

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER
LAKE WORKING GROUP,

Appellants,

v.

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

Respondents.

Supreme Court No. 75917

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**BRIEF AMICUS CURIAE OF THE CARSON WATER
SUBCONSERVANCY DISTRICT, ELKO COUNTY, HUMBOLDT RIVER
BASIN WATER AUTHORITY, DOUGLAS COUNTY, AND STOREY
COUNTY**

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NRAP 26.1 DISCLOSURE

The undersigned counsel certify that none of the amici parties are owned by a parent corporation or have issued stock, and therefore no publicly held company owns 10% or more of any amici party's stock. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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I. INTRODUCTION AND IDENTITY AND INTEREST OF AMICI CURIAE

A. Carson Water Subconservancy District

Carson Water Subconservancy District (CWSD) has an interest in filing an amicus brief with the Nevada Supreme Court in the case of *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018), because of the impact that this case will have on all Decrees and Nevada water law involving surface and ground water rights in the entire state of Nevada. Based on this concern, the CWSD submit their amicus brief opposing the use of the public trust doctrine to take water away from currently decreed and appropriated water rights, and to respond to the two questions the Ninth Circuit Court of Appeals has requested the Supreme Court of Nevada to answer. The United States Court of Appeals for the Ninth Circuit certified to this Court the following questions:

- 1) Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?
- 2) If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a “taking” under the Nevada Constitution requiring payment of just compensation?¹

The Court stayed all further proceedings in the case and is holding both the public trust and takings claims “in abeyance pending the result of certification.” ²

The CWSD, pursuant to Nevada Rules of Appellate Procedure (NRAP) Rule 29(a)(2), submits this amicus brief to assist the Court in answering these two important questions.

¹ *Mineral County v. Walker River Irrig. Dist.*, 900 F.3d 1027, 1034 (9th Cir. 2018). *Id.* at 273; *Mineral County*, 900 F.3d at 1034.

² *Id.* at 1028, 1035.

The Carson Water Subconservancy District, hereinafter CWSD, is a unique multi-county, bi-state agency dedicated to establishing a balance between the needs of the communities within the Carson River Watershed and the function of the river system.^{3 4}

CWSD acts as lead agency for integrated watershed planning and funds the Carson River Watershed Coordination Program, which facilitates the Carson River Coalition. CWSD strives to involve all counties and communities within the watershed in the effort to meet the various future water needs, enhance the health of the river system, protect the floodplains, and provide outreach and information to the community. CWSD's mission is to work within the existing governmental frameworks to promote cooperative action for the Carson River that crosses both agency and political boundaries. CWSD serves as an information resource for the

³ See, Chapter 621, Statutes of Nevada 1989 Carson Water Subconservancy District Act.

⁴ In 1989, the Nevada Legislature charged CWSD with the responsibility of “management and development of the water resources in the upper Carson River to alleviate reductions and loss of water supply, of the fragmented responsibilities for conservation and supply of water, and of any threats to the health, safety and welfare of the people of the upper Carson River Basin.” The legislation established a nine-member board comprised of representatives from Douglas County, Carson City, and Lyon County. In 1999, the Nevada Legislature expanded the CWSD Board to include members from Churchill County. In 2001, Alpine County, California joined CWSD through a Joint Power Agreement, and in 2018 Storey County became a member of the Carson River Watershed Committee. After the 1997 flood, the Carson River Coalition (CRC) was formed to deal with all the water issues in the Carson River Watershed in an integrated process, and the CWSD was asked to coordinate this effort. The CRC is a voluntary stakeholder group of representatives from federal and state agencies, city and county departments, conservation and weed management groups, farmers/ranchers, and any individual interested in the welfare of the Carson River Watershed.

Carson River watershed and oversees and funds numerous studies to better understand the complex dynamics of the region.⁵

Because of the breadth of the stakeholders that contribute to the CWSD, and the technical expertise offered by them to the CWSD regarding Nevada water, the CWSD is uniquely positioned to offer a broad and reasoned response to the important inquiry put to the Nevada Supreme Court.⁶ CWSD staff has expertise in the following disciplinary fields: water quantity, quality, hydrology, aquatic ecology, floodplain protection, water conservation, and county ordinance.

CWSD staff have the following certifications:

- Nevada Water Right Surveyor
- Certified Floodplain Manager
- Water Use Efficiency Practitioner
- Project Management

B. Elko County

Elko County is located in the northeastern corner of the state, at the head of the Humboldt River Basin. Elko County holds a number of vested and pending surface and groundwater rights for municipal uses throughout the county. The county

⁵ CWSD Board of Directors consists of fourteen members with representatives from each of the six counties within the Carson River watershed and includes several agricultural representatives and one advisory member.

CWSD has no regulatory authority

CWSD funds come from ad valorem taxes and federal, state, and local grants

CWSD is the designated Clean Water Act 208 Planning Agency

CWSD's mission is to work within existing governmental frameworks to promote cooperative action for the watershed that crosses both agency and political boundaries.

⁶ The General Manager of the CWSD, Ed James, is a registered Professional Engineer in the States of California and Nevada with 35 years of experience in the water resource field. The General Manager is also recognized as an expert witness in Hydrology and Colorado Water Law in Colorado Water Court Divisions 1 & 5.

relies on these vested rights in its planning capacity as well as for economic development. The reliability of vested water rights is closely tied with economic development, because water is necessary for agricultural, municipal, mining, and domestic uses. For these reasons, Elko County has an interest in filing an amicus brief with the Nevada Supreme Court in the case of *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018).

C. Humboldt River Basin Water Authority

The Humboldt River Basin Water Authority (HRBWA) was created in 1995 by Humboldt County, Lander County, Eureka County, Elko County and Pershing County pursuant to Nevada Revised Statutes 277.080 and 277.170 inclusive of the interlocal Cooperation Act which provides that any power, privilege, or authority exercised or capable of exercise by the public agency of the State of Nevada may be exercised jointly with any other public agency of the State. HRBWA is a separate administrative entity with its own powers, privileges, duties, functions, and responsibilities. The member counties recognize the need to act in a unified and cooperative manner with respect to ensuring the quality and availability of ground and surface water supplies which originate within or pass through the Humboldt River Basin as necessary to enhance environmental, social, economic, and fiscal conditions within the Basin and also share a common interest in the protection and enhancement of existing decreed and certificated water rights dependent upon surface and ground waters originating within the entire watershed serving the Humboldt River Basin.

HRBWA has a fifteen-member Board of Directors; three (3) appointed by each member county commission which includes at least one county commissioner from each member county and a representative of the Nevada Mining Association as non-voting member. The major roles and responsibilities of the Humboldt River Basin Water Authority are:

- Recognize and protect all existing decreed and certificated water rights
- Identify and seek to resolve inter-county water allocation and management issues
- Formulate positions for presentation to relevant local, state, and federal agencies
- Monitor water supply and demand within the Basin
- Monitor the extent to which proposals to develop and export Humboldt River Basin water may adversely affect the water balance for member counties within the Authority
- Recommend appropriate federal and state legislation for the management of surface and ground water within the Humboldt River Basin
- Encourage environmental stewardship of the recharge area ecosystem Humboldt River Basin
- Recommend cooperative programs and management of the water resources of the Humboldt River Basin.

The Humboldt River runs through northern Nevada and is approximately 300 miles long with a drainage area of 7,410 square miles. The Humboldt River is the only major river wholly contained within the State of Nevada.

Humboldt River Basin Water Authority (HRBWA) has an interest in filing an amicus brief with the Nevada Supreme Court in the case of *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018), because of the impact that this case will have on Nevada water law involving surface and ground water rights and Decrees in the Humboldt River Basin and in the entire state of Nevada.

Based on this concern, HRBWA opposes the use of the public trust doctrine to take water away from currently decreed and appropriated water rights. To do so

would create social and economic upheaval. Water is of primary importance to the economy of the Humboldt River Basin member counties.

D. Storey County

Storey County is located within the Carson River and Truckee River watersheds. Many land owners in Storey County including, but not limited to, the Tahoe-Reno Industrial Center and various agricultural users own and use surface water rights already adjudicated and settled under the doctrine of prior appropriations. Using the public trust doctrine to re-allocate water will create uncertainty to all water rights owners and will destabilize future economic development and diversification, job creation, and overall economic growth in Storey County and Northern Nevada. For these reasons, Storey County has an interest in filing an amicus brief with the Nevada Supreme Court in the case of *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018).

E. Douglas County

The decision of the Nevada Supreme Court in this matter endangers the long-established vested water rights of the citizens and local governments of the State of Nevada.

The West Walker River is a tributary of the Walker River and flows north and enters southern Douglas County, Nevada. These waters heavily support historic ranching operations and recreational activities in Douglas County (second only to Lake Tahoe). Topaz Lake is a primary recreation area in Douglas County and is fed by diverting waters from the West Walker River into a basin that had previously contained a smaller, natural lake. Topaz Lake is popular for boaters, water-skiers, campers, fishermen, and supports Topaz Lodge and other tourist-oriented businesses.

Douglas County hold a number of vested and pending surface and groundwater rights for municipal uses. The elected officials of this county relies on

these vested rights in their planning capacities as well as for economic development. The reliability of vested water rights is closely tied with economic development, because water is necessary for agricultural, municipal, mining, and domestic uses. For these reasons, Douglas County has an interest in filing an amicus brief with the Nevada Supreme Court in the case of *Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018).

F. General Statement

The Amici herein are “local governments” as defined by NRS 237.050, are political subdivisions of the State of Nevada, and are therefore authorized to file this brief without the prior consent of the parties or leave of the court pursuant to NRAP 29(a).

II. STATEMENT OF THE CASE

Under common law “public trust” doctrine, the state owns and has a duty to manage tidal and navigable waters, together with the lands beneath them, in trust for the public.⁷ While the doctrine was originally understood to focus on navigation, commerce and fishing, various state courts “over time have developed the doctrine alongside the public’s changing uses of water to incorporate additional public purposes, including traveling, bathing, recreating, hunting, protecting the ecosystem, preserving scenic beauty, and maintaining access to the waters.”⁸ The issue in this case is this: can the public trust doctrine be used to trump state law and take away water rights already adjudicated and settled under the doctrine of prior appropriation?

While the case giving rise to the questions being submitted to the Nevada Supreme Court concerns the Walker River, the result of this Court’s answers to the

⁷ See generally *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

⁸ Melissa Scanlan, “Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast,” 65 South Carolina Law Review 295, 308 (2013).

two questions issued by the 9th Circuit will affect the security of *all* water rights in the State of Nevada.

A. Background to the Walker River Case

In 1936, the United States District Court of the District of Nevada issued a final decree over all claims to the waters of the Walker River and its tributaries, including claims on behalf of the Walker River Paiute Tribe.⁹ The Decree was amended by the Ninth Circuit Court of Appeals in 1939.¹⁰ That decree had settled surface water rights to the Walker River.¹¹ In 1991, the Walker River Irrigation District petitioned the decree court to enforce its decreed rights.¹² The United States and the Paiute Tribe filed counterclaims, claiming new water rights for a reservoir built on the tribal land. In 1994, Mineral County moved to intervene, asking the Court to modify the decree to provide minimum levels to maintain the viability of Walker Lake.¹³

In 2015, the decree court dismissed Mineral County's complaint for lack of standing, while concluding that the public trust doctrine could not be used to reallocate decreed rights without constituting a taking for which just compensation must be paid.¹⁴ Mineral County appealed to the Ninth Circuit.¹⁵

The Ninth Circuit held the U.S. District Court erred by dismissing Mineral County for lack of standing.¹⁶ The court then analyzed the public trust doctrine

⁹ See *U.S. v. Walker River Irr. Dist.*, 11 F. Supp. 158, 159 (D. Nev. 1935), *U.S. v. Walker River Irr. Dist.*, 14 F. Supp. 10 (D. Nev. 1936)

¹⁰ *U.S. v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939)

¹¹ *Id.*

¹² *U.S. v. Walker River Irr. Dist.*, No. 3:73-cv-00128-RCJ, 2015 WL 3439122

¹³ *U.S. v. Walker River Irr. Dist.*, No. 3:73-cv-00128-RCJ, 2015 WL 3439122, at *3 (D. Nev. May 28, 2015), *rev'd in part sub nom., Mono Cnty. v. Walker River Irr. Dist.*, 735 F. Appx. 271 (9th Cir. 2018).

¹⁴ *Walker River Irr. Dist.*, No. 3:73-cv-00128-RCJ, 2015 WL 3439122, at *10.

¹⁵ *Mineral Cnty.*, 900 F.3d at 1034; *see also Mono Cnty.*, 735 F. Appx. at 271.

¹⁶ *Id.*

jurisprudence in Nevada, noting that the Nevada Supreme Court expressly recognized the doctrine but “whether it allows reallocation of rights settled under the separate doctrine of prior appropriation” remains unsettled.¹⁷

III. LEGAL BACKGROUND

Nevada’s comprehensive water law embraces the public trust doctrine and does not violate it. The Public Trust Doctrine should not apply to rights already adjudicated and settled under the doctrine of prior appropriation and if raised should not create a private right of action. Nevada Law provides judicial review of water allocation decisions of the State Water Engineer affording adequate safeguards and legal remedies to protect the public trust.

The abrogation of adjudicated water rights settled under the doctrine of prior appropriation would constitute a “taking” under the Nevada Constitution requiring payment of just compensation. There is significant value in water rights and a marketplace for its sale and acquisition. This marketplace ensures that changes in priorities and values can be accommodated into the future for the benefit of the state and our people. If the right to use water can be taken in a court proceeding without the need to pay for it, the marketplace will fail and there is no workable substitution to accommodate future development, technology and public values.

IV. ARGUMENT

A. Water rights already adjudicated and settled under the doctrine of prior appropriation should not be subject to reallocation under the public trust doctrine

The prior appropriation doctrine, codified into Nevada’s water laws with the establishment of the Office of the State Engineer in 1903 is the foundation for

¹⁷ *Id.*

allocating water throughout the state of Nevada.¹⁸ Nevada’s water statutes codified common law appropriations in Nevada.¹⁹ The statute declared these appropriated water rights to be in the public interest.²⁰ With a limited water resource and with the major watersheds (Walker, Carson, Truckee, and Humboldt) all flowing into the Great Basin, all the water in Nevada is fully utilized. As such, Nevada’s water systems and the availability of water is unique from other states. All major watersheds in Nevada have already been allocated by decrees. There is no “separate source” of water that could be tapped into to fill a mandated allotment or reallocation of water. A request for water would necessarily require another person or persons to surrender their allocated water. Ranching, farming, mining, and communities were all created with the fundamental understanding of water allocation through the prior appropriation doctrine.

i. The Public Trust Doctrine in Nevada

In defining a state’s trust obligations under the public trust doctrine, the United States Supreme Court held that the public trust applies to bed and banks underlying navigable waterways, and that a state may not divest itself of control over the trust property, “except as to such parcels as are used in promoting the interests of the public therein.”²¹ This Court expressly adopted the public trust doctrine and set forth Nevada’s public trust doctrine framework in *Clark County v*

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

¹⁹ *Id.* at ch. 4, § 8, 1903 Nev. Stat. 21 (“That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the . . . control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . .”); *See also Id.* at ch. 4, § 1, 1903 Nev. Stat. 21–22 (“the use of all water now appropriated, or that may hereafter be appropriated is hereby declared to be a public use.”).

²⁰ *Id.*

²¹ *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1982), at 434.

Lawrence.²² Finding that application of the public trust doctrine in Nevada is founded upon the policies established in the state constitution and statutes, this Court ruled that it was the Nevada Legislature that had the responsibility to “act as a fiduciary of the public in its administration of trust property.”²³ In *Lawrence*, this Court found that “another source of Nevada law that evinces the public trust doctrine is our statutory law, specifically, NRS 321.0005 and NRS 533.025.”²⁴

Recognizing Nevada Law, this Court held that: “by its express language, NRS 321.0005 contemplates fiduciary-type duties with regard to the state’s administration of state lands.”²⁵ NRS 533.025 provides that “[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.” Notably, NRS 533.025 does not provide that Nevada’s water belongs to the state; rather, it “belongs to the public.” Therefore, the public trust doctrine in Nevada requires that decisions regarding allocation of water are made in the public’s interest.

ii. Voluntary and statutory programs already exist in Nevada to solve the problems highlighted by the Walker Lake litigation. These successful programs do not require the upheaval of Nevada’s framework of water law.

The Walker Basin Restoration Program was established by Congress in October 2009 by Public Law 111-85, with the Program’s primary purpose to restore and maintain Walker Lake.²⁶ This is one existing program that is

²² *Lawrence v. Clark County*, 254 P.3d 606, 127 Nev. Adv. Op. 32 (Nev., 2011)

²³ *Id.* 254 P.3d at 613

²⁴ *Id.* 254 P.3d at 612

²⁵ *Id.*

²⁶ Omnibus Appropriations Act, 2009; P.L. 111-85 § 207-8, 123 Stat. 2858, 43 U.S.C. § 2211 (2009) (in 2009, Congress passed the “Walker Basin Restoration Program”).

successfully addressing the problems of Walker Lake. In 2017, the non-profit Walker Basin Conservancy (WBC) accepted the lead for all implementation efforts to restore and maintain Walker Lake while protecting agricultural, environmental and recreational interests in the Walker River Basin. The program includes a voluntary water rights acquisition program with willing sellers to reduce upstream water use with permanent increases in freshwater inflows to the Lake. To date, The Walker Basin Conservancy (Conservancy) has acquired 40 percent of the water rights required to restore Walker Lake.²⁷ The Conservancy acquires land, water and related interests from willing sellers in the Walker River Basin to restore and maintain Walker Lake while protecting agricultural and recreational interests. In 2017, WBC assumed the lead role for the Walker Basin Restoration Program, previously administered by the National Fish and Wildlife Foundation.²⁸ This voluntary water acquisition program is working; Walker River has reached Walker Lake for the first time in 6 years and is providing Walker Lake with much needed fresh water.²⁹ Also, Walker Lake has risen 12 vertical feet since the beginning of 2017.³⁰ The U.S. Geological Surveys, having run simulations for inflows to Walker Lake, predicts the lake will rise by as much as 15 to 18 feet this year, the most in a single year in recorded history.³¹

The CWSD was directly involved in the Newlands Project Water Rights Fund, another successful voluntary water buyout program. In 1999, the Nevada

²⁷ See, e.g., Walker Basin Restoration Program, National Fish and Wildlife Foundation, <https://www.nfwf.org/walkerbasin/Pages/home.aspx> (last visited Jan. 7, 2019); see also Walker Basin Restoration Program, Walker Basin Conservancy, <https://www.walkerbasin.org/wbrp/> (last visited Feb. 5, 2019); see also 72 Fed. Reg. 54,285 (Sept. 24, 2007).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

legislators passed AB 380, establishing the Newlands Project Water Rights Fund and a related program for the acquisition of certain surface water rights; and providing other matters properly relating thereto.³² This law included a voluntary water buyout program to reduce litigation in the Newlands project.³³ Per the bill, the CWSD administrated this program.³⁴

iii. Nevada’s established water law, in NRS 533.010 to NRS 533.560, requires the State Engineer to consider the public trust, incorporating all public trust values in deciding how to best appropriate water.

This Court held in *Lawrence*: “In sum, NRS 321.0005 and NRS 533.025 effectively statutorily codify the principles behind the public trust doctrine in Nevada.”³⁵ In Nevada any divestment of the public trust property must serve a beneficial use.³⁶ There can be no legal entitlement to the use of water if beneficial use is not established.³⁷ The Nevada Legislature requires the State Engineer to determine that the “public interest” is served when addressing the appropriation of water rights.³⁸ This Court has held that the State Engineer properly defined and proscribed the meaning of “the public interest” within his authority under NRS 533.370(3).³⁹ In *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, the State Engineer identified guidelines derived from Nevada’s water statutes (e.g., NRS Chapters 533, 534 and 540) to be considered when evaluating the “public

³² Nv. A.B. 380, 70th Cong. (1999)

³³ *Id.*

³⁴ *Id.*

³⁵ *Lawrence v. Clark County*, 254 P.3d at 613

³⁶ NRS 533.005 et seq.

³⁷ *Id.* at NRS 533.050, NRS 533.353

³⁸ *Id.* at NRS 533.370(3), NRS 533.070(2)

³⁹ *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 762 (1996).

interest.”⁴⁰ The CWSD’s experience working within the Carson River Basin is that the State Engineer *does* protect the public trust and works to ensure that all water allocations are in the public interest. As such, Nevada’s comprehensive water law is in harmony with and consistent with the public trust doctrine.

iv. Cases being represented as authoritative on the issue of the public trust in Nevada involving states that don’t adhere to the law of Prior Appropriation do not offer reasonable comparisons and should be disregarded.

It is important to recognize that the public trust doctrine has never been used to retroactively reallocate settled water rights in a state with laws based on prior appropriation. Prior appropriation states have not imposed requirements beyond their statutory laws covering water rights. And, the public trust doctrine has not been used to reallocate previously established and appropriated rights.

Colorado’s water law, like Nevada, is based on prior appropriation.⁴¹ When addressing the application of the public trust doctrine within Colorado water law, Colorado rejected the analysis in *National Audubon Society v. Superior Court*,⁴² as inapplicable to Colorado law.⁴³ The Colorado Court held that California’s reasonable use doctrine “has never been the law in Colorado’s ‘pure’ prior

⁴⁰ *Id.*

⁴¹ Colo. Const. art. XVI § 5; *see also* Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came From, And Why Colorado Does Not (And Should Not) Have One*, 16 U. Denv. Water L. Rev. 47, 48–49 (2012).

⁴² *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 446, 658 P.2d 709 (1983).

⁴³ *See Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14,312); *Pyle v. Gilbert*, 265 S.E. 2d 584 (Ga. 1980). This “pure” prior appropriation doctrine contrasts with California’s riparian/prior appropriation/public trust hybrid which California chose by reason of its own custom and law; *see National Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983); *Lux v. Haggin*, 10 P. 674 (Cal. 1886).

appropriation system.”⁴⁴ Nevada should do the same. The water law in Idaho, like Nevada is based on prior appropriation.⁴⁵ Idaho passed a statute that its law of prior appropriation satisfies the public trust doctrine.⁴⁶

When considering if the State Engineer should look to the laws of other states, this Court held, there is “no indication that Nevada’s Legislature intended that the State Engineer determine public policy in Nevada by incorporating another state’s statutes . . .” to analyze the public interest.⁴⁷ However, should this Court look to other states, only those states that also follow strict prior appropriation offer reasonable comparisons.

B. The abrogation of adjudicated or vested water rights is a “taking” under the Nevada Constitution requiring payment of just compensation.

Under Nevada Law, a water right is considered and protected as real property.⁴⁸ It cannot be taken without compensation.⁴⁹

Any argument that taking away the water is not a taking because the owner still owns the water right is absurd.

For a taking to occur, a claimant must have a “stick in the bundle of property rights.” The bundle of property rights includes “all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the

⁴⁴ *Id.*

⁴⁵ See Idaho Code § 42-1502.

⁴⁶ See Idaho Code § 58-1201 and Idaho Code § 58-1203.

⁴⁷ *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 762 (1996).

⁴⁸ See, NRS 111.167, NRS 533.382, and NRS 240.161 through 240.168; See also *Carson City v. Lompa’s Estate*, 88 Nev. 541, 501 P.2d 662 (1972); see also *Vineyard Land & Stock Co. v. Dist. Ct. of Fourth Jud. Dist. of Nevada in and for Elko Cnty.*, 42 Nev. 1, 171 P. 166 (1918) (water rights holders retain due process interests under Nevada’s takings clause).

⁴⁹ See, U.S. Const. amend. art. V., See also, NRS 37.035(3)(d)

property.”⁵⁰ Nevada Ranchers, farmers, miners and communities acquired water rights so they could use the water for a beneficial use. They need to use the water to meet the needs of their cattle, farm, business or development. They didn’t buy or acquire the water right so they could frame a certificate. Take away the use of the water itself and the water rights are meaningless.

Importantly, as discussed above, there is the market place for the sale and acquisition of water rights. If water can be taken away without paying for it, then the market place will fail and current successful programs to acquire water rights will also fail.

In the California case of *National Audubon Society v. Superior Court*, the court ruled that the state’s “continuing supervisory control” over water resources subject to the trust “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.”⁵¹ Thus, limiting the claim of having a vested appropriative water right in California.⁵² In that case the Supreme Court clarified the scope of the ‘public trust doctrine’ and held that the state as trustee of the public trust retains supervisory control over the state’s waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust.⁵³

The CWSD encourages this Court to adopt a better rule consistent with Nevada law that considers a water right to be a property right. This Court should

⁵⁰ *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647 (Nev. 2007), (quoting *Sisolak*, 122 Nev. at 658, 137 P.3d at 1119 (quoting *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000))). *See also*, Nev. Const. art. 1, § 1 (granting the inalienable constitutional right to “[p]rotect[]” property).

⁵¹ *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 446, 658 P.2d 709 (1983)

⁵² *States v. State Water Resources Control Board* 182 Cal.App.3d 82 (1986).

⁵³ *Id.*

apply a traditional regulatory takings analysis to takings claims arising from regulatory restrictions on the use of water. The *Penn Central* analysis⁵⁴ has been applied to takings claims arising from regulatory restrictions on a wide variety of property interests and there is no apparent reason why the same analysis should not apply to takings claims arising from restrictions on water use since a water right is considered and protected as real property in the State of Nevada⁵⁵.

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

If the Public Trust Doctrine was deemed to supersede Nevada's existing water law then all existing water rights would be subject to being taken. Increased piecemeal litigation would disadvantage farmers, ranchers, and property owners with limited resources to fight motivated developers and large corporations. There would be a lack of certainty that would hurt long term planning. The efforts of the CWSD, and other voluntary and statutory programs in the State of Nevada would be impaired.

V. CONCLUSION

Nevada is unique from other states due to its limited water resources and the fact that surface water in Nevada has been allocated by decrees. The water law in Nevada, based on prior appropriation is fair, requiring a determination of beneficial use and public interest. The legislature is best suited to establish laws consistent with evolving public needs and changing priorities. Nevada's water law is

⁵⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (discussing "economic impact," "investment-backed expectations," and the "character of the regulation").

⁵⁵ *Carson City v. Lompa's Estate*, 88 Nev. 541, 501 P.2d 662 (1972); see also *Vineyard Land & Stock Co. v. Dist. Ct. of Fourth Jud. Dist. of Nevada in and for Elko Cnty.*, 42 Nev. 1, 171 P. 166 (1918) (water rights holders retain due process interests under Nevada's takings clause).

appropriately managed by the State Engineer, considering public trust values and ultimately, affirmed, or altered by the courts. Predictability and certainty are prerequisites to vital marketplace investments in our state. Our current frame work for water law provides the level of certainty depended upon to encourage appropriate diversity in our State's development. The public trust doctrine should not be interpreted to allow piecemeal litigation to retroactively reallocate decreed water rights. As a valuable and necessary property interest the absence of which can make land worthless, water rights cannot be taken without just compensation. To hold otherwise would subvert the marketplace in Nevada that is currently responding to the public trust values of Nevada.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 16 in 14-point Times New Roman font;

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

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CERTIFICATE OF SERVICE

I hereby certify that the BRIEF AMICUS CURIAE OF THE CARSON WATER SUBCONSERVANCY DISTRICT, ELKO COUNTY, HUMBOLDT RIVER BASIN WATER AUTHORITY, DOUGLAS COUNTY, AND STOREY COUNTY was filed electronically with the Nevada Supreme Court on the **12th day of April, 2019**. Electronic Service of the same shall be made in accordance with the Master Service List as follows:

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