88 Nev. 623
Supreme Court of Nevada.

STATE of Nevada, Appellant,
v.
Julius BUNKOWSKI et al., Respondents,
Trout Unlimited, Amicus Curiae,
Carson Water Subconservancy
District, Amicus Curiae.

No. 6799.
|
Nov. 29, 1972.
|
Rehearing Denied Dec. 22, 1972.

Synopsis
Declaratory jdugment action by property owners to remove alleged cloud on title. The First Judicial District Court, Carson City, Frank B. Gregory, J., entered judgment and decree for plaintiffs, based on findings of fact, conclusions of law, and decisions of special master. The State appealed. The Supreme Court, Zenoff, C.J., held that Carson River which had been used to float logs and which was ideally located geographically for such use was 'navigable' under federal standard for determining title to river bed.

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Water Law** ⇐ Title and rights held in public trust

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2519 Title and rights held in public trust
(Formerly 270k1(3) Navigable Waters)

In determining title ownership of lands underlying waters within state, courts must apply uniform federal test of navigability.

2 Cases that cite this headnote

[2] **Water Law** ⇐ Rights incident to state's admission to Union in general

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)1 Ownership and Control in General
405k2646 Ownership by State
405k2649 Rights incident to state's admission to Union in general
(Formerly 270k36(1) Navigable Waters)

Title to bed of Carson River passed to state when state was admitted into Union, if river was navigable, and if river bed had not already been disposed of by United States.

1 Cases that cite this headnote

[3] **Water Law** ⇐ Specific waters

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2529 Specific waters
(Formerly 270k1(6) Navigable Waters)

Carson River which had been used to float logs and which was ideally located geographically for such use was "navigable" under federal standard for determining title to river bed.

2 Cases that cite this headnote

[4] **Water Law** ⇐ Title and rights held in public trust

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2519 Title and rights held in public trust
(Formerly 270k1(3) Navigable Waters)

State courts have jurisdiction to apply federal navigability test in determining title to river bed.

1 Cases that cite this headnote

[5] **Water Law** ⇐ Ownership by State
Water Law ⇐ Power to grant

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water

405XV(C)1 Ownership and Control in General
405k2646 Ownership by State
405k2647 In general
(Formerly 270k36(1) Navigable Waters)
405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities
405k2676 Power to grant
(Formerly 270k37(7) Navigable Waters)

Federal patents to lands traversed by navigable river, granted before Nevada became state, did not convey title to river bed, even though there was no express reservation of title thereto; title to such lands passed to state upon admission to statehood.

1 Cases that cite this headnote

[6] **Water Law** ⇦ Power to grant

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities
405k2676 Power to grant
(Formerly 270k37(7) Navigable Waters)

Federal patents granted after Nevada was admitted to statehood did not convey bed of navigable river; after statehood federal government did not have control over river bed.

[7] **Water Law** ⇦ Grant as incident to grant of riparian lands

405 Water Law
405XV Navigable Waters
405XV(C) Lands Under Water
405XV(C)2 Grants to and Acquisition by Private Owners or Municipalities
405k2685 Grant as incident to grant of riparian lands
(Formerly 270k37(7) Navigable Waters)

State patents to lands traversed by navigable river did not convey title to river bed, although patents were without reservation.

[8] **Water Law** ⇦ Specific waters

405 Water Law
405XV Navigable Waters
405XV(A) In General
405k2516 Navigability in General
405k2529 Specific waters
(Formerly 270k1(3) Navigable Waters)

Fact that Carson River was not included in statutory list of navigable waters was not determinative of whether river was navigable. N.R.S. 537.010 et seq.

2 Cases that cite this headnote

[9] **Estoppel** ⇦ Particular state officers, agencies or proceedings

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States
156k62.2(2) Particular state officers, agencies or proceedings
(Formerly 156k62(2))

Failure of state to assert its claim of ownership of river bed at earlier time did not estop state from asserting claim.

2 Cases that cite this headnote

Attorneys and Law Firms

***624** ****1231** Robert List, Atty. Gen., Michael L. Melner, and Arthur J. Bayer, Jr., Deputy Attys. Gen., Carson City, for appellant.

Laxalt, Berry & Allison, Stockes & Eck, Carson City, for respondents.

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Guild, Hagen & Clark, Reno, for amicus curiae.

***625** OPINION

ZENOFF, Chief Justice:

This is a land title action brought to remove the State's claim of ownership from certain described property owned by respondents.

Julius Bunkowski and David Lantry are the owners of 946 acres of land in Carson **1232 City and Lyon County, of which, in 40 acre parcels, 840 acres are traversed by the Carson River. Seven hundred seventy-seven acres were sold to the Brunswick Development Corporation for development and retrieval of mineralization existing in and about the river bed. The land owned by respondents devolve from ten federal and state patents. Three federal patents were issued prior to Nevada's statehood, the remaining five federal and two state patents were issued subsequent to statehood.

The Carson River is a natural water course having two branches or forks through which water flows every month of the year. The East Fork of the Carson and the tributaries thereof rise from rains, melting snows and springs in the Sierra Nevada Mountains near the town of Markleeville, Alpine County, California, whence they flow in a generally northerly direction into Douglas County, Nevada, through Carson Valley to a point in Carson Valley near Walley's Hot Springs where they join with the waters of the West Fork of the Carson River forming the main stream known as the Carson River. The West Fork and its tributaries similarly originate in Alpine County, California, in the vicinity of Hope Valley, whence the flow in a general northerly direction through Woodfords, California, into Douglas County and join with the East Fork of the Carson River. From Walley's Hot Springs the Carson flows in a general northeasterly direction through Douglas, Carson City, Storey and Churchill Counties, Nevada, in which latter county in the natural state the waters of the Carson flow into the Carson Sink and disappear. The entire water course exceeds 100 miles in length.

The lands in question owned by the respondents and traversed by the Carson lie within the Brunswick Canyon area *626 northeast of Carson City and are adjacent to a three to four mile stretch of the river.

The Attorney General of Nevada, on January 6, 1970, and the Nevada Legislative Counsel, on January 13, 1970, issued opinions that the Carson River is a navigable stream and that the State owns the river bottom thereof. Shortly thereafter the respondents commenced this declaratory relief action in the lower court seeking to clear the alleged cloud from their title. After that the parties stipulated, 'That as an historical fact, the Carson River was at one time used for the floating of logs and timber,' and, 'That the said Carson River is not now nor has it ever been used by cargo or passenger carrying vessels.'

All the evidence was heard before a Special Master. Pertinent to the issue before us the evidence showed that the patents from which respondents' title originates made no exception, reservation or exclusion for the portion of the channel lying within the bed of the Carson River. The lands in question have been carried on the tax rolls of Carson City [1] and Lyon County without exclusion of the river bed and taxes have been paid on the total land within the patent calls.

As to the physical condition of the river and its uses the evidence in the main was confined to the early history of the Carson near the time when Nevada became a state (October 31, 1864). Although considerable impediments to commercial use of the river existed, such as willows, sand bars and lack of water, the early history revealed that the river was used by loggers to float logs and timber from the headwaters of the Carson in Alpine County, California, to saw mills near Virginia City. The first log drive occurred in the spring of 1861 and was in the nature of an experiment. Thereafter a group of men procured a franchise from the Legislature of the Territory of Nevada to improve the channel of the Carson River and to float logs down the river. Laws of Nevada Territory 100—01 (1861). Subsequently great quantities of saw logs and cordwood were brought down the Carson to fuel and supply the well-known mining operation and bonanza at Virginia City, Nevada. As described **1233 by one witness, the log drives were accomplished in the following manner: 'They had to go up into the mountains (in Alpine County) and cut the logs and either drag them or float them on the small streams until they reached the main stream. Then they were floated down the (Carson) river to the entrance of the Carson Valley at Young's Crossing and there they had a (chain) boom and they held the *627 logs in great numbers at that point until . . . conditions would be right in the river so that they could float them down.'

The log drives continued from the early 1860's for thirty-five years when the loggers found it too expensive to bring the large saw logs from the mountain slopes to the streams forcing them to move to other areas. The floating down of cordwood continued on for a number of years.

Except for the log drives and some dredging for gravel and various aggregates the evidence showed that there has been no other type of commercial activity in the sense of water trade on the Carson River.

The Master, after reviewing the evidence, proceeded to make his finding, viz: 'That said Carson River is not in fact or in law now a navigable stream, nor was it in fact or in law a navigable stream on the 31st day of October, 1864, such as to vest title to the stream bed or any portion thereof in the State of Nevada.' The lower court adopted the conclusion of the Master and entered its judgment and decree, from which judgment this appeal has been taken.

The principal question in this appeal is whether the State has a valid claim to the bed of the Carson River as it flows across respondents' land. Other subsidiary issues must also be discussed, but first we will set out the appropriate test to resolve the primary issue.

[1] 1. In determining the title ownership of lands underlying waters within a state the courts must apply the uniform federal test of navigability, although various state tests of navigability, to be discussed below, exist. The United States Supreme Court stated in United States v. Holt Bank, 270 U.S. 49, 54—55, 46 S.Ct. 197, 198, 70 L.Ed. 465 (1926):

'It is settled law in this country that lands underlying navagable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent ***628** creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. (Citations.) But, as was pointed out in Shively v. Bowlby, (152 U.S. 1,) 49, 57—58, 14 S.Ct. 548, 38 L.Ed. 331, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' See Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922); United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); United States v. Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935); ****1234** State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970); Utah v. United States, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971).

[2] The State of Nevada was admitted into the Union on October 31, 1864 (13 Stat. 30, approved March 21, 1864), and under the constitutional principle of equality among the several states, the title to the bed of the Carson River then passed to the State, if the river was navigable, and if the bed had not already been disposed of by the United States. United States v. Holt Bank, supra, 270 U.S. at 55, 46 S.Ct. 197.

Most importantly and basic to the issue of title to the Carson River bed, the following statement of the court in United States v. Holt Bank, supra, at 55—56, 46 S.Ct. at 199 must be fully appreciated:

'Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. Brewer-Elliott Oil & Gas Co. v. United States, supra, (260 U.S.) p. 87, (43 S.Ct. 60). To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended.'

To restate it, so that all states when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained. True it is that many states have adopted varying and less stringent tests than the federal test in order to establish the right of public use in certain watercourses. For example, in California it has been held in People v. Mack, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448, 454 (1971), that, 'The ***629** streams of California are a vital recreational resource of the state. The modern determinations of the California courts, as well as those of several of the states, as to the test of nevigability can well be restated as follows: Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at

any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft.' See also State, by Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278, 287 (1954). Reference to People v. Mack, supra, which reviews a substantial number of state navigability cases, illustrates most forcefully that the state courts have not striven for uniformity. For this reason, those state cases are not authority for the determination of state ownership of navigable watercourse beds. Said determination must be made by reference to the uniform federal 'navigability for title' test.

That test is stated by the court in United States v. Holt Bank, supra, 270 U.S. at 56, 46 S.Ct. at 199.

'The rule long since approved by this Court in applying the Constituion and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. The Montello, 20 Wall. 430, 439, 22 L.Ed. 391; United States v. Cress, 243 U.S. 316, 323, 37 S.Ct. 380, 61 L.Ed. 746; Economy Light & Power Co. v. United States, 256 U.S. 113, 121, 41 S.Ct. 409, 65 L.Ed. 847; Oklahoma v. Texas, 258 U.S. 574, 586, 42 S.Ct. 406, 66 L.Ed. 771; Brewer-Elliott Oil & Gas Co. v. United States, supra, (260 U.S.) p. 86, (43 S.Ct. 60).'

Considering briefly the evidence adduced before the Master, it appears that the log drivers encountered difficulty in conducting **1235 their drives because of the irregular flow and unchannelized nature of the river in the Carson Valley. Respondents contend that these impediments to commercial use preclude a holding of navigability. As will be shown, that is not the case.

In the United States Supreme Court cases which discuss navigability, a distinction must be made, as suggested in R. Johnson & R. Austin, Jr., Recreation Rights and Titles to Beds on Western Lakes and Streams, 7 Nat.Res.J. 1, 15 (1967), *630 between 'navigability' for land title and 'navigability' for Federal Commerce Power.

'A. For the Commerce Test, the court held that impediments to commercial use, such as those noted above, do not destroy navigability. For example, in Economy Light & Power Co. v. United States, supra, 256 U.S. at 122, 41 S.Ct. at 412, where the issue concerned a dam to be built on the Desplaines River in Illinois the court stated: 'Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water . . .'

In the Montello, 20 Wall. (87 U.S.) 430, 441—442, 22 L.Ed. 391 (1874), it was said:

'The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

'It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessel, it could not be treated as a public highway. The capacity of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.' (Emphasis added.)

In another Federal Commerce case, United States v. Appalachian Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940), the court stated in the course of its opinion (at 405—410, 61 S.Ct. at 298—300):

'It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs;[2] that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The test as to navigability must take these variations into consideration.

'To appraise the evidence of navigability or the natural condition only of the waterway is erroneous. Its availability

for *631 navigation must also be considered. 'Natural and ordinary conditions' refers to volume of water, the gradient and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.

'In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

'Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of **1236 years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.' (Emphasis added.)

Applying the above rules to the facts stated above, it would appear that neither the impediments to navigation existing in the Carson nor the improvements in aid of navigation would preclude a finding of navigability under federal commerce power.

B. The Title Test. In addition to the commerce test a further condition to title navigability was made in United States v. Oregon, supra, 295 U.S. at 23, 55 S.Ct. .610, that the watercourse must be geographically situated so that it may be useful for commerce. See also State v. Bollenbach, supra, 241 Minn. 103, 63 N.W.2d at 289. This condition is met here. [3]

[3] Although no Supreme Court case has expressly based its decision of title navigability on the capacity of a stream to float out logs, the emphasized portions of the quotation from The Montello and Appalachian Power leads us to believe that in the setting of this case navigability for title has been established. *632 Log driving was the first and apparently only important commercial use of the Carson. [4] The river was fortuitously and ideally located geographically for this use. The Carson River was and is navigable. [5]

[4] 2. Do the state courts have jurisdiction to apply the federal navigability test?

No case has been found which holds that there is exclusive federal jurisdiction to determine title navigability. The federal 'question' appearing in the cases refers to the uniform federal 'test' which is not used in the jurisdictional sense, State of South Carolina ex rel. Maybank v. South Carolina E. & Gas Co., 41 F.Supp. 111 (E.D.S.C. 1941), but, on the contrary, has been applied by both state and federal courts to determine title to submerged lands. One of the best state cases applying the federal title test is State, by Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954). For a compilation of state court decisions applying the federal test see Appendix to R. Johnson & R. Austin, Jr., surpa, 7 Nat.Res.J. 1, 52 (1967). Although the Carson is an interstate watercourse, this action only relates to a portion of it lying solely within this court's jurisdiction.

3. Next we must consider the effect of the federal and state patents. Respondents claim title through ten patents; of these, two are state patents issued after statehood, eight are federal patents of which three were issued prior to statehood.

[5] As to the prestatehood federal patents, it is to be noted that there is no express reservation of title to the river bed, **1237 all described land is granted without reservation. In Wear v. Kansas, 245 U.S. 154, 38 S.Ct. 55, 62 L.Ed. 214 (1917), the patent of the United States under which Wear derived title was a grant, made before statehood, of land bordering on the Kansas River without restriction, reservation or expansion. The state supreme court took *633 judicial notice of the navigability of the river, refused to hear evidence thereon and held that the patent to land on a navigable steam did not convey the bed of the river. The United States by its unrestricted patent was properly taken to have assented to its construction according to the local law. Further, in Hardin v. Jordan, 140 U.S. 371, 384, 11 S.Ct. 808, 813, 35 L.Ed. 428 (1891), the court stated the applicable rule as to unrestricted patents in the following manner:

'We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.'

Therefore, by application of this rule we are free to construe the unrestricted federal and state patents by the same criterion. Considering the prestatehood federal patents, the following statement in United States v. Oregon, supra, 295 U.S. at 14, 55 S.Ct. at 615, seems appropriate:

'Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See Massachusetts v. New York, 271 U.S. 65, 89, 46 S.Ct. 357, 70 L.Ed. 838. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the states passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'

There is nothing in the record or to our knowledge which would rebut the presumption that the federal government held the subject lands in trust for the State of Nevada.

[6] After statehood, the river being navigable and the bed thereof owned by the state, the federal government did not have control over the bed, and it would appear obvious that the federal patents conveyed none of the submerged lands.

[7] As to the state patents, again, without reservation, it is clear that the State owned the land to do with as it might. 'It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign *634 capacity and may be used and disposed of as it may elect . . ..'

United States v. Holt Bank, supra, 270 U.S. at 54, 46 S.Ct. at 198.

It has been held, in what appears to be a majority of cases, that the states hold title to the beds of navigable watercourses in trust for the people of their respective states. Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 822—823, 112 A.L.R. 1104 (1937); Annot. Title to beds of natural lakes and ponds, 112 A.L.R. 1108 (1938); Menzer v. Village of Elkhart Lake, 51 Wis.2d 70, 186 N.W.2d 290 (1971); City of Long Beach v. Mansell, 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423 (1970); J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich.L.Rev. 473 (1970). Title to navigable water beds are normally inalienable. Miami Corporation v. State, 186 La. 784, 173 So. 315 (1936). In Alameda Conservation Association v. City of Alameda, 264 Cal.App.2d 284, 70 Cal.Rptr. 264 (1968), it was held that while the state owns land under bays, such lands can be transferred by the state free of trust upon proper legislative determination, citing **1238 People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913). See Marks v. Whitney, 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374 (1971). No such express legislative determination has been revealed here, consequently, the State, as sovereign, did not grant away the public land of the river bed.

[8] 4. Respondents assert in their answering brief that the list of legislative declared navigable waters in NRS Chapter 537 is exclusive and that since the Carson does not there appear, it is not navigable. First, as to the question of navigability, this court held in State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 876, 478 P.2d 159 (1970), that the issue of navigability is a judicial question, the 'statement in the statutes therefore served no purpose.' Accord, People v. Mack, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448, 453 (1971). Second, Chapter 537 is not a complete list as it omits Lake Tahoe which was held navigable in Davis v. United States, 185 F.2d 938, 942—943 (9th Cir. 1950).

[9] 5. For not asserting its ownership of the Carson River bed earlier respondents contend that the State is now estopped to claim title thereto.

'The doctrine of estoppel should not be lightly invoked against the state. It will not be applied against it in its . . . not be applied against it in its . . . of doctrine of estoppel against government and its governmental agencies, 114 A.L.R.2d 344 (1948)114 A.L.R.2d 344 (1948). In State v. Hutchins, 79 N.H. 132, 105 A. 519, 523 (1919), the court held that the public rights in public *635 waters cannot be alienated or made subject to easements except by legislative action; neither can the state's right in public waters be prescribed against nor can these rights be impaired by an estoppel growing out of a mere failure to object to encroachment. See State v. George C. Stafford & Sons, 99 N.H. 92, 105 A.2d 569, 573 (1954).

The State holds the subject lands in trust for public use.

Judgment reversed.

BATJER, MOWBRAY, THOMPSON, and GUNDERSON, JJ., concur.

All Citations

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Footnotes

1 Carson City now comprises what was once Ormsby County.

2 This court recognized the floating of logs and timber as commerce in Shoemaker v. Hatch, 13 Nev. 261, 267 (1878). See also Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40, 228 N.W. 144 (1929).

3 In one title case, United States v. Utah, 283 U.S. 64, 84, 51 S.Ct. 438, 444, 75 L.Ed. 844 (1931), the court quieted title in Utah to certain portions of the beds of the Green, Colorado and San Juan Rivers within the State of Utah, despite assertions that impediments to commercial use such as 'logs and debris, ice, floods, rapids, and riffles in certain parts, rapid velocities with sudden changes in the water level, sand and sediment which combined with the tortuous course of the rivers, produce a succession of shifting sand bars, shallow depths, and instability of channel,' would preclude a finding of title navigability.

4 Reference is made to a booklet entitled, 'ALONG COMSTOCK TRAILS FEATURING THE CARSON RIVER MILLS AND THE VIRGINIA & TRUCKEE RAILROAD,' by Dave Basso, found in the Carson City Library, N, F847, C6, B3, c. 2. This publication features a series of early Nevada pictures of several quartz mills along the Carson River built in the 1860's and 1870's. Very evident in the picture is the ample supply of water in the Carson River.

5 Technically the evidence presented to the Master established that the northern terminus of the log drives was the Russell Mill at Empire which is upstream from the property in question. We will assume for the purposes of this decision that the logs would have continued to float downstream if they were not restrained at the mill.

End of Document

Citing References (35)

Treatment	Title	Date	Type	Depth	Headnote(s)
Examined by	**1. Lawrence v. Clark County** 254 P.3d 606, 610+ , Nev. REAL PROPERTY - Water. Remand was necessary to determine whether land sought to be transferred was subject to public trust doctrine.	July 07, 2011	Case		1 2 8 P.2d
Cited by	**2. Mineral County v. Lyon County** 473 P.3d 418, 424+ , Nev. ENVIRONMENTAL LAW — Wetlands. The public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.	Sep. 17, 2020	Case		8 P.2d
Cited by	**3. Manning v. Nevada State Bd. of Accountancy** 673 P.2d 494, 495 , Nev. State Board of Accountancy filed complaint seeking an injunction to restrain individual from use of word "accountant" in his business. The First Judicial District Court, Carson...	Dec. 20, 1983	Case		9 P.2d
Cited by	**4. Neal v. Bently Nevada Corp.** 771 F.Supp. 1068, 1072 , D.Nev. Action was brought against landowner for injuries sustained when plaintiff swung from rubber hose tied to tree and dove into shallow part of river and sustained injuries. On...	July 12, 1991	Case		3 P.2d
Cited by	**5. Hodges Transp., Inc. v. State of Nev.** 562 F.Supp. 521, 523+ , D.Nev. Landowner sued State of Nevada to quiet title to bed of the Carson River and a dam on the river. On motion to dismiss, the District Court, Bruce R. Thompson, J., held that...	May 11, 1983	Case		5 P.2d
Cited by	**6. Hitchings v. Del Rio Woods Recreation & Park Dist.** 127 Cal.Rptr. 830, 834+ , Cal.App. 1 Dist. Action was brought to establish right to free and unobstructed navigation of portion of the Russian River. The Superior Court, Sonoma County, Vernon Stoll, J., declared the river...	Feb. 23, 1976	Case		4 P.2d
Cited by	**7. Mr. Roland Westergard** 1980 Nev. Op. Atty. Gen. 56, 56 Navigable River—The State Engineer, irrigation districts, the Division of State Lands, the individual counties, and the United States all have the authority to seek removal of...	Apr. 08, 1980	Administrative Decision		3 P.2d
Cited by	**8. 37 Or. Op. Atty. Gen. 1342, 1342** 37 Or. Op. Atty. Gen. 1342, 1342 This opinion is issued in response to a question presented by William S. Cox, Director, Division of State Lands. Can the Division of State Lands rely on the existence of log drives...	May 14, 1976	Administrative Decision		3 P.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**9.** 37 Or. Op. Atty. Gen. 578, 578+ 37 Or. Op. Atty. Gen. 578, 578+ This opinion is issued in response to a question submitted by the Honorable Nancie Fadeley, State Representative. What effect will HB 3258 have upon public rights in navigable...	May 19, 1975	Administrative Decision		3 P.2d
Mentioned by	**10. Pellegrini v. State** 34 P.3d 519, 531 , Nev. CRIMINAL JUSTICE - Habeas Corpus. Statute imposing one-year limitations period on habeas petitions applies to successive petitions.	Nov. 15, 2001	Case		9 P.2d
Mentioned by	**11. CWC Fisheries, Inc. v. Bunker** 755 P.2d 1115, 1119 , Alaska Holder of state-granted patent in tidelands brought trespass claim against commercial fisherman. The Superior Court, Third Judicial District, Kenai, Charles K. Cranston, J.,...	June 03, 1988	Case		—
Mentioned by	**12. Arizona Center For Law In Public Interest v. Hassell** 837 P.2d 158, 167 , Ariz.App. Div. 1 Organizations and individuals brought action challenging validity of provisions of legislation substantially relinquishing state's interest in riverbed lands. Landowners who...	Sep. 10, 1991	Case		1 P.2d
Mentioned by	**13. Bott v. Commission of Natural Resources of State of Mich. Dept. of Natural Resources** 327 N.W.2d 838, 844+ , Mich. Owners of land on both sides of creek brought trespass action against riparian owners of land on lake, and State filed complaint against plaintiffs, alleging that their bridge...	Dec. 08, 1982	Case		3 P.2d
—	**14. Portage Necessity as Affecting Navigability of Waterway Under Nonenvironmental Federal Law** 3 A.L.R. Fed. 2d 375 When determining whether or not a particular body of water is navigable for federal purposes, courts generally impose a fact-sensitive "navigability-in-fact" test, while keeping in...	2005	ALR	—	—
—	**15. Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned** 6 A.L.R.4th 1030 This annotation collects and analyzes the cases, state and federal, determining or discussing public rights to engage in recreational boating, fishing, wading, or like activities...	1981	ALR	—	1 3 4 6 8 P.2d
—	**16. Title to beds of natural lakes or ponds** 112 A.L.R. 1108 The reported case for this annotation is Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937).	1938	ALR	—	2 P.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**17.** Law of Water Rights and Resources s 8:12, § 8:12. Navigability for title: Federal versus state ownership—Federal test Navigability for title is determined by a historic, backward looking test. Although there was some confusion about the source of the test, three Supreme Court cases between 1926...	2020	Other Secondary Source	—	3 P.2d
—	**18.** Law of Water Rights and Resources s 8:14, § 8:14. Navigability for title: Federal versus state ownership—State definitions of navigability for post-patent disputes—Adoption of federal test Most states have adopted the federal navigable in fact test to allocate titles. This test vests title to the beds underlying these waters in the state. These states are Arkansas,...	2020	Other Secondary Source	—	—
—	**19.** State Environmental Law s 4:11, § 4:11. Navigability tests and private lands Application of the federal title test does not completely determine which natural resources are subject to the public trust doctrine. Although that test determines whether a state...	2020	Other Secondary Source	—	1 P.2d
—	**20.** Tiffany Real Property s 659, § 659. Tide waters—Powers of the state over submerged lands Tide waters are those in which the tide ordinarily ebbs and flows, including the sea, and also bays, rivers, and creeks, so far as they answer this description. A body or stream of...	2020	Other Secondary Source	—	—
—	**21.** 96 Am. Jur. Proof of Facts 3d 263, Navigability Disputes Involving Non-Tidal Waters Above Private Lands Am. Jur. Proof of Facts 3d This article discusses civil actions by landowners with respect to the public use of non tidal bodies of water, the beds and shores of which are privately owned, but which waters...	2020	Other Secondary Source	—	—
—	**22.** CJS Navigable Waters s 13, § 13. Statutory declarations of navigability; government attitude and official acts CJS Navigable Waters In some jurisdictions, statutes have been enacted declaring certain streams or other bodies of water to be navigable. According to some authority, a statutory declaration of...	2021	Other Secondary Source	—	8 P.2d
—	**23.** CJS Navigable Waters s 100, § 100. What law governs ownership of land under navigable water CJS Navigable Waters The ownership of the bed and banks of navigable waters within a state ordinarily is governed by state law, subject to the paramount power of the United States to ensure that such...	2021	Other Secondary Source	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**24. CJS Navigable Waters s 127, § 127. Public grants of riparian land as conveying land under water** CJS Navigable Waters Usually a public grant of land bounded by navigable water does not pass title to land under water, or, in other words, in the absence of a statute providing otherwise or language...	2021	Other Secondary Source	—	3 P.2d
—	**25. CERCLA'S NATURAL RESOURCE DAMAGE PROVISIONS: A LOOPHOLE FOR PRIVATE LANDOWNERS?** 9 Admin. L.J. Am. U. 425 , 460 Introduction. 425 I. Overview of CERCLA. 427 A. CERCLA's Legislative History. 427 B. The Structure of CERCLA. 429 C. Natural Resource Damages under CERCLA. 435 D. Interpretation of...	1995	Law Review	—	—
—	**26. THE PUBLIC TRUST AS AN ANTIMONOPOLY DOCTRINE** 44 B.C. Envtl. Aff. L. Rev. 1 , 54 Introduction. 2 I. The Foundation of the American Public Trust Doctrine: Antimonopolization of Public Resources. 6 A. Prohibiting Landowner Monopolization of Public Water...	2017	Law Review	—	—
—	**27. A COMPARATIVE GUIDE TO THE WESTERN STATES' PUBLIC TRUST DOCTRINES: PUBLIC VALUES, PRIVATE RIGHTS, AND THE EVOLUTION TOWARD AN ECOLOGICAL PUBLIC TRUST** 37 Ecology L.Q. 53 , 197+ This companion Article to the fall 2007 A Comparative Guide to the Eastern Public Trust Doctrines explores the state public trust doctrines--emphasis on the plural--in the nineteen...	2010	Law Review	—	3 7 8 P.2d
—	**28. CHANGING CONCEPTIONS OF PROPERTY AND SOVEREIGNTY IN NATURAL RESOURCES: QUESTIONING THE PUBLIC TRUST DOCTRINE** 71 Iowa L. Rev. 631 , 716 With th[e public trust doctrine], the California Supreme Court appears enthusiastically to have embraced a new legal Renaissance, in which modern 'humanists' rediscover old texts...	1986	Law Review	—	—
—	**29. RECREATIONAL USE OF WATERCOURSES** 4 Mo. Envtl. L. & Pol'y Rev. 71 , 87+ The rights of abutting landowners and members of the public to use the surface of watercourses are governed by several legal doctrines. Most importantly, their rights are...	1996	Law Review	—	2 5 6 P.2d
—	**30. 13 Nev. L.J. 290, LAWRENCE V. CLARK COUNTY AND NEVADA'S PUBLIC TRUST DOCTRINE: RECONSIDERING WATER RIGHTS IN THE DESERT** 13 Nev. L.J. 290 , 297+ Aridity, and aridity alone, makes the various Wests one. The distinctive western plants and animals, the hard clarity (before power plants and metropolitan traffic altered it) of...	2012	Law Review	—	7 P.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**31. A RIVER RUNS TO IT: CAN THE PUBLIC TRUST DOCTRINE SAVE WALKER LAKE?** 44 Santa Clara L. Rev. 831 , 860+ While traveling through Nevada, Mark Twain observed many curious waterways. He noted, There are several rivers in Nevada, and they all have this mysterious fate. They end in...	2004	Law Review	—	3 4 P.2d
—	**32. NATRUAL RESOURCE DAMAGES: THE NEW FRONTIER OF ENVIRONMENTAL LITIGATION** 34 S. Tex. L. Rev. 521 , 578 I. Common Law Basis For Natural Resource Damages. 523 A. Public Trust Doctrine. 524 1. Development of the Public Trust Doctrine at the State Level. 525 2. Federal Recognition...	1993	Law Review	—	—
—	**33. LEGAL UNDERPINNINGS OF THE RIGHT TO FLOAT THROUGH PRIVATE PROPERTY IN COLORADO: A REPLY TO JOHN HILL** 5 U. Denv. Water L. Rev. 457 , 499+ I. Introduction. 457 II. Navigability. 459 A. Overview of Navigability. 459 B. The Navigational Servitude. 461 1. Traditional Federal Navigational Servitude. 461 2....	2002	Law Review	—	5 6 7 P.2d
—	**34. ADAPTING TO CLIMATE CHANGE: THE POTENTIAL ROLE OF STATE COMMON-LAW PUBLIC TRUST DOCTRINES** 34 Vt. L. Rev. 781 , 853 Climate change is already altering historical expectations regarding water supply and aquatic ecosystems. In turn, changes in water supply may call into question the continued...	2010	Law Review	—	3 P.2d
—	**35. THE PUBLIC TRUST DOCTRINE: DOES THE COAST REALLY BELONG TO EVERYONE?** A. Breadth of Modern Doctrine is Immense B. Historical Roots of Public Trust Doctrine A. New Public Trust Uses B. The Problem of Competing Public Trust Uses C. Land Now Subject to...	1988	Other Secondary Source	—	—

Mineral County v. Lyon County

Justia Opinion Summary

The Supreme Court answered in the negative a question certified to it by the Ninth Circuit Court of Appeals, holding that the public trust doctrine does not permit the reallocation of rights already adjudicated and settled under the doctrine of prior appropriation.

This litigation stemmed from Mineral County's intervention in longstanding litigation over water rights in the Walker River Basin to protect and restore Walker Lake. Here, the Supreme Court was asked for the first time to consider whether the public trust doctrine permits reallocating water rights previously settled under Nevada's prior appropriation doctrine. The Supreme Court held that the doctrine, as implemented through the state's water statutes, does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.

Read more

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136 Nev., Advance Opinion 50

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER LAKE WORKING GROUP,
Appellants,
vs.
LYON COUNTY; CENTENNIAL LIVESTOCK; BRIDGEPORT RANCHERS; SCHROEDER GROUP; WALKER RIVER IRRIGATION DISTRICT; STATE OF NEVADA DEPARTMENT OF WILDLIFE; AND COUNTY OF MONO, CALIFORNIA,
Respondents.

No. 75917

FILED

SEP 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

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.

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 Tori N. Sundheim, Deputy Attorney General, Carson City,
for Respondent State of Nevada Department of Wildlife.

Best, Best & Krieger LLP and Roderick E. Walston, Walnut Creek, California; Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno; Stephen B. Rye, District Attorney, Lyon County,
for Respondent Lyon County.

SUPREME COURT
OF
NEVADA

(O) 1947A

20-34246

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.

Schroeder Law Offices, P.C., and Laura A. Schroeder and Therese A. Ure, Reno,
for Respondent Schroeder Group.

Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno; Stacey Simon, County Counsel, and Jason Thomas Canger, Deputy County Counsel, Mono County, California,
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Aaron D. Ford, Attorney General, Heidi Parry Stern, Solicitor General, and James N. Bolotin, Senior Deputy Attorney General, Carson City,
for Amicus Curiae Nevada State Engineer.

Benson Law Nevada and Kevin Benson, Carson City; Xavier Becerra,

Attorney General, and Nhu Q. Nguyen, Deputy Attorney General, Sacramento, California,
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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.

Hanson Bridgett LLP and Michael J. Van Zandt, San Francisco, California,
for Amici Curiae Churchill County, City of Fallon, and Truckee-Carson Irrigation District.

136 Nev., Advance Opinion 58

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Hanson Bridgett LLP and Michael J. Van Zandt, San Francisco, California,
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Mark B. Jackson, District Attorney, and Douglas V. Ritchie, Chief Deputy District Attorney, Douglas County,
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Michael Macdonald, District Attorney, Humboldt County,
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Theodore C. Herrera, District Attorney, Lander County,
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King & Russo, Ltd., and Patrick O. King, Carson City,
for Amicus Curiae Carson Water Subconservancy District.

Schroeder Law Offices, P.C., and Therese A. Ure and Laura A. Schroeder, Reno,
for Amicus Curiae Pershing County Water Conservation District.

Gregory J. Walch, Steven C. Anderson, and Brittany L. Cermak, Las Vegas,
for Amicus Curiae Southern Nevada Water Authority.

McDonald Carano LLP and Michael A.T. Pagni, Reno,
for Amici Curiae Truckee Meadows Water Authority, Washoe County Water Conservation District, and Carson-Truckee Water Conservation District.

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.

Taggart & Taggart, Ltd., and Paul G. Taggart and David H. Rigdon, Carson City,
for Amici Curiae Nevada Farm Bureau Federation, Nevada Cattlemen's Association, Lyon County Farm Bureau, and Elko County Farm Bureau.

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 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

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[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

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.

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

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[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).

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 Commission 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

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[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.

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 public 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

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[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.

> to encompass non-navigable 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.

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 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

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[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.

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]

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[6]Insofar as the dissent contends that our opinion provides no remedy should the State Engineer abuse its office or misallocate public resources, it

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 a given

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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).

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]

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[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

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

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.

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 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 a "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]

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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

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]

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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).

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.

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.

_____, J.
Stiglich

We concur:

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Cadish

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 5. 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 26.

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 14 & 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., Adv.

Op. 45, 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 21 & 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 17-18. 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 administrative 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"