Case No. 75917

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; and WALKER LAKE WORKING GROUP,

Appellants,

vs.

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

Respondents.

AMICUS CURIAE BRIEF OF NEVADA AGRICULTURAL ASSOCIATIONS

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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. There representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Amici have no parent corporations and no publicly held company holds 10% or more of any Amici's stock. Amici make their first appearance in this case in the Supreme Court of Nevada and the listed attorneys of record constitute all law firms expected to appear in this Court.

DATED this 19th day of April, 2019.

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The Nevada Farm Bureau Federation, Lyon County Farm Bureau, and Elko County Farm Bureau (collectively, "Farm Bureaus"), and the Nevada Cattlemen's Association ("Cattlemen's Association") are non-profit, grassroots associations that represent and promote the interests of farmers and ranchers throughout the State of Nevada. Nevada has over 4,000 ranches and farms covering more than six million acres of land that produce almost a billion dollars of agricultural products each year.[1] These ranches and farms employ more than 16,000 Nevada workers and provide the primary economic base for many of Nevada's rural communities.[2] More than half of Nevada's ranches and farms are small, family-owned businesses.[3] Beef and alfalfa raised in Nevada is exported worldwide and significantly contributes to Nevada's overall export economy.[4]

Nevada is the most arid state in the nation with relatively few naturally occurring streams and rivers. To successfully develop and operate a ranch or farm under these conditions requires a reliable and certain source of water. For over 150 years, Nevada's prior appropriation system, as reflected in the various decrees

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[1] NEV. DEP'T OF AGRIC., ECONOMIC ANALYSIS OF THE FOOD AND AGRICULTURE SECTOR IN NEVADA 2019 (2018).
[2] *Id.*
[3] *Id.*
[4] *Id.*

governing Nevada's rivers, has provided ranchers and farmers with the legal certainty that supports the large investments required to make their lands productive.

In this litigation, Appellants seek to have this Court upend the prior appropriation system and authorize the re-opening of already-settled water decrees. Such a request has implications that stretch beyond the facts and circumstances of this case. As representatives of Nevada's ranchers and farmers, the Farm Bureaus and Cattlemen's Association have a strong interest in protecting Nevada's prior appropriation system and the decrees governing Nevada's river and stream systems. Because Amici represent ranchers and farmers in every one of Nevada's 17 counties, they provide this Court with a valuable perspective that would otherwise be lacking in these proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants would have this Court authorize a federal judge to impose an involuntary seizure of decreed water rights for the purpose of restoring water levels at Walker Lake. But a restoration program for the lake is already proceeding apace and appears to be working. This program is a far superior alternative to Appellants' approach because it operates within the existing prior appropriation system, does not require involuntary seizures, and respects the sanctity of the various court decrees that govern Nevada's waterways.

This Court should reject Appellants' request to introduce a radical new interpretation of the *Illinois Central* doctrine into Nevada law, and thereby destroy the existing prior appropriation system, because: (1) the *Illinois Central* doctrine historically applied solely to land submerged under navigable waters – not the water itself, (2) Nevada has never applied *Illinois Central* beyond its historic context of submerged lands, (3) the few states that have expanded the *Illinois Central* doctrine to encompass water rights have done so for reasons that are not applicable in Nevada, (4) the rights recognized in Nevada's water decrees are vested property rights such that any unilateral alteration of those decrees will effectuate an unconstitutional taking, and (5) the restoration of Walker Lake is already occurring without the need to radically expand the scope of the *Illinois Central* doctrine.

ARGUMENT

I. The Prior Appropriation System Provides Nevada's Ranchers And Farmers With The Legal Certainty Needed To Support Their Operations.

Nevada water rights are governed by the doctrine of prior appropriation. This doctrine provides water users with a protectable real property interest in the water they need to run their operations.[5] This interest is perfected when the water is placed

[5] *See In re Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949) (right to beneficially use water "will be regarded and protected as real property.").

to beneficial use.[6] Once perfected, a water right can only be lost through forfeiture or abandonment.[7]

The prior appropriation system has served the public interest well.. In most western states, the doctrine of prior appropriation was adopted because it provided an economic incentive to invest in irrigation of arid lands.[8] The economic security afforded to water right holders made possible the large investments in infrastructure required to divert, transport, and use water in the arid climates of the western states.[9] By contrast, "reducing the security of property rights to resources reduces the incentive to invest in those resources."[10] States and nations with strong traditions of

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[6] NRS 533.035 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water."); *see also Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 544 (1868) ("[A]ppropriation is not deemed complete until the actual diversion or use of the water.").

[7] NRS 534.090.

[8] *See Twaddle v. Winters*, 29 Nev. 88, 85 P. 280, 285 (1906) ("As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions . . . where the lands are so arid that irrigation is required for the production of crops *necessary for the support and prosperity of the people*.") (emphasis added).

[9] Bryan Leonard & Gary D. Libecap, *Economic Analysis of Property Rights: First Possession of Water in the American West*, 8-9 (October 29, 2015) ("Once in place, prior appropriation water rights became the basis for water trade, investment in dams and canals, and expansion of irrigated agriculture and other activities critical to economic development. [ ] Granting precedent to earlier rights facilitated coordination for investment by *creating a property right that was secure* against the arrival of new claimants.") (emphasis added).

[10] *Id.*

securing and protecting property rights experience greater long-term economic growth than those that do not.[11]

Nevada's ranchers and farmers have positively responded to the incentives created by the prior appropriation system and invested billions of dollars in the development and improvement of Nevada's ranches and farms. The water used in these operations supports a multitude of crops and livestock and provides a substantial tax base for Nevada's rural communities. Many of these communities rely on the economic output from agriculture for their survival.

II. Nevada Has Only Applied The *Illinois Central* Doctrine In The Limited Context Of Submerged Lands.

Nevada has adopted the public trust doctrine of *Illinois Central*.[12] However, a careful reading of *Illinois Central*, and the Nevada cases applying it, demonstrates that the doctrine applies only to the ownership of lands submerged under navigable waterways. Because lands under submerged waterways are materially different in nature from other forms of property the State administers for the public's benefit, the *Illinois Central* doctrine is inapplicable to water.

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[11] *See generally* Daron Acemoglu, et al., *Institutions as the Fundamental Cause of Long-Run Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 10481, 2004). *See also* Leonard & Libecap, *supra* note 9; ANDRO LINKLATER, OWNING THE EARTH: THE TRANSFORMING HISTORY OF LAND OWNERSHIP 225 (Bloomsbury, 2013) (describing how insecure property rights in Kentucky drove small farmers, including Abraham Lincoln's father, to other states with secure property rights).

[12] *Lawrence v. Clark County*, 127 Nev. 390, 254 P.3d 606 (2011).

A. The primary concern in *Illinois Central* was keeping navigable waterways open for navigation and commerce.

"The 'lodestar' of the modern public trust doctrine is the United States Supreme Court's 1892 decision in *Illinois Central Railroad Company v. Illinois*."[13] Justice Field, writing for a narrow majority of the Court, held that the public trust doctrine prevented the Illinois Legislature from granting an exclusive interest in *all* the submerged lands under the Chicago harbor to a *single* corporate entity.[14] However, the doctrine did not bar the Legislature from transferring *portions* of the subject property to private parties as long as such transfers assisted the "improvement of the navigation and use of the waters."[15]

The holding in *Illinois Central* reflected the historic focus of the public trust doctrine which was limited to lands submerged under navigable waterways. In fact, under English common law, the doctrine extended only to land under tidal waters,

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[13] Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800 (2004).

[14] *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 453, 13 S. Ct. 110, 118 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them *entirely under the use and control of private parties* . . . .") (emphasis added).

[15] *Id.*

not to inland lakes or rivers.[16] This reflected the major concern of the doctrine which was to ensure that navigable waterways remain open to navigation and commerce.[17]

The doctrine was expanded in the United States to include all navigable waterways because the country's geography required the use of inland lakes and rivers for commercial shipping.[18] Even so, the doctrine was limited to public ownership of the *land* submerged under such navigable waterways, and not to other forms of public property.[19]

At the time *Illinois Central* was decided, the ownership of submerged lands was a uniquely problematic issue.[20] Justice Field acknowledged that the doctrine would be inapplicable to other types of state-owned property.[21] This is because

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[16] Kearney & Thomas, *supra* note 13 at 827 (citing JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WATERCOURSES at 17 (Wells & Lilly 1834)).
[17] *Id.* at 826 ("the concept of navigability was critical to resolving four distinct questions: (1) the right to travel by vessel on a body of water; (2) the right to fish in a body of water; (3) the ownership of land beneath a body of water; and (4) the jurisdictional line between the common law courts and the admiralty courts.")
[18] *Ill. Cent. R. Co.*, 146 U.S. at 435-36, 13 S. Ct. at 110-12 (noting that in England "'tide water' and 'navigable water' are synonymous terms.").
[19] *See, e.g., Ariz. Ctr. for Law in Pub. Int. v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App., 1991) ("[S]tate's responsibility to administer its *watercourse lands* for the public benefit is an inabrogable attribute of statehood.") (emphasis added); *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983) ("The State of Idaho holds title to the *beds of all navigable bodies of water* below the natural high water mark for the use and benefit of the public.") (emphasis added).
[20] *See* Kearney & Thomas, s*upra* note 13 at 826-36 (describing the legal uncertainties underlying the *Illinois Central* dispute).
[21] *Ill. Cent. R. Co*, 146 U.S. at 457, 13 S. Ct. at 120 ("The character of the title or ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory.").

ownership of other public resources does not present similarly vexing questions. As scholars have noted:

> The understanding of the public trust doctrine as a rule against inalienability emerged in the context of a struggle to define property rights in submerged land under navigable waters . . . . It is not clear how many other resources are vexed in a similar way or, if they are, whether a strong rule of inalienability is the correct answer to the dilemma.[22]

Accordingly, the public trust doctrine articulated in *Illinois Central* has limited application to other publicly owned resources.

B. Nevada has properly limited the application of the *Illinois Central* doctrine to disputes regarding ownership of submerged lands.

Nevada has never applied the *Illinois Central* doctrine beyond its historical context of land submerged under navigable waters. In *Cowles Bros.*, the public trust doctrine was used to determine whether a proposed groundwater well was located on private property.[23] The land where the well was proposed to be drilled had previously been submerged under Lake Winnemucca but was now exposed due to a gradual drying up of the lake.[24] This Court determined that, under the equal footing

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[22] Kearney & Thomas, *supra* note 13 at 928.

[23] *State Eng'r v. Cowles Bros.*, 86 Nev. 872, 873, 478 P.2d 159, 160 (1970) (noting that the well application "was denied on the ground that Cowles Brothers, Inc., did not own or control the land where it planned to drill the well . . . .").

[24] *Id.*, 86 Nev. at 873, 478 P.2d at 160.

doctrine, the State originally held title to the subject land for the public's benefit.[25] However, because the land became exposed as a result of reliction (defined as "the process of gradual exposure of land by the permanent recession of a body of water"),[26] the State could no longer assert its claim of title.[27] *Cowles Bros.* dealt solely with the issue of ownership of previously submerged land, not the water under that land that the applicant was appropriating.

Likewise, in *Bunkowski*, a quiet title action was brought against the State to settle ownership of the Carson River's beds and banks.[28] *Bunkowski*'s central question was whether the Carson River was a navigable waterway at the time of statehood.[29] The Court determined that it was and, therefore, the State held title to the lands in question.[30] Like *Cowles Bros.*, nothing in the *Bunkowski* decision applied the *Illinois Central* doctrine to the waters of the river itself.

The most recent case applying the public trust doctrine in Nevada is *Lawrence v. Clark County*.[31] Like *Cowles Bros.*, the issue in *Lawrence* was ownership of land previously submerged under a navigable waterway.[32] The *Lawrence* Court expressly

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[25] *Id.*, 86 Nev. at 874, 478 P.2d at 160.
[26] *Id.*, 86 Nev. at 875, 478 P.2d at 161.
[27] *Id.*, 86 Nev. at 877, 478 P.2d at 162.
[28] *State v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231 (1972).
[29] *Id.*, 88 Nev. at 627, 503 P.2d at 1233.
[30] *Id.*, 88 Nev. at 635, 503 P.2d at 1238 ("The State holds the subject lands in trust for public use.").
[31] *Lawrence*, 127 Nev. 390, 254 P.3d 606.
[32] *Id.*, 127 Nev. at 391-92, 254 P.3d at 607.

stated that it was setting forth the framework for future application of the *Illinois Central* doctrine in Nevada.[33] This framework focuses entirely on the character of previously submerged land. Under this framework, a court should consider (1) whether the stretch of water that covered the *land* was navigable at the time of statehood, (2) whether the *land* became dry by reliction or avulsion, and (3) whether transferring the *land* contravenes the public trust.[34] By its very nature, the *Lawrence* framework is applicable only to land either currently or previously submerged under navigable waterways. This comports with the history and origins of the *Illinois Central* doctrine.

In dicta, the *Lawrence* Court did refer to NRS 533.025 as one of several legal provisions that "provides grounding for the Nevada public trust doctrine."[35] However, this reference should not be considered binding precedent to establish that the public trust doctrine is applicable to water rights or can be used to re-open already-settled decrees. The *Lawrence* Court did not consider that question, the parties to that case did not brief that question, and this Court did not rule on that question at that time. The declaration in NRS 533.025 that water belongs to the public simply reflects Nevada's adherence to the prior appropriation system which recognizes the public's right to appropriate such water for beneficial use.

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[33] *Id.*
[34] *Id.*
[35] *Id.*, 127 Nev. at 400, 254 P.3d at 613.

Finally, in *Mineral County v. State*, this Court expressly declined an invitation to apply the public trust doctrine to water rights.[36] Instead, the Court dismissed the case on procedural grounds.[37] While Justice Rose's concurring opinion, arguing for expansion of the doctrine to water resources, has been cited in the present action, that opinion was only joined by one other justice and did not establish any binding precedent.[38]

C. The *Illinois Central* doctrine does not apply to water rights already adjudicated and settled under the prior appropriation system.

1. Different trust obligations and duties attach to different state-managed resources.

The State of Nevada holds legal title, or management control, over numerous public resources. These resources include, without limitation, the beds and banks of navigable waters, state parks, lands and buildings used to house state agencies, non-domesticated wildlife,[39] and airspace.[40] Because the State holds each of these resources for the public's benefit, the State's ownership interest in each case can be

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[36] *Mineral County v. State, Dep't of Conservation and Nat. Res.*, 117 Nev. 235, 20 P.3d 800 (2001).
[37] *Id.*, 117 Nev. at 246, 20 P.3d at 807 ("Because issuance of the writs is not appropriate, we leave for another day the remaining issues.").
[38] *Id.*, 117 Nev. at 246-48, 20 P.3d at 807-08.
[39] NRS 501.100 ("Wildlife in this State not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada.").
[40] *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 659, 137 P.3d 1110, 1119 (2006) ("the airspace above required minimum altitudes for flight, as established in federal regulations, is in the public domain . . . .").

characterized as that of a trustee. However, this does not mean that the *Illinois Central* doctrine is equally applicable to these resources.

Just as a private trustee's duties and obligations are defined by the specific nature of the trust she is managing, and the property in a trust, the State's trustee duties and obligation are defined by the unique nature of the particular resource it is managing. Different types of trusts have different management requirements. In *Illinois Central*, Justice Field expressly recognized this reality when he stated that "[t]he character of the title or ownership by which the state holds the state house is quite different from that by which it holds the land under navigable waters."[41]

Like *Illinois Central*, the doctrine articulated in *Cowles Bros.*, *Bunkowski*, and *Lawrence* establishes the framework for the State's management of lands submerged under navigable waterways. This framework arises from the unique manner in which the State took title to such lands – the application of the equal footing doctrine when Nevada became a state.[42]

However, the State has obtained its title to other public resources in a different manner that establishes different trust obligations. For example, when the State acquires land for a roadway via a dedication from an abutting property owner, that

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[41] *Ill. Cent. R. Co.*, 146 U.S. at 457, 13 S. Ct. at 119.

[42] *Cowles Bros.*, 86 Nev. at 874, 478 P.2d at 160 ("When a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory . . . .").

owner is entitled to have the land returned to them at no charge if the roadway is later abandoned.[43] Applying the *Illinois Central* doctrine (a doctrine put in place to ensure that the public "may enjoy the navigation of the waters" and "carry on commerce over them")[44] to a roadway abandonment would be just as impracticable as applying the roadway abandonment rule to lands submerged under navigable waterways, or water. Instead, each resource must be managed according to its unique characteristics.

2. Judicial intervention is not needed because Nevada's water laws already define the State's obligations to the public with respect to the management of water resources.

From the beginning, Nevada's prior appropriation system was developed with the public welfare in mind. In *Lobdell v. Simpson*, one of Nevada's first reported water cases, this Court recognized that a water rights holder "has no property in the water itself, but a simple usufruct."[45] In other words, the public is not completely divested of its interest in a water resource when that resource is diverted by a water user. Rather, the user is given an appropriative right to use the resource for a

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[43] *Carson City v. Capital City Entm't, Inc.*, 118 Nev. 415, 427, 49 P.3d 632, 640 (2002). *See also* NRS 321.001 (differentiating how state-owned lands are to be managed based on the purpose for their acquisition).
[44] *Lawrence*, 127 Nev. at 394, 254 P.3d at 609.
[45] *Lobdell v. Simpson*, 2 Nev. 274, 276 (1866).

designated beneficial purpose.[46] This right can be lost if the water is not used for the designated beneficial purpose.[47]

In *Lobdell*, this Court also found that the conditions of the arid west necessitated the adoption of the prior appropriation system and that the system "is founded upon the clearest principles of justice."[48] In *Twaddle v. Winters*, this Court further opined that "the law of ownership of water by prior appropriation for a beneficial purpose is *essential . . . to the general welfare.*"[49] With this statement, the *Twaddle* Court recognized that the public welfare is best served by allowing private parties to appropriate water and place it to beneficial use. As a result of Nevada's adoption of the prior appropriation system:

> vast quantities of land in [Nevada], beginning back in the territorial days, was brought under cultivation through the courage and hard work of those who homesteaded or otherwise secured farm and ranch lands and made appropriations of water with which to make such lands productive.[50]

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[46] *See* NRS 533.035 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").
[47] *See, e.g.*, NRS 533.410 (providing that a water right may be cancelled for failure to place water to beneficial use); NRS 534.090 (establishing a process for forfeiture and abandonment of water rights).
[48] *Lobdell*, 2 Nev. at 277.
[49] *Twaddle*, 29 Nev. at 88, 85 P. at 284.
[50] S. Rep. No. 755, p. 2, (1952) (quoted in *United States v. Hennen*, 300 F. Supp. 256, 261 (D. Nev. 1968)).

In other words, allowing private parties to appropriate public waters under the prior appropriation system significantly benefits the public owners of that resource. Among the benefits the public derives is the development and growth of a viable agricultural industry in an environment that is not naturally conducive to such endeavors.

Nevada's prior appropriation system is now codified in NRS Title 48 which includes Chapters 533 and 534 governing the appropriation of water. In Title 48, the Legislature has outlined the State's duties and obligations with respect to the management of Nevada's water resources.[51]

A similar system exists with respect to the management of the Nevada's non-domesticated wildlife resources. Like water, these resources also belong to the public.[52] The chapters of NRS Title 45 provide clear instructions from the Legislature to the Division of Wildlife on how this resource is to be managed for the public's benefit. Because wildlife resources are fundamentally different in nature from water resources, Titles 45 and 48 establish different management rules for their respective resources. In a similar fashion, because both water and wildlife resources

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[51] Only the Legislature represents the sovereign will of the public and thereby has the power to establish the obligations and duties of the State with respect to the management of resources owned by the public. *See Galloway v. Truesdell*, 83 Nev. 13, 22, 422 P.2d 237, 244 (1967) ("In the Legislature rests the entire power of the people, which is neither vested by the people through the Constitution in the executive or judicial departments . . . .").

[52] NRS 501.100.

are fundamentally different from land submerged under navigable waterways, the *Illinois Central* rule applicable to such lands should have little applicability to the management of wildlife or water resources.

Because the Legislature has provided comprehensive instructions on how Nevada's water resources are to be managed for the public's benefit, the requested judicial intervention is unnecessary. Such intervention will only serve to create uncertainty and insecurity in an otherwise stable water management system that has served Nevada well for over 150 years. In addition, expanding the *Illinois Central* doctrine to water rights will only encourage litigation to further expand it to include other public property like Nevada Department of Transportation roadways, wildlife, parks, etc.

III. The Few States That Apply The *Illinois Central* Doctrine To Water Rights Do So Based On Unique Circumstances In Those States That Are Not Applicable To Nevada.

Very few states have attempted to apply the *Illinois Central* doctrine to water rights issues. Only four state supreme courts – California, North Dakota, Idaho, and Hawaii – have issued rulings applying the doctrine to water rights. In Idaho, however, the state legislature subsequently rejected the judiciary's application of *Illinois Central* to water rights by passing legislation expressly declaring that the doctrine is "solely a limitation on the power of the state to alienate or encumber the

title to the beds of navigable waters."[53] Accordingly, only California, Hawaii, and North Dakota currently apply *Illinois Central* to water rights.

Of these three states, North Dakota is the only one that has adopted a pure prior appropriation system. By contrast, California employs a hybrid system that includes both riparian and prior appropriation principles. Hawaii has an even more complex water rights system that includes riparian rights, prescriptive rights, prior appropriation rights, and konohiki rights.

A. North Dakota

In North Dakota, the *Illinois Central* doctrine is applied solely on a prospective basis and is not used to reallocate already-settled rights. The doctrine has been interpreted as requiring "a determination of the potential effect of the allocation of public water on the present water supply and future water needs of this State."[54] Notably, the *Illinois Central* doctrine was applied in North Dakota to correct the fact that the state legislature had failed to require water resource planning to guide *future* water allocation decisions.[55] By contrast, Nevada has had a statewide

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[53] IDAHO CODE § 58-1203 (1996).
[54] *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d 457, 458 (N.D. 1976).
[55] *Id.*, 247 N.W.2d at 463.

water plan in place since the 1960s and this plan is expressly "designed to guide the development, management and use of the state's water resources."[56]

Because (1) North Dakota is the only pure prior appropriation state to apply the *Illinois Central* doctrine to water rights, (2) North Dakota only applies the doctrine on a prospective basis, and (3) the circumstances that led the North Dakota Supreme Court to apply the doctrine to water rights are different from the circumstances in Nevada, North Dakota's framework for applying the *Illinois Central* doctrine to water rights should be rejected for Nevada.

B. Hawaii

The Hawaii Supreme Court has endorsed the broadest use of the *Illinois Central* doctrine by applying it to both surface and groundwater rights, and allowing for retroactive application.[57] However, even this maximalist view of the *Illinois Central* doctrine recognizes the need to maximize the "beneficial allocation of water resources."[58] The Hawaii Court also has recognized that "the public trust, however, is a state constitutional doctrine."[59] Because of this, the Hawaii Court relied on

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[56] Nevada Division of Water Planning, Nevada State Water Plan (1999) (on file at the State Engineer's office).
[57] *In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000).
[58] *Id.*, 9 P.3d at 451.
[59] *Id.*, 9 P.3d at 455.

ancient Hawaiian law, its constitution, and its existing water statutes to formulate the scope and breadth of the *Illinois Central* doctrine in Hawaii.[60]

Hawaii is unique in many respects and has a very complex water system where a broad application of the *Illinois Central* doctrine was needed to provide a universal protection for the state's water resources that transcends its various competing water management systems. However, Nevada is a pure prior appropriation state and does not have competing systems for regulating water use. In Nevada, the State Engineer already has broad statutory authority to manage the prior appropriation system for the public's benefit. Accordingly, Hawaii's uniquely broad framework for applying the *Illinois Central* doctrine is not warranted in Nevada.

C. California

California has a hybrid riparian and prior appropriation water system that also creates unique challenges not seen in Nevada. The California Constitution places riparian rights outside the regulatory water agency's jurisdiction, and such rights can be expanded without regulatory oversight as long as the use is "reasonable and beneficial."[61] Thus, even if a particular stream system is evenly balanced to meet all

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[60] *Id.*, 9 P.3d at 457.

[61] CAL. CONST. art. X, § 2; *see Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 725 (Cal. 1983); *see also Millview Cty. Water Dist. v. State Water Res. Control Bd.*, 229 Cal. App. 4th 879, 889 (1st Dist. 2014), *as modified on denial of reh'g* (Oct. 14, 2014) ("Although riparian users must share with other riparian users on the watercourse, there is no predetermined limit on the amount of water an individual

existing commitments, including providing water for wildlife needs, a riparian water owner can increase demand on the system without first seeking the water board's approval.

The water board is also severely limited in its ability to regulate riparian uses. As seen in *National Audubon*, the water board was even without power to regulate or reduce licensed water rights that it originally had authority to issue, even under the "reasonable and beneficial" standard.[62] Further, the water board has no authority to grant an appropriation of water to augment instream flows.[63] Thus, for the State to adequately be able to protect the public's interest in the State's water resources, the Court was required to invoke the *Illinois Central* doctrine.

By contrast, Nevada uses a pure prior appropriation system and does not recognize riparian rights. Also, unlike California, Nevada officially recognizes the maintenance of instream flows to protect wildlife as a beneficial use of water and

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riparian user may divert, so long as the uses to which the diverted water is put are riparian, beneficial, and reasonable.").

[62] *Nat'l Audubon Soc'y*, 658 P.2d at 709 (the water board "believed it lacked both the power and the duty to protect the Mono Lake environment."). *See also id.*, n.28 (the water board would have difficulty cutting back the license based on the reasonable and beneficial use standard since domestic water consumption is arguably a prima facie reasonable and beneficial use).

[63] *See Cal. Trout, Inc. v. State Water Res. Control Bd.*, 90 Cal. App. 3d 816 (3d Dist. 1979); *Fullerton v. State Water Res. Control Bd*, 90 Cal. App. 3d 590 (1st Dist. 1979).

regularly permits water for such uses.[64] For example, the State Engineer has approved numerous instream flow change applications for Truckee River water rights "to assist the conservation and recovery of the Pyramid Lake fishery,"[65] and to restore habitat for waterfowl in the Carson Lake area.[66] Accordingly, there is no need for Nevada to expand the *Illinois Central* doctrine to water rights, as California did, to correct for some perceived deficiency in its water management practices.

D. When faced with a choice, Nevada Courts consistently adopt interpretations of legal doctrines that afford greater protection to property rights.

Whenever this Court is faced with a choice between adopting competing interpretations of legal doctrines, it has consistently adopted doctrines of law that afford greater protections to property rights.[67] Likewise, when the protection of water rights is at issue, Nevada follows the line of authority that affords greater

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[64] *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (holding that Nevada water law recognizes and permits water appropriation *in situ*, without a diversion, for public recreation purposes).

[65] Truckee-Carson-Pyramid Lake Water Settlement, Title II of Pub. L. No. 101-618 § 207(C)(1).

[66] *See Churchill County v. Norton*, 276 F.3d 1060 (9th Cir. 2001) (rejecting appeal of approval of Environmental Impact Statement for restoration project).

[67] *See, e.g., Wal Mart Stores v. County of Clark*, 125 F. Supp. 2d 420, 425-26 (D. Nev. 1999) (reviewing this Court's adoption of the "no further discretionary act" test for when property rights vest); *see also McCarran Int'l Airport*, 122 Nev. at 670, 137 P.3d at 1127 ("The Nevada Constitution contemplates expansive property rights . . . .").

protection of water rights.[68] Here the Court is faced with a choice of either (1) adopting California and Hawaii's expansive interpretation of the *Illinois Central* doctrine, or (2) applying the more limited interpretation followed by most of the other prior appropriation jurisdictions. Because the latter approach provides the greatest protection of individual property rights, it is the interpretation this Court should adopt.

IV. The Rights Recognized In Nevada's Water Rights Decrees Are Vested Property Rights That Cannot Be Unilaterally Altered Or Amended Without Effectuating A Taking.

This Court has stated that the purpose of Nevada's water law is "not only to have the water rights adjudicated but to have them adjudicated in such a proceeding as to *terminate for all time* litigation between all such water users."[69] In other words, water rights decrees are meant to be final and, thereby, provide certainty to water users. Because of this, the rights recognized under Nevada's various decrees are vested property rights that cannot be unilaterally altered or amended without effectuating a taking. If any such taking is needed, it should be accomplished using the regular eminent domain processes and procedures provided in Nevada law and not by judicial fiat.

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[68] *See, e.g., United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062 (9th Cir., 2002) (acknowledging Nevada's higher evidentiary threshold for determining whether a water right has been abandoned).

[69] *Ruddell v. Sixth Judicial Dist. Ct. ex rel. Humboldt Cty.*, 54 Nev. 363, 17 P.2d 693, 695 (1933) (emphasis added).

A. The water rights recognized in Nevada's water decrees are constitutionally protected vested property rights.

The Court's decision in this case will have implications beyond the Walker River basin. With the lone exception of the Colorado River, which is governed by an interstate compact, every major river system in Nevada is adjudicated under a judicial decree.[70] If the Court adopts Appellants' position, each of these decrees could be re-opened, and the existing water rights placed at risk, based on claims that a reallocation is needed to protect public trust assets. However, under Nevada law, the rights recognized in the various decrees are vested property rights that Nevada's ranchers and farmers rely upon.

A water right becomes vested when it "has become fixed and established either by diversion and beneficial use or by permit procured pursuant to the statutory water law relative to appropriation."[71] Once vested, such rights are "regarded and

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[70] *See, e.g., United States v. Orr Ditch Co.*, Equity No. A-3 (D. Nev. 1944) (adjudicating the Truckee River); *United States v. Alpine Land & Reservoir Co.*, Civ. No. D-183 BRT (D. Nev. 1980) (adjudicating the Carson River); *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries*, Case No. 2804 in the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt (1935); *In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Virgin River, in Clark County, State of Nevada*, in the Tenth Judicial District of the State of Nevada, in and for the County of Clark. (1927); *Muddy Valley Irrigation Co., et al., v. Moapa Salt Lake Produce Co., et al.*, Case No. 377, in the Tenth Judicial District of the State of Nevada, in and for the County of Clark (1920) (adjudicating the Muddy River).

[71] *In re Application of Filippini*, 66 Nev. at 22, 202 P.2d at 537.

protected as real property."[72] When a court is adjudicating a stream system, it is not allocating or granting water rights to various users. Instead, the Court is merely recognizing rights already perfected when water users diverted and placed water to beneficial use, and establishing the relative priority for each of these rights. In other words, a final water rights decree is a quiet title action.[73]

Accordingly, a decree court may not simply re-open a decree and reallocate water rights. The United States Supreme Court emphatically held that once a water user has perfected a water right by diverting and placing the water to beneficial use, such a right cannot be treated "like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit."[74] Instead, these rights are protected like real property under both the Nevada and United States Constitutions.

B. Reallocating decreed water rights would constitute a taking.

A taking occurs when the government forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[75] This is precisely what the Appellants are trying to accomplish in this case. Saving Walker Lake is a public project. If water is needed to augment instream

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[72] *Id.*, 66 Nev. at 21-22, 202 P.2d at 537.
[73] ROSS E. DE LIPKAU AND EARL M. HILL, THE NEVADA LAW OF WATER RIGHTS 4-3 (Rocky Mountain Mineral Law Foundation 2010).
[74] *Nevada v. United States*, 463 U.S. 110, 126, 103 S. Ct. 2906, 2916 (1983).
[75] *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 2315 (1994).

flows of the Walker River to accomplish this purpose, the cost of acquiring that water should properly be borne by the public.

The prior appropriation system already facilitates the restoration of wildlife habitat. Instream flows are already being restored for Walker Lake.[76] Restoration programs involved purchases of water rights from willing sellers, and changes of those water rights to require water to remain in a river for instream flows to support wildlife. The Nevada Division of Water Resources has facilitated such projects by approving change applications and recognizing the augmentation of river flows as a beneficial use of water. These programs create a win/win scenario where water users are fairly compensated for their water rights, while water is made available to support restoration programs.

The Legislature and state water managers, not individual federal judges, are in the best position to weigh competing policy concerns and make decisions regarding the best use of the water resources entrusted to their care. This is especially true when such decisions could result in an impairment or taking of constitutionally protected property rights that ranches and farmers rely on to sustain their operations.

[76] A similar program has also been implemented on the Truckee River to support endangered fish species.

Appellants would have this Court throw out prior appropriation completely and disrupt the voluntary restoration efforts already underway at Walker Lake so a federal judge can impose an involuntary seizure of water rights. Instead of throwing out the bedrock principle of Nevada's water law, solutions obviously exist within the prior appropriation system. Reasonable policy-makers have worked within the existing law to provide balanced solutions that both protect existing rights and provide water for restoration purposes. The prior appropriation system may not be perfect, but it has withstood the test of time. When properly managed, prior appropriation can provide both certainty for existing users and flexibility to address problems like those experienced at Walker Lake.

V. Past Experience Shows That This Court Should Be Wary Of Attempts To Change Nevada's Prior Appropriation System.

This is not the first time this Court has been asked to change course and deviate from the prior appropriation system. In 1871, this Court issued a decision in *Van Sickle v. Haines* that temporarily upended the prior appropriation system that had been previously established in *Lobdell* and replaced it with the common law doctrine of riparianism.[77] Reports from the time indicate that this decision was not well received and created great uncertainty. The December 9, 1871, Reno Crescent[78]

[77] *Van Sickle v. Haines*, 7 Nev. 249 (1872).

[78] The Reno Crescent was the predecessor to the Reno Evening Gazette which later merged with the Nevada State Journal to become the Reno Gazette-Journal.

reported that the *Van Sickle* decision "returns the very best agricultural lands of the State, redeemed by industry from desert sage plains, to their normal condition."[79] Further, "it wipes out of existence half the taxable property of the State."[80] The January 13, 1872, Eureka Sentinel reported that:

> The effects of the decision of the Supreme Court in the Haines-Van Sickle case are being felt already in Eastern Nevada. Water rights and privileges, hitherto established and respected, are to be again litigated.[81]

Fortunately, the *Van Sickle* decision was overturned and the prior appropriation system reinstituted.[82] However, the uncertainty and economic turmoil the *Van Sickle* decision created provides a stark example of the unintended consequences that can result from otherwise well-intentioned attempts to import judicial doctrines that are ill-suited to address the unique circumstances and conditions of our state.

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[79] *See* GRACE DANGBERG, CONFLICT ON THE CARSON 14-15 (Carson Valley Historical Society 1975).

[80] *Id.*

[81] *Id.*

[82] *See Jones v. Adams*, 19 Nev. 78, 6 P. 442, 447 (1885) ("The case of *Van Sickle v. Haines* . . . is hereby overruled.").

CONCLUSION

For the reasons stated above, the Farm Bureaus and Cattlemen's Association respectfully request that this Court reject Appellants' claims and advise the Ninth Circuit that Nevada's adoption of the *Illinois Central* doctrine is limited to lands submerged under navigable waterways and does not apply to fully perfected water rights.

RESPECTFULLY SUBMITTED this 19th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this amicus 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 answering brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify this amicus brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 6,803 words.

3. Finally, I hereby certify that I have read this entire amicus 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 answering 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.

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I understand that I may be subject to sanctions in the event that the accompanying answering brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of April, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing document as follows:

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