IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY AND WALKER LAKE WORKING GROUP, Appellants, v. LYON COUNTY; CENTENNIAL LIVESTOCK; BRIDGEPORT RANCHERS; SCHROEDER GROUP; WALKER RIVER IRRIGATION DISTRICT; STATE OF NEVADA DEPARTMENT OF WILDLIFE; AND COUNTY OF MONO, CALIFORNIA, Respondents.	Case No. 75917	Electronically Filed Apr 12 2019 10:58 a.m. Elizabeth A. Brown Clerk of Supreme Court

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' ANSWERING BRIEF (RESPONDENTS LYON COUNTY, *ET AL.*)

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DISCLOSURE STATEMENT

1. The respondents on this brief are:
    - Lyon County, Nevada;
    - Centennial Livestock, California; and
    - Schroeder Group, Nevada. The Schroeder Group respondents are: Peter and Veronic Fenili; Richard and Cynthia Nuti; Michael and Nancy Nuti; Ralph C. and Mary R. Nuti; Ralph E. and Mary E. Nuti; Larry and Leslie Nuti; Lura Weaver; Dan and Shawna Smith; and Donald Giorgi.

2. None of the foregoing respondents are a corporation or public held company within the meaning of Rule 26.1 of the Nevada Rules of Appellate Procedure.

3. The following law firms represent the aforesaid respondents:

    - District Attorney, Lyon County (representing respondent Lyon County)
    - Best Best & Krieger LLP (representing respondents Lyon County and Centennial Livestock)
    - Law Office of Jerry M. Snyder (representing respondents Lyon County and Centennial Livestock)
    - Schroeder Law Offices, P.C. (representing respondent Schroeder Group)

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STATEMENT OF ISSUES

In *Mineral County, et al. v. Walker River Irrigation District, et al.*, 900 F.3d 1027 (9th Cir. 2018), the Ninth Circuit certified the following questions to this Court:

> Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?
>
> If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

IDENTITY OF RESPONDENTS

The respondents on this brief are described more fully in the disclosure statement, and are as follows:

- Lyon County, a county in Nevada, which is the county into which the Walker River enters after exiting California;
- Centennial Livestock, a group of ranchers in Mono County, California; and
- Schroeder Group, a group of ranchers and individuals in Lyon County, Nevada.

All of the foregoing respondents have water rights in the Walker River established under the Walker River Decree. For convenience, the respondents will be collectively referred to as "Lyon County."

STATEMENT OF THE CASE

Lyon County adopts the statement of facts and procedural history set forth in the Ninth Circuit's certification order. *Mineral County*, 900 F.3d at 1028-1031.[1]

SUMMARY OF ARGUMENT

I

The first question certified by the Ninth Circuit is whether the public trust doctrine applies to appropriative water rights that have been adjudicated in judicial decrees, and if so, to what extent. Regardless of whether Nevada's public trust doctrine applies to adjudicated water rights, the doctrine does not authorize reallocation of such rights.

In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the seminal public trust case in America, the Supreme Court held that the states—which have sovereignty over navigable waters and underlying lands within their borders—hold the waters and lands in trust for the public for purposes of navigation, commerce and fisheries. The public trust doctrine is a state law doctrine, in that each state is responsible for determining the scope of its own public trust responsibilities.

In *Lawrence v. Clark County*, 127 Nev. 390 (2011), this Court held that the public trust doctrine applies in Nevada. The Court did not, however, address whether the doctrine applies to regulation of water, much less applies to adjudicated water rights, which is the question certified by the Ninth Circuit. But *Lawrence* established guidelines for resolving the issue. *Lawrence* held that

[1] The briefs of Mineral County and amici will be cited as follows: Mineral County's brief as "Mineral Br."; brief of Natural Resources Defense Council, *et al.*, as "NRDC Br."; Law Professors' brief as "Law Prof. Br."; State of California's brief as "Cal. Br."; Nevada State Engineer's brief as "State Engr. Br."; and Walker River Paiute Tribe's brief as "Tribe Br."

Nevada's public trust doctrine is based on Nevada's Constitution and statutes and the principles established in *Illinois Central*, and that the doctrine requires that the state provide for regulation of water in the public interest rather than the private interests of water users. Under these principles, Nevada's public trust doctrine does not authorize reallocation of water rights adjudicated in judicial decrees.

Turning first to Nevada's Constitution and statutes, Nevada's Constitution does not address water rights. But the Nevada Legislature has enacted a comprehensive statutory system for regulation of water rights, and the statutory system was enacted in the public interest rather than the private interests of water users. Several statutory provisions demonstrate the public interest purpose. The most important provision provides that water "belongs to the public," § 533.025,[2] a provision that, as *Lawrence* held, "statutorily codifies" Nevada's public trust doctrine, because it means that water may not be used by the state for any purpose but only those purposes that comport with the public interest. *Lawrence*, 127 Nev. at 400. Another provision states that water may be used only for a "beneficial use," which is considered a "public use." § 533.050. Still another provision states that the State Engineer cannot issue an appropriative permit for a proposed use that is "detrimental to the public interest." § 533.370(2). These provisions make clear that the statutory system was enacted in the public interest and not the private interests of water users.

The statutory water rights system also establishes a procedure for judicial adjudication of water rights in a stream system. §§ 533.090 *et seq*. Under this procedure, adjudicated water rights are "final" and "conclusive," § 533.210, and, most importantly here, the Nevada State Engineer is prohibited from carrying out

[2] All section references are to Nevada Revised Statutes (NRS) unless otherwise noted.

his duties in a manner that "conflicts" or is "inconsistent" with a federal or state water rights decree. §§ 533.0245, 533.3703. Thus, the statutory water rights system prohibits the reallocation of water rights adjudicated in a federal or state court decree. The Legislature has determined, in its judgment and wisdom, that the reallocation of adjudicated rights is not in the public interest.

The Legislature's judgment that reallocation of adjudicated water rights is not in the public interest, is reasonable and well-founded. Nevada, one of the most arid states in the nation, suffers from a scarcity of natural water supplies. Thus, the development of Nevada's scarce water supplies to serve Nevada's varied needs—its agricultural, domestic, industrial and hydroelectric power needs, among others—and the finality and certainty of adjudicated water rights that facilitate such development, are manifestly in the public interest, as the Legislature has determined. This Court has recognized that the "public welfare" of Nevada depends on "the largest economical use of the waters of the state for agricultural, mining, power and other purposes." *Application of Filippini*, 66 Nev. 17, 25 (1949). As this Court has stated, if Nevada determines that appropriation of water is "not well suited to solve the modern demands for water across our arid state," "the Legislature—not this court—must signal a departure from such a long-recognized Nevada water policy." *Pyramid Lake Paiute Tribe v. Washoe County,* 112 Nev. 743, 748-749 (1996).

Thus, Nevada's Constitution and statutes do not authorize reallocation of adjudicated water rights. To the extent that Nevada's Constitution and statutes inform Nevada's public trust doctrine, as *Lawrence* held, the doctrine does not authorize reallocation of adjudicated water rights.

Turning to the principles established in *Illinois Central*, these principles do not authorize reallocation of adjudicated water rights where, as here, the Legislature has determined that such reallocation is not in the public interest. *Illinois Central* held that the state must provide for regulation of navigable waters and underlying lands in the public interest rather than the private interests of those who have rights in the waters and lands. As stated above, the Nevada Legislature enacted the statutory water rights system in the public interest rather than the private interests of water users, as reflected in several statutory provisions. *Illinois Central* did not suggest that the state has a mandatory public trust duty to retain authority to reallocate adjudicated water rights, where, as here, the state's legislative body has determined that such reallocation is not in the public interest. Rather, *Illinois Central* held that each state is responsible for determining the scope of its own public trust responsibilities. Thus, Nevada's statutory water rights system, including the provisions that adjudicated water rights are not subject to reallocation, comports with *Illinois Central*'s principles.

The public trust doctrine is not, as Mineral County appears to argue, a separate body of law that exists outside the Legislature's statutory system of regulation, and that establishes regulatory duties of the state's agencies and officers that may conflict with and override their statutory duties. Rather, the public trust doctrine is a foundational principle of the state's statutory system of regulation, and guides and informs the Legislature in its regulation of water in the public interest. Since the Legislature enacted the statutory system in the public interest, the Legislature fulfilled and did not abrogate its public trust responsibilities under *Illinois Central*.

If the public trust doctrine were construed as authorizing reallocation of adjudicated water rights, as Mineral County argues, the doctrine would conflict

with constitutional principles that separate and define the legislative and judicial powers. Under these constitutional principles, the legislative branch, which is directly accountable to the people, is responsible for making policy judgments concerning regulation of water in the public interest, and for determining the balance between public trust uses and other uses. Mineral County's argument would allow the courts to override the legislative judgment, and substitute their judgment for the legislative judgment, by establishing a regulatory system based on common law principles that competes with and potentially overrides the Legislature's statutory system of regulation. The public trust doctrine cannot properly be construed as conflicting with constitutional principles separating and defining the legislative and judicial powers.

II

The second question certified by the Ninth Circuit is whether the public trust doctrine—if construed as authorizing reallocation of adjudicated water rights—would result in a "taking" of property requiring payment of compensation under the Nevada Constitution.

The Takings Clause of the Nevada Constitution is similar to the Takings Clause of the U.S. Constitution, and this Court has generally applied the takings principles of the U.S. Constitution in construing the takings principles of the Nevada Constitution, except that this Court has held that the Nevada Takings Clause provides greater protection of property rights than the federal Takings Clause. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 669 (2006). Therefore, the takings principles of the U.S. Constitution are relevant, although not dispositive, in construing the takings principles of the Nevada Constitution.

If Nevada's public trust doctrine were construed as authorizing reallocation of water rights adjudicated in judicial decrees, the doctrine would result in a *per se* physical taking of property under the principle established in *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982), and *Sisolak*, 122 Nev. at 669, and a regulatory taking under the principle established in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). The doctrine would result in a *per se* physical taking by depriving the adjudicated rights holders of all rights to the use of the reallocated water. The doctrine would result in a regulatory taking because of the "economic impact" on the water user, the interference with the water user's "distinct investment-backed expectations" and the "character of the government action." *Penn Central*, 538 U.S. at 124-125.

Mineral County contends that the Takings Clause applies only to legislative and executive actions restricting property rights, and not to judicial interpretations of property. The Supreme Court has held, however, that a judicial interpretation of property that significantly departs from past interpretations is subject to the limitations of the Takings Clause. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-164 (1980); *Chicago, B. & Q. R'y Co. v. Chicago*, 166 U.S. 226, 233-234 (1897). The Takings Clause bars the government from taking property without payment of compensation, regardless of which branch of government is responsible for the taking.

Mineral County argues that its construction of the public trust doctrine would not result in a taking because the doctrine is a "background principle" of Nevada law. On the contrary, the public trust doctrine has never been applied in Nevada or elsewhere as the basis for reallocating adjudicated water rights, and thus is not a "background principle" of Nevada law as Mineral County attempts to apply the doctrine here. Mineral County attempts to expand the public trust

doctrine beyond bounds ever recognized by this Court or any other court, and beyond the proper bounds of the doctrine itself.

ARGUMENT

I. NEVADA'S PUBLIC TRUST DOCTRINE DOES NOT AUTHORIZE REALLOCATION OF WATER RIGHTS ADJUDICATED IN JUDICIAL DECREES

The first issue certified by the Ninth Circuit is whether the public trust doctrine applies to water rights adjudicated and settled under the doctrine of prior appropriation and if so, to what extent. The reference to "adjudicated" water rights are those that have been adjudicated by the courts in a judicial decree, as in the Walker River Decree. For convenience, this brief will refer to such water rights as "adjudicated water rights."[3]

Regardless of whether the public trust doctrine applies to water rights, or even to adjudicated water rights, the doctrine does not authorize reallocation of adjudicated rights. The public trust doctrine, under the U.S. Supreme Court's decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), as followed by this Court in *Lawrence v. Clark County*, 127 Nev. 390 (2011), provides that water is a public resource that belongs to the people, and thus the state must provide for regulation of water in the public interest rather than the private interests of water users. The Nevada Legislature has enacted a comprehensive statutory water rights system in the public interest, which provides *inter alia* that adjudicated water rights are final and certain and not subject to reallocation. The Legislature's

[3] Although Mineral County's brief argues at length that the public trust doctrine applies to appropriative water rights, Mineral Br. 21-27, 43, its brief does not address whether the doctrine applies to *adjudicated* appropriative water rights—that is, appropriative water rights "already adjudicated and settled"—which is the issue certified by the Ninth Circuit.

judgment that reallocation is not in the public interest, is reasonable, because the finality and certainty of adjudicated water rights facilitates the development of Nevada's sparse water supplies to meet its varied needs. Thus, the statutory water rights system fully comports with the public trust principles established in *Illinois Central* and *Lawrence*.

A. Under the Public Trust Doctrine, the States Hold Navigable Waters and Underlying Lands in Trust for the Public, and Each State is Responsible for Determining Its Own Public Trust Responsibilities

As a result of the American Revolution, the original thirteen states acquired ownership and dominium over their navigable waters and underlying lands that had formerly belonged to the English Crown, subject to rights granted to the United States by the Constitution. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 590 (2012); *Montana v. United States*, 450 U.S. 544, 551-552 (1981); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *Martin v. Waddell*, 41 U.S. 367, 410-411 (1842).[4] Under the equal footing doctrine, new states are admitted to statehood on an equal footing with other states, and thus also acquire sovereignty over their navigable waters and underlying lands. *PPL Montana*, 565 U.S. at 591; *Corvallis Sand,* 429 U.S. at 372-374; *Shively*, 152 U.S. at 49-50. The states' sovereignty under the equal footing doctrine is "conferred not by Congress but the Constitution itself." *PPL Montana*, 565 U.S. at 591, quoting *Corvallis Sand*, 429 U.S. at 374. Thus, Nevada acquired sovereignty over its navigable waters and underlying lands when

[4] The United States' constitutional rights include the right to regulate navigable waters under the Commerce Clause, *e.g., United States v. Rio Grande Dam & Irr. Co.,* 174 U.S. 690, 703 (1899), and the right to reserve water for use on federal reserved lands under the Property Clause, *e.g., Cappaert v. United States*, 426 U.S. 128, 138 (1976).

it was admitted to statehood in 1864. *Nevada v. Bunkowski*, 88 Nev. 623, 628 (1972).

In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the seminal public trust case in America, the U.S. Supreme Court held that the states hold their navigable waters and underlying lands in trust for the public for purposes of navigation, commerce and fisheries. *Illinois Central*, 146 U.S. at 435, 452. The Court stated that the title acquired by the state "is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein." *Id*. at 452. The Court stated that "[t]he control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein." *Id.* at 453. The Court concluded that the Illinois Legislature had the right to revoke its grant of a fee interest to a private railroad company in the submerged lands of Lake Michigan in order to provide for commercial development of the lands for the benefit of the people of Illinois. *Id.* at 454-456.

The public trust doctrine is a federal law doctrine to the extent it holds that each state acquires sovereignty over its navigable waters and underlying lands upon its admission to statehood, and in determining whether the state has sovereignty over the waters and lands, which in turn depends on whether the waters were navigable when the state was admitted to statehood. *PPL Montana*, 565 U.S. at 591, 592. But the public trust doctrine is a state law doctrine to the extent it defines the scope of the state's public trust responsibilities over the waters and lands. *Illinois Central*, 146 U.S. at 440 ("The lands were made subject to the disposal of the legislature of the State."); *PPL Montana*, 565 U.S. at 603-604; *Corvallis Sand*, 429 U.S. at 374; *Montana,* 450 U.S. at 551. As the Supreme Court recently said, "[u]nder accepted principles of federalism, the States retain residual

power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine." *PPL Montana*, 565 U.S. at 603-604 (citations and quotation marks omitted). The Supreme Court has clarified that "*Illinois Central* was necessarily a statement of Illinois law." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997), citing *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). Thus, each state is responsible for determining its own trust responsibilities over navigable waters and underlying lands.

Mineral County asserts its public trust claim as a basis for requiring additional flows of Walker River water into Walker Lake, which is located in Nevada. Thus, the issue presented here concerns Nevada's public trust doctrine, namely whether Nevada's doctrine authorizes reallocation of adjudicated water rights for the purpose of providing additional inflows into the Nevada lake.

B. In *Lawrence v. Clark County*, This Court Held That Nevada's Public Trust Doctrine Is Based on Nevada's Constitution and Statutes and the Principles Established in *Illinois Central*, and That These Principles Require That the State Provide for Regulation of Water in the Public Interest Rather Than Private Interests

In *Lawrence v. Clark County*, 127 Nev. 390 (2011), this Court held that the public trust doctrine applies in Nevada. *Lawrence*, 127 Nev. at 401. After tracing the development of the public trust doctrine in America and Nevada, *id.* at 393-395, the Court stated that "although the public trust doctrine has its roots in the common law, it is distinct from other common law principles because it is based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power, as recognized by Illinois Central." *Id.* at 401. The Court also held that Nevada's public trust doctrine requires that the state provide for regulation of navigable waters and underlying lands in the public

interest rather than the private interests of those who have rights in the waters and lands. *Id.* at 400. As the Court stated, "the public land and water of this state do not belong to the state to use for any purpose, but only those purposes that comport with the public's interest in the particular property," and "the state is simply without power to dispose of public trust property when it is not in the public's interest." *Id.* The Court likened the public trust doctrine to the Nevada Constitution's prohibition of gifts of public funds, which provides that the state may dispense public funds only if such dispensation is in the public interest. *Id.* at 399 ("The public trust doctrine is based on that same principle upheld by the gift clause; the state must carefully safeguard public trust lands by dispensing them only when in the public's interest.").[5]

Lawrence addressed the issue of whether the public trust doctrine limits the state's authority to transfer the beds and banks underlying navigable waters, and did not address whether the doctrine applies to the state's regulation of water itself, much less authorizes reallocation of adjudicated water rights, which is the issue

[5] In holding that the public trust doctrine applies in Nevada, *Lawrence* cited its decisions in *State Engineer v. Cowles Bros., Inc.*, 86 Nev. 872 (1970), *Nevada v. Bunkowski*, 88 Nev. 623 (1972), and *Mineral County v. State, Dep't of Conservation*, 117 Nev. 235 (2001). *Lawrence*, 127 Nev. at 395-397. None of these decisions addressed whether the public trust doctrine applies to regulation of water, much less authorizes reallocation of adjudicated water rights. *Cowles* held that the doctrine of reliction of public lands applies against the state, and thus the owner of property adjacent to the relicted lands of Winnemucca Lake had the right to drill a well on the relicted lands. *Cowles*, 86 Nev. at 877. *Bunkowski* held that since Nevada's Carson River was navigable when Nevada was admitted to statehood, Nevada acquired ownership of the bed of the river, and thus patents granting ownership of the bed were subject to Nevada law. *Bunkowski*, 88 Nev. at 630-634. *Mineral County* held that the federal district court was the proper forum to resolve the public trust issue raised in this case. *Mineral County*, 117 Nev. at 245.

presented here.[6] Nonetheless, *Lawrence* established guidelines for resolving the issue. As noted above, *Lawrence* held that Nevada's public trust doctrine is based on Nevada's Constitution and statutes and the principles established in *Illinois Central*, *Lawrence*, 127 Nev. at 401, and that the doctrine requires that the state provide for regulation of water in the public interest rather than private interests. *Id*. at 400. Thus, these principles apply in determining whether Nevada's public trust doctrine authorizes reallocation of adjudicated water rights. As we now argue, these principles do not authorize reallocation of adjudicated water rights.

C. Nevada's Constitution and Statutes Do Not Authorize Reallocation of Adjudicated Water Rights

1. The Statutory Water Rights System

Nevada's Constitution does not address the subject of water rights. Nevada's statutes directly address the subject, however, by establishing a comprehensive system for regulation of water rights. Nevada's statutory water rights system was enacted against a historical backdrop in which the western states developed a unique doctrine of water law in response to their uniquely arid conditions.

Under the doctrine of riparian rights, a landowner has the right to use water flowing across or adjacent to its lands. The riparian doctrine is well suited to regions that have ample natural water supplies, such as England, where the doctrine originated, and the eastern states, which have adopted the doctrine as their basic water law. The riparian doctrine is poorly suited, however, to the arid and

[6] *Lawrence* held that the state's authority to transfer the beds and banks depends on various factors—whether the waters were navigable when Nevada was admitted to statehood, whether the lands became dry by reliction or avulsion, and whether the transfer contravenes the public trust. *Lawrence*, 127 Nev. at 391-392, 401-406.

semi-arid western states, which suffer from a chronic shortage of natural water supplies. In response to their arid and semi-arid conditions, the western states adopted a unique doctrine of water law—the doctrine of prior appropriation—that maximizes the use of their scarce water supplies. Under this doctrine, water may be "appropriated," or diverted, from its natural source for beneficial use elsewhere, and the first appropriator has priority as against subsequent appropriators. The doctrine originated as a custom among the early miners, was embraced by the courts as the common law, and was enacted by the legislatures as their statutory water rights laws. *See generally United States v. Gerlach Live Stock Co*., 339 U.S. 725, 744-754 (1950); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-165 (1935); 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States*, at 159-192 (U.S. Dep't of Agriculture: 1971) (hereinafter "Hutchins"); D. Tarlock, *Law of Water Rights and Resources* §§ 3:3-3.9, at 25-30, § 5.3, at 246 (Thomas Reuters: 2017 ed.).

In 1913, the Nevada Legislature enacted a comprehensive statutory water rights system, which established the appropriation doctrine as Nevada's basic water law and authorized the Nevada State Engineer to exercise permit authority over appropriative water rights. The statutory system is codified in Chapter 533, commencing at § 533.005 ("Adjudication of Vested Water Rights; Appropriation of Public Waters"), and Chapter 534, commencing at § 534.010 ("Underground Water and Wells").

2. Statutory System Enacted in Public Interest

The Nevada Legislature enacted the statutory water rights system in the public interest rather than the private interests of water users, even though the statutory system may incidentally benefit water users. This public interest purpose

is reflected in the statutory provision that all water above or below the ground "belongs to the public," § 533.025, a provision, as this Court has stated, is the "fundamental tenet" of Nevada water law. *Desert Irrigation, Ltd. v. Nevada,* 113 Nev. 1049, 1059 (1997). In *Lawrence*, this Court held that this provision "statutorily codif[ies] the principles behind the public trust doctrine in Nevada," because it means that "the waters of this state do not belong to the state to use for any purpose, but only for those purposes that comport with the public's interest." *Lawrence,* 127 Nev. at 400. Citing this provision, this Court has held that "one of the main purposes of this [statutory water rights] law, and doubtless the principal purpose, was to place the distribution of the stream or stream systems of this state … under state control." *Application of Filippini*, 66 Nev. 17, 25 (1949), quoting *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803, 805 (1914) (quotation marks omitted).

Other provisions also demonstrate the public interest purpose of the statutory system. Under the statutory system, water may be appropriated only for a "beneficial use," §§ 533.030(1), 533.353, which is considered a "public use." § 533.050. "[T]he concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states." *Desert Irrigation,* 113 Nev. at 1059. This same principle is enshrined in the water laws of other western states. As the U.S. Supreme Court has held, "in the arid-land states the use of water for irrigation, although by a private individual, is a public use." *California Oregon Power,* 295 U.S. at 165; *see* Hutchins, at 8-9.

But even if a proposed appropriation is for a beneficial public use, the State Engineer cannot issue an appropriative permit if the proposed use is "detrimental to the public interest." § 533.370(2); *see Pyramid Lake Paiute Tribe of Indians v.*

Washoe County, 112 Nev. 743, 748 (1996) (defining "public interest" standard). In determining the public interest, the State Engineer must consider the need for water not only for consumptive uses but also for environmental uses, such as recreation and wildlife, because such environmental uses are considered beneficial uses. §§ 533.030(2), 533.023; *see Nevada v. Morros,* 104 Nev. 709, 716 (1998) ("wildlife" is a "beneficial use").

In sum, the statutory system was enacted in the public interest, as reflected in the provisions that water "belongs to the public," § 533.025; that beneficial use is a "public use," § 533.050; and that water may be appropriated only if in the "public interest," § 533.370(2).

3. Non-Reallocation of Adjudicated Water Rights

Nevada's statutory water rights system establishes a procedure for judicial adjudication of appropriative water rights in a stream system. §§ 533.090 *et seq*. Under this procedure, water users in a stream system may submit an application for adjudication of their appropriative rights to the State Engineer, § 533.090, who may determine their "relative rights," *id*., and issue an order determining the rights, § 533.160. The court of the county where the stream system is located may, after taking further evidence, § 533.170, issue a decree affirming or modifying the State Engineer's order, § 533.185, which is subject to appeal, § 533.210. Appropriative water rights adjudicated in a statutory decree are "Vested Water Rights," according to the heading of the chapter, Chapter 533, that provides for adjudication of the rights. *See Salmon River Canal Co. v. Bell Brand Ranches, Inc.*, 564 F.2d 1244, 1248 (9th Cir. 1977) (referring to "the adjudication of vested water rights provisions of the Nevada Code").

Appropriative water rights adjudicated under these statutory procedures are subject to the same statutory requirements that apply to other appropriative water rights. § 533.035. Thus, the statutory requirements that water "belongs to the public," § 533.025, that beneficial use is a "public use," § 533.050, and that water may only be appropriated if in the "public interest, § 533.370(2), also apply to adjudicated water rights.

The statutory system expressly provides that vested adjudicated water rights are final and conclusive and not subject to reallocation. Specifically, the adjudicated rights are "final" and "conclusive" as to "all persons and rights lawfully embraced within the adjudication." § 533.210. More importantly here, water rights adjudicated in *any* judicial decree, whether by a federal or state court, are not subject to reallocation. Specifically, the State Engineer is prohibited from "carry[ing] out his or her duties . . . in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court," § 533.0245, and from authorizing any change of consumptive use in a manner "inconsistent with any applicable federal or state decree concerning consumptive use," § 533.3703.[7] Thus, water rights adjudicated in a federal or state court decree are not subject to reallocation by the State Engineer, or presumably anyone else. The Nevada Legislature has determined, in its judgment and wisdom, that non-reallocation of adjudicated water rights is in the public interest of Nevada.

Mineral County contends that an adjudicated water right is "vested" only as against other water rights, but not as against the state in its regulation of water rights. Mineral Br. 25-26, 33-35. The plain statutory language provides otherwise.

[7] The State Engineer and any adjudicated claimant may, however, apply to the court for modification of the decree within 3 years after its issuance. § 533.210.

The statutes expressly prohibit the State Engineer from carrying out his or her duties in a way that that "conflicts" or is "inconsistent" with a federal or state water rights decree. §§ 533.0245, 533.3703. Thus, the State Engineer—who is responsible for the state's regulation of water rights—is expressly prohibited from reallocating adjudicated water rights. Therefore, adjudicated water rights are vested as against the state and not just other water users.

The Legislature's judgment that non-reallocation of adjudicated water rights is in the public interest was reasonable and well-founded, because the finality and certainty of adjudicated water rights facilitates development of Nevada's scarce water supplies to serve its public needs. These public needs are manifold—farmers need irrigation water to produce foods that sustain the people of Nevada and the nation; the residents of Nevada's urban areas need water for drinking and other purposes; industries that are the source of jobs and growth need water for their plants; hydroelectric power facilities need water to produce electricity that lights homes and businesses. Nevada is one of the most arid states in the nation, and the development of Nevada's scarce water supplies, and the finality and certainty of adjudicated water rights that facilitate such development, are essential to the state's growth, prosperity and well-being. If adjudicated water rights thought to be final and certain were subject to reallocation, the water users who have the rights would have no assurance of being able to develop reliable water supplies to meet the public's varied needs, and of obtaining the necessary funding from lending institutions necessary for such development. This Court has recognized that appropriation of water for beneficial use is in Nevada's public interest, stating that "[t]he public welfare is greatly interested in the largest economical use of the waters of the state for agricultural, mining, power and other purposes." *Filippini*, 66 Nev. at 25, quoting *Ormsby*, 142 P. at 805.

Thus, the principle that adjudicated water rights are final and certain is one of the bedrock principles of Nevada's statutory water laws. If this principle is to be changed, the responsibility for making the change rests with the Legislature and not the courts. As this Court has stated:

> We recognize that some people may argue that the prior appropriation doctrine is not well suited to solve the modern demands for water across our arid state. However, the Legislature—not this court—must signal a departure from such a long-recognized Nevada water policy.

Pyramid Lake Paiute Tribe, 112 Nev. at 748-749.

The U.S. Supreme Court has also recognized the importance of finality and certainty of water rights in the arid western states, stating:

> Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. [Citation.] The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights. [¶] Prior appropriation law serves western interests by encouraging the diversion of water for irrigating otherwise barren lands and for other productive uses, and by ensuring developers that they will continue to enjoy use of water.

Arizona v. California, 460 U.S. 605, 620 & n. 11 (1983).

The California Supreme Court, in upholding California's own statutory system for adjudication of water rights in a stream system, has also recognized the importance of finality and certainty of adjudicated water rights. Cal. Water Code §§ 2500 *et seq.*; *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656, 665-666 (Cal. 1979). The California Supreme Court stated in *Long Valley* that the statutory adjudication system was intended to avoid "uncertainty" of water rights,

and that "[u]ncertainty concerning the rights of water users has pernicious effects," because "it inhibits long range planning and investment for the development and use of waters in a stream system," "fosters recurrent, costly and piecemeal litigation," and "impairs the state's administration of water rights." *Id.*

In sum, Nevada's statutory water rights system—including the provisions that adjudicated water rights are final and conclusive and not subject to reallocation—was enacted in the public interest rather than the private interests of water users. To the extent that Nevada's public trust doctrine is based on Nevada's Constitution and statutes, as *Lawrence* held, the doctrine does not authorize reallocation of adjudicated water rights.

D. The Principles Established in *Illinois Central* Do Not Authorize Reallocation of Water Rights Adjudicated in Judicial Decrees

Illinois Central applied the public trust doctrine—as this Court did in *Lawrence*—in the context of the state's regulation of lands underlying navigable waters rather than the context of the state's regulation of the waters themselves. Nonetheless, *Illinois Central* established two basic public trust principles that are relevant here.

First, *Illinois Central* held that each state is responsible for determining the scope of its public trust responsibilities. *Illinois Central*, 146 U.S. at 440 ("The lands granted were made subject to the disposition of the legislature of the State"); *see PPL Montana*, 565 U.S. at 603-604 ("Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders."); *see* pages 10-11, *supra*. Thus, the public trust doctrine does not establish a uniform national public trust standard that applies in

all states, but instead provides that each state is responsible for determining its own public trust standard.

Second, *Illinois Central* held that—since navigable waters are a public resource that belongs to the people—the state must provide for their regulation in the public interest rather than private interests, and the state cannot dispose of trust resources unless such disposal is in the public interest. *Illinois Central*, 146 U.S. at 453 (state can dispose of trust property only in "promoting the interests of the public," or if such disposal does not result in "substantial impairment of the public interest"). In *Lawrence*, this Court, following *Illinois Central*, also held that the state must provide for regulation of trust resources in the public interest rather than private interests, and that the state cannot dispose of the resources unless such disposal is in the public interest. *Lawrence*, 127 Nev. at 400 (state must provide for regulation of trust property "only for those purposes that comport with the public's interest in the particular property," and state "is simply without power to dispose of public trust property when it is not in the public's interest").

Thus, *Illinois Central* and *Lawrence* do not hold or suggest that the state has a public trust duty to retain continuing authority over adjudicated water rights for the purpose of reallocating them, as Mineral County argues. Rather, *Illinois Central* and *Lawrence* hold that the state has a public trust duty to regulate water in the public interest rather than private interests. If the state determines that non-reallocation of adjudicated water rights is in the public interest and on that basis provides they cannot be reallocated, the state has fulfilled and not abrogated its public trust responsibility.

As explained earlier, the Nevada Legislature enacted the statutory water rights system in the public interest and not the private interests of water users. *See*

pages 14-16, *supra*. This public interest purpose is reflected in several statutory provisions—the provision that water "belongs to the public," § 533.025, which "statutorily codif[ies]" Nevada's public trust doctrine, *Lawrence*, 127 Nev. at 400; the provision that water can be appropriated only for a beneficial use, which is a "public use," § 533.050; and the provision that water cannot be appropriated if such is detrimental to the "public interest," § 533.370(2). The statutory provisions that adjudicated water rights are "final" and "conclusive," § 533.210, and not subject to reallocation, §§ 533.0245, 533.3703, were also enacted in the public interest, because these provisions are a fundamental feature of the statutory system as applied to adjudication of water rights in a stream system. As argued earlier, the Legislature reasonably concluded that non-reallocation of adjudicated rights is in the public interest, because the finality and certainty of adjudicated water rights serves Nevada's public interest by facilitating development of its sparse water supplies for its varied agricultural, domestic and other needs. *See* page 18, *supra*. Since the Legislature enacted the statutory system in the public interest—including the provisions that adjudicated water rights are final and conclusive and not subject to reallocation—the Legislature fulfilled its public trust responsibilities in enacting the statutory system, consistently with the principles established in *Illinois Central* and *Lawrence*.

Notably, *Illinois Central* and *Lawrence* held that the state can entirely "dispose" of trust resources—rather simply regulating them—if the Legislature determines that their disposal is in the "public interest." *Illinois Central*,146 U.S. at 453; *Lawrence*, 127 Nev. at 400. *A fortiori*, the state—rather than disposing of trust resources—can provide that adjudicated water rights are not subject to reallocation if the Legislature determines, as the Nevada Legislature has, that non-reallocation meets Nevada's public needs and thus is in the public interest.

If the public trust were construed otherwise—as authorizing reallocation of adjudicated water rights even though the Legislature has precluded such reallocation—the doctrine would conflict with established principles of the Nevada Constitution governing the separation of the legislative, executive and judicial powers. *See* Nev. Const., art. 3, § 1 (defining separation of powers); *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291-292 (2009) (describing same). Under these constitutional principles, the legislative branch directly represents and is accountable to the public, which is, of course, ultimately responsible for determining the public interest in regulating water. Thus, the legislative branch is responsible for making policy judgments concerning regulation of water and water rights, and for determining the appropriate balance between public trust uses and other uses. Under separation-of-powers principles, the judicial branch cannot properly override the Legislature's policy judgment in regulating water in the public interest, or substitute its judgment for the legislative policy judgment. As the California Supreme Court has held, "[i]t is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished." *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971) (citation omitted). Although the courts may fashion common law as applied to regulation of water where the Legislature has not spoken, the courts cannot fashion common law that contravenes the legislative policy judgment where the Legislature *has* spoken. Cf. *Milwaukee v. Illinois*, 451 U.S. 304, 312-314 (1981) (federal Clean Water Act supersedes and displaces federal common law of nuisance as applied to water quality). If the Legislature's policy judgment—that adjudicated water rights are final and certain and not subject to reallocation—is to be changed, the Legislature and not the courts is responsible for making the change. Cf. *Pyramid Lake Paiute Tribe,* 112 Nev. at 748-749 ("[T]he Legislature—not this court—must signal a

departure from such a long-recognized Nevada water policy" pertaining to appropriation of water).[8]

Mineral County and its supporting amici argue that Nevada's public trust doctrine "co-exists" with the statutory system of regulation, and "inheres" in water rights granted under the statutory system. Mineral Br. 13, 19, 21, 22, 27; NRDC Br. 1, 5, 11-12, 14, 18; Law Prof. Br. 6, 9; Cal. Br. 5, 22. On the contrary, the public trust doctrine is not a separate body of law that exists outside of, and "co-exists" with, the statutory system of regulation, and that establishes "inherent" regulatory duties of state agencies and officers that may conflict with and override their statutory duties. Rather, the public trust doctrine is a foundational principle of the statutory system of regulation, and guides and informs the Legislature in its enactment of the statutory system. This foundational principle is reflected in the statutory provision that water "belongs" to the public rather than the water user, § 533.025, which this Court has held "statutorily codif[ies]" the public trust doctrine

[8] Constitutional separation-of-powers principles do not come into play, at least to the same extent, where, as in *Lawrence*, the state's officers have granted private rights in lands underlying navigable waters, and the issue is whether the state has adequately protected the public interest in the lands. Like other western states, Nevada has not adopted a comprehensive statutory system regulating the underlying lands that is comparable to its comprehensive statutory system for regulation of the waters themselves. Nevada's public interest is much less affected by regulation of the underlying lands than by regulation of the waters, because regulation of the waters directly affects the availability of water to meet the state's varied needs, such as for irrigation, domestic, industrial and hydropower uses. Indeed, the underlying lands and the waters are fundamentally different, in that the underlying lands are capable of private ownership while the waters themselves are not (because a water user has only a usufructuary right). *Sturgeon v. Frost*, __U.S. __, 2019 WL 1333260, *8 (March 26, 2019). For these reasons, while judicial deference should be given to the Legislature's judgment in regulating the waters in the public interest, much less deference needs be given to decisions by state officers in disposing of the underlying lands to private interests.

and requires the state to provide for regulation of water "only [for] those purposes that comport with the public's interest." *Lawrence,* 127 Nev. at 400. This foundational principle is also reflected in the nature of the water user's appropriative right; the appropriative user does not "own" the water but instead has a "usufructuary" right, that is, a right to the use of water owned by others. *Desert Irrigation*, 113 Nev. at 1059. Thus, the public trust doctrine is not a separate body of law that potentially overrides the Legislature's statutory water rights system, but rather is a foundational principle that guides and informs the Legislature in enacting the statutory system. The ultimate responsibility for determining whether the state's regulation of water rights comports with public trust principles rests with the Legislature, which, in its "wisdom and power" and "acting within the scope of its duties as trustee," is responsible for making public trust judgments and determining "whether public trust uses should be modified or extinguished." *Marks*, 491 P.2d at 381.

The fact that the public trust doctrine is a foundational principle of the statutory water rights system does not mean that the State Engineer, who is responsible for regulating water rights, has the right to reallocate water rights that have been adjudicated by the courts. On the contrary, the same statutory system that provides that water "belongs to the public," § 533.025, also provides that adjudicated water rights are "final" and "conclusive" and cannot be reallocated by the State Engineer or others. §§ 533.210, 533.0245, 533.3703. Thus, while water belongs to the public, the public has determined, through the legislative process in which its voice is heard, that adjudicated water rights are not subject to reallocation.

Under Mineral County's argument, the public trust doctrine—rather than simply "co-existing" with the statutory system—would override the statutory

system to the extent the statutory system conflicts with the public trust doctrine as Mineral County construes the doctrine. While the statutory system expressly *prohibits* the State Engineer from reallocating adjudicated water rights, §§ 533.0245, 533.3703, Mineral County argues that the doctrine *authorizes* the State Engineer to reallocate the rights if the State Engineer determines this is in the public interest.[9] In enacting the statutory system, however, the Nevada Legislature has already determined that the public interest is served by prohibiting the State Engineer from reallocating adjudicated rights. Since the State Engineer derives his regulatory authority from the statutes, the State Engineer does not have authority under the common law to reallocate rights that the statutes expressly preclude him from reallocating. Nor do the courts, which do not exercise the function of regulating water rights, have authority under constitutional separation-of-powers principles to reallocate adjudicated water rights that the State Engineer, who is responsible for regulating water rights, is expressly precluded from reallocating.

Mineral County and amici NRDC argue that their public trust argument is supported by Justice Rose's concurring opinion in *Mineral County v. Nevada*, 117 Nev. 235 (2001). Mineral Br. 19, 21; NRDC Br. 5, 9, 15-16. There, Justice Rose opined that the State Engineer is required under the public trust doctrine to exercise "continuing responsibility" over adjudicated water rights and to "continuously consider" whether such rights are in the public interest, and that—if the State Engineer lacks such statutory authority—"then the law is deficient," meaning, apparently, that the courts must change the law. *Mineral County*, 117 Nev. at 248 (Rose, J., concurring). The statutes, however, expressly preclude the State

[9] In fact, Mineral County does not specifically identify the institution—whether the State Engineer, the courts or some other institution—that would be responsible for reallocating adjudicated water rights under its theory.

Engineer from exercising continuing authority over adjudicated water rights for the purpose of reallocating them, or for any other purpose. §§ 533.0245, 533.3703 (prohibiting State Engineer from carrying out duties in manner that "conflicts" or is "inconsistent" with federal or state water rights decree). Thus, while the statutes *prohibit* the State Engineer from reallocating the adjudicated rights, Justice Rose's view would *authorize* the State Engineer to reallocate the rights because the statutes are "deficient." Justice Rose's view would simply re-write Nevada's statutory water rights laws, by authorizing the State Engineer to reallocate rights that the statutes expressly preclude him from reallocating. Under separation-of-powers principles, however, the courts cannot re-write the statutory laws by authorizing the State Engineer to exercise authority that the Legislature has expressly withheld, and cannot establish a different regulatory system than established by the Legislature.

Since water "belongs to the public," § 533.025, the Legislature has the right to change the statutory system and provide for reallocation of adjudicated water rights if the Legislature determines that this is in the public interest, subject to any constitutional rights of water users, which will be addressed later in this brief. *See* pages 32-46, *supra*. To date, the Legislature has not changed the statutory system. The public trust doctrine requires no more.

In sum, to the extent that Nevada's public trust doctrine is based on the principles established in *Illinois Central* and followed in *Lawrence*, Nevada's public trust doctrine does not authorize reallocation of adjudicated water rights.

E. The Decisions of Other State Courts, Including the *National Audubon* Decision, Do Not Support Mineral County's Public Trust Argument

Mineral County argues that its public theory is supported by the decisions of other state courts. Mineral Br. 13-18. The cited decisions applied the public trust doctrine in various contexts, such as whether the doctrine applies in the state and how the doctrine applies to lands underlying navigable waters. None of the cited decisions addressed whether the public trust doctrine authorizes reallocation of adjudicated water rights, which is the issue raised here.[10]

Mineral County and its amici argue that their public trust argument is supported by the California Supreme Court's decision in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983). Mineral Br. 22, 28, 39; NRDC Br. 13, 18-19; Law Prof. Br. 4; Cal. Br. 13-19. There, the California Supreme Court

[10] The decisions cited by Mineral County hold, for example, that that the public trust doctrine does not preclude the state from approving docketing facilities in a navigable lake, *Kootenai Env. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085, 1095 (Idaho 1983); that the public has the right to use navigable waters irrespective of streambed ownership, *e.g., Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984); that the state must consider public trust uses in the planning of the state's water resources, *United Plainsmen Ass'n v. State Water Cons. Comm'n*, 247 N.W.2d 457, 460 (N.D. 1976); and that the public trust doctrine applies in the state. *Rettkowski v. Dep't of Energy*, 858 P.2d 232, 239 (Wash. 1993).

Although Mineral County also cites the Hawaii Supreme Court's decision in *Water Permit Use Applications (Waiahole Ditch),* 9 P.3d 409 (Haw. 2000); Mineral Br. 29, 39, the decision did not consider whether the public trust doctrine authorizes reallocation of adjudicated water rights, which is the issue raised here. Notably, Hawaii—which unlike the continental western states does not suffer from arid conditions—has developed a unique body of water law based on ancient Hawaii custom, which differs in material respects from the appropriation doctrine that prevails in the continental western states. D. Getches, "Water Law in a Nutshell," at 222-228 (Thomson West: 4th ed.).

held that under California's public trust doctrine, the state, through its water rights agency, the State Water Resources Control Board (State Board), must consider public trust uses in planning and allocating the state's water resources, and has continuing authority over its appropriative water rights permits to determine whether to impose additional conditions to protect public trust uses. *National Audubon*, 658 P.2d at 728.

California's public trust doctrine, as interpreted in *National Audubon*, obviously does not apply in Nevada. Other state courts, such as the Colorado Supreme Court, have declined to follow *National Audubon*. *In re Ballot Title*, 274 P.3d 562, 573 (Colo. 2012); State Engr. Br. 30.[11]

National Audubon is distinguishable here in any event. First, *National Audubon* held that the State Board has continuing authority over its own permits to determine whether to impose additional conditions, but did not hold or suggest that the State Board has continuing authority over water rights adjudicated by the courts for this or any other purpose. The fact that the State Board has continuing authority over its own permits does not mean that the Board has continuing authority over court-adjudicated water rights. Indeed, absent specific legislative authorization, separation-of-powers principles preclude the State Board, an

[11] Amicus NRDC—attempting to minimize the impact of its public trust theory on the availability of scarce water supplies in Nevada—argues that while *National Audubon* resulted in a nearly 60% reduction of the City of Los Angeles' water exports from Mono Lake, any concomitant reduction of Nevada's water supplies could be overcome by "find[ing] replacement water for current water users." NRDC Br. 25-26. Although some states may be able to conveniently find replacement water to compensate for a 60% reduction of supplies, it is doubtful that Nevada—a highly arid state, in which water is scarce and largely appropriated—has access to readily-available water to replace supplies that would be lost under NRDC's theory.

executive branch agency, from exercising jurisdiction over water rights adjudicated by the judicial branch.

Second, no provision of California's statutory water rights laws precludes the State Board from exercising continuing authority over its own permits to impose additional conditions for public trust purposes, and *National Audubon* cited no statutory provision that might be construed as having this effect. Thus, *National Audubon* did not hold or suggest that the public trust doctrine overrides the Legislature's statutory system of regulation, as Mineral County argues here.

On the contrary, the California courts have held, both before and after *National Audubon*, that the Legislature is responsible for administering the public trust, and that its judgments are "conclusive" as long as it does not impair the right of subsequent legislatures to administer the public trust. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971); *City of Long Beach v. Mansell*, 476 P.2d 423, 437 n. 17 (Cal. 1970); *Mallon v. City of Long Beach*, 282 P.2d 481, 486 (Cal. 1955); *People v. California Fish Co*., 138 P. 79, 87 (Cal. 1913); *Zack's, Inc. v. City of Sausalito*, 81 Cal.Rptr.3d 797, 807 (Cal. 2008*); Personal Watercraft Coalition v. Marin County Bd. of Supervisors*, 122 Cal.Rptr.2d 425, 437 (Cal. 2002). Thus, the California courts have held that the Legislature is responsible for administering the public trust and determining the balance between public trust uses and other uses, not that the doctrine overrides the Legislature's statutory system of regulation.

Indeed, *National Audubon* itself held that the Legislature is ultimately responsible for determining the balance between public trust uses and other uses. *National Audubon* stated that the Legislature has the right to "prefer one trust use over another," and thus to determine the balance between commerce, navigation,

fisheries and other purposes, *National Audubon*, 658 P.2d at 722 n. 21, 723,[12] and that "as a matter of current and historical necessity" the Legislature can authorize water diversions even though the diversions harm public trust uses. *Id*. at 727.

In sum, no court, including *National Audubon*, has ever held or suggested that the public trust doctrine authorizes reallocation of adjudicated water rights. Mineral County attempts to expand the doctrine beyond the bounds recognized by any court, and beyond the proper bounds of the doctrine itself.

F. Nevada's Public Trust Doctrine Does Not Authorize Reallocation of Water Rights in California for the Benefit of Public Trust Uses in Nevada

Nevada's public trust doctrine, regardless of how construed, does not authorize reallocation of water rights in California for the benefit of public trust uses in Walker Lake in Nevada. A state's public trust doctrine applies only within the state, and only for the benefit of the people and trust resources of the state; therefore, one state's public trust doctrine does not apply in another state for the benefit of the first state's public trust resources. *Illinois Central*, 146 U.S. at 435 (the states have ownership and dominium over tidelands "within the limits of the several States," which belong to the states "within which they are found"); *id*. at 452 (State of Illinois has title to lands underlying Lake Michigan "within its limits"); *id*. (the waters are held in trust "for the people of the State"); *PPL*

[12] In support of this statement, *National Audubon* cited the California Supreme Court's decisions in *Colberg, Inc. v. California*, 432 P.2d 3, 9 (Cal. 1967), which held that the state had the right to authorize construction of a bridge over navigable waters that promoted commerce even though impairing navigation, and *Boone v. Kingsbury*, 273 P. 797, 812 (Cal. 1928), which held that the state had the right to grant permits for oil and gas production in navigable oceanic waters even though such production harmed public trust uses. *National Audubon*, 658 P.2d at 722 n. 21, 723.

Montana, 565 U.S. at 604 (the states have "residual power to determine the scope of the public trust over waters within their borders"); *Corvallis Sand*, 429 U.S. at 374 (a state has title to "lands underlying navigable waters within its boundaries"). A state's public trust doctrine stops at the state's borders, and does not reach into other states for the benefit of its own trust resources.

Therefore, Nevada's public trust doctrine does not apply in California, or to water users in California, for the benefit of public trust uses in Nevada. Hence, Nevada's doctrine does not authorize reallocation of water rights in California in order to provide additional water flows into Walker Lake in Nevada.[13]

II. NEVADA'S PUBLIC TRUST DOCTRINE, IF CONSTRUED AS AUTHORIZING REALLOCATION OF ADJUDICATED WATER RIGHTS, WOULD RESULT IN A TAKING OF PROPERTY UNDER THE NEVADA CONSTITUTION

The second issue certified by the Ninth Circuit is whether the public trust doctrine—if construed as authorizing reallocation of adjudicated water rights settled under the prior appropriation doctrine—would result in a "taking" of property requiring payment of compensation under the Nevada Constitution.

The Nevada Constitution provides that private property may not be "taken" for public use without payment of "just compensation." Nev. Const., art. 1, § 8.6; *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 669-670 (2006). Under Nevada law, as under the laws of most states, a water right, even though usufructuary, is a

[13] By the same token, California's public trust doctrine, although not at issue here, applies only in California, and only for the benefit of trust uses in California, and therefore California's doctrine does not authorize reallocation of water rights in California to provide additional inflows into Walker Lake in Nevada.

form of property protected under the Takings Clause. *Application of Filippini*, 66 Nev. 17, 21-22 (1949).[14]

The Takings Clause of the Nevada Constitution is similar to, and apparently patterned after, the Takings Clause of the U.S. Constitution, except that, as shall be seen, the Nevada Takings Clause is more protective of property rights than the federal Takings Clause. The Takings Clause of the U.S. Constitution, contained in the Fifth Amendment and made applicable to the states in the Fourteenth Amendment, also provides that private property shall not be "taken" for public use without "just compensation." U.S. Const., amends. V, XIV. This Court has applied the takings principles of the U.S. Constitution in construing the takings principles of the Nevada Constitution. *Sisolak*, 122 Nev. at 662-668. Therefore, the U.S. Supreme Court's takings jurisprudence is relevant in construing the takings principles of the Nevada Constitution, and this brief will, as appropriate, refer to the U.S. Supreme Court's jurisprudence in discussing Nevada takings principles.

The takings issue is relevant not only in determining whether water users who have adjudicated rights are entitled to compensation for the taking of their rights, but also in determining the scope of the public trust doctrine itself. Under the doctrine of constitutional avoidance, the public trust doctrine cannot properly be construed in a way that would infringe on the constitutional rights of the adjudicated rights holders. Cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast*

[14] The U.S. Supreme Court has also held that a water right is protectable "property" under the Takings Clause of the U.S. Constitution. *Nevada v. United States*, 463 U.S. 110, 124 (1983); *Ickes v. Fox,* 300 U.S. 82, 95-96 (1937); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-408 (1931); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737, 752-754 (1950); *Dugan v. Rank*, 372 U.S. 609, 625 (1963).

Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (under constitutional avoidance doctrine, statutes should be construed to avoid constitutional difficulties unless plainly contrary to congressional intent). Thus, the takings issue is relevant not only to the second issue certified by the Ninth Circuit—*i.e.*, the takings issue—but also to the first issue, *i.e.*, the construction of Nevada's public trust doctrine.

A. The Public Trust Doctrine, Under Mineral County's Construction, Would Result in a *Per Se* Physical Taking and Regulatory Taking Under the Nevada Constitution

The U.S. Supreme Court has held that a government regulation of property may result in a taking if the regulation goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), the Supreme Court adopted a balancing test for determining whether a regulation has gone "too far," which requires consideration of (1) the "economic impact" of the regulation on the property owner, (2) the extent to which the regulation interferes with his "distinct investment-backed expectations," and (3) the "character of the governmental action." *Penn Central*, 438 U.S. at 124; *see Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 538-539 (2005). The government is liable for a *per se* taking, however—and the *Penn Central* balancing test does not apply—if the regulation results in a "physical taking" of the property. *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 434-435 (1982). The government is also liable for a *per se* taking if the property owner is required "to sacrifice *all* economically beneficial uses in the name of the common good . . . ." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (original emphasis). On the other hand, no taking occurs if the government regulation is supported by "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029. The government has the right to "take" property, but must pay compensation when it does so. *Lingle*, 544 U.S. at 537-538, 543. The Takings

Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

If the public trust doctrine were construed as authorizing reallocation of adjudicated water rights, as Mineral County argues, the doctrine would result in both a *per se* physical taking under *Loretto* and a regulatory taking under *Penn Central*.

First, the public trust doctrine, so construed, would result in a *per se* physical taking, because the holders of adjudicated water rights would be wholly unable to use the portion of the water that has been reallocated. The reallocated water would be "physically taken" rather than simply "regulated," because the water users would have no right whatever to use the reallocated water. Thus, the water users would be required to "sacrifice *all* economically beneficial uses" of the reallocated water. *Lucas,* 505 U.S. at 1019 (original emphasis). In *Sisolak*, this Court, citing *Loretto*, held that a government restriction of airspace resulted in a permanent physical invasion of a landowner's airspace, and thus constituted a "per se regulatory taking" under the Nevada Constitution. *Sisolak*, 122 Nev. at 669. Accord, *Hsu v. Clark County*, 123 Nev. 625, 633-635 (2007) (following *Sisolak,* holding that government restriction of airspace constituted a permanent physical invasion and "per se regulatory taking" under Nevada Constitution).[15]

[15] The conclusion that Mineral County's construction of the public trust doctrine would result in a *per se* physical taking is supported by the Supreme Court's recent decision in *Horne v. Dep't of Agriculture*, 135 S.Ct. 2419 (2015), which held that a government regulation requiring raisin producers to dedicate a percentage of their raisin crop to the government free of charge ("reserve raisins") resulted in a *per se* physical taking, because the raisin producers were deprived of all economic use of the reserve raisins. *Horne*, 135 S.Ct. at 2428. The conclusion is also supported by

Second, the public trust doctrine under Mineral County's construction would result in a regulatory taking under the *Penn Central* balancing test. *Penn Central*, 438 U.S. at 124 (establishing balancing test). The doctrine would have a significant "economic impact" on the water users, by depriving them of water rights that have been recognized and exercised for several years or decades. The doctrine would impair the water users' "distinct investment-backed expectations," because the water users have no reasonable expectation that their rights would be reallocated on basis of common law public trust principles that have never been recognized or applied as a basis for such reallocation. The "character of the government action" would indicate a taking, because the action would be taken by the judicial branch rather than by the legislative or executive branches that normally regulate water and determine the balance between competing water uses.

B. The Nevada Constitution Provides Greater Protection of Property Rights Than the United States Constitution

The Nevada Constitution provides greater protection of property rights than the U.S. Constitution, which further demonstrates that Mineral County's argument would result in a taking under the Nevada Constitution. As this Court stated in *Sisolak*, "states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution." *Sisolak,* 112 Nev. at 669. Citing article 1, § 1 of the Nevada Constitution, *Sisolak* then stated that "[t]he first right established in the Nevada Constitution's declaration of rights is the protection

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the U.S. Court of Federal Claims' decision in *Tulare Lake Basin v. United States*, 49 Fed.Cl. 313 (2001), which held that a government regulation restricting the rights of water users to use a portion of their water rights constituted a *per se* physical taking, because, "[u]nlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value." *Tulare Lake Basin*, 49 Fed. Cl. at 319.

of a landowner's inalienable rights to acquire, possess and protect private property," and "[t]here is no corollary provision in the United States Constitution." *Id*. (citations and quotation marks omitted). *Sisolak* stated:

> [T]he Nevada Constitution contemplates expansive property rights in the context of takings claims through eminent domain. The drafters of our Constitution imposed a requirement that just compensation be secured prior to a taking, and our State enjoys a rich history of protecting private property owners against government takings. To clarify regulatory takings jurisprudence under the Nevada Constitution, a per se regulatory taking occurs when a public agency seeking to acquire property for a public use enumerated in NRS 37.010, fails to follow the procedures set forth in NRS Chapter 37, Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without first paying just compensation.

Id. at 670.

Since *Sisolak* held that Nevada's Takings Clause provides greater protection of property rights than the federal Takings Clause, and that a "per se regulatory taking" occurs when property is taken without compliance with statutory procedures, *Sisolak* further demonstrates that Mineral County's construction of the public trust doctrine would result in a taking under the Nevada Constitution.

C. An Adjudicated Water Right Is a Vested Right Protectable Under Nevada's Takings Clause

This Court has held that a "vested" water right is entitled to constitutional protection. *Application of Filippini*, 66 Nev. 17, 21-22 (Nev. 1949). In *Filippini*, this Court stated that "[t]he term 'vested rights,' as that term is used in relation to constitutional guarantees, implies an interest it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice," and that a water right is "vested" and "regarded and protected as

property" if the right "has become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law." *Id.*; accord, *Nevada v. Morros*, 104 Nev. 709, 714 (1998). Thus, *Filippini* held that a water right based on either diversion for beneficial use or a permit is a "vested right" protected by "constitutional guarantees."

A water right established in a judicial decree that adjudicates all water rights in a stream system, such as the Walker River Decree, is particularly "vested" and entitled to constitutional protection, even more than a water right based on diversion for beneficial use or a permit as in *Filippini*. An action to adjudicate all water rights in a stream system is more in the nature of an *in rem* action than an *in personam* action, because the action attempts to adjudicate all rights in a particular res, namely a body of water. *Nevada v. United States*, 463 U.S. 110, 143-144 (1983); *United States v. Alpine Land & Reservoir Co*., 174 F.3d 1007, 1013-1014 (9th Cir. 1999). A water right adjudicated in such an *in rem* proceeding is the most secure, certain and reliable form of a water right, because the right has been adjudicated in relation to other rights by a court of law, applying principles of law that apply to all of the rights. Thus, the holder of an adjudicated water right has the most reasonable expectation of the right to use, and to continue to use, the water that is the subject of the right. An adjudicated water right is thus entitled to the highest level of constitutional protection.

Mineral County and its amici argue that even though an adjudicated water right may otherwise be "vested," the right is subject to reallocation under the public trust doctrine, because the doctrine is an "inherent" limitation on all water rights. Mineral Br. 32-34; Law Prof. Br. 16-18; Cal. Br. 21-22. Thus, as before, Mineral County and its amici argue that the public trust doctrine does not simply "co-exist" with the statutory system, but overrides the statutory system to the

extent that the statutory system conflicts with the public trust doctrine as they construe the doctrine. Their argument is flatly inconsistent with this Court's decision in *Filippini*, which held that "vested" water rights are protected by "constitutional guarantees." *Filippini,* 66 Nev. at 22. Their argument misconstrues the public trust doctrine itself. As we have argued, the doctrine requires the Nevada Legislature to provide for regulation of water in the public interest, as the Legislature did in enacting the statutory system. *See* pages 14-20, *supra*. The doctrine does not establish a separate body of law that exists outside the statutory system of regulation, but instead guides and informs the Legislature in its enactment of the statutory system. *See* pages 24-25, *supra*. Thus, adjudicated water rights are "vested" rights, which, under *Filippini,* are protected under Nevada's Takings Clause.

D. Judicial Interpretations of Property Are Subject to Constitutional Limitations

Under Mineral County's construction, the public trust doctrine would result not only in a *per se* physical taking and regulatory taking, as argued above, but also a "judicial taking," in that the taking would occur as the result of the judiciary's interpretation and application of the doctrine. *See* B. Thompson, *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) (describing judicial taking doctrine).

Mineral County argues that there can be no "judicial taking" of property, because a taking can occur only as a result of legislative and executive actions restricting property and not as a result of judicial interpretations of property. Mineral Br. 44-50.

On the contrary, the U.S. Supreme Court has held that judicial interpretations of property can result in a taking. *Webb's Fabulous Pharmacies,*

Inc. v. Beckwith, 449 U.S. 155, 163-164 (1980); *Chicago B. & Q. R'y Co. v. Chicago*, 166 U.S. 226, 233-234 (1897). In *Webb's*, the Supreme Court held that the Florida Supreme Court's interpretation of a statute providing for distribution of funds resulted in a taking of property, because the Florida Court's interpretation was contrary to the "long established general rule" of how the statute had been interpreted. *Webb's*, 449 U.S. at 163. Thus, the Court held that the taking occurred because of the Florida Supreme Court's interpretation of the statute, and not because of the statute itself. In *Chicago B. & Q.*, the Supreme Court stated that "the prohibitions of the amendment [the Takings Clause] refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities." *Chicago B. & Q.,* 166 U.S. at 233. *See also Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring) (a state court definition of property can result in "taking of property without due process of law" if it constitutes a "sudden change in state law, unpredictable in terms of the relevant precedents"). Thus, a judicial interpretation of property that results in a sudden and unpredictable change in the definition of the property and is unsupported by prior judicial interpretations, can result in a taking of property.

As Mineral County notes, the Supreme Court recently considered the judicial taking doctrine in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env. Quality*, 560 U.S. 702 (2010). Mineral Br. 44-49. There, the Supreme Court unanimously agreed, with one justice not participating, that the Florida Supreme Court's interpretation of the rights of beachfront property owners did not result in a taking of property, because the Court's interpretation was consistent with "background principles of state property law." *Stop the Beach*, 560 U.S. at 731. In dicta, however, the Court addressed the judicial taking doctrine. Four justices, in a plurality opinion written by Justice Scalia, argued that a judicial interpretation of

property can result in a taking, *id.* at 719-729; two justices, in a concurring opinion written by Justice Kennedy, argued that a judicial interpretation of property can result in a violation of the Due Process Clause rather than a taking under the Takings Clause, *id*. at 733-742; and two justices, in a concurring opinion written by Justice Breyer, argued that the Court should not reach or address the judicial taking issue, *id*. at 742-745.

Thus, while a *plurality* of justices in *Stop the Beach* argued that a judicial interpretation of property can result in a taking, a *majority* of justices—those who signed the Justice Scalia and Justice Kennedy opinions—agreed that a judicial interpretation of property is subject to constitutional limitations, whether the limitations are found in the Takings Clause or the Due Process Clause.

In our view, the Court's plurality opinion correctly argued that a judicial taking can occur. As the plurality opinion convincingly argued, the Takings Clause "is not addressed to the action of a specific branch or branches," and "is concerned with the act, and not the governmental actor," *Stop the Beach*, 560 U.S. at 713-714; the Takings Clause "bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking," *id*. at 715 (original emphasis); and "[i]t would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.* at 714. Under the plurality opinion, Mineral County's public trust argument would result in a judicial taking.

But even if a judicial interpretation of property is subject to due process principles rather than takings principles, as Justice Kennedy's concurring opinion argued, Mineral County's public trust argument would still infringe on the constitutional rights of the water users, by violating their rights to due process

under Justice Kennedy's opinion.[16] Justice Kennedy argued that the Due Process Clause "limit[s] the power of courts to eliminate or change established property rights," and that "[w]hen courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision." *Stop the Beach*, 560 U.S. at 736 (Kennedy, J., concurring). As noted above, Justice Stewart argued in an oft-cited concurring opinion that a "taking of property without due process of law" occurs if the courts define property in a way that "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). Since the public trust doctrine has never been construed in Nevada or elsewhere as a basis for reallocating adjudicated water rights, the doctrine, if so construed, would "eliminate or change" established property rights without "direction from the executive or legislature" under Justice Kennedy's view, and would result in a "sudden change in state law, unpredictable in terms of the relevant precedents" under Justice Stewart's view. Thus, Mineral County's argument would result in a violation of due process regardless of whether it results in a taking.

These constitutional principles would apply with particular force if Nevada's public trust doctrine were construed as authorizing reallocation of adjudicated water rights in California for the benefit of public trust uses in Walker Lake in Nevada. As argued earlier, Nevada's public trust doctrine does not apply in California, and does not authorize reallocation of adjudicated water rights in California to provide additional flows into Walker Lake in Nevada. *See* pages 31-32, *supra*.

[16] The Nevada Constitution provides that no person may be deprived of "property" without "due process of law." Nev. Const., art. 1, § 8.5.

In sum, a judicial interpretation of property is subject to constitutional limitations, whether the limitations are found in the Takings Clause or the Due Process Clause. Although the courts may change the common law in response to changing conditions and thus the common law of property may evolve, as the Law Professors argue, Law Prof. Br. 23, a sudden and unpredictable change in the common law definition of property that is unsupported by relevant precedents goes beyond the simple evolution of the common law and crosses constitutional bounds. If the public trust doctrine were construed as authorizing reallocation of adjudicated water rights—a construction no court of any state has ever adopted—the doctrine would exceed constitutional bounds and infringe on the constitutional rights of the holders of the rights, whether their constitutional rights are based on takings principles or due process principles.

E. The Public Trust Doctrine as Construed by Mineral County Is Not a "Background Principle" of Nevada Law

The U.S. Supreme Court has held that a government regulation of property that is supported by "background principles" of state law does not result in a taking of the property. *Lucas*, 505 U.S. at 1029. Mineral County argues that its public trust argument is supported by "background principles" of Nevada law, because Nevada's public trust doctrine has always applied to water rights. Mineral Br. 30, 36-43.

The public trust doctrine is not a background principle of Nevada law, as Mineral County attempts to apply the doctrine here. The Nevada courts have never held, and indeed no court has ever held, that the public trust doctrine authorizes reallocation of adjudicated water rights. Although *Lawrence* recently held, in 2011, that the public trust doctrine applies in Nevada and limits the state's authority to transfer the beds and banks of navigable waters, *Lawrence* did not hold

that the public trust doctrine authorizes reallocation of adjudicated water rights, or, for that matter, that the doctrine even applies to regulation of water. Regardless of how this Court construes Nevada's public trust doctrine, the doctrine is not a background principle of Nevada law as Mineral County attempts to apply the doctrine here.

In fact, the background principles of Nevada law relevant here are that water rights are "vested" rights protected by "constitutional guarantees," *Filippini*, 16 Nev. at 16, and that the Nevada Takings Clause provides greater protection of property rights than the federal Takings Clause, *Sisolak*, 122 Nev. at 669-670. Thus, the background principles of Nevada law recognized in *Filippini* and *Sisolak* are that adjudicated water rights are protected by constitutional guarantees, not, as Mineral County argues, the opposite.

F. The Takings Issue Is Ripe for Judicial Review

Mineral County and amici NRDC contend that the takings issue certified by the Ninth Circuit is not ripe for review, because the Supreme Court, in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), held that a takings claim is not ripe until a government entity has reached a "final decision" restricting the property, and no final decision restricting property has been reached here. Mineral Br. 50; NRDC Br. 29.[17]

The takings issue is ripe because the Ninth Circuit has certified the issue to this Court, and this Court's response will assist the Ninth Circuit in resolving a

[17] The Supreme Court is currently considering whether *Williamson* should be overruled in holding that a takings claimant must exhaust its state court remedies before pursuing federal remedies. *Knick v. Township of Scott, Pennsylvania*, 862 F.3d 310 (2017), cert. granted 138 S.Ct. 1262 (2018).

concrete dispute between the parties. In its certification order, the Ninth Circuit asked this Court to assume that the public trust doctrine "applies" and "allows for reallocation" of adjudicated water rights, and the Ninth Circuit has asked whether such "abrogation" of the rights would result in a taking under the Nevada Constitution. Thus, this Court is not being asked to *decide* whether anyone's rights have been taken, which was the issue decided in *Williamson*, but instead is being asked to *assume* that the water users' rights have been abrogated, and to advise the Ninth Circuit whether such abrogation would result in a taking under the Nevada Constitution. *Williamson* has no relevance to the certified question posed by the Ninth Circuit.

Although an action seeking an advisory opinion is normally not ripe and justiciable, issues of ripeness and justiciability generally do not arise in certification actions, because the responding court is being asked, as here, to render an advisory opinion on an issue of law that will assist the certifying court in resolving a concrete dispute between the parties. The Ninth Circuit is asking for this Court's assistance in enabling the Ninth Circuit to resolve a concrete dispute. If this Court declines to provide assistance because it regards the certified issue as not ripe, the Ninth Circuit will be required to decide an important and unsettled issue of Nevada law without the guidance and assistance that the Ninth Circuit has requested from Nevada's highest court. Such a result would be contrary to principles of sound judicial administration. Cf. *National Audubon Society v. Superior Court*, 658 P.2d 709, 717 n. 14 (Cal. 1983) (holding that "usual objections to advisory opinions do not apply" where federal court abstains from deciding state law issue and instead requests state court to decide issue, because state court's failure to decide issue would "compel federal courts to decide

unsettled questions of California law which under principles of sound judicial administration [citation] should be resolved by state courts").[18]

CONCLUSION

This Court should hold that (1) Nevada's public trust doctrine does not authorize reallocation of water rights adjudicated in judicial decrees, and (2) if Nevada's public trust doctrine were construed as authorizing reallocation of such rights, the doctrine would result in a taking of property under the Nevada Constitution.

Respectfully submitted,

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[18] This brief does not address amicus Walker River Paiute Tribe's argument that the public trust doctrine does not apply to the Tribe's reserved right, Tribe Br. 12-14, and that the Tribe's right vested prior to Nevada's entry into the Union, *id*. at 14, because, as the Tribe correctly notes, the Ninth Circuit did not certify these issues to this Court. *Id*. at 3-5.

CERTIFICATE OF COMPLIANCE (RULE 28.2)

1. The undersigned attorneys hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4) and the type style requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using [state name and version of word-processing program] in 14 point Times New Roman font.

2. The undersigned attorneys further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,958 words.

3. Finally, the undersigned attorneys certify that they have read this appellate brief, and to the best of their knowledge, information and belief, it is not frivolous or interposed for any improper purpose. The undersigned attorneys 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 which the matter relied on is to be found. The undersigned attorneys understand that they may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that **RESPONDENTS' ANSWERING BRIEF (RESPONDENTS LYON COUNTY, *ET AL*)** were filed electronically with the Nevada Supreme Court on the 12th day of April, 2019. Electronic Service of **RESPONDENTS' ANSWERING BRIEF (RESPONDENTS LYON COUNTY, *ET AL*)** shall be made in accordance with the Master Service List as follows:

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I further certify that on the 12th day of April, 2019, I served, via USPS first class mail, complete copies of **RESPONDENTS' ANSWERING BRIEF (RESPONDENTS LYON COUNTY, *ET AL*)** on the following attorneys of record who are not registered for electronic service:

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/s/ Irene Islas
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