

IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 75917

MINERAL COUNTY; AND
WALKER LAKE WORKING GROUP,

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Elizabeth A. Brown
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Appellants,

v.

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

Respondents.

On Order From Ninth Circuit Court of Appeals
Certifying Questions

**AMICUS BRIEF OF
WASHOE COUNTY WATER CONSERVATION DISTRICT
AND CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST

The Washoe County Water Conservation District (the “Washoe Conservation District”) is an irrigation district organized under the provisions of Chapter 539 of the Nevada Revised Statutes. As an irrigation district and political subdivision of the State of Nevada, the Washoe Conservation District is authorized to file this amicus brief pursuant to NRAP 29(a).

The Carson-Truckee Water Conservancy District (“CT Conservancy District”) is a conservation district organized under the provisions of Chapter 541 of the Nevada Revised Statutes. As a conservation district and political subdivision of the State of Nevada, the CT Conservancy District is authorized to file this amicus brief pursuant to NRAP 29(a).

A. Background on the Washoe Conservation District

The Washoe Conservation District, originally known as the Truckee Meadows Irrigation District, was duly organized on June 25, 1929 by holders of Truckee River irrigation rights in the Truckee Meadows. The Washoe Conservation District was created, *inter alia*, to (1) facilitate conclusion of litigation over the waters of the Truckee River system and Lake Tahoe for the benefit of property owners within the Washoe Conservation District and (2) prevent shortages of irrigation water and reduce floods by (a) adjudicating ownership priorities of irrigation rights and (b) providing storage and regulatory

reservoirs to conserve water. The Washoe Conservation District generally encompasses all lands within the Truckee Meadows that were irrigable in 1929, together with portions of land in the Truckee canyon east of Sparks.

The Washoe Conservation District is an original participating party with respect to the decree entered in *United States v. Orr Water Ditch Co., et al., In Equity, No. A-3*, in the United States District Court for the District of Nevada (the “Orr Ditch Decree”). During the course of that litigation, the Washoe Conservation District began investigating the feasibility of storing water at the Little Truckee Canyon to protect diversions of senior irrigation right holders during drought by pursuing federal appropriations and filing applications for storage rights to construct and operate a dam for water storage.

These efforts spurred settlement discussions among key parties. In 1935, the Washoe Conservation District, the United States, Sierra Pacific Power Company, the Truckee Carson Irrigation District (which was the operator of the Newlands Project and, at that time, the operator of the dam at the outlet of Lake Tahoe under a contract with the United States), and certain individual parties entered into the Truckee River Agreement to facilitate entry of the final *Orr Ditch Decree*. The terms of the Orr Ditch Decree were contingent on construction of additional upstream storage. Ultimately, that additional upstream storage was provided

through construction of Boca Reservoir in 1939 on the Little Truckee River in California.¹

In 1944, the Truckee River Agreement was adopted and incorporated into the *Orr Ditch Decree*. Among other things, the agreement provides for the upstream storage of the waters of the Truckee River and its tributaries and for the coordinated operation of Lake Tahoe and Boca Reservoir for purposes of meeting certain prescribed rates of flow in the Truckee River known as “Floriston Rates.”

The Washoe Conservation District paid for the construction of the Boca Dam, and the Washoe Conservation District has been responsible for the care, operation and maintenance of the Boca Dam since 1942 under contracts with the United States Department of Interior. The Washoe Conservation District holds California Water Application 5169, License 3723, which grants the Washoe Conservation District rights to store 40,800 acre feet of water in the Boca Reservoir. In 1959, the Washoe Conservation District entered the Tahoe-Prosser Exchange Agreement with the United States, Sierra Pacific Power Company, and TCID to allow exchanges of surface water from the Lake Tahoe and Truckee River basins to meet Floriston Rates. Boca Reservoir serves, among other functions, as a

¹ Boca Reservoir was approved for construction by the President in 1935 under Section 4 of the Act of June 25, 1910, 36 Stat. 835, and under Subsection B of Section 4 of the Act of December 5, 1924, 43 Stat. 701, and Chapter 153 Public Law No. 86, Act of May 29, 1941, 55 Stat. 201. The District paid for the construction and operation of Boca Reservoir.

critical component of maintaining Floriston Rate flows in the Truckee River and drought supply for water rights users in Nevada. In 2018, the Washoe Conservation District entered a contract to reimburse the Department of Interior approximately \$3,800,000 over the next 50 years for seismic retrofit improvements to Boca Reservoir to protect these storage rights.

The Washoe Conservation District is a party to the Truckee River Operating Agreement (“TROA”), referenced and provided for in Title II of Public Law 101-618, 104 Stat. 3289 (1990), also known as the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (the “Settlement Act”).² The operations set forth in TROA provide a critical drought supply for water rights holders within the Washoe Conservation District’s boundaries and persons relying on effective management of the Boca Reservoir to meet Floriston Rates. To advance and protect its interest in water storage and reservoir management, the Washoe Conservation District participated in the negotiations of, and is a signatory to, TROA and was a party to several administrative and court proceedings required to facilitate TROA’s implementation.

In 2015, the *Orr Ditch Decree* and portions of the Truckee River Agreement incorporated therein were amended to incorporate TROA as the regulatory

² For a general discussion of the Settlement Act and its various purposes, see *Churchill County v. Norton*, 276 F.3d 1060, 1068-1071 (9th Cir. 2001) *mod.* 282 F.3d 1055 (2002), *cert. den.* 537 U.S. 822 (2002).

framework for managing the Truckee River and upstream storage reservoirs, including Boca Reservoir. In furtherance of TROA, the Washoe Conservation District also secured approval from the California State Water Resources Control Board to modify its Boca Reservoir License consistent with TROA by enlarging the places of use and points of diversion and expanding the authorized beneficial uses of Boca water to include municipal, domestic, industrial, irrigation, stockwatering, hydroelectric power, fish culture, water quality, recreational and fish and wildlife preservation and enhancement.

TROA advances the Washoe Conservation District's organizational purpose; namely, to facilitate the storage of Truckee River waters in priority under prior appropriation laws to alleviate supply shortages through effective reservoir operations and thereby curtail and/or eliminate protracted litigation over the waters of the Truckee River system. The multitude of public trust benefits established and furthered by the *Orr Ditch Decree*, Truckee River Agreement, Settlement Act and TROA could never have been achieved nor implemented without absolute certainty in the legality and continued enforceability of the first-in-time, first-in-right priorities established by Nevada's prior appropriation doctrine, the finality of the relative rights adjudicated by the *Orr Ditch Decree*, and implementation of Nevada's public trust responsibilities consistent with the foregoing.

As the party responsible for maintaining the Boca Dam such that the Boca Reservoir can serve the purposes set forth in the *Orr Ditch Decree*, the Settlement Act and TROA, the Washoe Conservation District has a direct and substantial interest in protecting and preserving Nevada's prior appropriation doctrine and the in-priority water storage regime painstakingly negotiated in TROA.

B. Background on CT Conservancy District

In 1956, Congress authorized the Washoe Project in the Truckee and Carson River basins. Pub. L. No. 84-858, 70 Stat. 775. The two principal reservoirs to be constructed in the Washoe Project were Stampede on the Little Truckee River and Watasheamu on the East Fork of the Carson River. The initial purposes of the Washoe Project were for irrigation, flood control, hydroelectric power, development of fish and wildlife resources, and "other beneficial purposes."

The CT Conservancy District was formed in 1958 to facilitate the development of Stampede Reservoir and Watasheamu Reservoir and to act as the agency to purchase water stored in these reservoirs. *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106, 108 (D. Nev. 1982). Because of the rapid growth of Reno and Sparks after the mid-1950's, and the need for additional water for municipal and industrial uses, the CT Conservancy District and Sierra Pacific sought to enter into a contract with the Secretary of Interior to distribute water for the reimbursable purpose of municipal and industrial use.

Construction of Stampede Reservoir was completed in 1970, but the Watasheamu dam was never built and its authorization was later revoked under the Settlement Act. In 1975, a surviving strain of the Lahontan cutthroat trout was declared a threatened species under the Endangered Species Act (“ESA”). *See* 40 Fed. Reg. 29,864; *Carson-Truckee Water Conservancy District v. Watt*, 549 F.Supp. 704, 707 (D. Nev. 1982). As a result of these listings, the Secretary of Interior decided to operate Stampede Dam so as to conserve the cui-ui and Lahontan cutthroat trout (pursuant to the ESA) and declined to enter into a contract with the CT Conservancy District and Sierra Pacific to allow water from Stampede Reservoir to be used for municipal and industrial purposes. *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257, 259 (9th Cir. 1984).

The CT Conservancy District and Sierra Pacific filed an action in the United States District Court for the District of Nevada to compel the Secretary to enter into such a contract. *See Carson-Truckee Water Conservancy District v. Watt*, 537 F. Supp. 106 (D. Nev. 1982); *Carson-Truckee Water Conservancy District v. Watt*, 549 F. Supp. 704 (D. Nev. 1982), *aff’d sub nom.*, *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984). The court decisions arising out of that action rejected the claim that the Secretary was required to operate Stampede Reservoir for municipal and industrial purposes and upheld the Secretary’s authority and discretion to operate Stampede Reservoir for the benefit

of the listed *cui-ui* and Lahontan cutthroat trout. That operation continues to the present, and under the Settlement Act, water stored in Stampede Reservoir is used for the conservation of the Pyramid Lake Fishery.

The CT Conservancy District continues to exercise jurisdiction as a conservation district under Nevada law and supports and sponsors projects within its jurisdiction to conserve, facilitate or develop water resource projects; improve water quality and preservation of waterways; and/or provide the greatest beneficial use of water within the District. Its regional authority spans several local jurisdictions based on the geographic reaches of the Truckee and Carson rivers, encompassing all of Carson City, Churchill and Washoe Counties, and parts of Douglas, Lyon and Storey Counties.

In addition, the CT Conservancy District entered the Martis Creek Agreement and Martis Creek Lake Operation and Maintenance Agreement with the U.S. Army Corps of Engineers in July 1973 to operate and maintain the Truckee River from the California-Nevada state line through Reno and to ensure a minimum channel capacity of 14,000 cfs. Under this agreement, the CT Conservancy District, along with the U.S. Army Corps of Engineers, exercises authority to grant encroachment permits to operate within the beds and banks of the Truckee River.

LEGAL ARGUMENT

The Washoe Conservation District and CT Conservancy District (collectively, the “Districts”) agree with and join in the points and authorities submitted in the Amicus Brief filed by the Truckee Meadows Water Authority, and in the interests of judicial economy, adopts the same as if fully articulated herein. The Districts submit the following additional points and authorities relative to the Districts’ respective interests.

Each state has the authority to determine the use of its public resources according to its own views of justice and policy as it considers the best interests of the public. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). The State of Nevada has always managed appropriation of its waters for the benefit of the public and consistent with evolving public trust values. The appropriation and placement of water to beneficial use is of immense value to the people of Nevada and affords vast and constantly expanding public access and public use of State resources, enabling development of reliable, sustainable drinking water supplies, and serving as an indispensable condition precedent to fostering and aiding commerce, agriculture, transportation, energy production, environmental preservation and recreation.

The Legislature has recognized this to be the policy of the State of Nevada in numerous contexts. Specific to the Washoe Conservation District, NRS 539.230 provides that the “collection, storage, conveyance, distribution and use of water by or through the works of irrigation districts . . . is hereby declared to be a public use.” The broad spectrum of beneficial uses to which water appropriated under Nevada law and stored in Boca Reservoir under the Settlement Act and TROA can be put evidences the manner in which Nevada’s public trust values are implemented through prior appropriation of water for beneficial use. They also demonstrate the manner in which public trust values are not only recognized but protected by the finality and certainty of Nevada’s prior appropriation doctrine.

Specific to the CT Conservancy District, NRS 541.030 declares it to be the policy of the State of Nevada and a public use to develop water resources “for the greatest beneficial use of water within this state” that is essential “for the public benefit and advantage of the people of the State of Nevada” and will “directly benefit residents of the State of Nevada by providing adequate supplies of water for domestic, municipal and industrial use.” NRS 541.030 further declares it “to be the policy of the State of Nevada ... [t]o control, make use of and apply to beneficial use unappropriated waters in this state to a direct and supplemental use of waters for domestic, manufacturing, irrigation, power and other beneficial uses [and] to cooperate with the United States and agencies thereof under federal

reclamation laws or other federal laws now or hereafter enacted and to construct and finance works within or without the State of Nevada” for water conservation and development.

The public trust doctrine was developed at common law in pursuit of a particular purpose and fashioned limits with that purpose in mind. But Nevada, in picking up that common law, has tailored that purpose to its unique interests through a statutory scheme designed to facilitate the beneficial use of water for the public benefit and advantage of the people. Certainty in water law is critical and diverting water to beneficial use under priorities and allocations that can be relied upon as definitive and final fosters the public’s interests in: reclaiming arid lands; creating communities; fostering industry; and populating the State with a “public.” Without the public that these uses serve, the objective of the public trust doctrine would be moot. Historical justifications for protecting navigation, fishing and commerce under the common law were not persuasive to founders of this arid State, leading to the development of more pragmatic public benefits and intervention of statutory schemes more in keeping with the geographic and climatic realities of life in the desert.

The Legislature thus provides the fundamental principles upon which the common law is implemented in Nevada -- that public trust values are fostered, not thwarted, by providing adequate water supplies for varied combinations of

domestic, municipal, industrial, mining, irrigation, wildlife, recreational and environmental uses. The Court must recognize the impact of Nevada's unique history and interweave Nevada's legislative policies with the inherited body of common law principles. To accept Mineral County's arguments to the contrary would undermine over a century of algorithmic compacts and multiplex decrees designed to further public trust values through reliance on the prior appropriation doctrine and would eviscerate the very interests the public trust doctrine seeks to protect.

"Law is a logical development, like everything else." B. Cardozo, *The Nature of the Judicial Process* 10 (1921). Courts must consider contemporary conditions -- social, industrial, economic, environmental, and political -- of the community affected by competing laws by balancing interests:

[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.

Id.

Under Nevada law, neither the public trust doctrine nor beneficial use/prior appropriation doctrine outweighs the other; rather, the public trust is facilitated and implemented through the appropriation of water to beneficial use pursuant to Nevada water law and adjudicated decrees and consistent with the prior

appropriation doctrine. In this regard, the doctrines are complementary and mutually consistent, part of an integrated system of laws with a symbiotic functional relationship.

CONCLUSION

Given Nevada's unique geographic and political history, the State has implemented the public trust through the conservation and development of the water resources of the State of Nevada for the greatest beneficial use of water such that both doctrines exist in harmony. To the extent the Court believes the balance struck by the Legislature violates the State's public trust obligations, the Districts agree with TMWA that the Court cannot usurp the Legislature's role by granting the relief sought by Mineral County. Nor may the Court, under the separation of powers doctrine, redistribute vested property rights.

The Ninth Circuit's broadly-posed questions have a far greater reach than the Walker River litigation, The Court's answers to those questions have the potential for massive, devastating adverse consequences if not considered in the context of vast direct and indirect public benefits conferred throughout the State in reliance on the finality and certainty of prior appropriative rights. The effect of accepting Mineral County's position on the Districts, Truckee River rights, and the bargains struck in the Truckee River Agreement and TROA would be catastrophic.

For these reasons, the Districts submit that the Court should answer the certified questions as follows:

Question 1: Yes, the public trust doctrine applies to vested, adjudicated and otherwise settled rights under the doctrine of prior appropriation but only in the manner the Legislature has provided and only in the manner that can be implemented consistent with the declared policy of furthering and protecting Nevada's public trust values by putting water to beneficial use through prior appropriation. Nevada's prior appropriation system and beneficial use doctrines represent a comprehensive, continuing governmental regulatory system to control the uses of water for the general benefit of the community, consistent with declared policies of this State that the placement of public waters to beneficial use, where approved by the State after confirmation that the appropriation is in the public interest and subject to the continuing jurisdiction and regulatory oversight by the State, furthers public trust values.

Question 2: Although the public trust doctrine is recognized in Nevada, it does not allow a Court to reallocate rights vested, adjudicated or otherwise settled under the doctrine of prior appropriation. Whether the law should allow for reallocation to reprioritize public trust values is a policy decision that only the Legislature can

make, and only then in a manner consistent with the Constitution. The Districts take no position on whether reallocation constitutes a taking.

Respectfully submitted this 18th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3,135 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in

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

Respectfully submitted this 18th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on or about April 18, 2019, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

I further certify that on this date I served a copy, postage prepaid, by U.S. Mail, as follows:

Dated: April 18, 2019.

/s/ Micki Arguello
An employee of McDonald Carano LLP