Supreme Court No. 75917

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.

ON CERTIFICATION FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Case No. 15-16342

BRIEF OF *AMICUS CURIAE* CHURCHILL COUNTY, THE CITY OF FALLON, AND TRUCKEE-CARSON IRRIGATION DISTRICT IN SUPPORT OF RESPONDENTS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the Truckee-Carson Irrigation District is an irrigation district organized under Chapter 539 of the Nevada Revised Statutes. Churchill County and the City of Fallon are governmental entities. The *amici* parties are not corporations and are not owned by parent corporations. The *amici* parties have not 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.

Dated: April 19, 2019

HANSON BRIDGETT LLP

By: /s/ Michael J. Van Zandt
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IDENTITY AND INTEREST OF *AMICI*

As political subdivisions of the state of Nevada, City of Fallon, Churchill County, and Truckee-Carson Irrigation District (together, "*Amici*") have standing to submit an *amicus* brief pursuant to Nevada Rules of Appellate Procedure (NRAP) Rule 29(a). The City of Fallon is a municipality with a population of nearly 9,000 located within Churchill County. Churchill County is a county in Northwestern Nevada, which was formed in 1861. The Truckee-Carson Irrigation District is a water district, headquartered in Fallon, Nevada and chartered in 1918 for the purpose of representing the water rights holders within the boundaries of the Newlands Project.

Amici, as political entities charged with providing water to Nevada citizens, farmers, and businesses, have a strong interest in maintaining the water rights upon which their constituents rely. Given the well-established need for certainty of supply in the most arid state in the nation, *Amici* are particularly sensitive to the harm that potential disruption to existing sources of water and operations would cause their constituents. *Amici* are acutely aware that the Court's decision in this case has the potential to cause a drastic and unprecedented unsettling of Nevada's long-established system of water rights.

Amici submit this *amicus* brief to assist the Court in understanding the relevant aspects of Nevada water law, the incompatibility of Appellants' proposed

unwarranted expansion of the public trust doctrine with long-standing doctrines of water jurisprudence, and the practical consequences of that proposal on *Amici* and their constituents.

QUESTIONS PRESENTED

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?

Mineral County v. Walker River Irrig. Dist., 900 F.3d 1027, 1034 (9th Cir. 2018).

SUMMARY OF ARGUMENT

While this Court's recent decision in *Lawrence v. Clark County* established the public trust doctrine in Nevada, the fundamental tenets of Nevada water law remain unchanged. Nevada law protects adjudicated and vested water rights that have not been abandoned or forfeited, requires that water be put to beneficial use, and respects water rights established by adjudication. Pursuant to statute, the power of the State Engineer to regulate the use and diversion of water is clearly defined, and it does not encompass the ability to retroactively alter established rights pursuant to the public trust doctrine. To interpret the public trust doctrine as

Appellants propose would override a century of Nevada law and turn the public trust doctrine into a more powerful weapon than has been wielded in any other jurisdiction. To do so without the input of the Nevada Legislature would ignore its leading role in state water policy and lead Nevada down a path of conflict and uncertainty that other western states have come to regret.

Nevada water law relies on certainty above all, and the repercussions of a decision in favor of Appellants would amount to a complete disruption of an established water system on which the well-being of the state and its citizens depends. Accordingly, employing the public trust doctrine as Appellants propose would have the counter-productive effect of causing great harm to the same Nevada public that the public trust doctrine is intended to serve. While these consequences exceed economic analyses, the retroactive alteration of established water rights would amount to a taking requiring just compensation under both the Nevada and United States Constitutions.

ARGUMENT

I. Nevada Law Protects Adjudicated and Vested Water Rights That Have Not Been Abandoned or Forfeited

A. Under Nevada Law the State Engineer Has Limited Authority to Disturb Adjudicated Rights

Nevada law makes clear that adjudicated rights established by decree that have not been forfeited or abandoned are not to be disturbed.[1] Nevada Revised Statute 533.210 provides that decreed water rights "shall be final and shall be conclusive upon all persons and rights lawfully embraced within the adjudication." NRS 533.0245 provides, "[t]he State Engineer shall not carry out his or her duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court." NRS 533.3703 provides that its provisions regarding changes in place of diversion or consumptive use of water rights "[m]ust not be applied by the State Engineer in a manner that is inconsistent with any applicable federal or state decree concerning consumptive use."

[1] *Amici* are holders of both adjudicated and pre-statutory vested water rights. Adjudicated rights are water rights—like those established by the Walker Decree—that have been determined by the final judgment of a court. Pre-statutory vested rights are those that were put to beneficial use prior to the establishment of Nevada water law in either 1905—with regard to surface water—or 1913—with regard to groundwater. Both are granted special protection under Nevada law. Subsequent permitted rights are subject to a finding of abandonment or, for groundwater, forfeiture by the State Engineer but otherwise constitute usufructuary property rights. Nevada Revised Statute 534.090.

Thus, the State Engineer simply has no statutory jurisdiction over adjudicated rights that have not been abandoned or forfeited through a failure to apply the allocated water to beneficial use.

B. This Court and Others Have Recognized the Importance of Finality to Pre-Statutory Vested Rights

"A 'vested right' in the context of water law . . . means 'water rights which came into being by diversion and beneficial use prior to the enactment of any statutory water law, relative to appropriation.'" *Waters of Horse Springs v. State Eng'r*, 671 P.2d 1131, 1132 (Nev. 1983) (quoting *Application of Filippini*, 202 P.2d 535, 537 (Nev. 1949)). "The term 'vested rights', as that term is used in relation to constitutional guarantees, implies an interest it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice. It is some interest in the property that has become fixed and established." *Application of Filippini*, 202 P.2d at 537 (internal citation omitted). As stated by the Court of Federal Claims, "it is 'axiomatic that once rights to use water are acquired, they become vested property rights.'" *Casitas Mun. Water Dist. v. U.S.*, 102 Fed. Cl. 443, 458 (2011) (quoting *United States v. State Water Res. Control Bd.,* 182 Cal. App. 3d 82, 101 (1986)).

Although the holder of a vested water right can lose that right due to abandonment or forfeiture, there is no authority in Nevada law permitting

alteration of vested rights due to public trust concerns, as Appellants propose and the Ninth Circuit's questions contemplate.

Furthermore, the pre-statutory vested rights held by *Amici* maintain a special status under Nevada law. As this Court held in *Ormsby County v. Kearney*, water rights perfected prior to the establishment of Nevada water law were vested and could not be altered by the State Engineer pursuant to statute. 142 P. 803, 810 (Nev. 1914) ("The greater portion of the water rights upon the streams of the state were acquired before any statute was passed prescribing a method of appropriation. Such rights have uniformly been recognized by the courts as being vested under the common law of the state. Nothing in the act shall be deemed to impair these vested rights; that is, they shall not be diminished in quantity or value.").[2]

With a ruling in favor of Appellants, the status of pre-statutory vested rights would suddenly become uncertain, contrary to the clear intentions of Nevada law.

C. Appellants' Arguments Totally Disregard Nevada Water Law in Their Effort to Expand the Public Trust Doctrine

Appellants' opening brief contends that "[t]he fact that an appropriative right has vested or been adjudicated under Nevada law does not render it absolute and immune from limitation or regulation to protect the public welfare." Opening Brief

[2] Water rights within the Newlands Project overseen by *Amicus* TCID, were vested as of 1902 and are thus recognized as possessing this strong protection under state law. *See United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. 1944); *United States v. Alpine Land and Reservoir Co.*, Civil No. D-183 (D. Nev, 1980).

at 25. This is an incorrect statement of Nevada law. Moreover, it is not supported by the two cases Appellants cite, which involve the loss of water rights due to forfeiture and abandonment, pursuant to the doctrine of beneficial use. *See Town of Eureka v. State Engineer*, 826 P.2d 948 (Nev. 1992); *In re Manse Spring*, P.2d 311 (Nev. 1940). The ability of the state to modify or revoke certain rights that have been forfeited or abandoned through non-use is not controversial—nor does it somehow imply that the state can use the public trust doctrine to retroactively modify adjudicated or vested rights to redress Appellants' environmental concerns.

Appellants also incorrectly assert that *Lawrence v. Clark Cty.* "imposes a permanent affirmative duty on the State as trustee to regulate [state] waters to protect the public's long-term interest in them," and, therefore, adjudicated rights can be altered. Opening Brief at 14 (citing *Lawrence v. Clark Cty.*, 254 P.3d 606, 610–613 (Nev. 2011)). But while the *Lawrence* opinion indicates that public trust uses may be a legitimate consideration for the State Engineer with regard to future appropriations, this Court has never suggested that the State Engineer has the power—much less the obligation—to unilaterally alter water rights that are either vested or established by court decree. By contrast, Nevada water law clearly states, as described above, that the State Engineer has no such power. *See* NRS 533.0245, 533.3703. Nevertheless, citing *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (Cal. 1983), Appellants would place upon the State

Engineer an "affirmative obligation to reconsider past allocation decisions." Opening Brief at 22. However, in light of the fact that *National Audubon* involved mere permitted rights, it is far from obvious that California courts would execute retroactive alteration of adjudicated rights pursuant to the public trust doctrine. Appellants are essentially asking this Court to prioritize California case law over Nevada statutes that obligate the State Engineer to respect decreed and vested rights—a request this Court cannot grant.

II. Nevada Water Law Protection of Vested Water Rights Does Not Violate the Public Trust Doctrine

A. The Public Trust Doctrine First Articulated by the Supreme Court Mandates the Balancing of All Water Uses in the Public Interest

The Supreme court in *Illinois Cent. R. Co. v. State of Illinois* first articulated the notion of the public trust doctrine when it held that "because the state holds [certain] property in trust for the public's use, the state is simply without power to dispose of public trust property when it is not in the public's interest." *Lawrence*, 254 P.3d at 613 (citing 146 U.S. 387, 453 (1892)). The Court held that the fundamental right protected by the public trust doctrine is that of the public to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein." *Illinois*, 146 U.S. at 452.

Although application of the doctrine initially focused on matters of commerce and navigation of waterways as uses in the public interest, it was

inevitable, given the scarcity of and competing uses for water, that environmental concerns would clash in the western states. However, the present day existence of competing uses does not mandate either a legislative or judicially preferred hierarchy of uses. In *Casitas Mun. Water Dist. v. U.S.*, a case involving a dispute over a water district's obligations to provide additional flows and to take other measures on behalf of an endangered species of fish, the court recognized that "the public trust doctrine is concerned not only with fish and other environmental values, but also with human navigation and commerce." 102 Fed Cl. 443, 459 (2011) (citing *Marks v. Whitney*, 491 P.2d 374, 3801–81 (Cal. 1971)). The court explained, "[i]mplementation of the public trust doctrine requires not only the balancing of the various public trust values, but also the weighing of the those values against other, broader public interests." *Id.* (citing *National Audubon*, 33 Cal.3d at 446–47). Accordingly, "[an] analysis of the public trust and reasonable use doctrines therefore must take into account not only the relevant environmental concerns, but also the beneficial uses served by Casitas's operations, the longevity and history of those operations, and the state policy favoring delivery and use of domestic water." *Id.*

In the instant case, Appellants set forth a conception of the public trust doctrine that prioritizes environmental and recreational uses as public interests above all others, eliding the fact that Nevada recognizes commercial uses of the

state's waters as beneficial and in support of the public welfare. *See Ormsby County v. Kearney*, 142 P. 803, 805 (Nev. 1914) ("The public welfare is very greatly interested in the largest economical use of the waters of the state for agricultural, mining, power, and other purposes."); NRS 321.0005 (identifying "the production of revenue and other public purposes" as uses in the best interest of the residents of the State).

B. Application of Judicial Deference Can Include Placing Commercial Needs Over Environmental Concerns, as Both Are in the Public Interest Protected by the Doctrine

Appellants wrongly predicate their assertion of what amounts to an unfettered right of the state to reallocate perfected or vested water rights to serve environmental needs on *National Audubon Society v. Superior Court*. In that case, the California Supreme Court held that "[t]he state has an affirmative duty to . . . protect public trust uses whenever feasible. . . . As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses." 33 Cal.3d at 446. As characterized by the Court of Federal Claims, "[t]he [*National Audubon*] court sought a middle ground . . . acknowledging the importance of both the public trust doctrine and the appropriative water rights system . . . ." *Casitas*, 102 Fed. Cl. at 457 (citing *National Audubon*, 33 Cal.3d at 445). Despite Appellants' reliance on *National Audubon*, that case does not support

the notion that this "middle ground" would permit the alteration of long-held adjudicated rights.

Furthermore, the *National Audubon* court was construing the public trust doctrine in light of a California statutory water law context that is much different than Nevada's. As the court stated, "[m]ore recent statutory and judicial developments . . . have greatly enhanced the power of the Water Board to oversee the reasonable use of water and, in the process, made clear its authority to weigh and protect public trust values." *National Audubon*, 33 Cal.3d at 443–44. By comparison, Nevada statutes clearly define and limit the State Engineer's jurisdiction to alter or revoke adjudicated and vested water rights.

Ultimately, given the manifold ramifications of Appellants' proposal, whether to dramatically expand the public trust doctrine in Nevada—which would conflict with the statutory protections afforded vested and perfected water rights—is a question of policy more appropriate for the Legislature than the courts. *See Renown Health v. Vanderford*, 235 P.3d 614, 616 (Nev. 2010) ("This court may refuse to decide an issue if it involves policy questions better left to the Legislature.").

III. Appellants' Proposal Would Be Tantamount to an Impermissible Retroactive Application of the Public Trust Doctrine

The public trust doctrine was not formally adopted by any Nevada court until this Court's decision in *Lawrence v. Clark County*, 254 P.3d 606, 617 (Nev.

2011) ("We expressly adopt the public trust doctrine in Nevada."). In *Lawrence*, this Court stated that "although the public trust doctrine has roots in the common law, it is distinct from other common law principles because it is based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power, as recognized by *Illinois Central*." *Id.* at 613. The Court's opinion in *Lawrence* pointed to Nevada statutory law as recognizing the public's interest in the state's water supplies. *Id.* at 612–13 (citing NRS 321.005, 533.025). NRS 533.025 provides, "[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." NRS 321.0005 mandates that "state lands must be used in the best interest of the residents of this state." However, there is no dispute that the public trust doctrine was not adopted in Nevada until 2011. The Legislature's historic recognition of the public's interest in Nevada water does not mean that Nevadans' established water rights—many of which predate the *Lawrence* opinion by decades—are subject to the whims of Appellants' notion of the public trust doctrine.

Lawrence's statutory references serve as a further reminder that Nevada water law is fundamentally a creature of statute. Nevada's newfound public trust doctrine does not override the statutory water scheme created by the state and from which *Amici* derive their water rights. Not only are *Amici*'s water rights vested and

recognized under established statutory law and pursuant to a court adjudication, but they are among the most fundamentally protected water rights in Nevada's longstanding body of water law. *See Ormsby Cty.*, 142 P. at 810 (recognizing that 1913 water law does not impair pre-1913 vested rights). As the Supreme Court has recognized, "not a great deal of evidence is really needed to convince anyone that western states [] rely upon water adjudications." *Arizona v. California*, 460 U.S. 605, 621 (1983); *see also National Audubon*, 33 Cal.3d at 446 ("Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel."). These are crucial and valuable rights, upon which not only their holders but the entire Nevada economy depends.

Moreover, this Court has acknowledged the wisdom of not retroactively applying new legal concepts to reverse long-standing decisions. *See Valdez v. Employers Ins. Co. of Nevada*, 162 P.3d 148, 154 (Nev. 2007) ("With respect to the application of newly enacted statutes, we generally presume that they apply prospectively unless the Legislature clearly indicates that they should apply retroactively or the Legislature's intent cannot otherwise be met."). The Walker Decree represents a final judgment of 80 years' standing, and thus, consistent with

the reasoning of this Court, it cannot be retroactively modified through a legal doctrine that was not adopted until 2011.

There is simply no jurisprudential basis to apply the public trust doctrine as Appellants propose. Appellants' proposition has never been endorsed by a court or Legislature of this state, and to adopt it now would represent an impermissible retroactive application of the public trust doctrine that undermines Nevada's long-established water system.

IV. Permitting Modification of Established Water Rights Would Represent an Unprecedented Expansion of the Public Trust Doctrine

A. No Other Jurisdictions Have Taken the Dramatic Step of Employing the Public Trust Doctrine to Reallocate Adjudicated and Vested Water Rights

The public trust doctrine is now recognized by most states as primarily precluding the sale of tidelands and granting access to navigable waters for the equally important public purposes of navigation, fishing, or recreation. *See, e.g*, *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 552 (Wash. 2018) ("[T]he State possesses an alienable, fee-simple private property interest in those beds and shores subject to an overriding public servitude to use the waters in place for navigation and fishing, and other incidental activities."); *Brooks v. Wright*, 971 P.2d 1025, 1031 (Alaska 1999) ("[W]e have noted that 'the common use clause was intended to engraft in our constitution certain trust principles guaranteeing

access to the fish, wildlife, and water resources of the state.'").[3] However, even those jurisdictions that apply public trust principles more broadly to private uses of water have not employed it to retroactively modify adjudicated rights. *See Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (stating "the public trust doctrine applies to all water resources without exception or distinction" in case involving permit applications and petitions to amend interim instream flow standards under state water code); A.R.S. § 37-1130 (Arizona permits appropriation of water "to maintain and protect public trust values," but only by complying with the normal requirements for an appropriation); *United Plainsmen Ass'n v. N. Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 462 (N.D. 1976) ("[T]he Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State" in case involving permitting of prospective water rights); *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 799 N.W.2d 73, 92 (Wis.

[3] *See also Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961) (the state holds waters "in trust for the equal use and benefit of the public," permitting "floating usable craft therein or thereon" and "when necessary, disembark[ing] and walk[ing], or wad[ing] upon submerged lands in order to pull, push, or carry craft"); *Hinman v. Warren*, 6 Or. 408, 412 (1877) (the state has "no authority to dispose of its tide-lands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets, and the like"); *State v. Red River Valley Co.*, 182 P.2d 421, 428 (N.M. 1945) (beneficial use of public waters includes recreation and fishing).

2011) (in light of "the legislature's delegation of the State's public trust duties, the DNR has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state").

Thus, were this Court to approve the deployment of the public trust doctrine to retroactively modify adjudicated or vested water rights to benefit one public interest over another, it would represent a decision that is wholly unprecedented and in derogation of established Nevada water law.

B. Judicial Expansions of the Public Trust Doctrine Would Run Afoul of the Political Question Doctrine

In other western states in which courts have expanded the public trust doctrine, the legislature has frequently responded by moving to rein it in, creating periods of uncertainty for citizens. In Idaho, for example, the legislature enacted Idaho Code § 58-1203, which precluded the application of the public trust doctrine to water rights appropriations, in response to court cases determining that "[t]he public trust doctrine takes precedent even over vested water rights." *See Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983). In Montana, the legislature enacted statutory provisions ensuring that appropriated water rights take precedence over public trust interests, in light of Montana courts' expansion of the public trust doctrine. *See* Mont. Code §§ 75-5-705, 75-7-104, 85-1-111; *see also Galt v. State*, 731 P.2d 912, 913 (Mont. 1987). In Utah, the legislature's passage of the Public Waters Access Act was perceived as the

legislature's effort to "cut back" on the expansion of public access to private waterways. *Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553, 555 (Utah 2017). In Arizona, the legislature and courts have engaged in prolonged conflict over the application and scope of the public trust doctrine under state law. *See Defs. of Wildlife v. Hull*, 18 P.3d 722, 727, 739 (Ariz. App. 2001).

Here, the Court need not cross that Rubicon and can avoid creating the kind of protracted legal and practical uncertainty seen in the aforementioned states by declining to judicially sanctify Appellants' novel conception of the public trust doctrine and instead allowing the state Legislature to decide whether to amend the statutes establishing the limits of the State Engineer's authority. Appellants' proposition presents a classic non-justiciable political question. *See, e.g., N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 310 P.3d 583, 587 (Nev. 2013) ("Under the political question doctrine, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.") (internal quotation marks omitted).

V. The U.S. Supreme Court Has Held That Principles of Finality and Repose Preclude Modification of Adjudicated Rights Outside of Specific Circumstances not Present in this Case

Although Appellants contend they are not proposing a new adjudication of water rights, but rather the reallocation of water previously resolved by the Walker

River Decree Court with jurisdiction over the water and parties, Appellants' approach constitutes a reallocation of decreed water rights—a notion previously rejected by the United States Supreme Court on grounds of certainty and finality. In *Arizona v. California*, the Supreme Court held that res judicata barred the reconsideration of a prior decree which sought to reapportion rights to water from the Colorado River under an existing judicial decree. 460 U.S. 605, 626 (1983). There, the prior decree had apportioned water rights based on the amount of "practically irrigable acreage" possessed by the tribe, who was represented in the original litigation by the United States, acting as trustee. Subsequently, "[t]he Tribes and the United States . . . claim[ed] that certain practicably irrigable acreage was 'omitted' from those calculations." *Id.* at 617. The Court rejected the tribe's plea, holding that water rights decrees "must be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Id.* at 606. Despite what the dissenting justices referred to as "manifest injustice" suffered by the tribe, the Court held that the principles of certainty and finality were the overriding concerns. In *Arizona*, the Supreme Court held that even where "the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform [the Court's] decision." *Id.* at 619.

In Nevada v. U.S., 463 U.S. 110 (1983), the United States brought an action on behalf of the Pyramid Lake Indian Reservation seeking additional water rights for the reservation in the Truckee River, which had been adjudicated 30 years prior. The Supreme Court held that the adjudication resulting in the Orr Ditch Decree was "intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to," and therefore "it would be manifestly unjust not to permit subsequent appropriators to hold the Reservation to the claims it made in *Orr Ditch*." *Id.* at 143–44 (internal alterations and quotation marks omitted). The Court further stated, "even though quiet title actions are *in personam* actions, water adjudications are more in the nature of *in rem* proceedings. Nonparties such as the subsequent appropriators in this case have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case." *Id.*

Relying on *Nevada v. U.S.*, the Ninth Circuit previously held in this litigation that, under the Walker Decree, "no party may relitigate a claim to water rights in the Walker River Basin, in the Nevada District Court or any other court, that was litigated in the original case as of April 14, 1936." 890 F.3d 1161, 1171–72 (9th Cir. 2018). Echoing the Supreme Court, the Ninth Circuit has also held that "[p]articipants in water adjudications are entitled to rely on the finality of decrees

as much as, if not more than, parties to other types of civil judgments." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1050 (9th Cir. 1993).

Without providing a legitimate legal basis upon which to reallocate the decreed water rights at issue in this case, Appellants cannot seek to have this Court wield the public trust doctrine like a magic wand that simply makes legal obstacles disappear—particularly in light of the countervailing principles of finality and repose. Such principles provide further support for the position that no matter how righteous Appellants view their cause, their legal arguments are woefully inadequate.

VI. Retroactively Applying the Public Trust Doctrine to Upend Vested Rights Would Undermine the Doctrine's Purpose and Cause Significant Disruptions and Economic Impacts for Nevada Communities

A. Amici's Use of Their Established Water Rights Furthers the Public Interest

Appellants and their supporting *amici* incorrectly label water used for municipal and agricultural purposes as "private" when courts have uniformly considered such uses as in furtherance of the public interest by providing immense public benefits. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 165 (1935) ("[T]his court [has] accepted . . . that in the arid land states the use of water for irrigation, although by a private individual, is a public use."); *Ormsby Cty. v. Kearney*, 142 P. 803, 805 (Nev. 1914) ("The state at large is not only interested in protecting prior appropriators in their rights, but is interested

in the conservation of the waters of the stream system to the end that the largest possible amount of land may be brought under cultivation through an economical diversion and use of such waters."); *Associated Builders & Contractors, Inc. v. S. Nevada Water Auth.*, 979 P.2d 224, 226 (Nev. 1999) (recognizing that municipal water authority "is empowered to acquire, develop, and maintain water supplies for the benefit of southern Nevada consumers"). Without reliable water supplies for municipal, personal, and commercial use, Nevada's communities, businesses, and industries would suffer greatly.

The existing requirement that water must be put to "beneficial use"—mandated by Nevada law and repeated in the Walker Decree itself—ensures that available water supplies are used to further the well-being of all Nevadans and the state's economy. *See* NRS 533.050; *Desert Irr., Ltd. v. State*, 944 P.2d 835, 842 (Nev. 1997); *see also* NRS 533.370(2) (precluding the State Engineer from approving applications for water rights that "threaten[] to prove detrimental to the public interest.").

B. The Destabilizing Effects of the Proposed Expansion of the Doctrine Would Undermine, Not Further, Public Trust Interests

As the Supreme Court has stated, "[c]ertainty of water rights is particularly important with respect to water rights in the Western United States. The development of that area would not have been possible without adequate water supplies in an otherwise water-scarce part of the country." *Arizona*, 60 U.S. at 620;

see also In re Waters of Long Valley Creek Stream Sys., 25 Cal.3d 339, 3555–56, 599 P.2d 656 (Cal. 1979) ("Uncertainty concerning the rights of water users has pernicious effects. Initially, it inhibits long range planning and investment for the development and use of waters in a stream system. . . . Uncertainty also fosters recurrent, costly and piecemeal litigation. . . . Finally, uncertainty impairs the state's administration of water rights."). In addition, allowing courts to modify adjudicated rights would expose parties to further litigation in the future, in light of continued efforts to expand the public trust doctrine. *See Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 860 (2018) (expanding the public trust doctrine to include groundwater).

It is crucial to note that the economic effects of wholesale reallocation of adjudicated water rights would be potentially catastrophic. The direct and indirect economic benefits of the agriculture industry alone on Churchill County are estimated at more than $319 million annually.[4] Because this industry is dependent on adjudicated water rights, the harm to *Amici* and Nevada citizens from disruption of those rights would extend far beyond the industry itself.[5]

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[4] Nevada Department of Agriculture, *An Economic Analysis of the Food and Agriculture Sector in Nevada*, at 32 (2017) (available at http://agri.nv.gov/Outreach/Publications/).

[5] *Amici* Sierra Club, *et al.*, demonstrate their lack of understanding of the circumstances with their assertion that "the practical effect of recognizing that the

Nevertheless, less disruptive alternatives exist that would allow Walker County to pursue its conservation goals as related to Walker Lake. For example, the State can potentially purchase water rights for fair compensation and retire them, as has been done in other western states. *See* John P. Sande, *A River Runs To It*, 44 Santa Clara L. R. 831, 858–9 (2004). Indeed, Congress has established federal programs for voluntary, market-based methods for promoting conservation of desert terminal lakes, including Walker Lake. *See United States v. United States Bd. of Water Commissioners*, 893 F.3d 578, 590 (9th Cir. 2018) ("In 2009, [Congress] established the Walker Basin Restoration Program 'for the primary purpose of restoring and maintaining Walker Lake.'"). The Walker Basin Conservancy, which assists in carrying out the program, reports that $85 million has been expended to acquire water from willing sellers for the purpose of increasing inflows into Walker Lake.[6]

In light of these alternatives, modification of adjudicated rights is unreasonable.

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public trust doctrine applies to appropriative water rights in Nevada will be modest" as well as their inapposite comparison of Nevada with Los Angeles, a city with superior water, infrastructural, and financial resources. *Amicus* Brief of Sierra Club, *et al.*, at 3.

[6] Walker Basin Conservancy, *2018 Annual Report*, at 4 (2018) (available at https://www.walkerbasin.org/).

VII. Reallocating Adjudicated Rights Based on the Public Trust Doctrine Would Be a Taking Requiring Just Compensation

A. Appellants' Proposal Would Result In a Taking Requiring Just Compensation

Although water itself is not "owned," the right to its beneficial use constitutes private property. This Court has held "there is no ownership in the corpus of the water, but . . . the use thereof may be acquired, and the basis of such acquisition is beneficial use." *In re Manse Spring & Its Tributaries, Nye Cty.*, 108 P.2d 311, 314 (Nev. 1940); *see also Casitas*, 102 Fed. Cl. at 458 ("As the California courts have repeatedly held, it is axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation.") (internal quotation marks omitted); *Dermody v. City of Reno*, 931 P.2d 1354, 1358 (Nev. 1997) (recognizing water rights as a "lesser estate in real property" pursuant to NRS 37.020(1)); *Carson City v. Lompa's Estate*, 501 P.2d 662, 662 (Nev. 1972) (stating water rights are "regarded and protected as real property" and thus can be condemned through eminent domain); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950) (holding respondents had riparian rights to periodic inundations of their lands by seasonal overflows of the San Joaquin River and these rights were compensable under California law).

Asserting that a taking in furtherance of the public trust doctrine cannot immunize the state from the requirements of the Takings Clause. In analyzing the implications of *National Audubon* on takings claims, the Court of Federal Claims has stated, "[w]e read *National Audubon* . . . as recognizing that the state has a right—indeed a duty—to exercise continuing supervisory control over its navigable waters to protect the public trust, but that the traditional water rights system—with its recognition and protection of water rights as property—remains in place." *Casitas*, 102 Fed. Cl. at 458. The *Casitas* court went on to reject the notion that "a mere showing of harm to the fish, without regard to the magnitude of the harm or the effect of the restriction on plaintiff, is sufficient to take the claim outside the protections of the Fifth Amendment," noting that "[such] a principle would eviscerate private property interests and throw the water rights regime into chaos." *Id.* at 458, 459. Accordingly, a reallocation of water rights due to public trust concerns, as proposed by Appellants, would amount to a taking requiring just compensation.

Regardless, no amount of money could possibly provide just compensation here, as the societal benefits of water exceed economic analyses. Not only have the water rights holders developed a reliance on their existing water rights that cannot accounted for, but the community could not be compensated for the economic harm resulting from the disruption.

B. Appellants Rely on Inapposite Cases For Their Argument That "Background Principles" of Nevada Law Would Preclude a Takings Claim

Appellants proffer inapplicable case law to bolster their argument that pre-existing background principles of Nevada law would prohibit the exercise of Appellees' water rights. In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), the Supreme Court based its holding on the state's ability to regulate beachfront public trust property—a concern which is not at issue in the present case. In *Esplanade Properties, LLC v. City of Seattle*, the Ninth Circuit based its denial of a takings claim in large part on its belief that when the property owner purchased the property, he knowingly "took the risk" that development of said property would be impossible, due to existing state regulations and the state's public trust doctrine. 307 F.3d 978, 987 (9th Cir. 2002). Appellants themselves assert that the Walker Decree did not expressly consider the public trust doctrine—thus, the parties to the Decree, unlike the property owner in *Esplanade*, could not have been aware of possible infringements upon their decreed water rights pursuant to the public trust. *See* Opening Brief at 22. Neither of these cases stand for the proposition that an uncompensated taking of private property is constitutional simply because the state's justification is the public trust doctrine, and the argument based on these cases is not apropos.

Furthermore, with the exception of *National Audubon*, the additional cases Appellants cite generally involve takings claims to property rights over tidelands, which have clearly been within the scope of the public trust since the *Illinois* case in 1892. *See* Opening Brief at 39–41 (citing *Wilson v. Commonwealth*, 583 N.E.2d 894, 901 (Mass. App. 1992); *State v. Slotness*, 185 N.W.2d 530, 533 (Minn. 1971); *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 119-20 (S.C. 2003); *Glass v. Goeckel*, 703 N.W.2d 58, 78 (Mich. 2005)). Adjudicated water rights, on the other hand, have never been retroactively modified under the public trust doctrine. Furthermore, the cited cases generally involve denial of permits for prospective projects, not the reduction of previously held property, as would be the case here. *See* Opening Brief at 41 (citing *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 113-15 (1999)).

Contrary to the assertions of Appellants and their supporting *amici*, the retroactive application of the public trust doctrine to reallocate water rights is not a "background principle" as defined by the Supreme Court in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). It would be patently unreasonable to contend that Nevada water rights holders could have had any expectation that their vested right to beneficial use could eventually be impacted by the public trust doctrine or that their exercise of these rights could be enjoined "under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that

affect the public generally, or otherwise." *Id.* at 1029. Therefore, *Lucas* does not support the argument that the proposed reallocations would not constitute a taking.[7] As the Supreme Court has held, "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property right it has taken never existed at all." *Hughes v. State of Wash.*, 389 U.S. 290, 296–97 (1967).

C. A Reallocation of Water Rights Pursuant to the Public Trust Can Constitute a Judicial Taking

While the Ninth Circuit certified the question of whether reallocation of water rights due to public trust concerns would constitute a taking, it did not specify that this hypothetical reallocation would be carried out by the judiciary. Rather, a decision by this Court to permit such reallocation could—and would likely—mean that non-judicial bodies would execute what would be a clear taking of private property requiring just compensation. Therefore, a statement by this Court regarding the validity of a judicial taking would constitute an advisory opinion.

Regardless, Appellants and their supporting *amici* offer no definitive basis for their assertion that a judicial action cannot constitute a taking. In *Stop the*

[7] *Amici* law professors also cite *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 US. 92 (1938), and *Hill v. State*, 894 N.W.2d 208 (Neb. 2017). Both cases are distinguishable because they involved an interstate compact that was deemed to take precedence over adjudicated rights.

Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., a plurality of the Supreme Court held that "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." 560 U.S. 702, 714 (2010). Thus, while not binding, the most definitive statement yet from the Supreme Court weighs clearly in favor of the existence of judicial takings. *Id.* at 713–14 ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor."). *Amici* law professors reference the concerns expressed by Justices Kennedy and Breyer in the *Stop the Beach* case and make a fallacious "slippery slope" argument regarding the potential "ossification" of the common law that would result from judicial takings. *Amicus* Brief of Law Professors at 21–23. If, as the law professors contend, a four-justice plurality should not be looked to for guidance, then it is unclear why a pair of two-justice concurrences should guide this Court. Like Justice Scalia in *Stop the Beach*, this Court should recognize the validity of the judicial takings theory.

CONCLUSION

For the reasons expressed above, *Amici* respectfully request that this Court answer Question No. 1 as "No" and Question No. 2 as "Yes."

Dated: April 19, 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 Times New Roman 14 point font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and, excluding the parts of the brief exempted from the word count, it contains 6,959 words, according to the count of Microsoft Word.

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.

Dated: April 19, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Hanson Bridgett LLP and that on the 19th day of April, 2019, I electronically filed the foregoing with the Clerk of the Court using the Supreme Court of Nevada Electronic filing system, which will send notification of such filing to the following attorneys of record via their email addresses:

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