IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER LAKE WORKING GROUP,

Appellants,

V.

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

Respondents.

Case No. 75917

On Order From Ninth Circuit Court of Appeals Certifying Questions

AMICI CURIAE SOUTHERN NEVADA WATER AUTHORITY'S BRIEF IN SUPPORT OF RESPONDENTS

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NRAP 26.1 DISCLOSURE

Undersigned counsel of record certifies that the Southern Nevada Water Authority is a government agency and a political subdivision of the State of Nevada. SNWA submits this amicus brief pursuant to NRAP 29(a), which states that the State of Nevada, or a political subdivision thereof, "may file an amicus curiae brief without the consent of the parties or leave of court."

Dated: April 18, 2019.

Southern Nevada Water Authority

/s/ Gregory J. Walch

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I. INTEREST OF SOUTHERN NEVADA WATER AUTHORITY

In 1991, seven local water and wastewater agencies formed the Southern Nevada Water Authority ("SNWA") to address water issues facing the region. As the region's wholesale water provider, SNWA is responsible for acquiring and managing long-term water resources. A leader in water conservation, SNWA and its member agencies serve nearly 75 percent of Nevada's population while accounting for merely 10 percent of Nevada's annual water consumption.

The Colorado River supplies 90 percent of SNWA's water resources. Seven "Basin States" and regions of Mexico rely on the Colorado River. Population growth and sustained drought have severely strained this resource. To diversify its portfolio and secure a sustainable water supply, SNWA also uses groundwater. SNWA has acquired groundwater rights throughout Nevada and is pursuing additional rights.

Given its role in supplying water to such a substantial portion of Nevadans, SNWA has an interest in the public trust doctrine's development in Nevada. Here, SNWA addresses the first certified question: the public trust doctrine's application to water rights already settled through prior appropriation. SNWA generally supports Respondents' position urging a more limited application of the doctrine.

II. INTRODUCTION

The Public Trust Doctrine ("PTD") protects the public's rights to Nevada's navigable waters and the lands beneath them. Nevada's government must act as a

trustee when handling trust assets for the benefit of its citizens. This brief makes three primary arguments concerning the Public Trust Doctrine's scope in Nevada.

First, despite some assertions to the contrary, NRS 533.250 ("water belongs to the public") *does not* equate to all water being subject to the PTD. If *all* water was included as trust assets there would be no need for navigability determinations. Yet, under the Public Trust Doctrine, the federal government only transferred *navigable* waters to the states to be held in trust. *Non-navigable* water bodies were generally not transferred. Rather, the federal government placed unappropriated non-navigable water in the public domain for beneficial use with no attendant trust duties. Thus, while NRS 533 is an exercise of Nevada's police powers, the Chapter does not establish state ownership of, or trust obligations over, non-navigable water.

Second, groundwater is plainly not navigable and, therefore, generally beyond the PTD's purview. The Court has noted, however, the PTD may apply to a non-navigable surface-water tributary if actions related to the non-navigable body harm a navigable body. By extension, the PTD should only, if ever, apply to groundwater in those rare instances where an aquifer acts like a surface-water tributary and pumping directly harms a trust asset. Regardless, applying the PTD to groundwater should be done with restraint to ensure legitimacy, fairness and predictability.

Third, based on Congress's paramount authority to control waters of the United States, the apportionment of Colorado River water is controlled by the "Law

of the River," which preempts state law. This vast web of federal law dates back nearly 100 years and prevents the PTD from interfering with Colorado River water apportionments. Nevada acknowledges this dynamic in NRS 533.0245, which prohibits interference with Colorado River operations. SNWA urges the Court to be mindful of these points in considering the nuances of the Public Trust Doctrine.

III. ARGUMENT OF AMICUS CURIAE

This amicus brief addresses the degree to which the PTD's heightened duties apply to water in Nevada and urges the Court to consider the broad implications of a decision on the first certified question. This brief does so by (1) responding to the assertion that the PTD applies to *all* water in Nevada, (2) addressing the PTD's relation to groundwater, and (3) addressing the Law of the River, which exempts Colorado River water apportionments from the PTD.

A. THE PUBLIC TRUST DOCTRINE DOES NOT APPLY TO ALL WATER IN THE STATE

Not all water in Nevada is subject to the Public Trust Doctrine. Relying on NRS 533, specifically NRS 533.025, some briefing in this appeal asserts – and a concurring opinion from the Court implies – that public trust assets include *all* water in Nevada. *See* State Eng'r Brief, Doc. 19-06292 at 3 (equating "belong[ing] to the public" to the imposition of trust duties); *Mineral Cnty. v. State*, 117 Nev. 235, 246, 20 P.3d 800, 807 (Rose J. concurring) ("The water of all sources . . . belongs to the public"). But, as further detailed below, PTD assets include only the water navigable

at Nevada's statehood and the lands beneath them.

1. The Equal Footing Doctrine and Desert Lands Act

Nevada's water resources can be generally categorized as "navigable" or "non-navigable." Regulatory obligations differ depending on the categorization. Under the Equal Footing Doctrine, Nevada acquired title to navigable waters, and the underlying beds and banks, within the state through admittance to the Union. These assets were acquired subject to the PTD. But the disposition of non-navigable water is different, as Nevada generally did not acquire title thereto– a condition to establishing a trust. Instead, through the Desert Lands Act in 1877, the federal government placed previously unappropriated non-navigable water in the public domain for beneficial use. Thus, the PTD does not apply to non-navigable waters.

i. The Equal Footing Doctrine and Trustee Duties

The PTD circumscribes a state's heightened duties when dealing with trust assets. *Illinois. Central R. Co. v. Illinois*, 146 U.S. 387, 434 (1892). Through the Equal Footing Doctrine, the federal government transferred to each state, upon its admission to the Union, title to all navigable waters and the lands beneath them to be held in trust for the public.[1] *Id.* Assets subject to the PTD are thus navigable waters and the land beneath them. *Id.*

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[1] Nevada was admitted as a state on equal footing in 1864. *Nevada Admission Acts* (1861), *available at* https://www.leg.state.nv.us/Const/NVAdmActs.html.

The PTD imposes heightened trustee duties on the state to protect trust assets so the public "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Lawrence v. Clark Cnty.*, 127 Nev. 390, 393-95, 254 P.3d 606, 608-09 (2011) (citing *Illinois Central*).[2] The state cannot shirk this duty. Indeed, "[s]uch abdication is not consistent with the exercise of that trust which requires . . . the state to preserve such waters for [public use]." *Illinois Central*, 146 U.S. at 453. Accordingly, public trust assets can only be "relinquished" in exceptionally rare circumstances where the asset "can be disposed of without any substantial impairment of the public interest in the lands and waters[.]" *Id.*

A water body's navigability is essential to its inclusion in the public trust. As the Court explained, "When a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all ***navigable bodies of water within the particular territory***, whether they be rivers, lakes or streams." *State Eng'r v. Cowles Bros*, 86 Nev. 872, 873, 478 P.2d 159, 160 (1970) (emphasis added). Indeed, the Court has repeatedly recognized this limitation by carefully assessing navigability when considering a PTD issue. *See id*; *State v. Bunkowski*, 88 Nev. 623, 627-30, 503 P.2d 1231, 1233-36 (1972).

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[2] As a purportedly "evolving" doctrine, the PTD can protect different uses as properly deemed appropriate. *Nat'l Audubon Society v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983).

In *Cowles*, for example, the Court considered the PTD and explained, "A body of water is navigable if it is used or is usable in its ordinary condition as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." 86 Nev. at 874, 478 P.2d at 160. Similarly, *Lawrence* stated, "Determining whether land is held in trust for the public by the state ***begins by reference to whether the land was submerged beneath navigable water*** when Nevada joined the United States on October 31, 1864." 127 Nev. at 401-02, 254 P.3d at 614 (emphasis added).

Although *Lawrence* addressed public trust *land*, there is no reason for the navigability-at-statehood inquiry to differ when assessing whether *water* is a trust asset. In both scenarios, Nevada's trustee obligations are predicated on the acquisition of ***navigable*** bodies obtained when admitted to the Union. If the PTD applied to all water bodies, these navigability inquiries would not be necessary.

ii. The Desert Lands Act and State Police Powers

A corollary to acquiring *navigable* waters under the Equal Footing Doctrine is that *non-navigable* waters were not included. Indeed, non-navigable bodies not already appropriated remained with the United States. *Cowles Bros*, 86 Nev. at 874, 478 P.2d at 160 ("If the body of water is classified as non-navigable at the time of the creation of the state, the underlying land remains the property of the United States") (citing *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894)); *see Bergman v.*

Kearney, 241 F. 884, 890 (D. Nev. 1917) ("subject to existing rights" public domain waters "belong to the United States Government"). Through the Desert Lands Act, however, the federal government placed unappropriated non-navigable waters in the public domain, making the water available for public appropriation subject to a state's police power authority. *Bergman*, 241 F. at 890 (state has duty to exercise police power to regulate when individuals are "exercising rights of ownership or possession . . . to the detriment of the community").

Prior to 1877, riparian law still had a foothold in the west. *Cal. Ore. Power Co. v. Beaver Cement Co.*, 295 U.S. 142, 157-58 (1935). Congress recognized riparian law was hindering broad settlement. *Id.* at 162. To entice settlers westward, Congress passed the Desert Lands Act in 1877 to, in part, sever riparian ties on federal land. *Id.*; 43 U.S.C. § 321 (1877). The Desert Lands Act also surveyed federal land and offered it for sale, but the non-navigable water thereon was to "remain and be held free" for public appropriation, subject to existing rights. 43 U.S.C. § 321.

While the Desert Lands Act permits state regulation of this non-navigable water, it did not transfer title to the states. *Cowles Bros*, 86 Nev. at 874, 478 P.2d at 160. Nevada adopted prior appropriation as the law to regulate the public's

appropriation of water pursuant to its police powers.[3] *Ormsby County v. Kearney*, 37 Nev. 314, 336-37, 805 (1914) (holding that regulating water use in the state is consistent with Nevada's police powers to "preserv[e], conserve[e], and improv[e] the public health, safety morals and general welfare"). But this does not equate to obtaining title with an attendant obligation to hold the water in trust. *See id.*

In short, navigable water bodies are public trust assets, while non-navigable bodies are not. This necessarily follows from how the federal government handled its various water resources. Through the Equal Footing Doctrine, the federal government transferred title to navigable bodies to the states to be held in trust. But the federal government made no such grant with non-navigable bodies. Instead, non-navigable water was made available to the public for appropriation and beneficial use, subject to existing rights and state regulatory police powers.

2. NRS 533 Does Not Expand Public Trust Property

Pursuant to NRS 533.025, all "water belongs to the public." This statute has been relied on for the proposition that all water in Nevada is subject to the PTD. *See, e.g.*, State Eng'r Brief, Doc. 19-06292 at 3; *Mineral Cnty.*, 117 Nev. at 246, 20 P.3d at 807 (Rose J. concurring). But NRS 533.025 did not expand the trust to include

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[3] *See Van Sickle v. Haines*, 7 Nev. 249, 256-57 (1872) (recognizing existence of riparian and prior appropriation law in Nevada five years prior to the Desert Lands Act's passage); *see also* Greg J. Walch, *Treading Water Law – A Nevada Water Rights Primer*, 6 NEV. LAW. 18, 18 (Nov. 1998) (describing the evolution of Nevada's statutory water law).

non-navigable water because: (a) there is no trust-creating language; (b) the public-ownership concept only reflects prior appropriation law; and (c) other states have not construed similar statutes in such a manner.

i. NRS 533 Lacks Essential Trust-Creating Language

Fundamental trust law requires a clear expression of intent that certain property be held in the trust by a trustee holding legal title to the property for the beneficiary. *See* NRS 163.002-.003. Thus, "[i]t is essential . . . that the language employed definitely indicate an intention to create a trust, that the subject matter thereof be certain, and that the beneficiaries be certain." *In re Foster's Estate*, 82 Nev. 97, 102, 411 P.2d 482, 484 (1966). Chapter 533 does not satisfy these elements.

As a preliminary and fundamental point, a trustee must hold title to trust property. Pursuant to NRS 163.002(1), creation of a trust requires "[a] declaration by the owner of property that he or she or another person holds the property as trustee." This element is absent in NRS 533. Nevada obtained title to *navigable* water from the federal government. With *non-navigable* water, however, Nevada never obtained ownership. *See supra* § III.A.1(ii).

Further, while NRS 533.025 states "water belongs to the public," there is no indication that Nevada acquired title to *all* water in the state or that Nevada intended to create a trust for administering the resource. The Legislature has, however, done this on occasion. For example, NRS 407.013's "declaration of legislative intent"

states that Nevada may acquire "areas of outstanding scenic, recreational, scientific and historical importance for the inspiration, use and enjoyment of the people . . . and that such areas shall be held in trust[.]" The Legislative declaration in NRS 533.024, however, says nothing of the sort.

In addition, the Legislature amended NRS 533 as recently as 2017 but did not add trust-creating language. In fact, the Legislature rejected an attempt to add trust language shortly after the *Lawrence* decision. *See* A.B. 396, 77th Leg. (2013). Accordingly, NRS 533 generally, and NRS 533.025 specifically, does not expand the public trust to cover all water in Nevada.

ii. The Concept of Water Belonging to the Public Simply Reflects Nevada's Adherence to Prior Appropriation

The Desert Lands Act states "water supply . . . not navigable" must "remain and be held free for the appropriation and use of the public . . . subject to existing rights." 43 U.S.C. § 321. Consistent with this, NRS 533.025 states "water of all sources of supply . . . belongs to the public," further specifying the beneficial uses identified in the Desert Lands Act, such as irrigation and mining. Stating that water "belongs to the public" is thus another way of saying, as federal legislation stated less succinctly, that the public may appropriate water in Nevada for beneficial use.

Indeed, the Court described public ownership as a "fundamental tenant of Nevada water law." *Desert Irr., Ltd. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997). Public ownership has also been described as "an adjunct of the appropriation

doctrine" and "related to the . . . rejection of the riparian doctrine."[4] The language of NRS 533.025 thus reflects Nevada's adherence to prior appropriation rather than a legislative intent to subject all Nevada water to the PTD.

iii. Other States with Similar Laws Do Not Place All Water in the Public Trust

Many western states, including other Desert Lands Act states, have laws comparable to NRS 533.025.[5] These states, however, do not equate "water belonging to the public" with the state holding title to the water as a trustee for the public. These states, rather, recognize the phrase "water belonging to the public" as a basic prior appropriation concept. *See, e.g., Farm Inv. Co. v. Carpenter*, 61 P.258, 265 (Wyo. 1900) ("appropriation is made in the first place upon the basis of public ownership").

In Colorado, "The water of every natural stream" is the "property of the public." Colo. Const. Art. XVI § 5. This phrase affirms "the right of appropriation in [Colorado]." *People v. Emmert*, 597 P.2d 1025, 1027-28 (Colo. 1979). In Arizona, water "belong[s] to the public and [is] subject to appropriation and beneficial use as provided in" A.R.S. § 45. Yet, Arizona limits PTD assets to navigable waters and has even created a navigability court. *Arizona Ctr. for Law in Public Interest v.*

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[4] Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism about the Takings Issue*, 27 Ariz. St. L.J. 423, 464 (1995).

[5] *See, e.g.,* ARIZ. REV. STAT. § 45-141(A); CAL. WATER CODE § 1201; N.M. CONST. ART. XVI, § 2; N.D. CENT. CODE § 61-01-01; OR. REV. STAT. § 537.010; S.D. COD. L. § 46-1-3; UTAH CODE ANN. § 73-1-1; WASH. REV. CODE § 90.03.010.

Hassell, 837 P.2d 158 (1991); *State v. Navigable Stream Adjudication Comm'n.*, 229 P.3d 242, 247 (Ariz. App. 2010).

And, in California, "water flowing in any natural channel [not already appropriated] . . . is declared to be public water" that is "subject to appropriation in accordance with the provisions of this code." Cal. Water Code § 1201. But California continues to recognize its distinct, trust duties only with respect to "navigable water the state holds in trust for the public purposes[.]" *Golden Feather Community Ass'n. v. Thermalito Irr. Dist.*, 209 Cal. App. 3d 1276, 1284 (1989).

Similarly, NRS 533.025 reflects Nevada's adherence to prior appropriation. Like Nevada, other states recognize that water belongs to the public. But, these states have not equated "water belonging to the public" to all water being held in trust by the state pursuant to the Public Trust Doctrine and neither should Nevada.

In sum, NRS 533 does not expand the public trust to include all water in Nevada or embody all aspects of the PTD. Nevada obtained title to navigable waters through a federal transfer and under the Equal Footing Doctrine. This created a trust and imposed heightened duties on Nevada's management of the asset. But Nevada did not obtain title to non-navigable water. Nothing in NRS 533 purports to change that or create a trust. The federal government, rather, placed this resource in the public domain. Thus, in managing non-navigable waters, Nevada, like many other prior appropriation states, simply exercises its regulatory police powers.

B. THE PUBLIC TRUST DOCTRINE SHOULD ONLY APPLY TO GROUNDWATER IN EXTRAORDINARY CIRCUMSTANCES

Stating the obvious, groundwater is not navigable. The Public Trust Doctrine should therefore only regulate groundwater, if at all, in rare instances where groundwater acts like a surface-water tributary and directly supplies a navigable body. Thus, if the Public Trust Doctrine expands to regulate groundwater, the expansion must be limited, precise, and remain tied to navigability because (1) regulating non-navigable surface-water would, alone, represent an expansion of the PTD, (2) connectivity determinations with groundwater are less certain than with surface-water tributaries, and (3) holders of groundwater rights cannot fairly be deemed to have been on notice that their rights could be lost through the PTD.

First, while the *Mineral County* concurrence states that the PTD "has evolved to encompass additional public values" and "the original scope . . . has evolved to encompass [certain] non-navigable tributaries," the Court has not definitively decided the issue of whether the PTD applies to non-navigable tributaries.[6] 117 Nev. at 247, 20 P.3d at 808. Thus, if the PTD "encompass[es] non-navigable tributaries," the concurrence concedes it would be an expansion of "the original scope of the public trust doctrine." *Id.* But, perpetual evolution and expansion of a law can lead to an unworkable doctrine where precedent is of little or no value.

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[6] In recounting Nevada's public trust case law, *Lawrence* cites the *Mineral County* concurrence without endorsing it. 127 Nev. at 396-97254 P.3d at 610-11.

Demonstrating a degree of restraint, the *Mineral County* concurrence would at least limit the doctrinal expansion to those instances where "the navigable water's existence is wholly dependent on" over-appropriated tributaries. *Id.* In this way, navigability remains a central consideration even though the water body being regulated would not, itself, be a trust asset. As the analysis moves farther from navigability, however, the Public Trust Doctrine's logical and legal underpinnings will erode to a correspondingly greater degree.

Second, any application of the PTD to groundwater should be exercised with great restraint because it would represent another doctrinal expansion beyond surface-water tributaries. Such an expansion would depend on more tenuous hydrologic connections, as well. Indeed, "no court has held that groundwater is a public trust resource." *Envt'l L. Foundation v. Water Resources Control Bd.* ("*ELF*"), 26 Cal. App. 5th 844, 859 (Cal. App. 3d. 2018) (Review denied Nov. 28, 2018). Thus, if the PTD applies to groundwater, it can only be justified if the aquifer is clearly supplying a navigable body, effectively constituting a tributary, and where the pumping harms a groundwater-dependent navigable water body.

Even when considered as a "tributary," the Public Trust Doctrine has not historically applied to groundwater. In fact, *ELF* appears to be the only decision to address the issue. *ELF*'s utility is limited, however, because it occurred in the context of a declaratory relief action with disputed facts. The parties, however, stipulated to

a set of facts to facilitate the resolution of an "extraordinarily narrow" issue concerning a new Groundwater Management Act in California. *Id.* at 851.

In dicta, and based on a hypothetical, the *ELF* decision notes that groundwater is not navigable and analogizes it to non-navigable surface water tributaries. *Id.* at 859. Incorporating the reasoning from *National Audubon*, the court explained that "the determinative fact [for application of the PTD] is the impact of the activity on the public trust resource." *Id.* at 859. Thus, to the extent a groundwater aquifer supplies a navigable body, as with a non-navigable surface water tributary, the PTD could apply if groundwater appropriations harmed the public trust asset.

With surface water, a tributary's connection to a navigable water body is obvious. With groundwater, however, connectivity to a navigable body is not so certain. Thus, the PTD's application to groundwater should only arise, if ever, when there is a scientifically sound connection between the aquifer and the navigable body and "the navigable water's existence . . . is wholly dependent on the" groundwater. *See Mineral Cnty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose J. concurring).

Third, continual doctrinal expansions will topple well-settled expectations and undermine the Public Trust Doctrine's legitimacy. Water rights are generally acquired subject to existing rights and "background principles" of state law. *See Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002). But when a background principle of state law, such as the Public Trust Doctrine,

continues to evolve, often through judicial decisions, it becomes more difficult to justify constructive notice. *See Mineral Cnty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose J. concurring) (discussing the public trust doctrine's evolving nature).

If the Public Trust Doctrine can revoke a groundwater right obtained decades ago, then the justification of subjecting water rights to background principles of state law simply does not apply. The holder had no actual or constructive notice, because Nevada's Public Trust Doctrine had not "evolved" to such a degree at that time and had never been interpreted to have such a reach. In such scenarios, extensions of the Public Trust Doctrine may more properly be applied prospectively.

SNWA therefore urges the Court to carefully consider how its ruling might impact groundwater use in Nevada. The Public Trust Doctrine should remain rooted in its foundational principle of navigability. In expanding the PTD, non-navigable bodies should only be impacted when the navigable body's existence is "wholly dependent on tributaries that appear to be over-appropriated." To the extent the PTD can expand and evolve to reach groundwater, additional restraint should apply because connectivity is not as apparent as it is with surface-water. Greater restraint adheres to the PTD's core navigability principle, helps avoid *ad hoc* decisions based on an amorphous doctrine, and provides appropriators with more certainty.

C. The Public Trust Doctrine Does Not Apply to Nevada's Colorado River Water Entitlement

The PTD does not apply to Nevada's Colorado River apportionment due to

Congress's commerce power and the "Law of the River" – a body of federal law that governs Colorado River operations.[7] The PTD is a matter of state law "subject to the paramount power of Congress" and Congress's "expansive authority" over "navigable water of the United States." *Bunkowski*, 88 Nev. at 627-28, 503 P.2d at 1233; *PPL Montana, LLC v. Montana*, 565 U.S. 576, 598 (2012).[8] These laws dictate that Colorado River water is "water controlled by the United States." *Arizona v. California*, 547 U.S. 150, 153-54 (2006).

1. Congress's Expansive Authority Over Navigable Waters of the United States Can Limit the PTD.

That "Congress has extensive authority over this Nation's waters under the Commerce Clause" is settled. *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979); *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954). The United States has a "dominant servitude" over the "navigable waters lying within [a state]." *Niagara Mohawk Power*, 347 U.S. at 249; *Mont. v. United States*, 450 U.S. 544, 555 (1981). "Navigable water of the United States," exists

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[7] *Lawrence* considered the public trust doctrine's application to the Colorado River's land, i.e., its bed and bank. in connection with the Colorado River in *Lawrence*. 127 Nev. at 407, 254 P.3d at 617. This brief, however, limits the argument to the Colorado River's *water* apportionment.

[8] Navigability for public trust purposes is distinct from whether a resource is a "navigable water of the United States." The latter inquiry concerns "whether the river forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried out with other States[.]" *PPL Montana*, 565 U.S. at 598 (citation omitted); *see also Bunkowski*, 88 Nev. at 629, 503 P.2d at 1235 (navigability "for land title" and "for Commerce Power" are distinct).

where, for example, a "river forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be carried" with other states or countries. *PPL Montana*, 565 U.S. at 598.

In *United States v. Appalachian Power Co.*, the Supreme Court explained, "In truth the authority of the United States is the regulation of commerce on its waters" and "[n]avigability . . . is but a part of this whole." 311 U.S. 377, 426 (1940). Indeed, "[f]lood protection, watershed development, and recovery of the cost of improvements through utilization of power are likewise parts of the commerce control." *Id.* Thus, the Supreme Court found that factual questions about navigability must consider the "Nation's right," under its sovereign powers, to ensure "that its waterways be utilized for the interests of the commerce of the whole country." *Id.* In short, such waters "are subject to national planning and control in the broad regulation of commerce granted the Federal Government." *Id.* at 427.

The Colorado River is subject to "national planning and control in the broad regulation of commerce granted the Federal Government" because it "forms by itself . . . a continued highway over which commerce is or may be carried out with other States or foreign countries." *See PPL Montana*, 565 U.S. at 598; *Kaiser Aetna*, 444 U.S. at 173. Through the "Law of the River," detailed below, the federal government exercised its "paramount" and "extensive authority" over Colorado River water, thus

preempting related state laws such as the Public Trust Doctrine.[9]

2. The Law of the River is an Appropriate Exercise of Federal Authority That Precludes State Law from Interfering with Colorado River Water Apportionments

The Colorado River is one of the world's most regulated waterways. The complex body of law that governing its operations is known as the "Law of the River." The Law of the River includes numerous statutes, regulations, interstate agreements, treaties and court decisions that establish a comprehensive framework for Colorado River operations. This includes establishing how and to whom Colorado River water is delivered, operating massive dams and the related hydro-electric facilities, resolving disputes, and enforcing conservation obligations. A brief overview of the Law of the River's central aspects illustrates how "national planning and control in the broad regulation of commerce" dictate the use of Colorado River water. *See PPL Mont.*, 565 U.S. at 598; *Kaiser Aetna*, 444 U.S. at 173.

i. The Law of the River's Origins

The Colorado River Compact ("Compact") is the heart of the Law of the River. The Compact established an equitable division of Colorado River water among the seven "Basin States."[10] In 1921, as disputes over water apportionment

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[9] David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution* 68 U. COLO. L. REV. 573, 575 (1997) ("Congress has preempted the operation of state water law in the allocation of water rights and the distribution of water from the Colorado River").

[10] The "Basin States" are Wyoming, Colorado, Utah and New Mexico ("Upper Basin States"), and Nevada, Arizona and California ("Lower Basin States").

were growing, Congress authorized the Basin States to negotiate over the water supply. 42 Stat. 171 (Aug. 19, 1921). The Compact's "major purposes" are "the equitable division and apportionment" of Colorado River water, removal of "causes of present and future controversies," and "expeditious agricultural and industrial development[.]" *Id.* art. I. Water storage and flood protection were also addressed. *Id.* The Compact was not ratified at that time but soon led to a "congressional scheme of apportionment." *Arizona v. California*, 373 U.S. 546, 567 (1963).

In 1928, Congress passed the Boulder Canyon Project Act ("BCPA"). 43 U.S.C. § 617. The BCPA directed the Secretary of the Interior ("Secretary") to "construct . . . on the Colorado river, a dam, a storage reservoir, and a hydroelectric plant" and to have "control, management, and operation" duties over the facilities. *Arizona v. California*, 283 U.S. 423, 448-49 (1931) (citing 43 USC § 617). The BCPA also "declares that the authority is conferred 'subject to the terms of the Colorado River compact,' 'for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for . . . beneficial uses within the United States, and for the generation of electrical energy as a means of making the project . . . self-supporting and financially solvent[.]" *Id.*

In addition, the BCPA restated the Lower Basin apportionment of 7,500,000 acre-feet annually ("afa"), while specifically apportioning 300,000 afa to Nevada

and directing "[n]o person" can take water stored in Lake Mead "except by contract" with the Secretary of Interior. 43 USC § 617(c)-(d). Through the BCPA Congress also approved the Compact, subject to approval by the legislatures of California and "at least five of the six other states." *Id.* The next year, after all Basin States except Arizona had approved the Compact, Congress issued the "Hoover Proclamation," declaring the Compact effective.[11] 46 Stat. 20 (June 25, 1929).

ii. Additional Developments in the Law of the River

The Law of the River has grown and been refined through decades of disputes and litigation. This includes U.S. Supreme Court affirmation of the water apportionment, direction on the process for handling Native American water rights, and a treaty with Mexico. These developments repeatedly establish the Law of the River (federal law) has a paramount role in addressing Colorado River water issues.

Immediately after the BCPA was enacted, Arizona sought to nullify the Secretary's authority, enjoin Hoover Dam's construction and declare the Compact unconstitutional. *Arizona*, 283 U.S. at 449-50.[12] Arizona alleged the Hoover Dam's construction invaded the state's "quasi sovereign rights" and "threatened" to invade Arizona's "right to prohibit or to permit appropriation, under its own laws, of the unappropriated water of the Colorado river flowing within the state." *Id.* at 451.

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11 Arizona ratified the Compact in 1944. *See* A.R.S. § 45-1301 (1944).

12 Nevada, California and other entities were joined as parties or intervened.

The U.S. Supreme Court rejected Arizona's arguments. Regarding construction of the dam, the Court held the United States could act "without conforming to the police regulations of a state." *Id.* The Court further held that the Compact and BCPA did not threaten the "3,500,000 acre-feet of water already appropriated in Arizona," and allegations of potential harm were too speculative. *Id.* at 464. The Court also noted the BCPA "specifically declares" that it does not interfere with a state's rights to water within its borders, "except as modified by interstate agreement." *Id.* at 462.

Approximately 30 years later, another *Arizona v. California* opinion addressed the amount of water to which each state had a right and the status of Colorado River tributaries. 373 U.S. 546 (1963). Through a 1964 Decree, the Supreme Court appointed the Secretary of the Interior as "water master" and apportioned surplus and shortage conditions in the Lower Basin. 376 U.S. 340 (1964).[13] Under the Decree, all mainstream Colorado River water in the United States below Lee's Ferry is "water controlled by the United States." *Id.*[14]

The Law of the River also grew to include groups not represented in the Compact. In 1944, the United States signed a treaty with Mexico to address sharing

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13 The Supreme Court issued additional decisions and decrees in 1968, 1979, 1983, 1984, 2000 and 2005.

14 Lee's Ferry is in northern Arizona and above Hoover Dam.

of Colorado River and Rio Grande water ("1944 Treaty").[15] The 1944 Treaty apportioned 1.5 million acre-feet annually of Colorado River water to Mexico and created the International Boundary and Water Commission to resolve related disputes. Native American rights to Colorado River water were also recognized in the Supreme Court's 1964 Decree, which identified the priority of several Native American tribes' "present perfected rights." 376 U.S. at 341.

iii. The Consolidated Decree

In 2006, the Supreme Court issued a "Consolidated Decree" to set forth "the substantive provisions" of several decrees entered in the underlying actions between 1963 to 2005. *Arizona v. California*, 547 U.S. 150 (2006). The Consolidated Decree also "provide[s] a single convenient reference" for those developments. *Id.* at 152. Here, the Supreme Court again affirmed that federal law governs state allocations of Colorado River water and other aspects of Colorado River operations. *Id.* at 152.

The Consolidated Decree defines "water controlled by the United States" as "the water in Lake Mead, Lake Mohave, Lake Havasu, and all other water in the mainstream below Lee Ferry and within the United States." *Id.* at 143-54. Consistent with the BCPA and Compact, the Consolidated Decree reaffirms that the United

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15 Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, February 3, 1944, 59 Stat. 1219. The treaty has been supplemented by additional agreements between the United States and Mexico, known as minutes, the most recent of which was *Minute No. 323* in 2017. *See* https://www.ibwc.gov/treaties_minutes/minutes.html.

States must release and deliver water under the precise conditions set forth therein. Specifically, Colorado River water must be released pursuant to Section II, which reaffirms "300,000 acre-feet for use in Nevada," and delivered to only those holding delivery contracts with the Bureau of Reclamation.[16] *Id.* Finally, the Consolidated Decree reaffirms that the Lower Basin states are enjoined ***"[f]rom interfering with or purporting to authorize the interference with releases and deliveries . . . of water controlled by the United States***." *Id.* at 160 (emphasis added).

iv. Nevada's Commitment to the Compact

The Compact's negotiation and ratification was a singular accomplishment. In fact, the Hoover Proclamation of 1929 represents the first congressional apportionment of interstate waters.[17] Nevada and the six other Basin States played a critical role in creating this interstate agreement. In doing so, the Basin States made concessions and compromises and recognized that for the Compact to work, continued interstate cooperation was necessary.

Nevada recognized how the Law of the River impacted Colorado River water regulation. Nevada's Legislature thus enacted several statutes to avoid conflicts with federal law. For example, the State Engineer generally adjudicates vested water

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16 SNWA has several delivery contracts with the Bureau of Reclamation. *See e.g.*, Contract No. 2-07-30-W0266, as amended, Nov. 17, 1944, *available at* https://www.snwa.com/assets/pdf/bor-contract-colorado-river.pdf.

17 Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. Ark. Little Rock L. Rev. 155, 158 (2002).

rights and regulates appropriation of water in Nevada. *See* NRS 532.110. But, under NRS 533.0245, the "State Engineer ***shall not carry out his or her duties . . . in a manner that conflicts with . . . an interstate compact . . . to which this State is a party for the interstate allocation of water pursuant to an act of Congress.***" (Emphasis added); *see* 43 U.S.C. § 617. Similarly, NRS 533.024(1)(a) identifies a legislative intent to efficiently use water while "not interfer[ing] with federal obligations to deliver water of the Colorado River."

The Law of the River, therefore, governs the apportionment and delivery of Colorado River water. The U.S. Supreme Court has repeatedly affirmed the interstate apportionment of water, that Lower Basin water is "controlled by the United States," and the directives for releasing and delivering water. Recognizing this, Nevada has enacted legislation to avoid conflict with the Law of the River and facilitate the federal government's delivery of Nevada's Colorado River apportionment. SNWA urges the Court to consider these points in refining the scope of Nevada's Public Trust Doctrine and avoid conflict with the Law of the River.

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IV. CONCLUSION

For the reasons explained above, SNWA urges the Court to acknowledge that not all water in Nevada is subject to the Public Trust Doctrine, limit or avoid the Public Trust Doctrine's application to groundwater, and recognize the Law of the River's paramount role Nevada's apportionment of Colorado River water.

DATED: April 18, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify 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 it has a proportionally spaced typeface using Microsoft Word with a 14-point typeface Times New Roman Font and is double spaced. I further certify this brief complies with NRAP 29(e)'s page- or type-volume limitations because, excluding those parts exempted from the word count, the brief contains 6,253 words.

I further certify I read this amicus brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for an improper purpose. I also certify this brief complies with all applicable Nevada Rules of Appellate Procedure, specifically 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 if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: April 18, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the *AMICI CURIAE* SOUTHERN NEVADA WATER AUTHORITY'S BRIEF IN SUPPORT OF RESPONDENTS was filed electronically with the Nevada Supreme Court on the 18th day of April, 2019. Electronic Service of the AMICI CURIAE SOUTHERN NEVADA WATER AUTHORITY'S BRIEF IN SUPPORT OF RESPONDENTS shall be made in accordance with the Master Service List as follows:

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