IN THE MATTER OF THE
JORDAN DANA FRASIER FAMILY TRUST.

AMY FRASIER WILSON, APPELLANT, *v*. STANLEY H. BROWN, JR., SPECIAL ADMINISTRATOR OF THE ESTATE OF DINNY FRASIER, DECEASED; PREMIER TRUST, INC.; JANIE L. MULRAIN; NORI FRASIER; AND BRADLEY L. FRASIER, M.D., RESPONDENTS.

No. 77981

August 27, 2020 471 P.3d 742

Appeal from district court orders resolving petitions concerning the internal affairs of a nontestamentary trust and confirming amendments to the trust. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

Doyle Law Office, PLLC, and *Kerry St. Clair Doyle*, Reno, for Appellant Amy Frasier Wilson.

Michael A. Rosenauer, Ltd., and *Michael A. Rosenauer*, Reno, for Respondent Janie L. Mulrain.

Robertson, Johnson, Miller & Williamson and *G. David Robertson* and *Alison Gansert Kertis*, Reno, for Respondent Premier Trust, Inc.

Wallace & Millsap LLC and *Patrick R. Millsap* and *Fred M. Wallace*, Reno, for Respondent Stanley H. Brown, Jr., Special Administrator of the Estate of Dinny Frasier.

Bradley L. Frasier, M.D., Oceanside, California, in Pro Se.

Nori Frasier, Oceanside, California, in Pro Se.

Before the Supreme Court, PARRAGUIRRE, HARDESTY and CADISH, JJ.

OPINION

By the Court, HARDESTY, J.:

NRS 164.015 governs contests to the validity of a revocable nontestamentary trust. Following the assumption of jurisdiction over the trust under NRS 164.010, the district court must hold an evidentiary hearing and make factual findings when an interested

person challenges a settlor's or trustee's fitness in accordance with NRS 164.015 and issue an order binding in rem on the trust and appealable to this court. Here, a trust beneficiary challenged the settlor's capacity to execute amendments to the trust, and the district court entered an order denying the objections and confirming the amendments. Because the district court did not hold an evidentiary hearing or provide factual findings regarding the challenge to the settlor's mental capacity prior to approving the amendments to the trust, as required by NRS 164.015, we reverse and remand for further proceedings.

I.

Jordan and Dinny Frasier, residents of California, created the Jordan Dana Frasier Family Trust in order to protect their wealth and provide for their three children—appellant Amy Frasier Wilson, respondent Dr. Bradley Frasier (Brad), and respondent Nori Frasier. As originally constructed, Jordan and Dinny were the co-trustees of the Family Trust. When Jordan passed away in 2014, the Family Trust divided into two subtrusts—the Survivor's Trust and the Tax Exemption Trust—for which Dinny was the sole trustee and the sole income beneficiary until her death.[1] Dinny subsequently appointed respondent Premier Trust, Inc., a Nevada trust corporation, as co-trustee.

In March 2016, Dinny and Premier filed a petition in the district court to confirm them as co-trustees and to provide guidance regarding a dispute that had arisen between the Family Trust and Brad. The dispute concerned whether money that was provided to Brad from the Family Trust for the purchase of a medical building was a gift, loan, or equity investment. In June 2016, Dinny executed a Second Amendment to the Survivor's Trust, designating Amy as the sole beneficiary and disinheriting both Brad and Nori. In August, the district court assumed jurisdiction pursuant to NRS 164.010[2] and ordered the parties to attend mediation.

In November, Premier filed a supplemental petition for instructions on how to handle allegations from Dinny's children, because "each of the children has, at one time or another, questioned Dinny's competency" and claimed their siblings or other persons were exerting undue influence over Dinny. In late 2016, California attorney

[1]During the pendency of this appeal, Dinny passed away, and Stanley H. Brown, Jr., was substituted in as the special administrator of her estate (hereinafter, Dinny's estate). *See In re Frasier Family Trust*, Docket No. 77981 (Order Substituting Personal Representative, Sept. 4, 2019).

[2]In 2017, the Legislature amended NRS 164.010, effective October 2017. 2017 Nev. Stat., ch. 311, § 51, at 1695-96. Because the district court assumed jurisdiction in August 2016, we consider the statute as it applied prior to the amendment.

Barnet Resnick began representing Dinny in her personal capacity and retained respondent Janie Mulrain to act as Dinny's power of attorney and personal fiduciary. Shortly thereafter, Dinny cut off all contact with her children and grandchildren.

In January 2017, the parties attended court-ordered mediation and reached a settlement agreement whereby Brad would receive title to the medical building, and Amy and Nori would receive title to other properties and would also get equalization payments from the Survivor's Trust upon Dinny's death. The settlement agreement required a capacity determination for Dinny by a qualified gerontologist and Nevada court approval to be effective. In February, Dr. James E. Spar, a qualified gerontologist, examined Dinny and found that "she retains the testamentary capacity (as defined in Cal. Probate Code § 6100.5) required to modify her estate plan," and "she retains the capacity to enter into contracts, *as long as she is not required to rely on her unaided recall alone*."

On April 27, 2017, Dinny executed a Third Amendment to the Survivor's Trust, which disinherited all of the children and left all of the trust's assets to charity. Dinny additionally filed a motion to approve and enforce the settlement agreement, and the district court ordered an evidentiary hearing on the matter in May 2017. At the evidentiary hearing, Amy argued Dinny lacked mental capacity and was susceptible to undue influence. Amy asserted that she had not had contact with Dinny since October 2016, and she expressed concern about some of Dr. Spar's findings. The district court disagreed with Amy's arguments and ruled that Amy should have summoned Dr. Spar and presented her own expert on Dinny's competency. The district court found that the settlement agreement was a valid and enforceable agreement. Near the end of the hearing, Amy requested that the district court appoint a guardian ad litem for Dinny, which the district court declined to do at that time. On May 19, 2017, Dr. Spar examined Dinny a second time and concluded that she was competent to make a decision to replace her co-trustee, as well as to make other trust-related decisions. In late May, Premier filed a second supplemental petition for instructions, claiming, among other things, that it was "extremely concerned" about Dinny, her finances, and her overall welfare. Amy joined in Premier's petition, agreeing with Premier's concerns over Dinny's welfare and additionally arguing that Mulrain exerted undue influence over Dinny.

In July 2017, the district court issued three orders that (1) set a hearing to determine Dinny's capacity and required Dinny to attend the hearing in person (hereinafter, July 2017 capacity order); (2) approved and enforced the settlement agreement; and (3) decided, among other issues, that Dinny had the authority to amend the Survivor's Trust if she was capacitated. In the district court's July 2017 capacity order, the district court concluded that "based upon the current allegations, no amendment to any trust documents will

be effective without proof to this [c]ourt of [Dinny]'s testamentary and contractual capacity. The evaluation provided by Dr. Spar is not preponderant proof of [Dinny]'s capacity." On September 22, 2017, Dr. Spar evaluated Dinny a third time. Dr. Spar determined that Dinny was

> functioning in the range of mild to moderate global cognitive impairment, with deficits mainly in spontaneous recall of previously learned facts and information . . . . [Additionally, Dinny] retains testamentary and contractual capacity, is quite aware of her overall circumstances, and remains capable of guiding you in the process of seeking a settlement of her current legal dilemma.

The district court set Dinny's capacity hearing for October 2017, but neither Dinny nor an examining physician attended. Dinny's counsel represented that the physician had a last-minute scheduling conflict and that Dinny was not present because her primary care physician advised her that traveling to Nevada would endanger her mental and physical health. No capacity determination was made at this hearing. Throughout the remainder of the proceedings below, Dinny never personally appeared, nor did the district court hold a hearing on her capacity. In December 2017, the district court ordered (1) Dinny's removal as co-trustee, (2) that Resnick and Mulrain provide an accounting for the district court's review, and (3) that Brad's motion seeking payment of $50,000 allotted to him in the settlement agreement be granted.

In June 2018, Dinny filed a petition for final accounting and requested the removal of Premier and appointment of a sole successor trustee. In August, Premier filed petitions requesting approval of its resignation as trustee, that the district court ratify and confirm all of Premier's actions, and to settle Premier's account. The district court set a hearing to resolve Premier's requests and determine Mulrain's fees and permitted prehearing statements by the parties. Amy then objected to Mulrain's fee request, questioning whether Dinny had capacity in 2016 to enter into a fiduciary relationship with Mulrain. Amy additionally claimed that Mulrain was exerting undue influence over Dinny, complained about the competency of Dinny's caregivers, and requested that the court appoint an investigator to examine Dinny's environment and report to the district court whether Dinny was competent and free from undue influence. Additionally in August, Dinny was evaluated by Dr. Sandra Klein, who opined that Dinny's "safety is a primary concern now. . . . [S]he is not capable of appreciating the situation or consequences of her decisions independently. . . . [She is] vulnerable to undue influence by others when it comes to her financial affairs."

In October, the district court held a two-day evidentiary hearing to resolve the outstanding issues related to the Survivor's Trust. Rel-

evant here, the parties discussed that the Survivor's Trust needed to be amended a fourth time to effectuate the terms of the settlement agreement, but all of the parties expressed concern about whether Dinny had the capacity to amend it. The court determined that it could not "conclude that [Dinny]'s incapacitated. There's too much evidence that she's still engaged in some ways. But I also can't conclude that she's fully capacitated . . . ." The parties agreed and arranged to have Dinny evaluated contemporaneously with her execution of the Fourth Amendment to the Survivor's Trust.

On November 12, 2018, Dr. Klein evaluated Dinny again and determined "she is not capable of appreciating the situation or consequences of her decisions independently. She is unable to manipulate information and balance the pros and cons of her immediate situation[ ] because information becomes overwhelming for her and she needs assistance keeping facts and details correct without forgetting." However, Dr. Klein concluded that Dinny's "cognitive ability has remained stable when compared to her performance on neuropsychological evaluations [on] July 12, 2018 and August 30, 2018. She continues to have [t]estamentary [c]apacity but would need trusted advisors to help her understand information sufficiently to ensure [c]ontractual [c]apacity." On November 13, Dinny executed the Fourth Amendment to the Survivor's Trust to effectuate the terms of the settlement agreement by providing for equalization payments but otherwise left everything to charity. On November 19, Dinny petitioned to confirm the Third and Fourth Amendments to the Survivor's Trust. Amy objected shortly thereafter arguing Dinny lacked capacity and could not understand the complex amendments made to the trust. Additionally, Amy challenged an arithmetic error in calculating the offset distributive balances in the Fourth Amendment to the Survivor's Trust.

In December 2018, the district court entered its order, wherein it denied Amy's challenge to Dinny's capacity, as well as (1) confirmed the Third and Fourth Amendments to the Survivor's Trust, (2) granted Premier's petition to resign as co-trustee and substituted U.S. Bank in its place, (3) granted Mulrain's fees, and (4) explained that it had

> previously expressed its concerns and invited the parties to comment upon the propriety of an independent investigator to confirm Dinny's capacity, removing Ms. Mulrain as Dinny's attorney-in-fact, and appointing a guardian ad litem. Upon reflection, this [c]ourt must adhere to its jurisdictional authority over the trusts and modestly intervene in personal issues in accordance with NRS 164.010 and NRS 164.015. Additionally, all persons related to these ancillary issues reside in California and the parties' convenience compels California as the appropriate forum to address these issues.

Later in December, Dinny petitioned the district court to effectuate the Fifth Amendment to the Survivor's Trust to resolve the alleged arithmetic error Amy raised. In January 2019, the district court entered a supplemental order confirming the Fifth Amendment to the Survivor's Trust.

Amy appeals the district court's December 2018 and January 2019 orders and challenges the court's confirmation of the amendments to the Survivor's Trust and payment of fees to Mulrain.

II.

Amy argues that the district court erred in confirming the Third and Fourth Amendments to the Survivor's Trust without first resolving her allegations about Dinny's lack of capacity.[3] Amy complains that the district court declined to resolve the capacity question throughout the proceedings, but she particularly focuses on the district court's failure to address the capacity issue in December 2018, after she objected to Dinny's petition to confirm the Third and Fourth Amendments to the Survivor's Trust. She claims that the district court erred by not holding an evidentiary hearing to resolve whether Dinny lacked capacity to execute those amendments in accordance with NRS 164.015.[4] We agree.

We review questions of statutory interpretation de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). NRS 164.015 sets forth procedures for when "an interested person contests the validity of a revocable nontestamentary trust" over which the district court has jurisdiction pursuant to NRS 164.010. A written challenge to the validity of the trust is treated as a pleading, whether it is raised by a petitioner or by an objector. NRS 164.015(3). When such a challenge is made, NRS 164.015(4) provides that

> the competency of the settlor to make the trust, the freedom of the settlor from duress, menace, fraud or undue influence at

[3]Amy also argues that the district court improperly found that it lacked jurisdiction to determine the issue of Dinny's capacity. We disagree. Though the district court's order is confusing, the district court assumed jurisdiction over the Trust pursuant to NRS 164.010 and clearly recognized throughout the proceedings its jurisdiction over trust matters and Dinny's capacity to amend the Survivor's Trust.

[4]On appeal, Premier does not oppose Amy's contention. Brad responds that Amy's arguments are "certainly a determination for the Supreme Court of Nevada to make," but he fails to support his arguments with relevant legal authority or citations to the record, and he made no attempt to supplement his brief after issuance of our order cautioning him that failure to do so could result in his arguments not being considered. *See In re Frasier Family Trust*, Docket No. 77981 (Order, Nov. 21, 2019); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Finally, Mulrain joined in the answering brief filed by Dinny's estate, and Nori failed to file an answering brief at all. Accordingly, our opinion addresses only the arguments raised by Amy and Dinny's estate.

> the time of execution of the will, the execution and attestation of the trust instrument, or any other question affecting the validity of the trust is *a question of fact and must be tried by the court* . . . .

(Emphasis added.) Based on the plain language of the statute, it is clear that district courts must resolve questions of fact in a trial before the court. At a minimum, an evidentiary hearing is required on the factual question raised in the challenge under NRS 164.015.

In the district court's December 2018 order confirming the Third and Fourth Amendments, the court detailed that some of Amy's objections were "previously considered by this [c]ourt . . . [and that] Amy's other objections, primarily to capacity, are denied." Based on our review of the proceedings below, although the district court noted concerns about Dinny's capacity at several points, it *never resolved* the factual question in accordance with NRS 164.015. Thus, despite Dinny's estate's arguments to the contrary, the district court erred when it failed to comply with NRS 164.015 following Amy's objection to the validity of the trust amendments based on Dinny's capacity. NRS 164.015's procedural requirements are clear: following Amy's objection and challenge to Dinny's capacity, the district court was required to hold an evidentiary hearing, make factual findings, and properly resolve capacity in a final appealable order before enforcing the amendments to the trust.[5] *See* NRS 164.015(3)-(4), (6).

Accordingly, we remand for further proceedings. We instruct the district court to hold an evidentiary hearing where Amy, as the plaintiff, has the burden to prove that Dinny (and going forward her estate) as the defendant, lacked capacity under California law.[6] NRS 164.015(3). The district court's inquiry must resolve whether Dinny possessed capacity to enter into the Third, Fourth, and Fifth Amendments to the Survivor's Trust.[7]

III.

Amy also argues that the district court erred when it approved Mulrain's fees without properly resolving Amy's allegations that Dinny lacked capacity to enter into a power-of-attorney relationship with Mulrain and was unduly influenced by Mulrain. We disagree.

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[5]To the extent that Amy also argues that the district court failed to consider whether undue influence affected the validity of the amendments, she never explicitly objected to the validity of the amendments on that basis. Thus, that issue need not be considered on remand.

[6]The Survivor's Trust provides that California law governs questions regarding the validity of the trusts.

[7]Nothing in this opinion is intended to nor modifies the district court's December 2018 order granting Premier's petition to resign as co-trustee and substituting U.S. Bank in its place or, as we explain further in this opinion, the district court's award of fees to Mulrain.

In the district court's December 2018 order, the court noted that Amy's objection to the payment of Mulrain's fees was based on an allegation "that Dinny lacks capacity or knowledge about Ms. Mulrain's professional services and costs." The district court determined that all other objections had been resolved by "Mulrain's submission of detailed invoices and Mr. Resnick's representation that Ms. Mulrain is not seeking double payment." The district court found that Amy failed to prove her contentions by a preponderance of the evidence and therefore approved Mulrain's fees. Furthermore, the district court refrained from overstepping "its jurisdictional authority over the trusts," noting that the personal issues regarding Dinny's power of attorney were best addressed in California, where all of the persons related to those issues resided.

Dinny and Premier's petition for the district court to assume jurisdiction in 2016 was to resolve issues related to the trust in rem. *See* NRS 164.010. This provided the district court with personal jurisdiction over Dinny to resolve questions regarding her capacity and undue influence as they relate to her administration of the trust, execution of the amendments to the Survivor's Trust, and ability to serve as trustee. *Id*.; NRS 164.015(1). However, Amy has provided no authority permitting or requiring the district court to determine the validity of a power-of-attorney relationship entered into by a California resident in California. And Amy's request for a guardian ad litem, for a conservatorship, or for the district court to order an investigation into Dinny's capacity to manage her personal affairs far exceeded the scope of the district court's jurisdiction related to the trust. *See* NRS 164.010(5); NRS 164.015(1).

Amy has not otherwise shown that Mulrain's fees were unreasonable and thus fails to demonstrate that the district court clearly erred in approving those fees. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (stating that we review a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence). Accordingly, we affirm the district court's order regarding the award of fees to Mulrain.

IV.

In conclusion, when a Nevada court assumes jurisdiction of a revocable nontestamentary trust under NRS 164.010, and an interested person challenges the settlor's or trustee's fitness to amend a trust instrument in accordance with NRS 164.015, the district court must hold an evidentiary hearing, make factual findings, and issue an order that is appealable to this court prior to enforcement of the challenged trust. Because the district court failed to comply with NRS 164.015's requirements, we reverse the district court's December 2018 and January 2019 orders, except for its award of fees to Mul-

rain and its grant to Premier to resign as co-trustee and be replaced by U.S. Bank in its place, and we remand for further proceedings consistent with this opinion.

Parraguirre and Cadish, JJ., concur.

In the Matter of the GUARDIANSHIP OF B.A.A.R., a Protected Minor.

LUCIA A.A., Appellant, *v.* MARIA M.R.; and JESUS V.A., Respondents.

No. 78626-COA

September 3, 2020 474 P.3d 838

Appeal from a post-judgment district court order in a guardianship matter. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

Reversed and remanded.

Law Offices of Martin Hart, LLC, and *Alissa A. Cooley*, Las Vegas, for Appellant.

Jesus V.A., in Pro Se.

Maria M.R., in Pro Se.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

OPINION

Per Curiam:

NRS 3.2203 provides that Nevada district courts may, in certain types of proceedings, make the predicate factual findings necessary for an individual to apply for Special Immigrant Juvenile (SIJ) status with the United States Citizenship and Immigration Services of the Department of Homeland Security (USCIS). In her petition for guardianship of her nephew, B.A.A.R., appellant Lucia A.A. requested that the district court make such findings, including a finding that reunifying B.A.A.R. with his mother in his country of origin was not viable due to abuse or neglect. In denying Lucia's request, the district court applied the heightened standard of proof applicable in proceedings for the termination of parental rights under NRS Chapter 128. As an issue of first impression, we hold that a party requesting predicate factual findings under NRS 3.2203 need

only show that such findings are warranted by a preponderance of the evidence, which is the minimum civil standard of proof, rather than the heightened standard applicable in termination proceedings. Thus, because the district court evaluated Lucia's request for predicate findings under the incorrect standard, we reverse the denial of the request and remand for further proceedings consistent with this opinion.

Additionally, because the district court appears to have misconstrued both the statutory definition of "abuse or neglect" under NRS 3.2203 and Lucia's arguments concerning it, we take the opportunity to briefly discuss that term. In so doing—and in line with recent precedent—we emphasize that district courts should consider the entire history of the relationship between a parent and child when evaluating the practical workability of reunification in light of past abuse or neglect.

BACKGROUND

B.A.A.R. was born in El Salvador in 2001 to respondents Maria M.R. and Jesus V.A. He lived there with Maria and other family members until he fled to the United States as a teenager in 2018. Ultimately, B.A.A.R.'s aunt, Lucia, took him into her care in Las Vegas, and she petitioned the district court for guardianship. Despite being served with the petition, neither Maria nor Jesus opposed it or otherwise appeared in the proceedings below.[1] The district court granted the unopposed petition and appointed Lucia as B.A.A.R.'s guardian, and B.A.A.R. consented to the continued existence of the guardianship until he reaches the age of 21.

In her petition for guardianship, Lucia had also requested that the district court make predicate factual findings under NRS 3.2203 that would allow B.A.A.R. to apply for SIJ status with USCIS. Lucia later submitted a more detailed motion, along with supporting declarations from both herself and B.A.A.R., alleging that reunifying B.A.A.R. with Maria in El Salvador was not viable because of abuse or neglect. Lucia further asserted that returning to El Salvador would not be in B.A.A.R.'s best interest. Lucia argued primarily that Maria had allowed B.A.A.R. to be exposed to domestic violence occurring between Maria and her live-in boyfriend, Jose, and that she had failed to intervene when Jose physically abused B.A.A.R.'s sister in the family home and when Jose threatened to kill B.A.A.R. if he continued to intervene in those altercations. According to Lucia, and as set forth in B.A.A.R.'s declaration, these events caused B.A.A.R. to fear Jose and suffer emotional distress. Lucia asserted that this amounted to abuse or neglect as defined under NRS 3.2203, as did Maria's poverty and lack of employment, because she was unable to properly provide for B.A.A.R.

[1]Likewise, neither Maria nor Jesus filed an answering brief in this appeal.

After the district court entered its order appointing Lucia as B.A.A.R's guardian, it issued a separate order denying Lucia's request for findings under NRS 3.2203. In denying the request, the court determined that the allegations in the motion and accompanying declarations did not provide sufficient factual support for a finding that reunification was not viable, especially in light of the fact that Maria and Jose had separated months before B.A.A.R. fled to the United States. The district court further stated that it would require Lucia to present a far more detailed history of neglect if the sole basis for such a finding was Maria's poverty, reasoning that a lack of financial resources alone is never a sufficient basis to terminate a parent's relationship with her child. Lucia now appeals from the district court's order.

ANALYSIS

Lucia contends that the district court erroneously applied the heightened standard of proof applicable in proceedings for the termination of parental rights to her request for predicate findings under NRS 3.2203. She further contends that the district court misconstrued the statutory definition of "abuse or neglect" and thereby ignored her primary argument as to why reunifying B.A.A.R. with his mother is not viable—that Maria abused or neglected B.A.A.R. by allowing him to be exposed to Jose's harmful behavior. We address each of these arguments below, in turn.

Standard of review

We review a district court's factual determinations for an abuse of discretion. *In re Guardianship of N.M.*, 131 Nev. 751, 754, 358 P.3d 216, 218 (2015). But the district court must apply the correct legal standard in reaching its decision, and we owe no deference to legal error. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992). Moreover, this court reviews the district court's interpretation of statutes de novo. *Amaya v. Guerrero Rivera*, 135 Nev. 208, 210, 444 P.3d 450, 452 (2019) (interpreting NRS 3.2203).

Predicate factual findings for Special Immigrant Juvenile status

Obtaining SIJ status—which allows undocumented juveniles[2] to acquire lawful permanent residency in the United States—is a two-step process involving both state and federal law. *Id.* at 209, 444

[2]Although B.A.A.R. is now over 18 years of age, he remains a juvenile/child for purposes of this process, which is defined in relevant part as an unmarried individual under the age of 21. 8 C.F.R. § 204.11(c) (2019); NRS 3.2203(8)(c); *see* NRS 159.343(1) (allowing the district court, with the consent of a protected person who is seeking SIJ status, to extend the appointment of the guardian until the protected person reaches age 21).

P.3d at 451. First, an aspiring applicant must obtain an order from a state juvenile court[3] issuing certain predicate findings, and only once such an order is issued may the applicant petition USCIS for SIJ status. *Id.* at 209, 444 P.3d at 451-52. While the function of state courts in this process is limited, they nonetheless play a key role in facilitating an applicant's efforts to obtain SIJ status. *See Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 735 (Ct. App. 2014) (noting that, although the federal government has exclusive jurisdiction to grant SIJ status, "state juvenile courts play an important and indispensable role in the SIJ application process" (internal quotation marks omitted)). As our supreme court recognized in *Amaya*, "[t]he state trial court does not determine whether a petitioner qualifies for SIJ status, but rather provides an evidentiary record for USCIS to review in considering an applicant's petition." 135 Nev. at 209-10, 444 P.3d at 452 (citing *Benitez v. Doe*, 193 A.3d 134, 138-39 (D.C. 2018)); *see Romero v. Perez*, 205 A.3d 903, 915 (Md. 2019) ("[T]rial judges are *not* gatekeepers tasked with determining the legitimacy of SIJ petitions; that is exclusively the job of USCIS.").

NRS 3.2203 sets forth the mechanism by which an aspiring applicant may obtain SIJ predicate findings, which "may be made by the district court at any time during a proceeding held pursuant to [various chapters of the Nevada Revised Statutes]." NRS 3.2203(2). Pursuant to NRS 3.2203(3), a person may include in a petition or motion made in various types of proceedings, including guardianship proceedings under NRS Chapters 159 and 159A,[4] a request that the district court make the following predicate findings to allow the subject juvenile to apply for SIJ status:

> (1) the juvenile is dependent on a juvenile court, the juvenile has been placed under the custody of a state agency or department, or the juvenile has been placed under the custody of an individual appointed by the court (dependency or custody prong); (2) due to abandonment, abuse, neglect, or some comparable basis under state law, the juvenile's reunification with one or both parents is not viable (reunification prong); and (3) it is not in the juvenile's best interest to be returned to the country of the juvenile's origin (best interest prong).

Amaya, 135 Nev. at 210, 444 P.3d at 452 (citing 8 U.S.C. § 1101(a)(27)(J) and NRS 3.2203(3)). If the district court determines

[3]"Juvenile court" is defined as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a).

[4]In addition to guardianship proceedings, NRS 3.2203 applies in proceedings under NRS Chapters 62B (general administration of juvenile justice), 125 (dissolution of marriage), and 432B (protection of children from abuse and neglect). NRS 3.2203(2)-(3). Further, the Supreme Court of Nevada has recognized that the statute also applies in child custody proceedings under NRS Chapter 125C. *See Amaya*, 135 Nev. at 210 n.4, 444 P.3d at 452 n.4.

that there is evidence to support all of the findings—including, but not limited to, a declaration from the subject juvenile—it "shall issue an order setting forth such findings." NRS 3.2203(4). And the use of the word "shall" in the statute indicates that issuing such an order is mandatory if there is sufficient evidence to support the findings. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) ("[T]his court has stated that 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." (internal quotation marks omitted)).

The preponderance-of-the-evidence standard applies when a district court determines whether to make SIJ predicate findings under NRS 3.2203

Lucia contends that the district court erroneously applied the heightened standard of proof applicable in proceedings for the termination of parental rights to her request for predicate findings under NRS 3.2203. Specifically, she points to a portion of the district court's order where it stated that it "would require [a] very specific and detailed history of neglect if the sole basis for such neglect is a parent's poverty" and that, "[w]hile lack of financial resources may be sufficient to temporarily remove a child from a parent[,] it is never a sufficient basis to terminate the relationship; or in other words, to find that reunification is not viable." Because we agree with Lucia that this language indicates that the district court applied the incorrect standard of proof, we reverse.[5]

NRS 3.2203 is silent as to what standard of proof applies to a request for SIJ predicate findings, and our courts have not previously addressed this issue. But the Supreme Court of Nevada has recognized that the preponderance-of-the-evidence standard, which is the minimum civil standard of proof, is the standard generally applicable in civil cases. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 251, 327 P.3d 487, 491 (2014). Accordingly, the standard applies in all civil proceedings "absent a clear legislative intent to the contrary." *Mack v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996). One such legislative exception is found in NRS Chapter 128, which governs proceedings for the termination of parental rights and requires that petitioners establish the facts in support of termination by clear and convincing evidence. *See id.*; *see also* NRS 128.090(2); *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982) (requiring a standard of at least "clear and convincing evidence" to afford due process in state court proceedings for the termination of parental rights); *In re Parental Rights as to Q.L.R.*, 118 Nev. 602, 605, 54 P.3d 56, 58 (2002) (citing *Santosky*, 455 U.S. at 753).

[5]Although we reverse and remand for application of the appropriate standard of proof, we nevertheless agree with the district court insofar as it determined that Maria's poverty alone does not amount to "abuse or neglect" under the relevant statutes, as discussed *infra* note 6.

In its order, the district court equated a predicate finding that reunification is not viable under NRS 3.2203 with the termination of parental rights. But the proceedings below, which were not even proceedings to determine whether B.A.A.R. actually qualifies for SIJ status, *see Amaya*, 135 Nev. at 209-10, 444 P.3d at 451-52, were not termination proceedings under NRS Chapter 128. *See Lopez v. Serbellon Portillo*, 136 Nev. 472, 476, 469 P.3d 181, 185 (2020) (noting that "SIJ findings do not result in the termination of parental rights"); *see also Kitoko v. Salomao*, 215 A.3d 698, 708-09 (Vt. 2019) (clarifying in a similar case involving SIJ predicate findings that, "[t]o the extent that the trial court perceived that a finding that reunification with father is not viable would be tantamount to terminating father's parental rights," such a "finding would not amount to a termination . . . and would not preclude future contact between children and father should father reestablish contact").

Moreover, because NRS 3.2203 does not set forth an applicable standard of proof, there is no clear legislative intent for district courts to apply anything other than the preponderance-of-the-evidence standard when determining whether SIJ predicate findings are warranted. *See Mack*, 112 Nev. at 1066, 921 P.2d at 1261. Indeed, other appellate courts that have addressed this standard-of-proof question have likewise concluded that the preponderance-of-the-evidence standard applies when a state juvenile court determines whether to make SIJ predicate findings. *See B.R.L.F. v. Sarceno Zuniga*, 200 A.3d 770, 776 (D.C. 2019) (holding that the preponderance-of-the-evidence standard applies when a court is determining whether to make the SIJ predicate finding that reunification with a parent is not viable); *Romero*, 205 A.3d at 912-13 (concluding that, "because [SIJ] proceedings do *not* involve any termination of parental rights," the preponderance-of-the-evidence standard applies).

Based on the foregoing analysis, we—like the other courts to have addressed this issue—hold that an individual requesting predicate factual findings under NRS 3.2203 need only demonstrate that such findings are warranted by a preponderance of the evidence. *See B.R.L.F.*, 200 A.3d at 776; *Romero*, 205 A.3d at 912-13; *see also Lopez*, 136 Nev. at 476, 469 P.3d at 185; *cf. In re Temp. Custody of Five Minor Children*, 105 Nev. 441, 445, 777 P.2d 901, 903 (1989) (noting that, "[b]ecause an order for temporary custody [under NRS Chapter 432B] differs significantly from an order terminating parental rights, . . . the lesser [preponderance-of-the-evidence] standard is appropriate" when determining whether to enter such an order). And this standard of proof controls as to the SIJ predicate findings regardless of the type of proceeding in which the findings are sought.

As noted previously, NRS 3.2203 applies in a variety of different proceedings, *see* NRS 3.2203(2)-(3), and in some of those proceed-

ings standards of proof other than the preponderance of the evidence generally apply. For example, petitioners in guardianship proceedings like those at issue here must demonstrate that the guardianship itself is necessary by clear and convincing evidence. *See* NRS 159.055(1); NRS 159A.055(1). However, nothing in the guardianship statutes, nor in any of the other statutory schemes in which NRS 3.2203 applies, indicates that a heightened standard of proof would ever apply to a request for SIJ predicate findings. And our supreme court has recognized in comparable circumstances that different standards of proof may apply to different parts of a single proceeding. *See In re Parental Rights as to J.D.N.*, 128 Nev. 462, 472, 283 P.3d 842, 848-49 (2012) (holding that a preponderance standard applies when parents seek to rebut statutory presumptions in termination-of-parental-rights proceedings, even though petitioners in such proceedings are required by statute to satisfy a clear-and-convincing-evidence standard with respect to the facts supporting termination, because the relevant statutes are silent as to what standard applies to rebut the presumptions).

Because, as discussed above, an individual requesting predicate factual findings under NRS 3.2203 need only demonstrate that such findings are warranted by a preponderance of the evidence, the district court erred in applying the heightened standard of proof applicable in termination proceedings to Lucia's underlying request for findings. And because it is not clear that the district court would have reached the same conclusion on the viability of reunification had it applied the correct standard of proof, we must reverse the district court's decision and remand for further proceedings. *See Nassiri*, 130 Nev. at 249, 327 P.3d at 490 (noting that the function of a standard of proof "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication'" (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

On remand, the district court must consider whether Lucia has shown, by a preponderance of the evidence, that reunification of B.A.A.R. with his mother is not viable because of abuse or neglect. If the district court determines that reunification is not viable, it must then consider whether it is in B.A.A.R.'s best interest to return to El Salvador. NRS 3.2203(3)(c). And if the district court finds that returning to El Salvador is not in his best interest, it shall enter an order setting forth findings that would allow B.A.A.R. to petition USCIS for SIJ status. NRS 3.2203(4).

A district court may find that reunification is not viable due to past abuse or neglect

Although the district court's application of the incorrect standard of proof by itself warrants reversal, Lucia further argues that the district court misconstrued the meaning of "abuse or neglect"—which

is a single term defined under NRS 3.2203(8)(b)—by focusing only on the abuse allegedly inflicted by Jose on the one hand, and the neglect allegedly brought about by Maria's poverty on the other. Specifically, Lucia argues that the district court's identification of Jose as "the sole purveyor of . . . abuse" and Maria's poverty as "the sole basis [proffered by Lucia] for [a finding of] neglect" shows that the district court fundamentally misunderstood the statutory definition of "abuse or neglect." Lucia further contends that the court's statements in this regard demonstrate that it misunderstood her primary argument with respect to the reunification prong—that Maria was both the abuser and neglecter, as her failure to prevent Jose's conduct amounted to a particular species of abuse or neglect; namely, "negligent treatment or maltreatment" as set forth in NRS 432B.140.

NRS 3.2203(8)(b) defines "[a]buse or neglect" for purposes of SIJ predicate findings as having "the meaning ascribed to 'abuse or neglect of a child' in NRS 432B.020." And NRS 432B.020 defines that term as "[p]hysical or mental injury of a nonaccidental nature," "[s]exual abuse or sexual exploitation," or, as relevant here, "[n]egligent treatment or maltreatment as set forth in NRS 432B.140," which is "caused *or allowed* by a person responsible for the welfare of the child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm." NRS 432B.020(1) (emphasis added). In turn, NRS 432B.140 provides that

> [n]egligent treatment or maltreatment of a child occurs if a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic, has been abandoned, is without proper care, control or supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.

Accordingly, as relevant to the circumstances at issue here, a parent's allowing his or her child to be subjected to conduct (e.g., by failing to intervene) that is terrorizing or emotionally traumatic and threatens the health or welfare of the child may amount to abuse or neglect as defined under NRS 3.2203(8)(b).[6] *See* NRS 432B.020(1)(c); NRS 432B.140; *cf. In re Five Minors*, 105 Nev. at 445-46, 777 P.2d at 903-04 (concluding in the context of a protective-custody proceeding that, among other things, the parents'

[6]We note that the district court was correct in essentially determining that, on the evidentiary record presented below, Maria's poverty alone would not amount to abuse or neglect under NRS 3.2203. The declarations Lucia submitted to the district court do not demonstrate that Maria's failure to financially provide for B.A.A.R. was attributable to her "faults or habits" or that she was able to provide for him and "neglect[ed] or refus[ed]" to do so. *See* NRS 432B.140.

failure "to protect the[ir] children from each other" was sufficient to demonstrate negligent treatment or maltreatment under a previous, less-expansive version of NRS 432B.140).

In light of the applicable statutes, we agree with Lucia that the abovementioned statements in the district court's order indicate that it may have misconstrued the exact parameters of the relevant statutory definitions and of Lucia's associated arguments, at least to the extent that it appeared to not recognize that Maria's inaction with respect to Jose might have amounted to abuse or neglect. However, the district court did briefly acknowledge Lucia's argument regarding Maria's inaction in its order. But in so doing, the court noted that Maria and Jose had ended their relationship and that Jose had left the family's home months before B.A.A.R. fled to the United States, and it appeared to disregard Lucia's argument regarding Maria's past inaction on those grounds.

As our supreme court recently recognized, however, when determining whether reunification with a parent is viable, a district court should consider "the entire history of the relationship between the minor and the parent in the foreign country." *Lopez*, 136 Nev. at 474, 469 P.3d at 184 (quoting *J.U. v. J.C.P.C.*, 176 A.3d 136, 140 (D.C. 2018)). This entails "assess[ing] the impact of the history of the parent's past conduct on the viability, *i.e.*, the workability or practicability of a forced reunification of parent with minor, if the minor were to be returned to the home country." *Id.* at 474-75, 469 P.3d at 184 (quoting *J.U.*, 176 A.3d at 141). District courts should therefore consider the following nonexhaustive list of factors when making such a determination:

> (1) the lifelong history of the child's relationship with the parent (i.e., is there credible evidence of past mistreatment); (2) the effects that forced reunification might have on the child (i.e., would it impact the child's health, education, or welfare); and (3) the realistic facts on the ground in the child's home country (i.e., would the child be exposed to danger or harm).

Id. at 475, 469 P.3d at 184 (quoting *Romero*, 205 A.3d at 915). Accordingly, as relevant here, the district court should consider Maria's past conduct when evaluating the reunification prong, regardless of Jose's exit from the family home.

Thus, on remand, in addition to applying the appropriate standard of proof as set forth above, the district court must follow the approach set forth by the supreme court in *Lopez* for evaluating the viability of reunification. *Id.* at 475-76, 469 P.3d at 184. In so doing, it should evaluate whether Maria's past conduct constituted abuse or neglect such that reunifying B.A.A.R. with her would not be viable. And should it decide that reunification is not viable, the district court must proceed to evaluate whether returning to El Salvador would be in B.A.A.R.'s best interest. NRS 3.2203(3)(c).

CONCLUSION

A party requesting predicate factual findings under NRS 3.2203 must demonstrate that such findings are warranted by a preponderance of the evidence. Because the district court applied the incorrect standard of proof to Lucia's request for predicate factual findings, we reverse its order denying the request and remand this matter for further proceedings. On remand, we instruct the district court to re-evaluate Lucia's evidence and arguments with respect to the reunification prong consistent with this opinion and the supreme court's recent opinion in *Lopez v. Serbellon Portillo*, 136 Nev. 472, 469 P.3d 181 (2020). Should it determine that Lucia has shown, by a preponderance of the evidence, that reunification of B.A.A.R. with Maria is not viable because of abuse or neglect, the district court must then consider whether it is in B.A.A.R.'s best interest to return to El Salvador. And if it is not, the district court shall enter an order setting forth predicate findings that would allow B.A.A.R. to petition USCIS for SIJ status.[7]

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.

No. 75917

September 17, 2020 473 P.3d 418

Certified questions under NRAP 5 concerning Nevada's public trust doctrine. United States Court of Appeals for the Ninth Circuit; A. Wallace Tashima, Raymond C. Fisher, and Jay S. Bybee, Circuit Judges.

Question answered.

PICKERING, C.J., with whom SILVER, J., agreed, dissented in part.

Simeon M. Herskovits, El Prado, New Mexico; *Sean A. Rowe*, District Attorney, Mineral County, for Appellants Mineral County and Walker Lake Working Group.

Aaron D. Ford, Attorney General, *Heidi Parry Stern*, Solicitor General, *Bryan L. Stockton*, Senior Deputy Attorney General, and

[7]In light of our disposition, we need not address any of the other arguments Lucia presents on appeal.

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Best, Best & Krieger LLP and *Roderick E. Walston*, Walnut Creek, California; *Law Office of Jerry M. Snyder* and *Jerry M. Snyder*, Reno, for Respondent Centennial Livestock.

Woodburn & Wedge and *Gordon H. DePaoli, Dale E. Ferguson*, and *Domenico R. DePaoli*, Reno, for Respondent Walker River Irrigation District.

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Jason D. Woodbury, District Attorney, Carson City; *Taggart & Taggart, Ltd.*, and *Paul G. Taggart* and *Timothy D. O'Connor*, Carson City, for Amicus Curiae Carson City.

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Brett C. Birdsong, Las Vegas, for Amicus Curiae Law Professors.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *John D. Echeverria*, South Royalton, Vermont; *Robert Johnston*, Carson City, for Amici Curiae Natural Resources Defense Council, Sierra Club, Western Resource Advocates, National Wildlife Federation, and Nevada Wildlife Federation.

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Parsons Behle & Latimer and *Gregory H. Morrison*, Reno, for Amicus Curiae Nevada Mining Association.

Blanchard, Krasner & French and *Steven M. Silva*, Reno, for Amicus Curiae Pacific Legal Foundation.

Simons Hall Johnston PC and *Brad M. Johnston*, Yerington, for Amici Curiae Peri & Sons Farms, Inc., Desert Pearl Farms, LLC, Peri Family Ranch, LLC, Jason Corporation, and Frade Ranches, Inc.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, STIGLICH, J.:

In *Lawrence v. Clark County*, we adopted the public trust doctrine, which generally establishes that a state holds its navigable waterways in trust for the public. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). We are asked for the first time to consider whether the doctrine permits reallocating water rights previously settled under Nevada's prior appropriation doctrine.

The Ninth Circuit Court of Appeals certified two questions to this court. The first question, as we rephrased it, asks: "Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" The second question asks: "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?"

We conclude that the public trust doctrine as implemented through our state's comprehensive water statutes does not permit the reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation. In doing so, we reaffirm that the public trust doctrine applies in Nevada and clarify that the doctrine applies to all waters within the state, including those previously allocated under prior appropriation. We further hold that the state's statutory water scheme is consistent with the public trust doctrine by requiring the State Engineer to consider the public interest when allocating and administering water rights. But in recognizing the significance of finality in water rights, our Legislature has expressly prohibited reallocating adjudicated water rights that have not been otherwise abandoned or forfeited in accordance with the state's water statutes. Accordingly, we answer the first question as reworded in the negative, and we need not consider the second.

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

FACTS AND PROCEDURAL HISTORY[2]

The current litigation arises from appellant Mineral County's intervention in long-running litigation over the water rights in the Walker River Basin to protect and restore Walker Lake.

Walker River Basin and Walker Lake's decline

The Walker River Basin covers about 4,000 square miles, stretching northeast from its origins in the Sierra Nevada mountain range in California to its terminus, Walker Lake in Nevada. Approximately one quarter of the Basin lies in California, and California accounts for a majority of the precipitation and surface water flow into the Basin. The vast majority of the water is consumed and lost through evaporation across the border in Nevada.

Walker Lake is approximately 13 miles long, 5 miles wide, and 90 feet deep. However, its size and volume have shrunk significantly since they were first measured in 1882. By 1996, Walker Lake retained just 50 percent of its 1882 surface area and 28 percent of its 1882 volume. Today, Walker Lake suffers from high concentrations of total dissolved solids, such that it has high salt content, low oxygen content, and high temperatures. While the cause of the decline is attributable to multiple factors, including declining precipitation levels and natural lake recession over time, it is clear that upstream appropriations play at least some role. The decline of Walker Lake, according to appellants, has threatened the shelter of migratory birds and proven inhospitable to fish species such that much of the lake's fishing industry has been eliminated.

Litigation over water rights in Walker River Basin

Litigation over the Walker River Basin began in 1902 when a cattle and land company sued another to enjoin it from interfering with the company's use of the Walker River in Nevada. *See Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910). That litigation ended in 1919 with a final decree from the United States District Court for the District of Nevada. *See Mineral Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 240, 20 P.3d 800, 803 (2001).

In 1924, the United States brought a case in the United States District Court for the District of Nevada to establish water rights for the Walker Lake Paiute Tribe (the Tribe). The case resulted in the Walker River Decree (the Decree) in 1936, which adjudicated the water rights of various claimants under the doctrine of prior appropriation. *See United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10, 11 (D. Nev. 1936). The Decree also created the Walker River Com-

[2]The following facts are from the Ninth Circuit's certification order, given that this court's review is limited to those facts. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012).

mission and the United States Board of Water Commissioners. *See Mineral Cty.*, 117 Nev. at 240, 20 P.3d at 804. The United States District Court for the District of Nevada has maintained jurisdiction over the Decree since.

In 1987, the Tribe intervened in this litigation to establish procedures to change allocations of water rights subject to the Decree. That motion was granted, and since then, the Nevada State Engineer reviews all change applications under the Decree in Nevada in accordance with the state's water statutes, subject to the federal district court's review. In 1991, the Tribe sought recognition of additional water rights under the implied federal reserved water right.

Mineral County's intervention

In 1994, Mineral County moved to intervene to modify the Decree to ensure minimum flows into Walker Lake. It noted the decline of Walker Lake and its impact on Mineral County's economy. The amended complaint sought an allocation of minimum flows of 127,000 acre/feet per year to Walker Lake under the "doctrine of maintenance of the public trust." The United States District Court for the District of Nevada granted Mineral County's intervention in 2013.[3] Appellant Walker Lake Working Group also supports Mineral County's position but was a defendant in the lower court case as a rights holder under the Decree.

In 2015, the United States District Court for the District of Nevada dismissed Mineral County's amended complaint in intervention, concluding that (1) Mineral County lacked standing to assert a *parens patriae* theory; (2) the public trust doctrine could only prospectively prevent granting appropriative rights, and any retroactive application of the public trust doctrine would constitute a taking requiring just compensation; (3) under the political question doctrine, the court lacked authority to effectuate a taking; and (4) Walker Lake is not part of the Walker River Basin.

Mineral County and the Walker Lake Working Group appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit determined that Mineral County had standing to assert its public trust claim. In a concurrent case, it determined that Walker Lake is within the Walker River Basin. *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 605-06 (9th Cir. 2018). However, whether Mineral County could seek minimum flows depended on whether the pub-

[3]During the pendency of the motion for intervention, appellants filed a writ petition with this court seeking to enjoin the State and the Department of Conservation and Natural Resources from granting additional water rights from Walker River and challenging their previous allocations as violations of the public trust. We dismissed the writ petition because the United States District Court for the District of Nevada was the proper forum as the decree court monitoring Walker River. *See Mineral Cty.*, 117 Nev. at 245-46, 20 P.3d at 807.

lic trust doctrine permits reallocating rights previously settled under prior appropriation. The Ninth Circuit certified two questions to our court, and we accepted both questions.

DISCUSSION

In determining whether the public trust doctrine permits reallocating rights adjudicated and settled under the doctrine of prior appropriation, we first discuss the tenets of each doctrine. We then discuss Nevada's statutory water scheme, which we conclude already embraces both of these doctrines.

Prior appropriation doctrine in Nevada

Like most western states, Nevada is a prior appropriation state. The prior appropriation doctrine grants "[a]n appropriative right [that] 'may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.'" *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 13 (4th ed. 1986)). In *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866), we formally recognized the prior appropriation doctrine in Nevada. Decades later, we affirmed that the doctrine of prior appropriation was the prevailing doctrine in Nevada. *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P. 317, 322 (1889); *see also Jones v. Adams*, 19 Nev. 78, 84-86, 6 P. 442, 445-46 (1885) (noting that the common-law doctrine of riparian rights was not suitable for the conditions in Nevada).

The public trust doctrine in Nevada

The public trust doctrine establishes that the state holds its navigable waterways and lands thereunder in trust for the public. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The doctrine generally acts as a restraint on the state in alienating public trust resources. *Id*. at 453. It is an ancient principle originating from Roman law, which provided that "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea." *The Institutes of Justinian*, Lib. II, Tit. I, § 1, at 158 (Thomas Collett Sandars trans., Callaghan & Co., 1st Am. ed. 1876). From this origin, it was adopted by the common-law courts of England. *See Shively v. Bowlby*, 152 U.S. 1, 11 (1894) ("By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King.").

The public trust doctrine was first recognized in the United States in *Martin v. Waddell*, 41 U.S. 367 (1842). In *Martin*, the United States Supreme Court noted that "when the [r]evolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use . . . ." *Id*. at 410. Then in the seminal case of *Illinois Central Railroad*, the United States Supreme Court explained that when states were admitted into the United States on an "equal footing" with the original states, they were granted title to the navigable waters and the lands covered by those waters. 146 U.S. at 434-35. The states thus held title to these areas "in trust for the people of the State" to be enjoyed for navigation, fishing, and commerce freed from the obstruction of private parties. *Id.* at 452.

Nevada has historically embraced public trust principles. In *State Engineer v. Cowles Brothers, Inc*., we recognized that "[w]hen a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory, whether they be rivers, lakes or streams." 86 Nev. 872, 874, 478 P.2d 159, 160 (1970). In *State v. Bunkowski*, we reaffirmed the principles of state ownership of navigable waters and the beds underneath in determining that the Carson River was "navigable" and therefore belonged to the State in trust for public use. 88 Nev. 623, 633-34, 503 P.2d 1231, 1237 (1972). In a concurrence in *Mineral County v. State, Department of Conservation*, Justice Rose eloquently explained the role of the public trust doctrine in Nevada water law:

> This court has itself recognized that this public ownership of water is the "most fundamental tenet of Nevada water law." Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times "forms the outer boundaries of permissible government action with respect to public trust resources." In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring) (internal footnotes omitted) (internal citations omitted).

Ten years later, in *Lawrence v. Clark County*, we expressly adopted the public trust doctrine in Nevada. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). In doing so, we explained that sources of Nevada's public trust doctrine derived not only from common law, but from Nevada's Constitution, its statutes, and the inherent limitations on the state's sovereignty. *Id*. at 398, 254 P.3d at 612.

Particularly, Article 8, Section 9 of the Nevada Constitution, the gift clause, provides that "[t]he State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." We noted that this clause limits the Legislature's ability to dispose of the public's resources, "at the core of which lays the principle that the state acts only as a fiduciary for the public when disposing of the public's valuable property." *Lawrence*, 127 Nev. at 399, 254 P.3d at 612. "[T]he public trust doctrine, like the gift clause, requires the state to serve as trustee for public resources." *Id*.

Moreover, we noted that the Legislature effectively codified the principles behind the public trust doctrine through NRS 321.0005 and NRS 533.025. Specifically, the Legislature has declared that state lands "must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes." NRS 321.0005(1). Regarding water, the Legislature has declared that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025. Thus, "[b]oth provisions recognize 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, exemplifying the fiduciary principles at the heart of the public trust doctrine." *Lawrence*, 127 Nev. at 400, 254 P.3d at 613.

Finally, we noted that the public trust doctrine also derives from inherent limitations on a state's sovereign powers, as recognized by the United States Supreme Court in *Illinois Central Railroad* in establishing that:

> 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 . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

146 U.S. at 453. Thus, in *Lawrence*, we explained that "because the state holds such property in trust for the public's use, the state is simply without power to dispose of public trust property when it is not in the public's interest." 127 Nev. at 400, 254 P.3d at 613.

While we note that the parties here do not dispute whether the public trust doctrine applies in Nevada, they dispute (1) whether such doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, and (2) whether such doctrine applies to nonnavigable waters, navigable waters only, or no water at all.

The public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation

Appellants ask this court to explicitly recognize that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right. We explicitly recognize so.

Since our state's admission to the Union, the state's constitution and inherent limitations on state sovereignty have restricted the state's ability to dispose of public trust resources such as navigable waters and the lands thereunder. *See* Nev. Const. art. 8, § 9; *Ill. Cent. R.R.*, 146 U.S. at 453. Thus, when the state declared that all water within the state belonged to the public, all waters, whether navigable or nonnavigable, within the state were subject to this limitation on the state's discretion to dispose of public trust resources. *Cf.* NRS 533.025. These inherent limitations applied prior to our court's express adoption of the doctrine in *Lawrence*. The public trust doctrine therefore applies to water rights allocated before and subsequent to our opinion in *Lawrence*.

The public trust doctrine applies to all waters within the state, whether navigable or nonnavigable

Appellants and their amici ask this court to recognize that the public trust doctrine encompasses nonnavigable waters, while respondents and their amici argue, alternatively, that the doctrine either applies only to navigable waters or no water at all. Given the confusion over the *res* of the public trust doctrine, we clarify that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters.[4] *See id.* To limit the public trust doctrine to only navigable waterways and the lands below would ignore the fact that flowing water that feeds into the navigable waters is allocated along the way. As stated by Justice Rose,

> [A]lthough the original scope of the public trust reached only navigable water, the trust has evolved to encompass nonnavigable tributaries that feed navigable bodies of water. This extension of the doctrine is natural and necessary where, as here, the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated.

[4]The dissent errs in contending that this clarification unnecessarily expands the scope of the public trust doctrine. The Legislature recognized that "[t]he water of all sources" is subject to the public trust doctrine. *See* NRS 533.025. The waters of the Basin include nonnavigable tributaries that feed into the navigable Walker Lake, and, as the dissent recognizes, nonnavigable tributaries feeding navigable waters must fall within the scope of the doctrine to prevent the harm of their diversion. Moreover, the parties dispute the scope of the doctrine, warranting this clarification.

Mineral Cty., 117 Nev. at 247, 20 P.3d at 807-08 (Rose, J., concurring) (internal footnote omitted). To permit the state, as owner of all water within its borders, to freely allocate nonnavigable waters to the detriment of navigable waters held for the public trust would permit the state to evade its fiduciary duties regarding public trust property. This, the state cannot do.

We therefore reaffirm that the public trust doctrine applies in Nevada. We also clarify that it applies to rights previously settled under prior appropriation and clarify that the doctrine applies to all waters in the state and the lands submerged beneath navigable waters.

Nevada's water statutes are consistent with the public trust doctrine

Although we recognize that the public trust doctrine applies to prior appropriated rights and that the doctrine has always inhered in Nevada's water law, we hold that Nevada's comprehensive water statutes are already consistent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*. *See* 127 Nev. at 405, 254 P.3d at 616.

Nevada's statutes regulating water use require the State Engineer to consider the public interest in allocating water rights

The Legislature has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights in Nevada. Much of Nevada's water laws were rewritten and codified in 1913, bringing all of the state's surface waters and artesian groundwater under state ownership and regulation by the State Engineer.[5] 1913 Nev. Stat., ch. 140, §§ 1, 18, 20, at 192, 195, 196. In bringing all of the state's water under comprehensive regulation, the Legislature declared that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025.

Nevada's water statutes embrace prior appropriation as a fundamental principle. Water rights are given "subject to existing rights," NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).

The other fundamental principle that the water statutes embrace is beneficial use. Specifically, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035; *see also* NRS 533.030(1) (providing that "all water may be appropriated for beneficial use" subject to existing rights and other limitations provided in the water statutory scheme). Beneficial use is declared "a public use," NRS 533.050, and by statute includes

[5]The State Engineer was then granted jurisdiction over all underground waters in the state in 1939. 1939 Nev. Stat., ch. 178, § 1, at 274.

uses such as irrigation, power, municipal supply, domestic use, mining, livestock watering, and storage, NRS 533.340. In 1969, "any recreational purpose," which includes fishing and wildlife habitations, was additionally deemed a beneficial use. NRS 533.030(2); *see* 1969 Nev. Stat., ch. 111, § 1, at 141 (amending NRS 533.030); *State v. Morros*, 104 Nev. 709, 716-17, 766 P.2d 263, 268 (1988) (citing Hearing on A.B. 278 Before the Senate Federal, State & Local Governments Comm., 55th Leg. Sess. (Nev., March 7, 1969)). NRS 533.023 was added in 1989 to define "[w]ildlife purposes" to include "the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." *See* 1989 Nev. Stat., ch. 741, § 1, at 1733. Accordingly, beneficial use underpins Nevada's water statutes, and the Legislature has continued to delineate and expand on which uses are considered public uses in Nevada.

To ensure that water is being used beneficially and for public use, Nevada's water law charges the State Engineer with approving and rejecting applications. *See* NRS 533.325 (requiring that anyone who wishes to appropriate water or change its diversion apply to the State Engineer for a permit). The State Engineer has identified 13 guidelines, including beneficial use, in determining what constitutes the public interest. *See Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 746-47, 918 P.2d 697, 698-99 (1996). In considering whether to approve or reject applications, the State Engineer must consider whether the proposed action is "environmentally sound" and "an appropriate long-term use which will not unduly limit the future growth and development in the basin" for groundwater applications, NRS 533.370(3)(c)-(d), and must reject any permit applications detrimental to the public interest, NRS 533.370(2). In these ways, Nevada's water statutes constrain water allocations to those that are public uses and require the State Engineer to reject permits if they are unnecessary or detrimental to the public interest. These considerations are consistent with the public trust doctrine.

Appellants argue, however, that the statutory scheme does not ensure that the state is fulfilling its continuous public trust duties. They maintain that the statutory scheme does not place an affirmative fiduciary duty on the state to assure that public trust resources are available for future generations. We disagree.

First, the statutes constrain water usage to uses that are necessary and terminate water rights when water is not used beneficially, thereby ensuring against waste. *See* NRS 533.045 ("When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of this State except at such times as the water is required for a beneficial purpose."); NRS 533.060(1) ("Rights to the use of water must be limited and restricted to as much as may be necessary, when reasonably and economically used for irrigation and other beneficial

purposes . . . . The balance of the water not so appropriated must be allowed to flow in the natural stream . . . and must not be considered as having been appropriated thereby."); NRS 534.090 (recognizing forfeiture for nonuse of groundwater for five consecutive years). Second, the statute recognizes that water rights may be abandoned. *See* NRS 533.060 (regarding surface water rights); NRS 534.090 (regarding groundwater rights). Finally, the State Engineer is permitted to declare preferred uses and regulate groundwater in the interest of public welfare, which includes curtailing groundwater rights during water supply shortages. NRS 534.120. In these ways, Nevada's water statutes protect against wasteful use and incorporate mechanisms for limiting water rights when water resources are depleted. The statutory scheme therefore sufficiently places an affirmative duty on the State Engineer to maintain public trust resources.[6]

Nevada's water statutes satisfy Lawrence

In *Lawrence*, we adopted a three-part test to determine whether the dispensation of public trust property is valid. 127 Nev. at 405, 254 P.3d at 616. Specifically, we stated that courts must consider "(1) whether the dispensation was made for a public purpose, (2) whether the state received fair consideration in exchange for the dispensation, and (3) whether the dispensation satisfies 'the state's special obligation to maintain the trust for the use and enjoyment of present and future generations.'" *Id*. (quoting *Ariz. Ctr. for Law v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991)). In considering the third prong, courts must evaluate the following factors:

> [T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, *i.e.* commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

Id. at 406, 254 P.3d at 616 (alteration in original) (internal quotation marks omitted). Furthermore, "when the Legislature has found that

[6]Insofar as the dissent contends that our opinion provides no remedy should the State Engineer abuse its office or misallocate public resources, it is mistaken. The certified questions do not ask the court to settle the matter of judicial review of the State Engineer's actions, and we reject any contention that such actions are per se exempt from judicial review. *See, e.g.*, NRS 533.450 (providing for judicial review of State Engineer orders and decisions); *Pyramid Lake Paiute Tribe of Indians*, 112 Nev. at 762, 918 P.2d at 709 (Springer, J., dissenting) (reasoning that the State Engineer erred in failing to adequately consider the public trust in the allocated resource).

a given dispensation is in the public's interest, it will be afforded deference." *Id*. at 406, 254 P.3d at 617. Hence, public interest and benefit remain paramount.

Respondents argue that Nevada's statutory water scheme satisfies the requirements to transfer public trust property under *Lawrence*, and we agree. First, the statutes permit the State Engineer only to grant permits that are based on beneficial use, which the Legislature has declared a public use. *See* NRS 533.035; NRS 533.050. Water allocations under the statutes are thus dispensed only for a public purpose. *See Lawrence*, 127 Nev. at 405, 254 P.3d at 616.

Second, the state receives fair consideration in allocating water for beneficial use, satisfying *Lawrence*'s second requirement. *See id*. When water is allocated for purposes such as irrigation, power, municipal supply, mining, storage, or recreation, residents in the state are able to grow or purchase food and receive drinking water, electricity, and other resources. Farmers and miners are able to grow their industries, which in turn boosts the state's economy. *See, e.g*., Nev. Dep't of Agric., *Economic Analysis of the Food and Agriculture Sector in Nevada 2019*, at 3 (2018) (noting that "Nevada's food [and] agriculture sector contributed $1.3 billion to the state's economy in 2017"); Nev. Dep't of Taxation, Div. of Local Gov't Servs., *2018-2019 Net Proceeds of Minerals Bulletin* 9 (2019) (indicating that Nevada's mining industry contributed approximately $55.8 million in state taxes in 2018). Nevada's prosperity and progress was dependent on the early mining and agricultural industries, which was contingent on the allocation of water based on beneficial use. *See, e.g.*, *In re Manse Spring & Its Tributaries*, 60 Nev. 280, 290, 108 P.2d 311, 316 (1940) ("Courts appreciate the necessity of requiring that water be beneficially used, because of its importance to the agricultural industry of the state."); *Reno Smelting, Milling & Reduction Works*, 20 Nev. at 275, 21 P. at 319 ("And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the pacific states and territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle . . . ." (internal quotation marks omitted)).

Finally, the dispensation of water under the state's statutory scheme satisfies *Lawrence*'s final requirement that the dispensation "maintain the trust for the use and enjoyment of present and future generations." *See* 127 Nev. at 405, 254 P.3d at 616. As previously discussed, the state's water statutes limit water allocations to those that are put to beneficial use, *see* NRS 533.060, require the State Engineer to reject permits that are unnecessary or detrimental to the public interest, *see* NRS 533.370(2), and limit water rights when water resources are short, abandoned, or being wasted, *see* NRS

534.090; NRS 534.120. Mechanisms are thus in place to ensure the preservation of water for the future. As the state's statutory water scheme reflects *Lawrence*'s requirements, we reject appellants' contention that the statutes effect an abdication of the state's continuous public trust duties.

We therefore hold that Nevada's comprehensive water statutes are consistent with the public trust doctrine.[7]

The state's water statutes recognize the importance of finality in water rights and therefore do not permit reallocation of adjudicated water rights

As part of Nevada's comprehensive water statutes, which we conclude adhere to the public trust doctrine, the Legislature enacted NRS 533.185 to establish a judicial decree regarding a water right permit. Regarding those judicial decrees, NRS 533.210(1) provides that:

> The decree entered by the court, as provided by NRS 533.185, *shall be final and shall be conclusive* upon all persons and rights lawfully embraced within the adjudication; but the State Engineer or any party or adjudicated claimant upon any stream or stream system affected by such decree may, at any time within 3 years from the entry thereof, apply to the court for a modification of the decree . . . .

(Emphasis added.) NRS 533.0245 then prohibits the State Engineer from carrying out his or her duty "in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court."

Respondents argue that the plain language of Nevada's water law statutes prohibit reallocating adjudicated water rights, and we agree. "When the language of a statute is plain and unambiguous, [this] court should give that language its ordinary meaning and not go beyond it." *See City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). NRS 533.210 expressly provides that decreed water rights "shall" be final and conclusive. *See Nat. Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) ("The word 'will,' like the word 'shall,' is a mandatory term, unless something about the context in which the word is used

[7]The dissent errs in construing this opinion as holding that relevant provisions in NRS Chapter 533 supplant the public trust doctrine. Rather, the provisions we address here represent the Legislature's efforts to guide the doctrine's application. And as we conclude that they comport with *Lawrence*'s test, this opinion retains the distinction between the relevant statutes and the public trust doctrine, with which they must comply.

We caution against the view that an allocation necessarily comports with the public trust doctrine because it meets the statutory requirements. Apart from the statutory scheme, individual dispensations must comport with *Lawrence*'s requirements.

indicates otherwise." (internal citation omitted)). The statutes also provide an explicit exception wherein a decree could be modified only within three years, NRS 533.210, and the State Engineer is expressly prohibited from allocating water in a manner that conflicts with such finality, NRS 533.0245. The statutory water scheme in Nevada therefore expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited, or otherwise lost pursuant to an express statutory provision.

We note that such recognition of finality is vital in arid states like Nevada. In *Arizona v. California*, the United States Supreme Court recognized that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States," and "[t]he doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights." 460 U.S. 605, 620 (1983); *see United States v. Alpine Land & Reservoir, Co*., 984 F.2d 1047, 1050 (9th Cir. 1993) ("Participants in water adjudications are entitled to rely on the finality of decrees as much as, if not more than, parties to other types of civil judgments."). Municipal, social, and economic institutions rely on the finality of water rights for long-term planning and capital investments. Likewise, agricultural and mining industries rely on the finality of water for capital and output, which derivatively impacts other businesses and influences the prosperity of the state. To permit reallocation would create uncertainties for future development in Nevada and undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine.

Appellants argue, however, that a right is not exempt from regulation to protect the public welfare simply because it has vested or been adjudicated. Moreover, they argue that water rights are not absolute, but rather relative and usufructuary. We agree that water rights are subject to regulation for the public welfare and are characterized by relative, nonownership rights. *See Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842 (recognizing water right as an "inchoate usufructuary right" and that rights holders do not own or acquire title to water); *Town of Eureka v. Office of the State Eng'r*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992) ("Water rights are subject to regulation under the police power as is necessary for the general welfare."); *In re Manse Spring*, 60 Nev. at 287, 108 P.2d at 315 (noting the state has the right to prescribe how water may be used); *Usufruct*, *Black's Law Dictionary* (11th ed. 2019) ("A right for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it."). Nonetheless, this does not necessarily mean that water rights can be reallocated under the public trust doctrine. Rather, it means that rights holders must continually use water beneficially or lose those rights. We therefore hold that the public trust doctrine does not permit reallocating water

rights already adjudicated and settled under the doctrine of prior appropriation.[8]

We recognize the tragic decline of Walker Lake.[9] But while we are sympathetic to the plight of Walker Lake and the resulting negative impacts on the wildlife, resources, and economy in Mineral County, we cannot use the public trust doctrine as a tool to uproot an entire water system, particularly where finality is firmly rooted in our statutes. We cannot read into the statutes any authority to permit reallocation when the Legislature has already declared that adjudicated water rights are final, nor can we substitute our own policy judgments for the Legislature's.[10]

Second certified question

Because we hold that the public trust doctrine does not permit reallocation, we need not address the second certified question, which asks: "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?" Without reallocation, no rights are abrogated and no takings issue is implicated.

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[8]The dissent mistakenly contends that the matter of reallocation lies beyond the scope of the certified questions and that rephrasing the first question was thus misguided. The underlying dispute involves demands for overappropriated resources that require determining whether water rights may be reallocated from current rights holders. Mineral County sought an annual allocation of minimum flows of 127,000 acre/feet, and, as stated by the Ninth Circuit, its complaint sought to "reopen and modify the final Decree." The Basin does not appear able to meet the county's needs without abrogating the rights of more senior right holders. The county's request would therefore require reallocating water rights. The Ninth Circuit recognized as much in its Amended Certification Order stating, "[T]he remaining issue—whether the Walker River Decree can be amended to allow for certain minimum flows of water to reach Walker Lake—depends on whether the public trust doctrine applies to rights previously adjudicated and settled under the doctrine of prior appropriation and *permits alteration of prior allocations*." (Emphasis added.) Rephrasing the certified question thus served to "streamline [the questions certified] in order to best resolve the legal issues presented." *In re Fontainebleau Las Vegas Holdings*, 128 Nev. at 571-72, 289 P.3d at 1209.

[9]Mark Twain once observed regarding Walker Lake and other lakes in Nevada, "Water is always flowing into them; none is ever seen to flow out of them, and yet they remain always level full, neither receding nor overflowing." Mark Twain, *Roughing It*, ch. XX (Project Gutenberg 2006) (ebook) (1872). Unfortunately, this is no longer the case, and our state's water is now more precious than ever.

[10]While we recognize that the dissent would urge that we adopt a model more freely permitting reconsideration of prior allocations, such as that discussed in *National Audubon Society v. Superior Court*, 658 P.2d 709, 732 (Cal. 1983), we decline to diminish the stability of prior allocations and detract from the simultaneous operation of both prior appropriation and the public trust doctrine, *see Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring).

CONCLUSION

Nevada's statutory scheme already incorporates the public trust doctrine, giving force to constitutional and inherent limitations on state sovereignty that protect the public interest in the waters of the state, both navigable or nonnavigable, as well as the lands underneath navigable waters. To allow the state to otherwise allocate waters without due regard for the public trust would permit the state to evade its fiduciary duties, and this we cannot sanction.

In implementing the public trust doctrine, our state's water rights statutes forbid reallocating adjudicated water rights. The public has an interest in the effective use of public trust resources. This requires that allocations of water rights have certainty and finality so that rights holders may effectively direct water usage to its beneficial use, without undue uncertainty or waste. Our state's application of the public trust doctrine thus protects the waters of Nevada in order to maintain them in trust for the use and enjoyment of present and future generations.

In response to the first certified question, as reworded, we answer that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. Because we answer the first question in the negative, we need not address the second certified question.

Gibbons, Hardesty, and Cadish, JJ., concur.

Pickering, C.J., with whom Silver, J., agrees, concurring in part and dissenting in part:

I.

The certified question from the Ninth Circuit is: "Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Because this court's answer to such a question is only appropriate where it "may be determinative of the cause then pending in the certifying court," NRAP 5, we must accept and address the question in the limited context in which it arises. *See Peone v. Regulus Stud Mills, Inc.*, 744 P.2d 102, 103 (Idaho 1987) (cautioning against deciding extraneous matters that "would result in an advisory opinion on a question not certified"). Here, the question arises from an appeal from a district court order granting a motion to dismiss, on the basis that the public trust doctrine gives Mineral County no claim upon which relief might be granted in respect to its prayer that the Walker River Basin decree court adopt measures to protect Walker Lake water levels. Given this procedural context, the majority opinion should have been limited to addressing whether the public trust doctrine applies to, and to what extent it may be determinative of,

Mineral County's request for consideration of the health of Walker Lake in the administration of the waters in the Basin.

Instead, the majority rephrases the Ninth Circuit's question to ask: "Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Majority op. at 506. Thus rephrased, the question effectively asks whether the public trust doctrine allows the Walker River Decree Court to revoke senior adjudicated upstream rights. But, as Mineral County argues, it does not seek creation of a super-senior water right to override those already adjudicated and settled in the underlying case. Rather, consistent with the relevant procedural posture, Mineral County seeks a range of relief aimed at facilitating the Walker River Decree Court's fulfillment of this state's public trust duty with respect to the precious natural resource that is Walker Lake. As Mineral County explains, an order granting it the relief sought in its complaint-in-intervention could take a number of different forms.

> Such an order might involve, without limitation: (1) a change in how surplus waters are managed in wet years and how flows outside of the irrigation season are managed; (2) mandating efficiency improvements with a requirement that water saved thereby be released to [Walker Lake]; (3) curtailment of the most speculative junior rights on the system; (4) a mandate that the State provide both a plan for fulfilling its public trust duty to Walker Lake and the funding necessary to effectuate that plan; and/or (5) an order requiring water rights holders to come up with a plan to reduce consumptive water use in the Basin as was done by the [State Engineer] in Diamond Valley.

Mineral County further represents that the Walker Basin Restoration Program (WBRP) has acquired by purchase half of the water rights needed to fulfill Walker Lake's demand, but that WBRP is facing obstruction by the federal water master and exorbitant charges, such that not one drop of the purchased water has reached Walker Lake. If proven, these allegations—which we should assume are true for purposes of answering the Ninth Circuit's certified question, *see Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012) (in reviewing an order granting a motion to dismiss, the Ninth Circuit accepts "all factual allegations in the complaint as true")—support directives by the Walker River Decree Court to the water master to facilitate delivery to Walker Lake of the water purchased for it without further delay and expense.

Notably, none of these remedial measures would require a "reallocation of rights," as framed by the majority. And thus, as a threshold matter, I cannot agree that NRAP 5 authorizes the court to rephrase and then answer a question the underlying case does

not present—the revocation of vested water rights is not at issue, and this court need not answer whether the public trust doctrine can effect the same.

II.

But there is another, more substantive problem with the revised question the majority asks itself: As revised, the question suggests an all-or-nothing approach that is fundamentally inconsistent with the public trust doctrine. Nevada's appropriative water rights system and the public trust doctrine developed independently of each other. The goal is to balance them and their competing values, not set them on a collision course.

> [B]oth the public trust doctrine and the [prior appropriation] system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.

Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 723-24 (Cal. 1983). Just as the system of prior appropriation "may be necessary for efficient use of water despite unavoidable harm to public trust values, . . . an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." *Id.* at 728. The rephrased question misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine.

A.

I begin with the points on which the majority and I agree—this court has previously made plain that the public trust doctrine inheres in Nevada law. *Lawrence v. Clark Cty.*, 127 Nev. 390, 398, 254 P.3d 606, 612 (2011); *see Mineral Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 247, 20 P.3d 800, 808 (2001) (Rose, J., concurring). The doctrine stems from "the most fundamental tenet of Nevada water law," *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997)—that is, public ownership of this state's water sources—because, necessarily correspondent to this public ownership is the state's fiduciary obligation "to protect the people's common heritage of streams, lakes, marshlands and tidelands," *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (quoting *Audubon*, 658 P.2d at 723-24); *see also Farm Inv. Co. v. Carpenter*, 61 P. 258, 265 (Wyo. 1900)

("There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the state."). I likewise concur with the majority that these doctrinal principles are founded in Nevada's Constitution and "inherent from inseverable restraints on the state's sovereign power." *Lawrence*, 127 Nev. at 398, 254 P.3d at 612; majority op. at 520.

But from there the majority and I part company. Citing Justice Rose's limited statement that the public trust encompasses both navigable water and "non-navigable tributaries that feed navigable bodies of water," *Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 807-08 (Rose, J., concurring) (citing *Audubon*, 658 P.2d at 721) (concluding that "the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries"), the majority proceeds to "*clarify* that the public trust doctrine applies to *all waters of the state, whether navigable or nonnavigable*, and to the lands underneath navigable waters." Majority op. at 512 & n.4 (emphases added). This "clarification" marks a significant expansion of the public trust doctrine—one that increases the conflict the majority posits between the public trust doctrine and Nevada's prior appropriation system. While the principle is consistent with doctrine emerging in a few jurisdictions, *see In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (holding that the "public trust doctrine applies to all water resources without exception or distinction"); *Parks v. Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) (holding that "all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public"), it is not universally adopted, *see, e.g.*, *Audubon*, 658 P.2d at 721 n.19; *Parks*, 676 N.W.2d at 839-41 (collecting cases). *See also* Joseph Regalia, *A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts*, 108 Ky. L.J. 1, 14 (2020) (discussing variability among western states with regard to waters covered by the public trust doctrine). But here, the question of expanding the public trust doctrine to reach all water without regard to navigability is not presented: No one disputes, for purposes of deciding the certified questions in this case, that Walker River and Walker Lake encompass navigable waters, fed by nonnavigable surface tributaries. We could meaningfully answer the ultimate question—even as framed by the majority—by simply assuming the navigability of waters in the Basin for purposes of traditional public trust doctrine analysis. *Figueroa-Beltran v. United States*, 136 Nev. 386, 467 P.3d 615 (2020) (noting that when deciding certified questions, the court "accept[s] the facts as stated in the certification order and its attachments") (quoting *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014)); *see Audubon*, 658 P.2d at 721 n.19 (declining to "consider the question

whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to nonnavigable streams" where the facts did not require it to do so).

B.

Having recast the certified question, and then expanded the reach of the public trust doctrine beyond the call of that question to reach all waters, even groundwaters not connected to navigable waterways, the majority then subsumes the public trust doctrine in a handful of sections in NRS Chapter 533. Majority op. at 516-17 & n.7. According to the majority, and based on those sections, the Legislature has reposed in the State Engineer the entirety of this state's fiduciary duties to protect and conserve all of Nevada's water sources under the public trust doctrine. *Id.* at 514-15. And under such an approach, so long as the State Engineer executes his discretionary statutory obligations under NRS Chapter 533, *see Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 308, 448 P.3d 1106, 1112 (2019) (noting generally that the State Engineer's discretionary decisions are reviewed deferentially), there is no remedy or action to be taken to protect from the irreversible depletion of this state's most precious natural resource. But this view fundamentally misapprehends the public trust doctrine and its constitutional and sovereign dimensions. *See* Regalia, 108 Ky. L.J. at 20 (noting that the doctrine "is emblematic of fundamental constitutional principles embedded in American democracy").

To begin, the Nevada Constitution expressly limits the Legislature's ability to freely dispose of public resources. *See* Nev. Const. art. 8, § 9 (prohibiting the gift or loan of public property). And this court has made plain that any legislative action that purports to convey property held in trust for the public is therefore subject to judicial review. *Lawrence*, 127 Nev. at 399-401, 254 P.3d at 612-13 (citing *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999)); *see also Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 166-68 (Ariz. Ct. App. 1991). Thus, even assuming that NRS Chapter 533 comports with the public trust doctrine, the doctrine's judicial check would be necessary; the mere existence of water source regulations does not ensure the Legislature's and the State Engineer's compliance with the same. *See Lawrence*, 127 Nev. at 399-401, 254 P.3d at 612-13. Put differently, "[j]ust as private trustees are judicially accountable to their beneficiaries for dispositions of the res, . . . so the legislative and executive branches are judicially accountable for their dispositions of the public trust." *Hassell*, 837 P.2d at 169 (internal citations omitted).

Moreover, it is a well-established principle of separation of powers that a legislature cannot "grant to an officer under its control what it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Accordingly, it cannot be that with the enactment of NRS Chapter 533, the Legislature effectively delegated to an adminis-

trative officer its own public trust obligations and the judiciary's responsibility to police constitutional and sovereign limits on the Legislature's own authority. *San Carlos Apache Tribe*, 972 P.2d at 199 (stating that a legislature cannot "by legislation destroy the constitutional limits on its authority" or "order the courts to make the [public trust] doctrine inapplicable to . . . any proceedings" governing water rights); *Hassell*, 837 P.2d at 166-68 (basing its decision on the separation-of-powers doctrine and a constitutional gift clause nearly identical to Nevada's). As this court stated in *Lawrence*, "[t]he public trust doctrine is . . . not simply common law easily abrogated by legislation." 127 Nev. at 401, 254 P.3d at 613. Rather, it is an "inabrogable attribute of statehood itself." *Hassell*, 837 P.2d at 168; *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (noting that a state cannot abdicate its duties under the public trust doctrine).

The majority does not tackle these principles head-on, instead attempting a sleight of hand. NRS Chapter 533, the majority argues, has functionally replaced the public trust doctrine because its provisions are "consistent with" the public trust doctrine and "satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*." Majority op. at 513. The majority further attempts to misdirect that the values the public trust doctrine protects are totally commensurate with the "public interest" as considered in NRS Chapter 533. *See id.* at 517 n.7. In so doing, the majority equates the concepts in error—an appropriation could conceivably be in the public interest while still resulting in unavoidable and unjustified harm to public trust values. *See Audubon*, 658 P.2d at 728. For example, while it could theoretically be in the public interest to allocate water rights to facilitate cattle grazing, increase herd size, and ultimately reduce the price of beef for dinner, if done without regard to the deleterious impacts of unsustainable watering and grazing on Nevada's natural resources, such action could also be entirely inconsistent with public trust principles.

In any case, while it is true that the cited water statutes and public trust doctrine may share and even promote the same core principles, this shared purpose alone "do[es] not override the public trust doctrine or render it superfluous." *Water Use Permit Applications*, 9 P.3d at 445. To the contrary, the public trust doctrine, enforced by a separate and independent judiciary, is one intentionally endowed with flexibility—to consider a multitude of needs and impacts, to encompass more and different protections over this state's water sources, to check the actions by legislative and executive actors for absolute compliance with their fiduciary obligations—that those limited statutory sections cited lack. *See Kootenai*, 671 P.2d at 1095 (noting that "mere compliance by [the State Engineer] with [its] legislative authority is not sufficient to determine if [its] actions comport with the requirements of the public trust doctrine"); *see also* Rebecca LaGrandeur Harms, *Preserving the Common Law Public*

Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes, 39 Environs: Envtl. L. & Pol'y J., 97, 113 (2015) (recognizing the "unique utility of the public trust doctrine in its original common law form"—"common law doctrine has been able to expand to cover more natural resources and public uses").

Perhaps even more concerning is that the rigid statutory protections the majority would endow with sovereign state functions can be repealed, *see Audubon*, 658 P.2d at 728 n.27 (noting same concern); what of this storied doctrine then? I cannot fathom relocating this long-standing limitation on sovereign authority, *see* Regalia, 108 Ky. L.J. at 28 (discussing purpose of doctrine), to such shaky ground. No doubt the public trust doctrine may "inform [the] interpretation [of NRS Chapter 533], define its permissible 'outer limits,' and justify its existence." *Water Use Permit Applications*, 9 P.3d at 445. But it cannot be that this state's affirmative fiduciary obligations over certain water sources—obligations supervised by the judiciary and founded on a century of common law, inherent sovereign authority, and the state constitution—are entirely subsumed by a handful of statutes governing the specific duties of an administrative agent.

Indeed, that the public trust doctrine exists as one part of an integrated system of water law that also includes NRS Chapter 533 is the only logical outcome—as Mineral County stated so aptly in its reply brief, the "[i]nclusion of a provision in statutory law does not ensure execution of that provision in satisfaction of the State's public trust duties." And that principle is well-illustrated here. The public trust doctrine demands that some responsible state entity take action to preserve the public value of Walker Lake, yet all parties recognize its continuing decline despite the State Engineer's statutory obligations. The doctrine does not permit the Walker River Decree Court to simply stand by and watch the ruination of public resources, but what enforcement avenue has the majority left here? Simply put, if the doctrine does not empower the Walker River Decree Court's independent supervision of the State Engineer's management of rights in Basin waters, it is illusory; the majority's recognition of its history and scope, mere lip service.

Unsurprisingly then, and as many cases cited above suggest, courts in other states have held that the public trust doctrine is one part of an integrated system of water laws, which system also includes, in part, a statutory system of appropriative water rights. *See, e.g.*, *Audubon*, 658 P.2d at 732; *Parks v. Cooper*, 676 N.W.2d 823, 838 (S.D. 2004) (aligning South Dakota's jurisprudence with other jurisdictions'). And despite the interconnectedness of the doctrine and appropriative systems, these foreign courts have still recognized that the public trust doctrine exists "independently of any statutory [water source] protections supplied by the legislature." *See Water Use Permit Applications*, 9 P.3d at 444 (collecting cases); *see also*

Kootenai, 671 P.2d at 1094; *Hassell*, 837 P.2d at 168; *Cooper*, 676 N.W.2d at 838 (collecting cases).

This court has repeatedly reaffirmed that Nevada looks to the water law of its western sister states to interpret and understand its own. *See Happy Creek*, 135 Nev. at 304, 448 P.3d at 1109. And indeed, this court reviewed and previously approved of the reasoning in some of those cases cited above. *Mineral Cty.*, 117 Nev. at 247 & nn.4-5, 20 P.3d at 808 & nn.4-5 (Rose, J., concurring) (discussing and favorably citing *Audubon*); *Lawrence*, 127 Nev. at 405-06, 254 P.3d at 616 (favorably citing the reasoning in *Hassell*). This court should not easily set aside such analysis, *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (stating that, generally, this court "will not overturn [precedent] absent compelling reasons for so doing"), or the well-reasoned decisions underlying the same. But the majority makes no attempt to explain how the principles enunciated in *Audubon*, *Hassell*, and *Kootenai* have become inapplicable in the years since we first highlighted them, citing *Audubon* and *Hassell* only in passing and omitting any mention of *Kootenai*.

C.

Setting aside these considerations of sovereign responsibilities, separation of powers, and stare decisis, the majority points to the importance of "finality" in water-rights determinations. In fact, the majority implicitly holds that this principle outweighs every other already mentioned, to require the merger of the public trust doctrine and NRS Chapter 533. The majority relies on a United States Supreme Court decision involving California and Arizona for its proposition that the necessity of finality of water rights supersedes the effective application of an inseverable constitutional restraint on state power. Majority op. at 518 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). But the precedent of both those states, cited and discussed above, establishes that the public trust doctrine exists independently of their respective state water statutes, and even despite the importance of finality. *Hassell*, 837 P.2d at 169 (noting that "[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary" (quoting *Kootenai*, 671 P.2d at 1092)); *Audubon*, 658 P.2d at 723 (recognizing the "continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust").

The posited dichotomy is thus a false one. Crediting Mineral County's position with respect to the public trust doctrine does not require that the decree court revoke senior adjudicated Walker Basin water rights. It bears repeating: Mineral County names several approaches that would better protect the value of Walker Lake *without disturbing vested rights or impinging on principles of finality.*

It is not now this court's responsibility—or the Ninth Circuit's—to determine whether Mineral County can prevail across the board on its claims and obtain all the relief it seeks. *See Skilstaf*, 669 F.3d at 1014 (holding that, in reviewing an appeal from an order granting a motion to dismiss, the reviewing court accepts as true the non-moving party's allegations). But, if Mineral County can demonstrate that conservation of Walker Lake would be enhanced by using these measures, and that the administration of the Basin contrary to those objectives contravenes the public trust doctrine, it is entitled to proceed. In any case, and as established, the Walker River Decree Court cannot simply ignore its obligations under the doctrine because in application the facts are complicated. *See Ill. Cent. R.*, 146 U.S. at 453 ("The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.").

Bearing all this in mind, I do not deem trivial the concerns of Basin rights holders regarding finality, or deny that their reliance on prior allocations of Basin waters may be substantial. To the contrary, such concerns should enter into any reexamination of authorized diversions in the Basin undertaken by the Walker River Decree Court according to the public trust doctrine. *See Audubon*, 658 P.2d at 729. But, under our system of water rights, a prior appropriation is never permanent—even vested rights are granted only to the extent their holders do not over-appropriate or waste water. *See Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). Accordingly, the existence of such appropriations cannot be said to entirely preclude the Walker River Decree Court from addressing public trust concerns. *See id.* ("It is clear that some responsible body ought to reconsider the allocation of the waters of the . . . Basin. No vested rights bar such consideration.") (footnote omitted).

III.

Based on the discussion offered above, I would answer the Ninth Circuit's first question as follows: The public trust doctrine is one part of Nevada's integrated system of water laws, and assuming the truth of the facts presented, the doctrine protects Walker Lake from harm caused by diversions of Basin waters, whatever the cause, and that this interest must be cast into the balance in managing the Walker River Basin, even though doing so may impinge on historical practices in utilizing vested water rights. I recognize that my response to the Ninth Circuit's first question begs an answer to its second question, which the majority declined to answer—namely, "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?"

In *Audubon*, the California Supreme Court offered the definitive discussion of the delicate balance an independently supervised public trust doctrine helps strike in an integrated system of water law. *See Audubon*, 658 P.2d at 727. With regard to the powers of the legislature and authorized executive agency, the California court noted that they necessarily have "the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream." *Audubon*, 658 P.2d at 727. Indeed, the court admitted that "[t]he population and economy of [a] state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." *Id.* But weighing against these economic considerations is the truth, demonstrable even by the precipitous decline of Walker Lake, that "an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests." *Id.* at 728. Thus, the public trust doctrine requires that the state affirmatively reassess the availability of water resources, as necessary to protect the public interest, "in light of current knowledge or . . . current needs," *id.*, and demand feasible accommodations as necessary.

In this case, Mineral County represents that the objectives of the public trust reassessment may be achieved in any one of several different ways. But importantly, whatever solution the Walker River Decree Court ultimately adopts, it would not demand the creation of a new and superior water right that would upset the prior "allocation of rights" and require a complete restructuring of Nevada water law, as framed by the majority. As discussed above, the limited factual record before this court indicates that the Basin waters are publicly held navigable or nonnavigable surface water tributaries, such that any holders of usufructuary rights in the waters acquired them subject to the public trust in the first instance. *See Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring); *cf. Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842 ("Indeed, even those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use."). Even the vested water rights at issue are only worth the maximum amount of water available for allocation in the Basin, which water source, according to the record before this court, is held in public trust. Thus, while enforcement of the doctrine could potentially alter the amount of Basin water available for private use—as Mineral County points out, just as "any other natural constraint on the already variable availability of water to supply private appropriations"—it does not effect a reallocation of vested water rights. *Audubon*, 658 P.2d at 723 (stating that "while [a rights holder] may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no

vested right to bar recognition of the trust or state action to carry out its purposes"). Accordingly, even to the extent the Walker River Decree Court would act to protect Walker Lake pursuant to the doctrine by limiting the availability of Basin waters, it would not divest anyone of any legal title they previously held. *Id.* ("Except for those rare instances in which a grantee may acquire a right to use former trust property free of restrictions, the grantee holds subject to the trust . . . ."); *see also* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 Pace Envtl. L. Rev. 649, 650-51 (2010) (stating that "[c]ourts applying [this] doctrine demand all feasible accommodations to preserve and protect trust assets, but they do not attempt to eliminate private property. In fact, virtually all applications of the public trust doctrine leave possession of private property unchanged" and collecting cases (internal footnote omitted)).

The answer to the Ninth Circuit's second question then, is that enforcement of the public trust doctrine here does not result in a "reallocation of water rights," much less implicate the constitutional takings doctrine.

* * *

In sum, "[t]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state . . . ." *Kootenai*, 671 P.2d at 1094 (quoting *Audubon*, 658 P.2d at 723-24). And, as the majority recognizes, the duty in question arises from constitutional sources and inherent sovereign authority to protect the interests of "present generations [and] those to come." *Hassell*, 837 P.2d at 169. Moreover, "[t]he check and balance of judicial review" are essential components of the state's fiduciary duties, particularly where water resources are concerned, "provid[ing] a level of protection against improvident dissipation of an irreplaceable res." *Id.* I therefore cannot agree that the Legislature can implicitly bestow these responsibilities on an executive agent, eliminating any judicial oversight. Even apart from this, Mineral County does not request a "reallocation of rights," only that the existing decree be managed in accordance with long-standing principles.

Accordingly, while I concur in part, I otherwise respectfully dissent.

CHARLES JESSEPH; AND CHARLES CHURCHWELL, APPELLANTS, *v.* DIGITAL ALLY, INC., RESPONDENT.

No. 78480

September 17, 2020 472 P.3d 674

Appeal from a district court order dismissing appellants' complaint to recover attorney fees under the substantial benefit doctrine. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

HARDESTY, J., with whom PICKERING, C.J., agreed, dissented in part.

Aldrich Law Firm, Ltd., and *John P. Aldrich*, Las Vegas; *Purcell Julie & Lefkowitz LLP* and *Steven J. Purcell, Douglas E. Julie*, and *Robert H. Lefkowitz*, New York, New York, for Appellants.

Armstrong Teasdale LLP and *Jeffrey F. Barr*, Las Vegas; *Iglody Law, PLLC*, and *Lee Iglody*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, SILVER, J.:

Generally, attorney fees in Nevada must be awarded under a statute, rule, or contract authorizing the award. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). The substantial benefit doctrine provides an exception to this rule in shareholder derivative actions, allowing successful shareholder plaintiffs who confer a substantial benefit on all shareholders of the defendant corporation to recover attorney fees in appropriate cases. *Id.* at 90-91, 127 P.3d at 1063; *Johnson v. U.S. Dep't of Hous. & Urban Dev.*, 939 F.2d 586, 590-91 (8th Cir. 1991) (relied on in *Thomas*). In this appeal, we first consider whether appellants' independent claim for attorney fees is a cognizable claim in Nevada. We then address whether a party must file litigation before the substantial benefit doctrine can apply. We conclude that appellants' claim for attorney fees is a cognizable, independent claim under these facts, but that the district court properly dismissed the claim because predicate litigation is necessary to obtain relief under the substantial benefit doctrine and predicate litigation was absent here.

FACTS

Appellants Charles Jesseph and Charles Churchwell owned or own common stock in respondent Digital Ally, a Nevada corporation that produces digital video imaging and storage products. Digital Ally sought to amend its articles of incorporation and change its capital structure twice: one amendment increased the amount of Digital Ally common stock, and the other created shares of blank check preferred stock. Under the majority vote requirement for the amendments, if the beneficial holders of Digital Ally stock did not affirmatively submit voting instructions to their brokers, the brokers themselves would not have discretionary authority to vote on the amendments, thus resulting in a "broker non-vote" for those shares.

Digital Ally reported that a majority of stockholders approved both amendments. However, it was later discovered that Digital Ally permitted brokers to vote in favor of the amendments even when beneficial owners did not instruct them to. Neither amendment would have received the necessary votes for approval without the invalid broker votes. After this discovery, Jesseph and Churchwell served a demand on Digital Ally, asserting that the amendments were not validly approved, and advised Digital Ally that they would commence litigation unless it took corrective action. In response, Digital Ally admitted that the amendments were not validly passed and rescinded them.[1]

After Digital Ally resolved the issues noted in their demand letter, Jesseph and Churchwell filed suit against Digital Ally. Their sole claim for relief was a cause of action titled "Attorneys' Fees." Jesseph and Churchwell claimed they were entitled to an award of $250,000 in attorney fees because their demand letter to Digital Ally "conferred a fundamental and substantial benefit on the Company's stockholders." In essence, they alleged that, but for the corrective actions their demand letter caused, the company would have become unstable and exposed to myriad claims, including damages, due to its failed capital structure. Jesseph and Churchwell alleged that because their actions forced Digital Ally to take corrective action and thereby saved it from substantial harm, they were entitled to attorney fees under the substantial benefit doctrine.

Digital Ally moved to dismiss under NRCP 12(b)(5), arguing that, because Jesseph and Churchwell had not instituted litigation to obtain the substantial benefit, the doctrine did not apply and their claim failed. The district court granted the motion, finding that "predicate litigation is an essential element to maintaining a claim for attorney's fees under the substantial benefit doctrine found in Nevada common law, and it is undisputed that the [c]omplaint does not allege any predicate litigation." Jesseph and Churchwell now

[1]Digital Ally resubmitted both amendments for shareholder approval, but the shareholders approved only one of the amendments.

appeal, arguing that predicate litigation is not a prerequisite to an award of attorney fees under the substantial benefit doctrine and, even if it is, their demand letter should be considered litigation for purposes of the doctrine.

DISCUSSION

This court reviews de novo a district court's order granting a motion to dismiss, and the order will not be upheld "unless it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief." *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (third alteration in original) (quoting *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)). In reviewing an order granting a motion to dismiss pursuant to NRCP 12(b)(5), this court will draw every reasonable inference in the plaintiff's favor. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

This court analyzes a claim by its substance, not its title, and the amount in controversy was met

Digital Ally first argues that we should affirm the district court's dismissal order because it did not have subject matter jurisdiction over what Digital Ally refers to as Jesseph and Churchwell's "independent claim for attorney[ ] fees." Specifically, Digital Ally argues that Jesseph and Churchwell have not met the monetary threshold required for subject matter jurisdiction in Nevada's district courts. Further, Digital Ally asserts that awarding attorney fees is a remedy, not an independently actionable claim.

Here, although the relief requested is an award of attorney fees, the claim itself is that Jesseph and Churchwell conferred a substantial benefit on Digital Ally's shareholders and are entitled to the payment of fees incurred in creating that benefit. *See Thomas*, 122 Nev. at 91, 127 P.3d at 1063 (providing that the doctrine applies when a party's successful actions confer a substantial benefit on an ascertainable class). And the claim is not untenable solely because Jesseph and Churchwell titled the claim as one for attorney fees, rather than as a claim for relief under the substantial benefit doctrine. Indeed, "this court has consistently analyzed a claim according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 809, 312 P.3d 491, 498 (2013).

Additionally, the amount-in-controversy requirement would not bar the lawsuit here because Jesseph and Churchwell's complaint claims they conferred a substantial benefit on the corporation, which warrants a $250,000 fee award. This amount well exceeds the jurisdictional threshold for Nevada's district courts. *See* Nev. Const. art. 6, § 6(1) (granting the district courts original jurisdiction over matters outside the justice courts' original jurisdiction); NRS 4.370(1)(b)

(providing that Nevada's justice courts have jurisdiction over cases seeking damages of $15,000 or less); *Morrison v. Beach City LLC*, 116 Nev. 34, 38, 991 P.2d 982, 984 (2000) (holding that a claim should only be dismissed for not meeting the amount-in-controversy requirement when it "appear[s] to a legal certainty that the claim is worth less than the jurisdictional amount"). Digital Ally's argument that attorney fees cannot be included to meet the amount-in-controversy requirement, relying on *Royal Insurance v. Eagle Valley Construction, Inc.*, 110 Nev. 119, 120, 867 P.2d 1146, 1147 (1994), fails here. *Royal Insurance* addressed a plaintiff's argument that its request for attorney fees and costs *incurred in that case* could be used to meet the jurisdictional requirement. *See id.* Here, Jesseph and Churchwell's claimed damages are not for attorney fees incurred in litigating their complaint, and therefore can be properly included to meet the amount-in-controversy requirement. *See id.* (recognizing that the amount-in-controversy requirement focuses on the "*damage claimed*" (emphasis in original) (quoting NRS 4.370(1)(b))). Thus, we decline to affirm the district court's dismissal order on the basis that it lacked jurisdiction over the complaint.

The substantial benefit doctrine does not allow for attorney fees absent predicate litigation

We now turn to the primary issue on appeal: whether the substantial benefit doctrine requires predicate litigation before shareholders can recover attorney fees. Jesseph and Churchwell argue that predicate litigation is not required or that their demand letter should constitute litigation for purposes of the doctrine. We disagree.

"Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing [the] award." *Thomas*, 122 Nev. at 90, 127 P.3d at 1063. The judicially created "substantial benefit doctrine" is an exception to the American rule. *Id*. at 90-91, 127 P.3d at 1063. "This doctrine allows recovery of attorney fees when a successful party confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Id.* at 91, 127 P.3d at 1063 (internal quotation marks omitted).

To recover an award of attorney fees under the doctrine, a party must demonstrate that "(1) the class of beneficiaries is small in number and easily identifiable; (2) the benefit can be traced with some accuracy; and (3) the costs can be shifted with some exactitude to those benefiting." *Id.* (internal quotation marks omitted). Additionally, "to qualify for the substantial benefit exception to the American rule . . . the *prevailing party* must show that the losing party has received a benefit from the *litigation*." *Id.* at 85, 127 P.3d at 1060 (emphases added). The substantial benefit exception is appropriate in shareholder actions where "the successful shareholder plaintiff

confers a benefit on all shareholders of the defendant corporation." *Johnson*, 939 F.2d at 590-91 (recognizing that shareholders actions and unions make up the "typical substantial benefit case").

We have addressed the substantial benefit doctrine in *Thomas* and *Guild, Hagen & Clark, Ltd. v. First National Bank of Nevada*, 95 Nev. 621, 600 P.2d 238 (1979), and, on both occasions, we considered the doctrine where predicate litigation occurred. *Thomas*, 122 Nev. at 85, 127 P.3d at 1060 (noting that the parties raised the substantial benefit doctrine as the basis for their attorney fees and costs motion following successful litigation); *Guild*, 95 Nev. at 622, 600 P.2d at 239 (noting the party filed the request for attorney fees based on the substantial benefit doctrine after successfully litigating a claim in an estate case). The facts of these cases, therefore, did not require us to address whether the substantial benefit doctrine can apply in the absence of predicate litigation.

Although not many courts have addressed the issue, of the ones that have, the majority deny fee recovery absent filed litigation. For instance, in *Foley v. Santa Fe Pacific Corp.*, a division of the Illinois Appellate Court, interpreting Delaware law, held that "[a]bsent the filing of an underlying meritorious lawsuit, there can be no suit for the recovery of fees under the [substantial benefit doctrine]," finding no law to support that argument. 641 N.E.2d 992, 996 (1994). The court therefore created a three-step test for determining whether an award of fees is appropriate under the substantial benefit doctrine, which made clear that predicate litigation was required: "(1) the action was meritorious when filed; (2) a benefit is produced in favor of the corporation or the shareholders; and (3) there is a causal connection between the litigation and the claimed benefit." *Id.* at 995; *see also Kaufman Malchman & Kirby, P.C. v. Hasbro, Inc*., 897 F. Supp. 719, 723-24 (S.D.N.Y. 1995) (recognizing that New York does not permit fee recovery when plaintiff's demand letter produced benefit for corporation, but plaintiff did not actually institute a lawsuit).

The Alaska Supreme Court has also expressed that predicate litigation is necessary before receiving an award of attorney fees in this context. *See Jerue v. Millett*, 66 P.3d 736, 747-48 (Alaska 2003). There, plaintiff shareholders were denied attorney fees because they failed to make a demand on the defendant corporation prior to filing suit. *Id.* at 748. The court explained, in a hypothetical similar to the facts present here, where no suit was filed but the shareholders made a successful demand, that if plaintiff shareholders make a demand and "the directors promptly take curative action that satisfies the shareholder's concerns, there would be no suit and clearly no attorney's fees awarded to the shareholder." *Id.* at 748. The court further reasoned that "if the hypothetical shareholder who satisfies the demand procedure is not entitled to attorney's fees, it is inequitable to award fees to shareholders who failed to make a demand or prove that it was excused." *Id.*

In another example, a corporation's shareholders made "inquiries" regarding the low rates the corporation charged for transportation, and in order to prevent a derivative lawsuit, the corporation took action to obtain higher rates for its services. *Ripley v. Int'l Rys. of Cent. Am.*, 227 N.Y.S.2d 64, 68 (App. Div. 1962). The New York appellate court considering that matter held that, although the demand caused the corporation to take action, the shareholders were not entitled to receive attorney fees for making the demand. *Id.* The court ruled that "[i]t would be unwise to authorize compensation to counsel for a stockholder whenever management took action beneficial to the corporation as a result of a request or demand by a stockholder." *Id.* Further, "[t]he requirement that a stockholder make a demand is to afford the corporation an opportunity to act, and if the corporation does act it makes further proceedings on the part of a stockholder unnecessary." *Id.*

We agree with these cases and adopt the "no suit, no fee" approach. Public policy also weighs in favor of our decision. When a party files a shareholder derivative lawsuit, the complaint must set out the party's efforts, or reasons for a lack of effort, to obtain the action the party desires. NRS 41.520(2) (discussing the required contents of a shareholder derivative complaint); NRCP 23.1 (addressing the procedure for filing a shareholder derivative action). The purpose of encouraging shareholders to make their demands before filing a complaint is to give the corporation an opportunity to correct any alleged mistakes on its own accord without judicial intervention. *See Ripley*, 227 N.Y.S.2d at 68; *see also Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633, 137 P.3d 1171, 1179 (2006) (explaining that the demand requirement allows the corporation to manage its own affairs without judicial interference), *abrogated on other grounds by Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 72-73, 458 P.3d 336, 340 (2020). Indeed, by "promoting . . . alternate dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations." *Shoen*, 122 Nev. at 633, 137 P.3d at 1179 (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000)). Permitting fees without predicate litigation hinders that purpose by exposing the corporation to fees and potential litigation regarding those fees when receiving a demand letter, regardless of whether the corporation corrects the mistakes alleged in the demand. Permitting fees without predicate litigation also encourages "strike suits," where shareholders demand certain actions from the corporation via a derivative lawsuit and corporations are encouraged to settle quickly in order to avoid the potential expense of attorney fees. *See Galfand v. Chestnutt*, 402 F. Supp. 1318, 1331 (S.D.N.Y. 1975) (noting that the demand requirement "prevent[s] the initiation and maintenance of strike suits

brought solely to . . . extract legal fees"), *aff'd & modified on other grounds by Galfand v. Chestnutt Corp*., 545 F.2d 807 (2d Cir. 1976). And permitting fees under the substantial benefit doctrine absent predicate litigation would disincentivize corporations' directors from correcting mistakes based on pre-litigation shareholder demands, as doing so may instantly open the corporations up to costly fees. *Kaufman*, 897 F. Supp. at 724.

Moreover, the very context of the substantial benefit doctrine suggests it does not apply when there is no predicate litigation. The doctrine is an exception to the American rule that "[e]ach litigant pays his [or her] own attorney's fees, win or lose, unless a statute or contract provides otherwise," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253 (2010), and would therefore only apply if the American rule would not otherwise allow a *litigant* to recover attorney fees. *See Thomas*, 122 Nev. at 90, 127 P.3d at 1063 (noting that the substantial benefit doctrine is an exception to the American rule regarding attorney fee awards). Without filing suit, one never becomes a litigant subject to the American rule for awarding attorney fees or the substantial benefit exception to that rule. Because Jesseph and Churchwell never advanced the complaints from their demand letter into a formal shareholder complaint filed with the district court, they are not entitled to an attorney fees award under the American rule or its exceptions.

Additionally, our decision comports with our ruling in *Thomas*. Although the discussion there is in the context of litigation, *Thomas* supports Digital Ally's assertion here, that litigation is necessary to obtain an award of attorney fees under the substantial benefit doctrine. Notably, we clarified that in cases involving shareholders, "[w]hat is important . . . is that the class of beneficiaries [i.e., shareholders who pay the attorney fees assessed against the corporation] is *before the court* in fact or in some representative form." *Id.* at 91, 127 P.3d at 1063 (emphasis added) (internal quotation marks omitted). After stating the importance of the shareholders being *before the court*, we provided the substantial benefit doctrine's three-part test. *Id.* This lends further support for our conclusion that the doctrine applies only in circumstances where the party seeking attorney fees has initiated litigation. And, as applied here, Digital Ally's shareholders who possibly benefited from Jesseph and Churchwell's actions are now being asked to share in paying attorney fees when they have not been before the court in any manner.

We also decline Jesseph and Churchwell's invitation to view their demand letter as "litigation" for purposes of the substantial benefit doctrine. By its definition, "litigation" does not encompass a pre-litigation demand letter. *See Litigation*, *Black's Law Dictionary* (11th ed. 2019) (defining "litigation" as "[t]he process of carrying on a lawsuit"). And doing so would also cut against the considerations laid out in this opinion, such as providing the ability for a cor-

poration to correct a mistake before incurring costly litigation fees, *see* NRS 41.520(2); *Kaufman*, 897 F. Supp. at 724; *Jerue*, 66 P.3d at 748, and discouraging strike suits, *see Galfand*, 402 F. Supp. at 1331. Based on the foregoing, the district court properly dismissed Jesseph and Churchwell's complaint for failure to state a claim because they could not prove entitlement to relief under the substantial benefit doctrine without alleging predicate litigation. *See* NRCP 12(b)(5); *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

CONCLUSION

Jesseph and Churchwell's complaint raised a claim recognized by Nevada law—relief under the substantial benefit doctrine—and its damages claim met the jurisdictional threshold for Nevada's district courts. Their complaint was therefore not subject to dismissal on those bases. However, reason and policy dictates that an award of attorney fees under the substantial benefit doctrine must be based on predicate litigation. Applying that holding to the facts of this case is straightforward—no suit, no fee. In the present complaint, the sole point of which is to recover attorney fees for their earlier demand letter, Jesseph and Churchwell do not claim they filed a lawsuit against Digital Ally based on the allegations made in that demand letter. Without alleging predicate litigation, Jesseph and Churchwell are not entitled to attorney fees under the substantial benefit doctrine, and we therefore affirm the district court's order dismissing Jesseph and Churchwell's complaint.

Gibbons, Parraguirre, Stiglich, and Cadish, JJ., concur.

Hardesty, J., with whom Pickering, C.J., agrees, concurring in part and dissenting in part:

I concur in the majority's conclusions that Jesseph and Churchwell raised a cognizable claim under the substantial benefit doctrine and that the damages sought met the Nevada district court's jurisdictional threshold.

I respectfully dissent, however, as to the majority's insistence that a substantial benefit claim requires the filing of a predicate lawsuit. Instead, I would follow the reasoning of the Delaware Chancery Court in *Bird v. Lida, Inc.*, 681 A.2d 399, 405 (Del. Ch. 1996), permitting a shareholder to sue for attorney fees following a demand letter without formal litigation. As the chancery court observed in rejecting a similar "filed litigation" requirement, the key question is whether the claim was meritorious, not whether the claim was actually filed. *Id.* at 404-05.

Strong public policy supports the *Bird* approach, namely the collective action problem faced by corporations and their shareholders. The collective action problem arises because, although expenditures

on monitoring public companies may benefit the corporation and all shareholders, each shareholder typically owns only a small portion of the corporation and thus has "little incentive to incur those costs himself in pursuit of a collective good." *Id*. at 403. Permitting fees for a successful demand encourages oversight by shareholders of the corporation while at the same time discourages costly litigation. *Id.* at 404. As the *Bird* court observed:

> [I]f we appreciate the collective action problem of shareholders . . . why should the law care whether [plaintiff] conferred a benefit through a meritorious legal claim or through stimulating the board simply to act in a way he correctly thought was advantageous? In either event the collective action problem of shareholders was overcome and a substantial benefit was realized by the corporate collectivity.

Id. at 407.

In my view, requiring the filing of a suit, which in this context must be preceded by a demand on the Board or a showing of futility, adds nothing except an increase in attorney fees. If the Board, in managing its own affairs, determines the demand has merit, it reduces its exposure to increased costs and fees caused by lengthy litigation.

Therefore, I would reverse the district court's dismissal, recognize a substantial benefit claim without filing predicate litigation, and remand for a determination of the "key" issue—was the demand meritorious?