IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY, et al., Appellants, v. LYON COUNTY, et al., Respondents.	Supreme Court Case No. 75917 On Certification from the United States Court of Appeals for the Ninth Circuit Case No. 15-16342

BRIEF *AMICUS CURIAE* OF THE NEVADA MINING ASSOCIATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae has no parent corporations and no public held company holds 10% or more of either Amicus Curiae's stock. Amicus Curiae makes its first appearance in this case in the Supreme Court of Nevada and the listed attorneys of record constitute all law firms that are expected to appear in this court.

Dated: April 18, 2019.

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I. INTEREST OF AMICUS

Amicus is a non-profit organization dedicated to providing a voice for Nevada's mining industry. For more than 100 years, amicus has represented the interests of the mining industry on policy matters before the State Legislature and local governments and provided public relations services on behalf of its members. Amicus' members range from prospectors and miners to multinational corporations, most of whom operate in Nevada's vast rural areas.

Mining and the milling of mined products are recognized as beneficial uses of water, as is the reclamation of a mine. Each of those beneficial uses require a reliable and predictable water supply, and a radical shift in Nevada's water law would undermine that predictability. An overbroad application of the public trust—one that undermines Nevada's historic prior appropriation system and the water rights held thereunder—would be a radical shift in policy and would threaten the viability of the mining industry in Nevada. For that reason, amicus seeks leave to submit this brief to assist the Court in resolving the merits of the certified questions.

II. SUMMARY OF ARGUMENT

Nevada is the driest state in the country, so it is necessary to achieve the maximum benefit from our limited water supply. Maximizing beneficial use of the resource requires effective long-term water planning and management—long-term planning that cannot succeed without predictability and stability in the water law.

To foster that necessary predictability, amicus urges the Court to define the scope of the public trust consistently with its historic application—that articulated by the Supreme Court of the United States in *Illinois Central Railroad Co. v. Illinois*.[1] Amicus urges the Court to reject the expansive scope of the public trust recently adopted by outlying states, an approach that would perpetually subject decreed and permitted water rights to re-evaluation and reduction in favor of ever-changing public trust uses.

To foster predictability, Nevada should pattern the scope of its public trust after similarly-situated states like Arizona, Idaho, and Colorado. Those states adhere to the historic scope of the public trust, applying it only to the beds and banks of waterways capable of navigation at the time of statehood, and only for commerce, fishing, and navigation purposes. Public ownership of the states' waters does not in and of itself make those waters public trust resources. Water appropriations made pursuant to the states' water law and maintained through beneficial use are protected against curtailment in the name of a newly-expanded public trust. Finally, if the state needs additional water to increase and foster public trust use of a waterway, it must either appropriate the water according to state law or purchase (or condemn) the additional water, providing fair value to the water right holder.

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[1] 146 U.S. 347 (1892).

An extremely broad application of the public trust doctrine such as the approaches of California and Hawai'i does not harmonize the public trust with the competing doctrine of prior appropriation. Rather, it supersedes prior appropriation, functioning as a "super-permit" in which the public trust takes precedent above all other appropriations. Not only would this super-permit allow for immediate curtailment of appropriative rights, it would perpetually subject appropriations to further reductions as new "public trust values" evolve. Any predictability in Nevada's century-old water law would be sacrificed in the name of a doctrine that is perpetually one court decision away from expansion.

To adopt the approaches of California and Hawai'i, the Court must ignore the striking differences between those states and Nevada, not the least of which is the fact that both of those coastal states expressly incorporate some form of public trust in their constitutions. Without that constitutional mandate, the Court must reject calls to mimic their public trust doctrines.

Nevada's Constitution states that private property shall not be taken for public uses without just compensation. It does not exempt the judicial branch from that prohibition. If the Court, in place of the legislature, determines that water rights—a form of real property in Nevada—should be stripped from prior appropriators in favor of public trust uses, then the Court will be taking private rights for public use. The Nevada Constitution says that those whose rights are taken must be

compensated. A plurality of the United States Supreme Court has held that judicial takings should be considered viable, and the public trust issue before the Court here is a textbook example of the judicial taking the plurality described.[2] Nevada strives to protect the property rights of its citizens, and the Court should maintain its tradition of requiring compensation for takings—whether legislative, regulatory, or judicial—when it answers the second certified question.

III. MINING FACTS

A. MINING'S IMPORTANCE TO NEVADA

It is impossible to overstate the importance of mining in Nevada. Mining is an integral part of Nevada's economic health and has been since gold was discovered in a tributary to the Carson River in 1849. From that initial gold discovery, mining in Nevada has grown into an $8 Billion-per year industry.[3] Precious metals drove the initial surge of mining, but they were followed closely by lead, zinc, copper, tungsten, and iron.[4] Nevada is also home to North America's only producing lithium mine.

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[2] *Stop the Beach Renourishment v. Florida Dep't of Env. Protection*, 560 U.S. 702, 713-14, 130 S. Ct. 2592, 2596 (2010).
[3] Nevada Dep't of Taxation, *2017-2018 Net Proceeds of Minerals Bulletin* (April 30, 2018).
[4] *See* Tingley, et al., *Outline of Nevada Mining History*, p. 8 (Nevada Bureau of Mines and Geology, 1993).

Mining creates good jobs. There are more than 11,000 high-paying mining jobs in Nevada, most of them in rural counties. The average annual salary in the mining industry is $93 thousand compared to $47 thousand statewide.[5] For each one of those "direct" jobs, two additional "indirect" or "induced" jobs are created. In total, over 33,000 jobs are supported by Nevada mining, totaling over $2.4 billion in wages and salaries.[6]

Mining is also responsible for significant tax revenue. Between operators and royalties, mining generates almost $90 million in county and local taxes, and almost $70 million in state taxes, annually.[7] Despite employing only 1.1 percent of the workforce, mining generates 4.2 percent of the taxes for the State's general fund.[8] The mining industry pays a higher business tax rate on payroll than other industries, as well as a higher effective property tax rate on minerals.[9] Two of the ten highest assessed taxpayers in the State are mining companies.[10]

The mining industry is an exemplary corporate citizen in Nevada. In calendar year 2017 alone, mining companies donated approximately $3 million to non-profits and charities, $2 million to educational scholarships, $1.4 million to higher

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[5] Aguero, Jeremy, *Nevada's Mining Industry: Perceptions and Realities* (Applied Analysis, 2017).
[6] *Id.*
[7] *Net Proceeds of Minerals Bulletin* at 10.
[8] *Nevada's Mining Industry* at 57.
[9] *Id.* at 63.
[10] *Id.* (Barrick Mining and Newmont Mining).

education institutions, $1.5 million to capital improvements in local communities, and $1.8 million to other charitable causes.[11] Mining companies provide internships Nevada students, and have partnered with Cisco Systems and Great Basin College to bring free digital education to Nevada residents.[12] Mining companies offer post-secondary scholarships to their employees' children and have also created scholarship programs with neighboring tribes.[13]

Nevada law requires that mining companies plan and bond for the closure of their facilities before they begin operation.[14] As good neighbors in the areas in which the operate, mining companies typically undertake concurrent reclamation—that is, they rehabilitate previously mined landscapes as mining progresses. These post-mining reclaimed areas provide habitat for wildlife, among other uses, and depend on the reliable availability of water. Thousands of acres have been reclaimed in this manner, and reclamation efforts are ongoing. Nevada law also allows for other industrial uses of post-mined land, and rural Nevada communities, most recently Yerington, are utilizing these opportunities for economic development activities that will diversify their local economies. One area of great promise is the use of post-mined land for renewable energy production.

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11 Nevada Mining Ass'n, *Mining Industry Issues and Opportunities* (Applied Analysis 2018).
12 *Nevada's Mining Industry* at 64.
13 *Id.*
14 NRS 519A.210.

B. MINING'S CAPITAL-INTENSIVE NATURE REQUIRES INVESTMENT, WHICH REQUIRES PREDICTABILITY.

Initiating a mining operation on the scale seen in Nevada requires a large amount of capital. Costs of exploration, planning, permitting, and development of a large-scale mine can reach into the billions of dollars. Because of its capital-intensive nature, the Fraser Institute, a nonpartisan, global policy think-tank in Canada, has developed a "Policy Perception Index," a composite index designed to assess how public policy factors such as taxation and regulatory uncertainty affect exploration investment.[15] The Policy Perception Index compares various political jurisdictions (nations, provinces, states) and rates them for their attractiveness in mining investment. The higher a political jurisdiction ranks on the Policy Perception Index, the more attractive it is to mine operators and mining investment. In 2018, Nevada ranked fifth in the world on the Policy Perception Index, and first among U.S. states. Drastic policy shifts can reflect an unpredictable regulatory climate, making a state less attractive to mining investment.

Mining requires large volumes of water for the mining and milling processes, as well as dust suppression and potable water supplies for mine workers. Without reliable water supplies, mining cannot take place. The Court should therefore consider the ramifications of adopting a public trust well beyond the scope of its

[15] *See* https://www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2017 (last visited December 21, 2018).

historical understanding. A public trust doctrine that results in the threat of reductions to prior water appropriations will sow uncertainty and remove the regulatory predictability that makes Nevada such an attractive market to the industry. Nevada's position on the Policy Perception Index would surely plummet, and investment dollars—and all associated benefits listed above—will cease to come to Nevada.

IV. ARGUMENT

In answering the certified questions, the Court should stay true to principles articulated in *Lawrence v. Clark County* and the precedential cases cites therein.[16] Where necessary, the Court should look to similarly-situated states for guidance. The legal and geographic differences between Nevada and both California and Hawai'i make those states the wrong sources for Nevada law, and the Court should reject Appellants' invitation to adopt their outlying public trust doctrines.

Expansion of the scope of the public trust in such a manner that water rights already appropriated pursuant to statute can be stripped away from appropriators in the name of that trust will result in a taking. The fact that the Court, rather than a legislative or administrative body, would be the body that effects the taking should not preclude affected water right holders from receiving just compensation for their water when it is taken for a public use.

[16] 127 Nev. 390, 254 P.3d 606 (2011).

A. *LAWRENCE* ADOPTED, BUT DID NOT EXTENSIVELY DEFINE THE SCOPE OF, THE PUBLIC TRUST DOCTRINE; THIS COURT SHOULD DEFINE THE SCOPE OF THE DOCTRINE NARROWLY.

Each state "retain[s] residual power to determine the scope of the public trust over waters within [its] borders.[17] In *Lawrence*, the Court "expressly adopt[ed] the public trust doctrine in Nevada," and held that the beds and banks of navigable waterways are public trust resources.[18] The *Lawrence* Court did not clearly define what the scope of the doctrine would be, leaving unanswered several questions crucial to those certified here: How are navigable waters are defined? Does the trust include only navigable waters, or does it extend to waters tributary to navigable waters? Are recreational and ecological uses within the public trust? Does the public trust include all public waters and the statutory appropriation thereof? Although it did not answer those questions, the *Lawrence* Court provided guidance for how those questions *should* be answered, and where the Court should look in answering them.

1. The *Lawrence* Court Provided Public Trust Principles and Guidance for its Future Application.

From the public trust's inception in Roman law through the United States Supreme Court's decision in *Illinois Central*,[19] the *Lawrence* Court extracted the

[17] *PPL Montana, LLC v. Montana,* 565 U.S. 576, 604 (2012).
[18] 127 Nev. at 406, 254 P.3d at 616.
[19] 146 U.S. 387 (1892).

principle that the State holds title to trust lands for its citizens to "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."[20] *Lawrence* expressly recognized only the three traditional public trust uses—navigation, commerce, and fishing—above the beds and banks of navigable waterways.

The Court next cited *State Engineer v. Cowles Bros., Inc.*,[21] for the principle that the State holds title to beds and banks of navigable waterways, and turned to *State v. Bunkowski*,[22] for the principle that those state lands are held in trust and cannot be alienated "absent proper legislative determination."[23] Finally, the Court turned to Justice Rose's concurrence in *Mineral County v. State, Department of Conservation*.[24] In his *Mineral County* concurrence, Justice Rose said

> It is then appropriate, if not our constitutional duty, to expressly reaffirm the [State] Engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not 'substantially impair the public interest in the lands and waters remaining'

Justice Rose's concurrence affirms that the State Engineer is responsible for preservation of public trust resources. Nothing in the concurrence signals that

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[20] 127 Nev. at 394, 254 P.3d at 609 (quoting *Illinois Central*, 146 U.S. at 452).
[21] 86 Nev. 872, 478 P.2d 159 (1970),
[22] 88 Nev. 623, 503 P.2d 1231 (1972),
[23] 127 Nev. at 395, 254 P.3d at 610.
[24] 117 Nev. 235, 20 P.3d 800, 808-09 (2001).

Nevada's statutory water appropriation system should be subrogated to the public trust, or that principles must be applied retroactively to reduce water rights validly obtained and maintained within Nevada's prior appropriation laws.

The *Lawrence* Court found its sole constitutional grounding in Article 8, Section 9—the "gift clause"—which stands for the principle that "the state acts only as a fiduciary for the public when disposing of the public's … property."[25] Thus, the State must safeguard public trust resources by "dispensing them only when in the public's interest."[26] In statute, the *Lawrence* Court cited NRS 321.0005 ("state lands must be used in the best interest of the residents of this state…") and NRS 533.025 ("the water of all sources of water supply within the boundaries of the State … belongs to the public"). The Court synthesized those statutes for the proposition that the "public land and water of this state do not belong to the state to use for any purpose, but only for those purposes that comport with the public's interest in the particular property…."[27] Finally, the Court looked to public trust principles inherent in limitations on the state's sovereign power and determined that "the state is simply without power to dispose of public trust property when it is not in the public's interest."[28]

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[25] 127 Nev. at 399, 254 P.3d at 612.
[26] *Id.*
[27] *Id.* at 400, 254 P.3d at 613.
[28] *Id.*, 254 P.3d at 613.

From the above considerations emerged the Court's formal adoption of the public trust doctrine in Nevada. "[T]o ensure that the state does not breach its duties as a sovereign trustee," the Court articulated tests for assessing if a dispensation of public trust property comported with the principles of the trust.[29] The Court looked to Arizona for guidance to do so, citing *Arizona Center for Law in Public Interest v. Hassell*.[30] On at least the issue of transferability, the Court noted that "the approach taken by Arizona deserves concerted attention, as its constitution contains a gift clause nearly identical to Nevada's."[31] The Court continued, "Arizona's approach is instructive because it faces many of the same challenges that this state faces … given its arid desert climate and rapidly expanding urban population."[32]

2. <u>For Guidance in Defining the Scope of Nevada's Public Trust Doctrine, the Court Should Look to Similarly-Situated States, and Not Dissimilar States at the Extremes of Public Trust Application.</u>

Each of the arid western states has adopted the public trust doctrine in some form. There is disparity among those states regarding the scope of the doctrine, generally falling on a broad continuum—from minimalistic approaches like those used in Arizona, Colorado, Idaho, Kansas, and Nebraska to the broadest

[29] *Id.* at 401, 254 P. 3d at 613.
[30] 837 P.2d 158 (Ariz. App. 1991).
[31] 127 Nev. at 404, 254 P.3d at 615.
[32] *Id.*

interpretation of the doctrine like it is applied in California and Hawai'i.[33] Each state reserves to itself the right to decide whether the public trust applies only to navigable waterways, or if it should extend to tributary waterways; each state defines "navigable" in its own way; each state can determine what constitute "public trust" uses; and each state can determine whether the public trust applies to water appropriations at all.[34] Thus, it is far from an "inescapable conclusion" that the trust should or must apply to appropriative water rights.

To answer the certified questions defining the scope of the public trust in Nevada, the Court should again look to similarly situated states, and not dissimilar states on the fringes of public trust jurisprudence. As in similarly-situated states, the Court should narrowly define the scope of the public trust to the beds and banks of only those waterways that were navigable at the time of statehood, and only for the trust values defined in *Illinois Central*. The Court should reject calls to adopt a public trust that applies to essentially every drop of water in the state, as is the case in California and Hawai'i. The Court should also reject calls for a recreational or ecological public trust, values far beyond the scope envisioned by the *Illinois Central* Court. Finally, the Court should reject calls for a super-priority water right

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[33] *See* Robin K. Craig, *Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecologic Public Trust*, 37 Ecology L. Q. 53, 71 (2010).
[34] *See PPL Montana* 565 U.S. at 603-05.

that perpetually subjects all appropriative rights to curtailment in the name of an ever-evolving public trust.

a. The *Lawrence* Court Relied on The Gift Clause from Nevada's Constitution and Looked to Arizona, as the State Most Analogous, for Guiding Principles.

As stated above, the gift clause of the Nevada Constitution is the sole constitutional basis for Nevada's public trust doctrine. The *Lawrence* Court, noting that Arizona's constitutional gift clause is nearly identical to Nevada's, applied Arizona public trust principles to answer the question before it.[35] The states' similarities are not just constitutional. Arizona is landlocked, arid, and has rejected riparianism in favor of strict prior-appropriation.[36] Thus, "Arizona's approach is instructive because it faces many of the same challenges that [Nevada] faces in maintaining its public trust property, given its arid desert climate …."[37] The *Lawrence* Court correctly found that Arizona is the state most analogous to Nevada. As an arid, landlocked state, Arizona has developed a scope of the public trust that properly balances the needs of the trust against the need to maximize beneficial use of its limited water supply. Here, the Court should again look to Arizona for guidance.

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[35] *Id.* at 404, 254 P.3d at 615 ("…the approach taken by Arizona deserves concerted attention, as its constitution contains a gift clause nearly identical to Nevada's").
[36] ARIZ. CONST., Art. XVII, § 1.
[37] *Id.*, 254 P.3d at 615.

Arizona uses the federal test of navigability from *The Daniel Ball*,[38] meaning that to be "navigable," the water must have been, "at that time [] used or [] susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel … could have been conducted in the customary modes of trade and travel on water."[39] Arizona limits the scope of its public trust to the beds and banks of those waters subject to the equal footing doctrine, requiring that the waterway was navigable upon the date of Arizona's statehood.[40] Arizona limits its public trust uses to those recognized in *Illinois Central*: commerce, navigation, and fishing, and rejects recreation and ecology as public trust uses.[41] In Arizona, if the state requires additional water to "maintain and protect public trust values," it must follow the statutory appropriation requirements, and receives no preference in priority for trust uses.[42] Stated differently, if the state wants to augment flows to promote public trust uses on waterways determined to be public trust resources, it must purchase or appropriate water for those uses. The state cannot simply revisit prior appropriations in the name of the public trust and deny water right holders in good standing the right to use their water.

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[38] 77 U.S. 557 (1870).
[39] Ariz. Rev. Stat. § 37-1101(5); *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Com'n*, 229 P.3d 242 (Ariz. 2010).
[40] Ariz. Rev. Stat. § 37-1101(8).
[41] Ariz. Rev. Stat. § 37-1101(9).
[42] Ariz. Rev. Stat. § 37-1130(B).

b. Several Similarly-Situated States Employ an Approach to the Public Trust Similar to Arizona's.

Other similarly-situated states can provide additional guidance for the Court in defining the scope of Nevada's public trust. Other landlocked, prior appropriation states take an extremely limited approach to the public trust, whether it be the scope of waters to which it applies or the uses considered within the trust.

Idaho, a strict prior appropriation state, also has a comprehensive system of laws governing the appropriation of water.[43] Idaho's water law, like Nevada's, requires that the public interest be considered in evaluating any proposed water appropriation.[44] Like Nevada, Idaho defines navigability according to the federal test.[45] Unlike Nevada, Idaho has extensively codified the application and limitations of the public trust, and Idaho law warrants consideration by the Court.[46]

Idaho Code Chapter 12 begins with a series of legislative declarations, including, "[t]he state has a right to determine for itself to what extent it will preserve its rights of ownership in [public trust lands]," "the legislature of the state of Idaho has enacted a comprehensive system, of laws for the appropriation … of the waters

[43] *Compare* Idaho Code, Title 42, *with* NRS Ch. 533.
[44] Idaho Code §42-203(C)(2); NRS 533.370(2).
[45] Idaho Code § 58-1202 ("waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood") *see also Bunkowski*, 88 Nev. at 631-32, 503 P.2d at 1236; *Shoemaker v. Hatch*, 13 Nev. 261, 267 (1878).
[46] Idaho Code, Title 58, Ch. 12.

of Idaho, which addresses the public interest therein," and "[t]he public's interest in the environment is protected in other parts of Idaho's constitutional or statutory law."[47] Idaho has adopted the federal test of navigability, and only the beds and banks of waters fitting that definition of navigability are public trust resources.[48] Further, the public trust doctrine does not apply to the appropriation or use of water.[49]

Following that lead, the Court should recognize that Nevada's comprehensive prior appropriation system adequately addresses and protects the public interest in its waterways. It should also recognize that the public interest in the environment is protected in other parts of the law and should not be shoehorned into the structure of the public trust and state lands ownership. Finally, the Court should follow Idaho's lead in distinguishing public trust resources from water appropriations.

Colorado does not have a constitutionalized public trust doctrine; in fact, several attempts to "adopt and defend a strong public trust doctrine" into the Colorado Constitution failed in the 1990s.[50] As in Nevada, the waters of Colorado belong to the public subject to appropriation according to the water law.[51] Colorado also applies a very narrow scope of the public trust. The Supreme Court of Colorado

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[47] Idaho Code § 58-1201.
[48] Idaho Code §§ 58-1202(3), 58-1203(1).
[49] Idaho Code § 58-1203(2)(b).
[50] *See, e.g., In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted March 20, 1996, by the Title Board Pertaining to Proposed Initiative "1996-6"*, 917 P.2d 1277, 1279-82 (Colo. 1996) (en banc).
[51] COLO. CONST., Art. XVI, §§ 5, 6.

has declared virtually every stream in the state non-navigable, limiting the extent of state-owned lands subject to public trust.[52] Although the state holds the water in streams for appropriations, there is no public trust right to use the water for recreation.[53] If the public interest in additional recreational waterways warrants, the Colorado Supreme Court stated that the legislature—not the Court—was the proper body to create those recreational waters.[54] The Court should adopt those aspects of the Colorado public trust. The trust should be limited to navigable waters according to the federal test, and the Court should reject the recreational public trust. If the state requires additional resources for public trust uses, the legislature should be the body that decides how those resources should be obtained.

Other states have adopted similarly restrictive public trust doctrines. In Nebraska and North Dakota, the public trust extends only to navigation, and only on navigable-in-fact rivers.[55] The Kansas Supreme Court expressly refused to create a recreational public trust when the legislature had not.[56] Thus, arguments that the public trust must include all waters, and that ecological and recreational uses are necessarily within the trust, are unsupported. Similarly, arguments that this Court

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[52] *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912).
[53] *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).
[54] *Id.* (finding that if there was a need for additional recreation space on waters, "the legislative process is the proper method to achieve this end").
[55] *Krumwielde v. Rose*, 129 N.W.2d 491, 496 (Neb. 1964); *J.P. Furlong Enters., Inc. v. Sun Exploration & Production Co.*, 423 N.W.2d 130, 132 (N.D. 1988).
[56] *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1364 (Kan. 1990).

has the responsibility to adopt an expansive public trust where the legislature has not, are not valid.

c. California and Hawai'i Are Uniquely Situated and are Not Proper Analogues to Nevada.

The Court should reject calls to employ the public trust approaches of California and Hawai'i.[57] Even a cursory look at California and Hawai'i reveals their striking differences from Nevada, both geographically and legally, and those differences cannot be ignored. A comparison of the public trusts of California and Hawai'i to those of the other western states also reveals them to be outliers in their application of the public trust. Nevada should not join those states on the outer fringe of public trust, and our Constitution does not support doing so.

California and Hawai'i are coastal, each with hundreds of miles of navigable coastal waters and thousands of miles of tidal shoreline.[58] The broad public trust applied by those states first emerged as a tool to protect access to coastal lands for fishing and other recreation.[59] The historic use of the vast coastal resources of both

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[58] *See* National Oceanic Atmospheric Administration, *National Atlas of the United States, Coastline and Shoreline* (available at http://nationalatlas.gov/articles/mapping/a_general.html).

[59] *Cf. Marks v. Whitney*, 491 P.2d 374, 380 (1971) (describing the function of the public trust on tidelands); *see also Hawaii County v. Sotomura*, 517 P.2d 57, 61-63 (holding that public use of beaches had ripened into a customary right, favoring "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible").

California and Hawai'i informs those states' public trust doctrine and underlies its expansive application. Both California and Hawai'i also recognize riparianism in some form.[60] California recognizes the riparian or littoral owner's right to use a reasonable, correlative share of the flow of a riparian source.[61] Hawai'i recognizes riparian rights as a traditional cultural right, allowing the islands' historic residents to use water for traditional customary uses.[62] In both states, the public trust doctrine is a tool to limit water use under riparian rights where regulatory agencies might have little or no ability to preclude diversions.

Perhaps most important is the fact that both California[63] and Hawai'i[64] expressly incorporate the public trust doctrine into their state constitutions. As a

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[60] Cal. WATER Code, § 101; Haw. Rev. Stat. § 7-1.
[61] *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 547 (1938).
[62] *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745 (1982).
[63] *See* Cal. Const., Art. I, § 25 (… no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon…); Art. X, § 3 ("All tidelands within two miles of any incorporated city and county, or town … shall be withheld from grant or sale to private persons …); Art. X, § 4 ("No individual … claiming or possessing the frontage or tide lands of a … navigable water in this State[] shall be permitted to exclude the right of way to such water … for any public purpose…"); Art X, § 5 ("The use of all water now appropriated, or that may hereafter be appropriated … is hereby declared to be a public use, and subject to the regulation and control of the State …");
[64] HAW. CONST., Art. XI, § 1 ("… the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy resources in a manner consistent with their conservation … All public natural resources are held in trust by the State for the benefit of the people."); *see also In re Water Use Permit Applications*, 9 P.3d 409, 443-44 (Haw. 2000) ("the people of this state have elevated the public trust doctrine to the level of constitutional mandate").

broad constitutional mandate adopted by the citizens of the state, the public trust can be applied as broadly as it is written into the constitution. Where ecology and recreation are written into a constitution and statute, courts are not forced to strain *Illinois Central* beyond its logical limit to insert them into the public trust.

In states such as Nevada, where the public trust evolved through judicial interpretation of a single constitutional clause, and where no public trust uses have been expressly mandated by the voters, the public must be applied with greater restraint—that is, more consistently with its origins in *Illinois Central*. Should Nevada's citizens determine that the State's public trust should apply more broadly than the constitutional baseline set by *Illinois Central*, the constitutional and legislative processes are the correct ones for such an expansion.

B. TO REDUCE WATER AVAILABLE TO AN APPROPRIATOR IN ORDER TO DEDICATE THAT WATER TO PUBLIC TRUST USE IS A TAKING REQUIRING JUST COMPENSATION.

In the second certified question, the 9th Circuit asked "[i]f the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation," does abrogation of those rights constitute a compensable taking under the Nevada Constitution? If this Court adopts a scope of the public trust that would allow water rights to be stripped from private appropriators and used for public trust uses, it will result in a compensable taking. Although judicial takings have not been recognized by this Court, Nevada's Constitution clearly prohibits

taking of private property for public uses without compensation and does not exempt the judiciary from that prohibition.

1. Ripeness is a Jurisdictional Question; the Nevada Rules of Appellate Procedure Expressly Give this Court Jurisdiction Over Certified Questions.

In a case of first impression—in fact, a case wherein the 9th Circuit Court of Appeals has specifically requested the Court to provide it with guidance on specific issues of Nevada law—issues of ripeness and lack of precedent are inapplicable. While ripeness might be a jurisdictional concern if a specific taking was here alleged, this Court has unquestioned jurisdiction to answer a broad, certified question. Nevada Rule of Appellate Procedure 5(a) states simply that the "Supreme Court may answer questions of law certified to it by … a Court of Appeals of the United States …." The question of law posed here, "if the public trust doctrine allows for reallocation" of water rights, "does the abrogation … constitute a taking" is properly posed by the 9th Circuit and within the Court's jurisdiction to answer.[65]

2. A Judicial Act Can Result in a Compensable Taking.

At Article I, Section 8(6) (the "Takings Clause"), the Nevada Constitution states that "[p]rivate property shall not be taken for public use without just

[65] *Kaplan v. Chapter 7 Trustee*, 124 Nev. Adv. Op. 80,__, 384 P.3d 491, 493 ("this court may answer questions of law certified to it by federal courts when the answers may be determinative of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law").

compensation having been first made ….” The Takings Clause does not limit its application to any branch of government or exempt any branch; it states simply that private property shall not be taken for public use without just compensation. Thus, if the net result of this Court adopting a broad public trust doctrine is that holders of water rights have those rights—a form of real private property—taken away in the name of the public trust—the very definition of a public use—those water right holders must be paid just compensation.

Where Nevada law closely resembles federal law, and where there is no Nevada case law speaking directly to an issue, the Court looks to federal case law for guidance.[66] The Nevada Takings Clause closely resembles the takings clause of the United States Constitution, and the United States Supreme Court has addressed judicial takings in a plurality decision in *Stop the Beach Renourishment v. Florida Dep't of Env. Protection*.[67] As the plurality noted in *Stop the Beach Renourishment*, “[t]he 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 (‘nor shall private property *be taken*’).”[68] Nevada's Takings Clause is identically non-specific regarding the government actor taking property, private property

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[66] *See, e.g., Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (noting similarities between the Nevada and Federal Rules of Civil Procedure).
[67] 560 U.S. 702, 130 S. Ct. 2592 (2010).
[68] 560 U.S. at 713-14, 130 S. Ct. at 2596 (emphasis in original).

simply "shall not be taken for public use" without just compensation. Particularly in instances such as this one, where there is no constitutional directive and the Legislature did not create the law or rule effecting the taking, the Court is acting in place of those authorities to create Nevada law. If the result of the Court's decision is that private property is taken for public use, compensation is required.

3. Taking Water Rights from Appropriators for Public Trust Purposes is a Compensable Taking.

Water rights are real property in Nevada.[69] While a water right is usufructuary in nature, it is the right to divert and use the water that is protected as property. When a water right holder is denied the right to use his or her water, that water right holder is deprived of the very essence of the real property right. When the water right holder's right to use water is diminished in favor of a public use, that deprivation requires compensation from the state.[70] It is the usufructuary nature of the water right that results in the taking; it does not immunize the State from compensating the right holder whose usufructuary right is denied for a public use.

In isolation, NRS 533.025 (the water within the boundaries of the State belongs to the public) might appear to support the argument that water right holders

[69] *Carson City v. Estate of Lompa*, 88 Nev. 541, 542, 501 P.2d 662 (1972) ("When a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation as authorized by the state water law, it is a right which is regarded **and protected** as real property.") (emphasis added).
[70] *Id.* (a city can exercise its right of eminent domain to acquire water rights).

can be stripped of their water in the name of the public trust. The Court need only look to NRS 533.030 to see the flaw in that line of reasoning. It states that "all water may be appropriated for beneficial use as provided in this chapter." NRS 533.025, together with 533.030, results in the simple rule that all water in Nevada belongs to the public *subject to appropriation*. Once water has been appropriated, the appropriator gains a right to the water that takes on the form of real property. Thus, the fact that all water belongs to the public *until appropriated* does not immunize a water right from protection against unconstitutional takings.

Likewise, the State's continuing oversight over water appropriations does not immunize water rights from the Takings Clause. The Takings Clause is implicated when private property is taken for a public use—the right is re-allocated, not just limited—without compensation. Limitations on the extent of a water right that may be used due to failure to comply with permit terms or drought do not implicate the Takings Clause. Curtailment does not place water that would otherwise be used by the right holder to a public use. Cancellation of a permit for failure to comply with permit terms and forfeiture for non-use do not re-allocate the water for public uses. Those limitations on a water right are statutory recognition of the need to maximize beneficial use of the resource. Exercise of a state's police power to manage its water is simply not the same as redistributing the state's water assets without compensation to the owners of the asset.

V. CONCLUSION

For the reasons set forth above, the Court should advise the Ninth Circuit that Nevada's public trust doctrine is limited to the historic application from *Illinois Central*. That narrow public trust applies only to the beds and banks of waterways capable of navigation at the time of Nevada's statehood, and only for the historic public trust values of navigation, commerce, and fishing. Ecology and recreation are not public trust values. If appropriative water rights are reduced in the name of the public trust, those waters are taken from private owners for dedication to a public use. Such a redistribution is a compensable taking pursuant to Nevada's Constitution.

VI. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Times New Roman.

2. 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 or more, and contains 6,544 words.

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

Dated: April 18, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Parsons Behle & Latimer and that on this 18th day of April, 2019, I cause and true and correct copy of the foregoing document, BRIEF *AMICUS CURIAE* OF THE NEVADA MINING ASSOCIATION, to be served by filing with the Clerk of the Court using the Court's CM/ECF system, which sent electronic notification to the following registered users:

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