2211 (2009) (in 2009, Congress passed the "Walker Basin Restoration Program").

[48] NFWF is an independent nonprofit organization.

[49] *See, e.g.*, Walker Basin Restoration Program, National Fish and Wildlife Foundation, https://www.nfwf.org/walkerbasin/Pages/home.aspx (last visited Jan. 7, 2019); *see also* Walker Basin Restoration Program, Walker Basin Conservancy, https://www.walkerbasin.org/wbrp/ (last visited Jan. 7, 2019); *see also* 72 Fed. Reg. 54,285 (Sept. 24, 2007).

> grants for research, conservation and stewardship, improved water management, and voluntary water forbearance agreements with willing landowners, businesses, public entities and private organizations in the Walker River Basin.[50]

Thus, through the Restoration Program, water rights are being acquired from upstream uses. Within Nevada's statutory process, these water rights are being changed for the benefit of Walker Lake, to restore the fishery, and revive the recreational history of Walker Lake.

V. ARGUMENT

This Court should look to Nevada's history and laws to determine the scope of Nevada's public trust doctrine. The public trust doctrine is first and foremost a state-based doctrine.[51] Just as the United States Supreme Court severed water from the public domain and affirmed state-specific water rights paradigms in *California Oregon Power Company*, it also left "the administration and disposition of the sovereign rights in navigable waters, and in the soil under them . . . to the sovereign control of each state."[52] Nevada must therefore define the public trust

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[50] *Id.*

[51] *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1982); *Lawrence v. Clark Cnty.*, 127 Nev. Adv. Op. 290, 394, 254 P.3d 606, 609.

[52] *Shively v. Bowlby*, 152 U.S. 1, 55 (1894); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 165 (1935) (The

doctrine "within its borders according to its own views of justice and policy."[53]

A. History of the Public Trust Doctrine in Nevada

The public trust doctrine, which finds its roots in Roman law, was developed in the United States to assure that, as states were admitted to the Union, their admission was on an "equal footing" with other states, including title to the navigable waters and lands underneath those waters.[54] In defining a state's trust obligations under the public trust doctrine, the *Illinois Central Railroad* Court found that the public trust applies to bed and banks underlying navigable waterways, and that a state may not divest itself of control over the trust property, "except as to such parcels as are used in promoting the interests of the public therein."[55] The public trust doctrine does not impede the state's authority

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Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself," and "the public interest in such state control in the arid land states is definite and substantial.").

[53] *Id.* at 26; *see also Lawrence*, 127 Nev. at 394, 254 P.3d at 609, *citing Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842) ("the people of each state . . . hold the absolute right to all their navigable waters and the soils under them for their own common use.").

[54] *See Illinois Cent. R.R. Co.*, 146 U.S. at 434.

[55] *Id.* at 453.

to distribute the waters of the state for public purposes, or the property rights that result from that distribution.[56]

Nevada formally adopted the public trust doctrine and applied it to submerged lands underlying navigable waterways in *Lawrence v. Clark County*.[57] Establishing an explicit adoption of the public trust doctrine, the *Lawrence* Court set forth Nevada's public trust doctrine framework. The Court recognized that the state could, under certain circumstances, "alienate public trust lands without breaking the public trust" so long as the alienation was in the public interest.[58] Further defining the public trust doctrine, the *Lawrence* Court found that it was the Nevada Legislature that had the responsibility to "act as a fiduciary of the public in its administration of trust property" and that such was an "inseverable restraint[] on the state's sovereign power."[59] The *Lawrence* Court concluded that the application of the public trust doctrine in Nevada is

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[56] *Ormsby Cnty. v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

[57] L*awrence*, 127 Nev. at 406, 254 P.3d at 616 ("We expressly adopt the public trust doctrine in Nevada.").

[58] *Id.* at 396, 245 P.3d at 610.

[59] *Id.* at 398–99, 254 P.3d at 611–12.

founded upon the policies established in the state constitution and statutes.[60]

B. Application of Nevada's Public Trust Doctrine

Nevada's public trust doctrine does not prohibit transfer of public trust property.[61] The *Lawrence* Court equates the public trust doctrine to Nevada's Constitutional gift clause, which prevents private usurpation of public resources.[62] The test is whether the public received a benefit as part of the transaction, rather than whether a private party received an incidental benefit.[63]

Therefore, the public trust doctrine as it exists in Nevada ensures that decisions regarding public trust resources are made in the public's interest.[64] The *Lawrence* Court's definition of limitations upon the property is left to the legislature. The Court stated, "when the Legislature has found that a given dispensation is in the public's interest,

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[60] *Id.*

[61] *Id.*

[62] Nev. Const. art. VIII, § 9 ("The State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes."). *See also* 25 Nev. Op. Att'y Gen. (1995).

[63] *Lawrence*, 127 Nev. at 399, 254 P.3d at 612.

[64] *Id.*

it will be afforded deference."[65] Accordingly, the Court properly looks to the Legislature to identify public trust values and considerations, in particular those that constrain alienation of public trust property.[66] The Court's review serves to ensure that the state does not abrogate its fiduciary duty in maintaining the trust for the public benefit. This duty is fulfilled so long as the divestment of ownership is in the public interest.[67]

C. Nevada's Water Law Incorporates Nevada's Public Trust Doctrine Considerations

Nevada's statutory water laws incorporate the principles underpinning Nevada's public trust doctrine. The doctrine of prior appropriation, both under common law and statute, establishes the manner in which the State may divest the public's interests in water. One critical factor, which applies to all water appropriations, is the prerequisite that any divestment of the public trust serve a beneficial

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[65] *Id.* at 406, 254 P.3d at 617.
[66] *Id.*
[67] *Id.*

use.[68] If beneficial use is not established, then there is no legal entitlement to the use of the water.[69] There are severe penalties for taking water without a right in Nevada.[70] Because all appropriations are subject to the beneficial use standard, the state, via the State Engineer, exercises its lawful discretion in determining how water may best serve the interests of the public.

The Nevada Legislature has afforded the State Engineer broad discretion to determine what constitutes the "public interest" when addressing the appropriation of water rights.[71] This discretion allows for public interest priorities and values to change over time.[72] Certain considerations have been explicitly set forth in statute; but ultimately, it is appropriate and proper for "public interest" priorities that are subject to change be left to the discretion of the State Engineer to respond as appropriate to those evolving societal priorities.

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[68] Beneficial use establishes the constraints on a water right and is defined as "the basis, measure and the limit of the right to the use of water." NRS 533.035.

[69] *Id.*

[70] *See generally* NRS 533.460, *et seq.*; NRS 534.190, *et seq*.

[71] *See generally Honey Lake*, 112 Nev. at 743, 918 P.2d at 697.

[72] *See, e.g., State v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988) (grant of water appropriation rights in situ to United States to benefit a natural lake for public recreation purposes was in the public interest).

The Nevada Legislature reinforced its decision to afford the State Engineer discretion when it considered establishing specific criteria used for defining the public interest.[73] It elected to do so after establishing an interim water study specially convened for this purpose.[74] The Interim Water Study committee ultimately concluded that legislation would not be able to "address specific public interest concerns [and] the committee did not see the need to establish strict and comprehensive public interest criteria in Nevada's statutes."[75]

In the *Honey Lake* case, this Court confirmed that the State Engineer properly defined the meaning of "the public interest" within his authority under NRS 533.370(3).[76] The Court held the State Engineer's "thirteen guidelines adequately defined the public interest."[77] This

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[73] S.B. 327, 1993 Leg., 67th Sess. (Nv. 1993) ("Establishes guidelines for determinations by state engineer of 'public interest' under water law.")

[74] Hearing on S.B. 327 Before the S. Comm. on Nat. Res., 1993 Leg., 67th Sess. 3 (May 17, 1993) (statement of Senator Mark A. James) ("a major function of the interim study would be to clarify the definition of 'public interest' as it pertains to water law."); *see also* Bulletin No. 95-4 Study of the Use, Allocation and Management of Water, Legislative Commission of the Legislative Counsel Bureau, State of Nevada 22 (Dec. 1994).

[75] Hearing on S.B. 327 Before the S. Comm. on Nat. Res., 1993 Leg., 67th Sess. at 23.

[76] *Honey Lake*, 112 Nev. at 748, 918 P.2d at 700.

[77] *Id.*

holding established that public interest priorities and values evolve over time.

In *Honey Lake*, the State Engineer identified 13 guidelines derived from Nevada's water statutes (NRS Chapters 533, 534 and 540) to be considered when evaluating the "public interest":

> 1. The water of all sources above or beneath the ground belongs to the public. NRS 533.025.
> 2. Subject to existing rights, all such water may be appropriated for beneficial use as provided for in Nevada's water laws. NRS 533.050.
> 3. The beneficial use of water is declared a public use. *Id*.
> 4. The Legislature has determined that it is the policy of the State of Nevada to continue to recognize the critical nature of the state's limited water resources. It is acknowledged that many of the state's surface water resources are committed to existing uses under existing water rights, and that in many areas of the state the available ground-water supplies have been appropriated for current uses. It is the policy of the State of Nevada to recognize and provide for the protection of existing water rights. It is also the policy of the state to encourage efficient and non-wasteful use of the state's limited supplies of water resources. NRS 540.011(1).
> 5. The Legislature recognizes the relationship between the critical nature of the state's limited water resources and the increasing demands placed on these resources as the

population of the state continues to grow. NRS 540.011(2).

6. The Legislature recognizes the use of water for wildlife, including the establishment and maintenance of wetlands and fisheries. NRS 533.023.
7. Springs on which wildlife customarily subsist must be protected. NRS 533.367.
8. The Legislature encourages the use of effluent where such use is not contrary to public health, safety or welfare. NRS 533.024.
9. Water for recreational purposes from either underground or surface sources is declared to be a beneficial use. NRS 533.030(2).
10. Livestock watering is declared to be a beneficial use. NRS 533.490(1).
11. Springs and streams on which livestock subsist must be protected. NRS 533.495.
12. The law addresses not allowing the waste of water and allowing rotation among users. NRS 533.075, 533.530(1).
13. The law prohibits the pollution and contamination of underground water and directs the State Engineer to promulgate rules to prevent such. NRS 534.020(2).[78]

Further, the State Engineer identified an additional list of principles set forth in Nevada law that assist in evaluating the public interest.[79] In addition to the 13 criteria upheld in *Honey Lake*, as well as

[78] *Honey Lak*e, 112 Nev. at 746, 918 P.2d at 699.

[79] The State Engineer has previously identified 13 additional principles, including but not limited to, a finding of beneficial use (NRS 533.370), the magnitude of the use (NRS 533.340), financial ability

the State Engineer's list of principles, the Nevada Legislature has added further statutory elements that NDWR may look to for guidance when considering the "public interest." This includes the adoption of NRS 533.370(3) relating to the interbasin transfer of water, under which the State Engineer is required to consider the following:

> (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.[80]

Therefore, the current law governing the State Engineer clearly directs him to consider the public's interest in Nevada's natural water

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to construct the project (NRS 533.375), whether a groundwater source is over-pumped (NRS 534.110(3)). *See, e.g.*, State Engineer Ruling No. 6454 at pp. 8–13 (Dec. 26, 2018), http://intranet/images/rulings/6454r.pdf (last visited Jan. 22, 2019).

[80] NRS 533.370(3).

resources. As stated by Justice Rose in his concurrence in *Mineral County*:

> If the current law governing the [State Engineer] does not clearly direct [him] to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate . . . to expressly reaffirm the [State Engineer's] continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not "substantially impair the public interests in the lands and waters remaining."[81]

Nevada water law already incorporates public trust doctrine principles, which have evolved with society's priorities.[82] Because the Legislature and this Court have addressed the public interest factors that must be balanced with respect to water rights, it is appropriate for the Court to conclude that those considerations satisfy Nevada's public trust principles. This Court should continue to afford deference to the legislative body in making the policy determinations as to what reflects

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[81] *Mineral Cnty.*, 117 Nev. at 248, 20 P.3d at 808 (*citing Illinois Cent. R.R. Co.*, 146 U.S. at 452).

[82] The addition of wildlife habitat, water for wildlife and recreation as beneficial uses of water reflects the Nevada Legislature's directive to the NDWR to consider society's evolving priorities. *See* NRS 533.023, NRS 533.030(2), and NRS 533.367.

society's public interest values.[83] It is also proper to defer to the Nevada Legislature to determine the balance between those public interests, including maximizing the economic benefit from the use of water.[84]

D. Water Right Appropriations May Not Be Reallocated

In Nevada, a water right "is regarded and protected as real property."[85] It is well established that the Nevada Legislature may properly establish the means to convey title to the beneficial use of water and grant it as a private property right, subject to a takings claim.[86] Indeed, inherent in the law of prior appropriation, "[t]he meaning of the

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[83] *Lawrence*, 127 Nev. at 406, 254 P.3d at 617.

[84] *See, e.g.*, *Application of Dan Filippini*, 66 Nev. 17, 29, 202 P.2d 535, 541 (Nev. 1949) (*quoting Ormsby Cnty. v. Kearney*, 37 Nev. 314, 142 P. 803, 805 (1914)) ("[t]he public welfare is very greatly interested in the largest economical use of the waters of the state for agricultural, mining, power and other purposes.").

[85] *Carson City v. Lompa's Estate*, 88 Nev. 541, 501 P.2d 662 (1972); *see also Vineyard Land & Stock Co. v. Dist. Ct. of Fourth Jud. Dist. of Nevada in and for Elko Cnty.*, 42 Nev. 1, 171 P. 166 (1918) (water rights holders retain due process interests under Nevada's takings clause).

[86] *Application of Filippini*, 66 Nev. 17 at 27, 202 P.2d 535 at 540; *see also Town of Eureka v. Office of State Eng'r of State of Nevada, Div. of Water Res.*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992) (as the owner of all water in Nevada, the State has the right to prescribe how water may be used); *See also California Oregon Power Co.*, 295 U.S. at 158, 165.

word 'appropriation' . . . is an acquisition of a right to use unappropriated water from the government."[87]

Nevada's Constitution contains a series of checks and balances. The takings clause allows the State the absolute right to purchase, or buy back, already-distributed property to maintain the desired balance between free enterprise and government functions.[88] However, the clause also recognizes the need to compensate property owners and clearly states "[p]rivate property shall not be taken for public use without just compensation having been first made."[89]

It is for this reason that "the legislature cannot constitutionally enact laws *impairing* rights already in existence."[90] A water right cannot be impaired or revoked in any manner other than what is prescribed by statute.[91] A water right holder is entitled to the beneficial use of water,

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[87] *Application of Filippini*, 66 Nev. at 24, 202 P.2d at 538.

[88] Nev. Const. art. I, § 8(6).

[89] *Id.*

[90] *Application of Filippini*, 66 Nev. at 30, 202 P.2d at 541. *See also* Fred W. Welden, History of Water Law in Nevada and the Western States, Legislative Counsel Bureau 4 (Jan. 2003), https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP03-02.pdf (last visited Jan. 22, 2019).

[91] *Application of Filippini*, 66 Nev. at 27, 202 P.2d at 540.

subject only to existing senior rights.[92] Any restriction other than what is provided by statute or under the terms of the permit will likely impair rights already in existence. The relief requested by Mineral County is simply not provided for in the law in Nevada, and certainly is not consistent with the finality of water rights that were appropriated with consideration of the public interest.[93]

E. Only Those States That Follow the Law of Prior Appropriation Afford Reasonable Comparisons

Moreover, no western state adhering to the doctrine of prior appropriation has used the public trust doctrine to retroactively reallocate settled water rights. As stated in the *Honey Lake* case, there is "no indication that Nevada's Legislature intended that the State Engineer determine public policy in Nevada by incorporating another state's statutes . . ." to analyze the public interest.[94] However, should this

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[92] NRS 534.090(2)(c).

[93] *See, supra*, fn. 42.

[94] *Honey Lake*, 112 Nev. at 749, 918 P.2d at 700 (referencing Idaho's public interest considerations).

Court look to other states, only those states that also follow strict prior appropriation afford reasonable comparisons.[95]

Like Nevada, Colorado's water appropriation statutes observe a strict prior appropriation, not a hybrid, approach as used in California. California's reasonable use doctrine "makes California a 'hybrid' riparian/prior appropriation state."[96] When addressing the application of the public trust doctrine within Colorado water law, Colorado rejected the analysis in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 446, 658 P.2d 709 (1983), as inapplicable to Colorado law.[97] It held California's reasonable use doctrine "has never been the law in Colorado's 'pure' prior appropriation system."[98] In fact, Colorado rejected the use of the "public trust theory to resolve the issue of recreational use of the public's water resources" altogether, as it "improperly lumps land and

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[95] *Lawrence*, 127 Nev. at 404, 254 P.3d at 615 (*citing Arizona Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158, 170 (App. 1991)) ("Arizona's approach is instructive because it faces many of the same challenges that this state faces in maintaining its public trust property, given its arid desert climate and rapidly expanding urban population.").

[96] *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 573, 2012 CO 25, ¶ 40 (2012).

[97] *Id.*

[98] *Id.*

water interests together in derogation of the historical and doctrinal framework of public trust law."[99] Idaho, also a strict prior appropriation state, adopted a statute declaring that its law of prior appropriation satisfies the public trust doctrine.[100]

Even California has not extended the application of the public trust doctrine to reach back and reallocate settled rights. Rather, under California's application of the public trust doctrine, it is a "consideration doctrine" that imposes only the duty "to consider the effect of the taking on the public trust."[101] Significantly, California's public trust doctrine recognizes that, "[a]s a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses."[102] It does not "dictate any particular allocation of water."[103] The extent of the doctrine as applied to California's water laws only grants it the *authority* to "protect public trust uses," and even then only "whenever feasible".[104]

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[99] *Id.*, 274 P.3d at 572, 2012 CO at ¶ 36.

[100] Idaho Code Ann. § 58-1201.

[101] *Nat'l Audubon Soc'y*, 33 Cal. 3d at 446, 658 P.2d 709.

[102] *Id.*

[103] *Id.* at 452, 658 P.2d at 709.

[104] *Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 862, 237 Cal. Rptr. 3d 393, 404 (Ct. App. 2018) (*citing Nat'l*

Thus, to the extent the Court looks beyond Nevada's own laws to consider the treatment of the public trust doctrine in other states, two conclusions are clearly established. First, other pure prior appropriation states have not imposed considerations in excess of those established by their statutory laws with respect to the appropriation and administration of water rights. And, second, even where the public trust doctrine has been extended to water appropriations, it has not been exercised in a manner that reallocates previously established and appropriated rights.

F. There Will Be Significant Consequences Should the Public Trust Doctrine Supersede Nevada's Existing Water Law

Redefinition of the public trust doctrine by reference to non-statutory factors would have significant statewide implications. Altering the current legal framework established by the Nevada Legislature would significantly affect all surface water decrees and

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Audubon Soc'y, 33 Cal. 3d at 446–47, 658 P.2d at 709); *see also In re Water Use Permit Applications*, 94 Haw. 97, 141, 9 P.3d 409, 453 (2000) ("The state also bears an 'affirmative *duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible'. . . Preliminarily, we note that this duty may not readily translate into substantive results.") (*quoting Nat'l Audubon Soc'y*).

appropriations throughout the State of Nevada. These same effects may arguably extend to groundwater rights throughout Nevada.

Extending the public trust as requested by Mineral County to established water rights would require decree courts and NDWR to re-open final and settled decrees. It could cause redistribution of long-settled water rights as well as reassessment of appropriative rights with a legal interest in diverting water from a particular source of supply. This would result in significant disruption to long-settled expectations regarding each water right holder's interest in their water right, which is a protected real property interest.

Moreover, should the Court impose a different set of considerations, a clearly articulated standard with which to identify the public trust reservation would be required to allow the decree courts and NDWR to determine the measure of water necessary to be reserved for the "public trust." Absent a clearly defined standard, significant disagreement among holders of water rights and other stakeholders will impair NDWR's ability to perform its trust obligations. To otherwise leave the scope and limit of the application of the public trust open to interpretation would interject great uncertainty into NDWR's obligation

to manage Nevada's limited water resources, regardless of the source of supply.

Further, should this Court extend the public trust as requested by Mineral County, it must, respectfully, decide whether the public trust doctrine extends to groundwater resources. In 2017, the Nevada Legislature amended NRS 533.024 to declare as a public policy of the state "[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water."[105] This, in effect, acknowledges the hydrologic connection between surface and groundwater resources.

Extension of the public trust in the manner sought by Mineral County beyond surface water sources will have major impacts on the ability of NDWR to manage groundwater basins, particularly over-appropriated basins. Such an extension would trigger draconian management decisions needed to accommodate new public trust interests.

Accordingly, any application of a newly defined public trust, over the existing public interest considerations within Nevada's water laws

[105] NRS 533.024(1)(e).

would have significant consequences. Those consequences, if determined to constitute the taking of a private property right, would not only disrupt water resource allocation and management, but would also potentially deprive water right holders with protectable property interests of their rights, and could result in significant financial ramifications for the state.

G. The Walker Basin Restoration Program Provides the Requested Relief

As stated by Justice Rose in his concurring opinion in *Mineral County*, "[a] better approach would be to determine if all appropriators can be accommodated by a plan that will save the essentials of everyone's water needs."[106] That is the approach currently in place on the Walker River, obviating the necessity for a major upheaval in existing law. Through the establishment of the Walker Basin Restoration Program, a private-public solution has been developed to acquire water rights to allow for increased flows of freshwater from the Walker River to reach Walker Lake.[107] The Restoration Program seeks to acquire sufficient

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[106] *Mineral Cnty.*, 117 Nev. at 248, 20 P.3d at 808 (concurring opinion).

[107] *See* Walker Basin Restoration Program, https://www.nfwf.org/walkerbasin/Pages/home.aspx (last visited Jan. 2, 2019). *See also* Walker

water rights needed to restore Walker Lake as a sustainable fishery, as well as those needed for habitat for birds and other wildlife, while protecting agricultural, environmental and other interests.[108] Since the initiation of the acquisition program, nearly 100 cubic-feet per second (cfs) of water rights have been acquired from willing sellers for delivery to Walker Lake.[109]

This private solution seeks to restore Walker Lake within the confines of Nevada's water law and the doctrine of prior appropriation. Through the acquisition of privately-owned water rights, the Restoration Program is working to secure sufficient water to achieve the same result that Mineral County seeks by means of the effort to modify the established decree and through a radical modification of Nevada's water law. The Program has thus far been successful, and the water rights transfers are consistent with the public trust doctrine and Nevada's public interests. Therefore, the Restoration Program is accommodating the needs of all appropriations along the Walker River and its tributaries.

Basin Restoration Program Overview, https://www.walkerbasin.org/wbrp/ (last visited Jan. 2, 2019).

[108] *Id.*

[109] *Id.*

It is appropriate for this Court to recognize that there is a private solution to restore Walker Lake that will accomplish Mineral County's ultimate goal. Nevada's water law already recognizes the public interest in supplying water to support wildlife, habitat and other natural resources. Therefore, the existing statutes accommodate public trust values and facilitate private solutions, such as the NFWF Restoration Program, to respond to society's evolving priorities and needs.[110] Mineral County's arguments to the contrary should be rejected.

VI. CONCLUSION

This Court's holdings in *Lawrence* are consistent with the Legislature's decision to grant a private property right to the use of water resources for the benefit of the public.[111] The statutory water law created by the Nevada Legislature was not only necessary for attracting settlers and investors to build Nevada's communities, but also for shaping, and re-shaping, the public values representative of Nevadans' way of life.[112]

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[110] *See, e.g.*, NRS 533.023 (Use of water for wildlife, and the establishment and maintenance of fisheries and wetlands is a beneficial use); NRS 533.030(2) (Recreation is a beneficial use).

[111] *Application of Filippini*, 66 Nev. at 25, 202 P.2d at 539 ("The public welfare is very greatly interested in the largest economical use of the waters of the state for agricultural, mining, power and other purposes.").

[112] *Id.*

The legislative scheme for water rights management is therefore a direct expression of local societal values and multiple public interests, which are administered by the State Engineer, and ultimately, affirmed or altered by the courts. The public trust doctrine should not be interpreted as a mechanism to compel a particular result or retroactively reallocate settled rights. This is because "[c]ertainty of rights is particularly important with respect to water rights in the Western United States."[113] This is a matter of public policy and the Nevada Legislature properly delegated the responsibility of balancing public trust interests to the State Engineer and the decree courts.

RESPECTFULLY SUBMITTED this 25th day of January, 2019.

AARON D. FORD
Attorney General

By: /s/ Tori N. Sundheim
TORI N. SUNDHEIM
Deputy Attorney General

[113] *Arizona v. California*, 460 U.S. 605, 620 (1983).

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 16 in 14 pitch Century Schoolbook.

2. I further certify that this brief complies with the requested 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 8,022 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 sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 25th day of January, 2019.

AARON D. FORD
Attorney General

By: /s/ Tori N. Sundheim
TORI N. SUNDHEIM
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 25th day of January, 2019, I served a copy of the foregoing NEVADA STATE ENGINEER'S AMICUS BRIEF, by electronic filing to:

Simeon M. Herskovits, Esq.
Sean A. Rowe, Esq.
Attorneys for Mineral County & Walker Lake Working Group

Therese A. Ure, Esq.
Attorney for Schroeder Group

Steven G. Martin, Esq.
Roderick E. Walston, Esq.
Attorneys for Centennial Livestock

Bryan L. Stockton
Sr. Deputy Attorney General
Attorney for Nevada Department of Wildlife

Stephen N. Kerins, Esq.
Stacey Simon, Esq.
Attorneys for County of Mono, California

Gordon H. DePaoli, Esq.
Dale E. Ferguson, Esq.
Attorneys for Walker River Irrigation District

Stephen B. Rye, Esq.
Jerry M. Snyder, Esq.
Roderick E. Walston, Esq.
Attorneys for Lyon County

/s/ Dorene A. Wright