IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY AND WALKER LAKE WORKING GROUP,

Appellants,

v.

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

Respondents.

Case No. 75917

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

AMICUS CURIAE BRIEF OF PERSHING COUNTY WATER CONSERVATION DISTRICT; PERSHING COUNTY, NEVADA; HUMBOLDT COUNTY, NEVADA; AND, LANDER COUNTY, NEVADA, IN SUPPORT OF RESPONDENTS

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that Pershing County Water Conservation District ("PCWCD"), Pershing County, Nevada, Humboldt County, Nevada, and Lander County, Nevada do not have any parent corporations or publicly held companies that own 10% or more of the party's stock as outlined in NRAP 26.1.

Dated this 19th day of April, 2019

/s/ Therese A. Ure

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AMICUS CURIAE

STATEMENT OF INTEREST

Amici Pershing County, Pershing County Water Conservation District ("PCWCD"), Humboldt County and Lander County are in northern Nevada located along the Humboldt River System, and who either rely upon, or whose constituents rely upon, water allocated and settled under the Humboldt River Decree.[1]

Pershing County, located at the end of the Humboldt River System, with the county seat in Lovelock Nevada, is particularly vulnerable to changes in water delivery or allocation pursuant to the Humboldt River Decree. Agriculture is one of the largest economic industries in Pershing County, and the farmers in Lovelock Nevada receive their water from adjudicated decreed rights on the Humboldt River through PCWCD, a district not dissimilar from the Walker River Irrigation District ("WRID").

PCWCD is an irrigation district formed under Nevada Revised Statutes ("NRS") Chapter 539. PCWCD owns, controls, and operates water rights and a water conveyance system that delivers water, under water rights adjudicated pursuant to the 1931 Bartlett Decree (aka the Humboldt River Decree), to approximately 37,506.62 acres of irrigated agricultural lands within PCWCD

[1] Amicus PCWCD is an irrigation district, and Amici Pershing County, Humboldt County, and Lander County are political subdivisions of the state of Nevada and are therefore authorized to file Amicus Brief per NRAP 29(a).

boundaries. PCWCD underwent a several decade long title transfer project for Rye Patch Dam and Reservoir, on the Humboldt River, wherein the United States transferred title to PCWCD by deed signed on January 11, 2016. As part of this title transfer project, PCWCD relied on its adjudicated and decreed water rights of use, as well as its additional certificated water rights, to support the storage and use of Humboldt River waters.

Humboldt County is upstream from Pershing County and also sits along the decreed Humboldt River. In Humboldt County, water right decrees control the use of water rights related to the Humboldt River, Little Humboldt River, Quinn River and Kings River systems, and numerous other creeks. The Humboldt County Board of County Commissioners governs two general improvement districts that manage a water system in Golconda and McDermitt.

Continuing east and upstream along the Humboldt River, Lander County operates the water system in Battle Mountain. In Lander County, decrees control water rights related to the Humboldt River and numerous other rivers and creeks. PCWCD also owns approximately 22,000 acres in Lander County operating as a "community pasture" for its constituents. This community pasture relies on the Humboldt River to provide stockwater to cattle grazed on the community pasture. The community pasture not only supports livestock grazing, but also provides

habitat for wildlife and recreation for fishermen and hikers along the Humboldt River.

Amici have an interest in the Nevada Supreme Court case Mineral County v. Walker River Irrigation District, Case No. 75917 as the questions presented to the Supreme Court will set precedent that likely will be applied to decreed rights of use upon which all Amici depend. The prior appropriation doctrine, the doctrine governing water in Nevada, provides certainty to all water users. Amici are concerned that changing Nevada's legislative enactments related to public interest in the manner suggested by Mineral County's request that the Court recognize a public trust doctrine as established in California will upset Nevada water law as to adjudicated and decreed rights. Amici are concerned that the stability of Nevada's legislated prior appropriation doctrine's decreed rights as used for, and relied upon by municipal, agricultural, mining, industrial, and domestic uses will be taken if a California type public trust is recognized by the Courts, undermining as well the Nevada legislature's requirements of public interest. Amici submit this brief in support of Respondents requesting this Court refuse to accept Mineral County's invitation to super impose a public trust doctrine that the Nevada legislature has not adopted and request that this Court not apply a California type public trust to Nevada water rights of use, particularly to those water rights that are adjudicated, decreed, settled, and certain.

SUMMARY OF ARGUMENT

The water of Nevada belongs to the public, NRS 533.025, so the public should decide which uses of water best correspond with its interests. The State Legislature historically speaks for the citizens of Nevada, assuming a trust responsibility for resources – including water – held for the public's use and enjoyment. This legislative responsibility cannot be abdicated, only limited by margins established in consideration of the public interest.

As delineated by the United States Supreme Court in *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387, 13 S. Ct. 310 (1892), the public trust doctrine requires states to hold the bed and banks of navigable waterways in trust for the public, and that control over the trust property "can never be lost, except as to such parcels as are used in promoting the interests of the public therein." *Id.* at 453. The doctrine is a state law principle, meaning that a state must determine the extent of its public trust responsibilities, including whether it encompasses the use of water.

Although the public trust doctrine has been expressly recognized in Nevada, *Lawrence v. Clark County,* 127 Nev. 390, 254 P.3d 606 (2011), Appellant Mineral County contends that its reach should be expanded. It argues that, pursuant to case law and Nevada statutes, the state has a trust duty to manage water resources so as to preserve the public's interest.[2] But in reality, Mineral County seeks to

[2] Mineral County Brief ("Mineral Br.") at 20. Other briefing cited herein includes

destabilize Nevada's firmly grounded system of water law by nullifying certain facets of its backbone principle found in prior appropriation. Although the focus of the underlying litigation is water rights adjudicated and settled in the Walker River Decree, this public trust issue has much broader implications.

Principally, this Court has been asked to consider whether Nevada's public trust doctrine authorizes reallocation of adjudicated and settled water rights of use within the state. While other attendant concerns were included in the two questions certified by the Ninth Circuit, the arguments advanced herein specifically address the rephrased inquiry above and demonstrate that Mineral County's position is both misguided and untenable.

First, Nevada's trust responsibilities regarding the administration of its water resources are reflected in a comprehensive statutory code that has emphasized public interests since it was first enacted. Public ownership of water, NRS 533.025, is "the most fundamental tenant of Nevada water law," *Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997), which, along with the declaration that beneficial use is a public use, NRS 533.050, manifests the trust accountabilities of the administrative authority, the Nevada State Engineer.

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briefs in support of Appellants from the Natural Resources Defense Council, *et al.* ("NRDC Br.") and Law Professors ("Law Prof. Br.")

Lawrence simply pointed out the public trust mechanisms under which the state's water use has been regulated for 100-plus years.

Second, Mineral County's position fails to account for the property interests that stand to be compromised. Vested rights in Nevada are "regarded and protected as real property," *Application of Filippini,* 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949), while rights settled in a judicial decree are considered final and conclusive. NRS 533.210(1). Mineral County suggests that public trust conditions render adjudicated rights vulnerable, perhaps even to reallocation, but the protections contained in Nevada's water code indicate otherwise.

Third, the reliance of Mineral County and its amici on *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709 (1983), *cert. denied,* 464 U.S. 977 (1983) as persuasive authority is more convenient than appropriate. The ruling, in which the California Supreme Court determined the state of California had continuing authority over water rights in protecting trust interests, *id.* at 446, favors Mineral County's position but shares few similarities with the underlying circumstances at issue here. The basis of California's water law differs from Nevada's, as does the statutory authority that guides the respective regulatory agencies. Courts in other prior appropriation jurisdictions have declined to follow *National Audubon,* and this Court should do the same.

And fourth, the policy shift that Mineral County proposes would represent a significant departure from Nevada's established water law principles. Although *Illinois Central* instructs states to determine the scope of their responsibilities under the public trust doctrine, and states such as California and Idaho have undergone extreme regulatory modifications, any change in Nevada must result from legislative fiat. If Nevada's water law is deficient, it is not the place of the State Engineer or this Court to decide how it should be fixed.

To be sure, the public trust doctrine was established in Nevada long before *Lawrence* acknowledged its presence. The doctrine's principles are infused in the state's 106-year-old water code and reflected in the performance of the State Engineer, whose regulatory role dates back even further. Yet it is the Nevada Legislature that "act[s] as a fiduciary of the public in its administration of the trust property," *Lawrence,* 127 Nev. at 401, and it has long been the Legislature's judgment that public interests are best served by the tenets of prior appropriation. The point is moot until the Legislature says differently.

ARGUMENT

A. *Lawrence* merely affirms public trust responsibilities long imposed on State Engineer by Nevada's water law, which itself reflects many foundational principles of public trust doctrine.

While the *Lawrence* Court expressly adopted the public trust doctrine in Nevada, *id.* at 406, it did not introduce the concept. The opinion observed that the

doctrine was "not simply a common law remnant" of *Illinois Central*, but rather was embodied in Nevada statutes and its Constitution, *id.* at 399, and that "this state has previously embraced the tenets on which it is based." *Id.* at 395.

Indeed, *Lawrence* identified three cases that reflected recognition, however oblique, of the public trust doctrine – *State Engineer v. Cowles Bros., Inc.*, 86 Nev. 872, 478 P.2d 159 (1970); *State v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231 (1972); and *Mineral County v. State, Department of Conservation*, 117 Nev. 235, 20 P.3d 800 (2001). *Lawrence,* 127 Nev. at 395-97. Further, the opinion pointed out that, under the doctrine, the state's ability to dispose of trust property was predicated on the same requisite condition – public benefit – as the Nevada Constitution's so-called gifts clause, Article VIII, Sec. (9), *Lawrence,* 127 Nev. at 399. Finally, the opinion identified two statutes whose language "statutorily codif[ied]" the public trust doctrine in Nevada. *Id.* at 399-400. One of those statutes, NRS 533.025, expanded the discussion into the water law realm. *See Mineral County,* 117 Nev. at 247 (Rose, J., concurring).

However, the impact of NRS 533.025 and its legislative forebears on the state's public interest have been felt for more than a century. Enacted as part of Nevada's first comprehensive water code, Act of 1913, ch. 140 Nev. Stat. 192, the provision now enumerated as NRS 533.025 established that "water of all sources … within the boundaries of the state … belongs to the public." Read in conjunction

with other provisions that originated in the Act of 1913 – an appropriation of water must be for a beneficial use (presently NRS 533.030), and beneficial use is declared to be a public use (NRS 533.050) – NRS 533.025 places a trust responsibility on the entity charged with the duty of administering Nevada's water resources. Even before the Act of 1913, that duty was impressed upon the office of the State Engineer.

The *Lawrence* opinion merely affirmed the obligation imposed on the State Engineer when his office was created by the Irrigation Act of 1903, ch. 4, sec. 3, 1903 Nev. Stat. 25. Even as Nevada's water code evolved, the State Engineer unwaveringly functioned under the statutory mandate to deny proposed appropriations and changes of use that threaten or prove detrimental to the public interest. NRS 533.370(2). Despite Mineral County's blanket assertion that the State Engineer has historically failed in this capacity, Mineral Br. at 27, the Nevada Legislature has left public interest determinations regarding use of the state's water resources to the discretion of the State Engineer. This Court noted more than 20 years ago that the Legislature "demonstrated through its silence" that defining the public interest should remain within the purview of the State Engineer, *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 749, 918 P.2d 697, 700-01 (1996). The Legislature's persistent silence on the issue, even as public

interest values and considerations continually shift[3], demonstrates this remains true today.

Although *Lawrence* expressly recognized Nevada's management of its public lands and resources necessarily included a trust responsibility for its citizens, *Lawrence,* 127 Nev. at 406, the opinion served more as a reminder to the State Engineer. The principles of the public trust doctrine are mirrored in foundational provisions of this state's water code, among them public ownership of water (NRS 533.025), "the most fundamental tenant of Nevada water law," *Desert Irrigation,* 113 Nev. at 1059, and beneficial use (NRS 533.030), "singularly the most important public policy underlying the water laws of Nevada." *Id.* Since it is the duty of the State Engineer to ascertain whether an appropriation of water is for a beneficial use, and beneficial use is declared to be a public use, NRS 533.050, the State Engineer is intrinsically involved in determining how water serves the public interest.

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[3] Notably, NRS 533.030 was amended in 1969 to declare that the use of water for any recreational purpose was a beneficial use. 1969 Nev. Stat. 141. Subsequently, this Court determined that wildlife purposes, NRS 533.023, fall within the recreation-beneficial use definition of NRS 533.030(2). *State v. Morros,* 104 Nev. 709, 716, 766 P.2d 263, 268 (Nev. 1988), and that ecological uses fit into the public trust paradigm. *Mineral County,* 117 Nev. at 248 (2001) (Rose, J., concurring).

B. Adjudicated and settled rights are final and conclusive pursuant to Nevada water law and therefore cannot be reallocated.

Holders of Nevada water rights possess a usufructuary interest – while the water belongs to the public, appropriators acquire an ownership in the right of use. *Desert Irrigation*, 113 Nev. at 1059. Still, water rights "are regarded and protected as real property." *Filippini,* 66 Nev. at 21-22, which, as *Filippini* implies, is basic security for the holder of any right fixed and established pursuant to the doctrine of prior appropriation or Nevada's statutory water code. *Id.* at 22. If this serves as the baseline and vested rights, those for which "it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice," *id.* (*citing Los Angeles v. Oliver*, 102 Cal. App. 299, 283 P. 298. (Dist. Ct. App. 1929), it follows that a vested water right adjudicated and settled by a court decree should be entitled to an even higher level of protection.

The Nevada Legislature evidently agrees. NRS 533.087 *et seq.* addresses the "Adjudication of Vested Water Rights," the process by which the rights of each appropriator on a stream system are determined and confirmed by judicial decree. Once entered by the presiding court, the decree "shall be final and conclusive upon all persons and rights lawfully embraced within the adjudication," subject only to petitions for modification which may be filed by the State Engineer or an

adjudicated claimant within three years of the decree's date of entry.[4] NRS 533.210(1). Further, although the State Engineer is obligated to administer and regulate decreed rights pursuant to his statutory duty, he is precluded from doing so "in a manner that conflicts with any applicable provision of a decree … issued by a state or federal court." NRS 533.0245.[5]

Therefore, decrees entered for stream systems in Nevada are innately invulnerable, as are the adjudicated rights they confirm. Accordingly, the answer to the core issue before this Court seems apparent: The public trust doctrine **does not** sanction reallocation of adjudicated rights because the state's water code simply **does not** allow it.

Curiously, Mineral County has largely sidestepped this core issue by framing it in more general terms. Rather than focus on the subject matter specifically certified by the Ninth Circuit – rights already **adjudicated and settled** under the doctrine of prior appropriation – Mineral County has concentrated on the relationship between the public trust doctrine and "appropriative rights." Mineral

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[4] The decree at the heart of this matter, the Walker River Decree, was initially entered in 1936. *U.S. v. Walker River Irrigation Dist.,* 14 F.Supp. 10 (D. Nev. 1936). Pursuant to an appeal filed by the United States on behalf of the Walker River Indian Reservation, the Walker River Decree was amended three years later. *U.S. v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

[5] *See also* NRS 533.3703(2)(a): State Engineer cannot authorize a change of consumptive use that is "inconsistent with any applicable federal or state decree concerning consumptive use."

Br. at 21-27, 42-43; *see also* NRDC Br. at 4-16, 27-30. An appropriative right is one in which the right to use water was lawfully acquired from the government, *Filippini,* 66 Nev. at 24, so the definition encompasses all state-recognized rights of use, among them, rights adjudicated and settled by way of judicial decree.

However, an analysis of the public trust doctrine's effects on "appropriative rights" unduly expands this inquiry for one salient reason – adjudicated rights are imbued with statutory protections to which other appropriative rights are not necessarily entitled. A decree denotes completeness; upon entry it is considered final and conclusive, NRS 533.210, and is thereafter exempt from interference by the State Engineer that "conflicts" or is "inconsistent" with any of the decree's provisions. NRS 533.0245 and 533.210(1). While all water rights are unique forms of property that are entitled to protection, *Eureka County v. Seventh Judicial Dist. Court,* 134 Nev. Adv. Rep. 37, 417 P.3d 1121, 1126-27 (2018) (*citing Dixon v. Thatcher,* 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987)), and vested rights are safeguarded by "constitutional guarantees," *Filippini,* 66 Nev. at 22, the Nevada Legislature has determined that adjudicated rights warrant additional protection, and has provided it in statutory form.

This is hardly surprising, considering Nevada's distinction as one of the nation's most arid states. The scarcity of water places paramount importance on its use, being that "[t]he public welfare is very greatly interested in the largest

economical use of the waters of the state for agricultural, mining, power and other purposes." *Id.* at 25. But the assurance of a continued right of use has likewise been an integral component in development involving this vital resource. "Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country." *Arizona v. California*, 460 U.S. 605, 620, 103 S. Ct. 1382, 1392 (1983) (*citing Colorado River Water Conservation District v. United States*, 424 U.S. 800, 804, 96 S. Ct. 1236, 1239 (1976) ("It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water."). A looming possibility of reallocation would create apprehension that the doctrine of prior appropriation, "itself largely a product of the compelling need for certainty in the holding and use of water rights" *Arizona,* 460 U.S. at 620, helped alleviate.

It bodes mention that, in Nevada, this certainty is not reserved for holders of adjudicated rights. As part of the state's first comprehensive water code, Act of 1913, ch. 140 Nev. Stat. 192, the Legislature declared that "[n]othing … shall impair the vested right of any person to the use of water," a provision that is currently enumerated as NRS 533.085. Although a vested right in Nevada is generally considered one established prior to the applicable statutory procedure –

1905 for surface water, 1913 for groundwater[6] – this Court has recognized it as "a right to use water [that] has become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law, and is a right which is regarded and protected as property." *Filippini,* 66 Nev. at 22. So while this Court was not asked to consider the protections afforded by NRS 533.085, it is evident they apply to vested rights adjudicated and settled pursuant to the statutory procedure delineated in NRS 533.087 *et seq.* – in addition to protections prescribed therein that render a decree final and conclusive.

C. Authority offered by Appellants in support of their public trust argument is largely incompatible with Nevada law, and therefore should be given limited consideration.

This Court has urged caution over relying on the laws and practices of other states in determining policy in Nevada, regardless of how closely aligned the circumstances may be. *Pyramid Lake Paiute Tribe*, 112 Nev. at 749. Thus, it follows that policy makers, not to mention the judiciary, should be especially wary of outside authority that fundamentally differs from the issue they seek to address. The purportedly persuasive guidance Appellants have used to buttress their

[6] *See, e.g.,* Summary of Statutory Procedures for Filing Claims of Vested Rights, Making Application for a Water Right and a Summary of Fees of the State Engineer, p. 1, http://water.nv.gov/Documents/SE_Procedures_Fees_Brochure.pdf (last visited April 11, 2019).

interpretation of the public trust doctrine merits limited consideration because it does not correspond with Nevada law.

Mineral County and its amici have primarily relied on the California Supreme Court's ruling in in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709 (1983), *cert. denied,* 464 U.S. 977 (1983), a case that shares ostensible characteristics with the underlying matter at hand. Like Walker Lake, California's Mono Lake is a terminal desert lake whose water level has historically declined due to appropriations diverting from inflowing streams. *Id.* at 424. And as in foregoing litigation here, the court was asked to reconcile the state's statutory scheme for the regulation of water rights with the public trust doctrine. *Id.* at 425. Although the court's holding clearly supports the point of view Appellants are now advancing, its opinion resulted from the analysis of disparate circumstances.

First, California, unlike Nevada, does not strictly embrace the principles of prior appropriation. California's system of water law integrates certain riparian rights into the prior appropriation base, which creates a prominent divergence: the reasonable use doctrine. In sum, all rights of water use must be reasonable and beneficial, Cal. Const., art. X, sec. 2. Colorado, which like Nevada faithfully adheres to prior appropriation, deemed the reasonable use doctrine to be beyond the scope of its laws and consequently rejected the *National Audubon* analysis while considering the applicability of the public use doctrine within its water code.

Kemper v. Hamilton (In re Title, Ballot Title, & Submission Clause for 2011-2012 #3), 2012 Colo. 25, ¶ 40, 274 P.3d 562, 573 (2012) ("This concept … has never been the law in Colorado's 'pure' prior appropriation system.")

Second, California's administering agency, the California Water Resources Board ("Water Board"), has been endowed with continuing, even retrospective authority. Through powers gradually expanded by legislation and judicial decisions, *National Audubon,* 33 Cal. 3d at 444-46, fn. 27, 28, the Water Board is authorized to reconsider water rights pursuant to the reasonable use doctrine, in part due to the state's ability to grant nonvested rights even though they may harm public trust uses. *Id.* at 426. The Nevada State Engineer has no parallel authority because he is statutorily mandated to act pre-emptively. Pursuant to NRS 533.370(2), the State Engineer **shall reject** proposed appropriations and changes of use that threaten or prove detrimental to the public interest.

Third, and perhaps most significantly, no taking issues are implicated in California's reconsideration and potential reallocation of water rights because, pursuant to the reasonable use doctrine, no property rights attach to an unreasonable use. After California added the reasonable use doctrine in 1928 by way of constitutional amendment (enacted as art. XIV, sec. 3), its courts held that a party could not subsequently acquire a vested right for an unreasonable use. *See, e.g., Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 145, 429 P.2d 889, 898

(1967). The rights involved in the Mono Lake dispute were granted by permit in 1940 by the Division of Water Resources, predecessor of the Water Board, *National Audubon,* 33 Cal. 3d at 424.

In contrast, the water rights that are the subject of the present inquiry are not only vested, therefore "regarded and protected as real property" and entitled to "constitutional guarantees," *Filippini,* 66 Nev. at 21-22, they are adjudicated and settled by court decree. The Adjudication of Vested Water Rights, NRS 533.087 *et seq.*, is a detailed collaborative process – involving the State Engineer and the judiciary – in which the uses of water on a stream system are determined and confirmed. Once this process is complete, the resulting decree entered by the presiding court is considered final and conclusive, NRS 533.210(1), as are the adjudicated rights set forth therein. Thus, it is apparent that a property interest attaches to vested adjudicated rights, and dispossession of that interest as a result of state action – i.e., reallocation – would amount to a compensable taking. Nev. Const., art. 1, sec. 8(6).

Any suggestion that adjudicated rights are unsettled due to the uncertain nature of water rights in general, and the evolving priorities of public trust values in particular, Law Prof. Br. at 8-10, is patently inconsistent with Nevada law.

Implying that *National Audubon* should serve as the legal template for deciding the issue before this Court, *id.*at 4, NRDC Br. at 2[7], is likewise off the mark.

Appellants and their amici also offer a Hawaii Supreme Court decision, *Water Permit Use Applications,* 94 Haw. 97, 9 P.3d 409 (2000), as persuasive authority. Mineral Br. at 29, 39; NRDC Br. at 19. But that state's unique system of water law, combining native rights with elements of riparianism and prior appropriation,[8] render it an even less appropriate guide in this matter than *National Audubon.*

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[7] NRDC gleaned three elements from *National Audubon* that it suggested was representative of the "balanced approach" this Court should adopt: "(1) the state has a duty to take the public trust into account in planning for and allocating water resources, and to protect public trust uses whenever feasible; (2) no person can acquire a vested right to appropriate water in a manner harmful to public trust uses; and (3) the public trust doctrine imposes a duty on the State to continually supervise the use of appropriated water and to reconsider and reallocate water when feasible and necessary to protect public trust uses." NRDC Br. at 2 (*citing National Audubon*, 33 Cal. 3d at 452). While NRS 533.370(2) accommodates the first element (the State Engineer shall reject any application that threatens or proves detrimental to the public interest), the second element is inapplicable because, as discussed above, the water rights at issue in this matter are adjudicated vested rights and are final and conclusive. NRS 533.210(1). There is no constitutional or statutory basis in Nevada for the third element.

[8] Robert Kundis Craig: *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 118-21 (2010) ("Craig: Comparative Guide").

D. State Legislature must decide if changes to state's water policy are necessitated by public interests.

One of the enduring principles established by *Illinois Central* is the proposition that a state must independently determine the extent of its responsibilities under the public trust doctrine. 146 U.S. at 440. *See also PPL Montana, LLC v. Montana,* 565 U.S. 576, 604, 132 S. Ct. 1215, 1235 (2012) ("Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders."). As discussed in Section A *supra,* public trust principles are embedded in Nevada's Constitution and its statutory code, and judicial analysis of relevant provisions demonstrates that the state embraced the tenants on which public trust doctrine is based. *Lawrence,* 127 Nev. at 395.

Ultimately, a state's public trust responsibility falls on its legislative body, under whose law-making authority dispensations of public trust property are made. In regard to the administration of water use in Nevada, the State Engineer serves at the behest of the Legislature – he performs duties pursuant to power emanating from a statutory scheme that was enacted by way of legislation, clearly with public trust considerations in mind. Some statutes allow the State Engineer to exercise discretion – for instance, he must assess if a prospective use threatens to be detrimental to the public interest, NRS 533.370(2) – while in others his duties are strictly prescribed – he cannot perform in a way that interferes with a judicial

decree. NRS 533.0245, 533.210(1). But whether a statute is deficient is not for him to decide.

Mineral County asserts that the argument raised in *Mineral County,* 117 Nev. at 246-49 (Rose, J., concurring), and cited in *Lawrence,* 127 Nev. at 396-97, 400-01, supports its public trust position regarding appropriative rights. Mineral Br. at 21, 42. *See also* NRDC Br. at 9. The concurrence stated that vested water rights are "forever subject to the public trust," *Mineral County,* 117, Nev. at 247, and as such the State Engineer should have a "continuing responsibility" to assess if vested rights prove detrimental to the public interest. *Id.* Justice Rose went on to say that if state law did not provide the State Engineer with such continuing authority, "then the law is deficient." *Id.* at 248.

But as thoroughly explained above, the State Engineer has no statutory authority to reallocate or even reconsider settled and adjudicated rights, which is the issue this Court has been asked to consider. Indeed, Nevada's water code expressly prohibits the State Engineer from in any way interfering with a water right confirmed by a judicial decree. NRS 533.0245 and 533.210(1). So Appellants are either encouraging this Court "to read into the law something … not … stated there even by implication," *In re Filippini*, 66 Nev. at 27, or to force the State Engineer's hand in apparent violation of separation of power principles (judicial encroachment into legislative province, Nev. Const. art. 3, sec. 1). Yet this is not

the court's decision to make. Any change in Nevada's well-established water policy must come from the legislature, not the judiciary. *Pyramid Lake Paiute Tribe*, 112 Nev. at 749.

An instructive example can be found in Idaho, which like Nevada is a strict adherent of prior appropriation. After exploring the contours and applicability of the state's public trust doctrine in several cases, the Idaho Supreme Court ruled that all water rights, including those subject to the Snake River Basin Adjudication, "are impressed with the public trust." *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 156, 911 P.2d 748, 749 (1995). However, one year later, the Idaho Legislature invalidated the ruling and halted the state's shift toward the "modern trend" – water and proprietary rights of use are held subject to public trust, Craig: Comparative Guide, 37 Ecology L.Q. at 77. It enacted legislation that limited the public trust doctrine to land below navigable waters, and expressly removed water use from that protective domain. Idaho Code 58-1201 to 58-1203.[9]

But just as a state legislature can bring about a change in water policy, its relative silence on a particular issue can solidify the status quo. Consider New Mexico, another strict prior appropriation state: Its constitution reads, in pertinent

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[9] Idaho Code 58-1203(2)(b) states that the public trust doctrine shall not apply to "[t]he appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights as provided for in article XV of the constitution of the state of Idaho and title 42, Idaho Code, or any other procedure or law applicable to water rights in the state of Idaho."

part, that "[t]he unappropriated water of every natural stream … is hereby declared to belong to the public," N.M. Const. art. XVI, sec. 2. Read in conjunction with *State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1947), the constitutional provision suggests that the public trust doctrine only applies to unappropriated water because appropriated water is no longer public. Craig: Comparative Guide, 37 Ecology L.Q. at 151, fn. 554. This dynamic has remained constant for more the 70 years because the New Mexico Legislature has presumably seen no reason to change it. Pursuant to *Illinois Central,* which instructs states to establish the scope of their respective public interests, 146 U.S. at 440, New Mexico has fulfilled its fiduciary responsibilities by maintaining that it is in the public interest to preclude the state's appropriated waters from the public trust.

California public trust policies, though conspicuous from the ones described above, were fleshed out through the same process. "It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished." *Marks v. Whitney*, 6 Cal. 3d 251, 260, 491 P.2d 374, 381 (1971). As acknowledged in *National Audubon,* California's reasonable use doctrine established state water policy by imposing "a duty of continuing supervision over the taking and use of the appropriated water." 33 Cal. 3d at 447. This approach

"radically altered water law in California," *id.* at 442, because the state legislature determined an alteration was necessary and facilitated this alteration with a constitutional amendment.

It is entirely possible Nevada may eventually arrive at a similar conclusion. But any departure from well-established water law policy, including the position that vested adjudicated rights are not subject to reallocation because they are final and conclusive, NRS 533.210(1), must be initiated by the Legislature, not the court. *Pyramid Lake Paiute Tribe*, 112 Nev. at 749.

CONCLUSION

Based on the foregoing points, Amici urge this Court recognize that Nevada's public trust doctrine does not authorize reallocation of adjudicated and settled water rights of use within the state.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), 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.

Pursuant to NRAP 28.2, I hereby certify that I have read this Amicus Curiae Brief, and to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Pursuant to NRAP 32(a), I 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) as this brief is prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(ii)) and NRAP 29(e), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,669 words (less than 7,000 words).

I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(d), I hereby certify that on the 19th day of April, 2019, I caused a copy of the foregoing ***AMICUS CURIAE BRIEF OF PERSHING COUNTY WATER CONSERVATION DISTRICT; PERSHING COUNTY, NEVADA; HUMBOLDT COUNTY, NEVADA; AND, LANDER COUNTY, NEVADA, IN SUPPORT OF RESPONDENTS*** to be served on the following parties as outlined below:

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