THE SUPREME COURT OF THE STATE OF NEVADA

No. 75917

MINERAL COUNTY, et al,

Appellants

vs.

LYON COUNTY, et al,

Respondents.

ON CERTIFICATION FROM THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, WESTERN RESOURCE ADVOCATES, NATIONAL WILDLIFE FEDERATION, AND NEVADA WILDLIFE FEDERATION IN SUPPORT OF APPELLANTS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that none of the *amici* parties (Natural Resources Defense Council, Sierra Club, Western Resource Advocates, National Wildlife Federation, and Nevada Wildlife Federation) is owned by a parent corporation, and that none of the *amici* parties have issued stock and therefore no publicly held company owns 10% or more of any *amici* party's stock. This representation is made in order that the Judges of this Court may evaluate

possible disqualification or recusal.

Respectfully submitted this 3d day of December, 2018

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INTERESTS OF *AMICI*

Amici are non-profit organizations dedicated to protecting the environment and collectively have thousands of members in Nevada. *Amici* have advocated for the protection of waterways and wildlife through application of the public trust doctrine. Many of *amici*'s individual members have engaged in education aimed at protecting Walker River and Walker Lake. Several of the *amici* previously filed a brief *amicus curiae* in this case in the U.S. Court of Appeals for the Ninth Circuit urging certification of a question to this Court about the application of the public trust doctrine to appropriative water rights. *Amici* now seek leave to submit this brief to assist the Court in resolving the merits of the certified questions.

SUMMARY OF ARGUMENT

Amici urge the Court to recognize that appropriative water rights and the public trust doctrine each represent well-established Nevada legal doctrines that deserve recognition and reaffirmation. It would be contrary to longstanding precedent to follow one doctrine and disregard the other. Instead, the Court should uphold both doctrines and harmonize them by reaffirming the existence of private rights to the use of water in Nevada while also recognizing that these rights are held subject to the public trust.

The Court should also recognize that the public trust doctrine encompasses navigation, commerce, fishing, recreation as well as ecological protection. In addition, the Court should recognize that the public trust doctrine applies to activities in tributaries to navigable waters that adversely affect public trust uses in navigable waters. Finally, the Court should adopt a balanced approach to the public trust doctrine based on the approach adopted by the California Supreme Court in the landmark *National Audubon* case, including the following elements: (1) the state has a duty to take the public trust into account in planning for and allocating water resources, and to protect public trust uses whenever feasible; (2) no person can acquire a vested right to appropriate water in a manner harmful to public trust uses; and (3) the public trust doctrine imposes a duty on the State to continually supervise the use of appropriated water and to reconsider and reallocate water when feasible and necessary to protect public trust uses. See *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 452, 189 Cal.Rptr.346, 369 (1983).

Recognition that the public trust doctrine applies to appropriative water rights should have only a modest practical impact on water users. In an arid environment the State must have the authority to allow private uses of water that will unavoidably harm public trust uses. In addition, the public trust doctrine imposes a duty on the State to protect water resources that is comparable to other

existing limitations on the nature and scope of private water rights in Nevada, such as the requirement of non-wasteful, beneficial use of water. The experience of California, and in particular of Los Angeles, in the aftermath of the *National Audubon* decision supports the prediction that the practical effect of recognizing that the public trust doctrine applies to appropriative water rights in Nevada will be modest.

Finally, *amici* urge the Court to reject the argument that recognition that the public trust doctrine applies to appropriative water rights will result in a "taking" of property under the Nevada Constitution. While some academics have speculated about the viability of the so-called "judicial takings" theory, neither the U.S. Supreme Court nor this Court has ever ruled that judicial common law rulings can amount to takings, and the Court should not embrace that radical theory in this case. Even if there were any merit to the judicial takings idea, no such claim would lie in this case because the claim would not be ripe and it should be rejected on the merits.

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ARGUMENT

I. THE COURT SHOULD RECOGNIZE THAT THE NEVADA PUBLIC TRUST DOCTRINE APPLIES TO APPROPRIATIVE WATER RIGHTS.

The Court should recognize that the Nevada public trust doctrine applies to appropriative water rights. This Court, like many other courts around the country, has already recognized that the public trust doctrine applies to navigable waters and the lands beneath these waters. *See Lawrence v. Clark County*, 127 Nev. 390, 254 P.3d 606 (2011). Thus, the Court starts in this case from the premise that there *is* a legally-recognized public trust in the State's navigable waters. The narrow, specific issue left for the Court to decide in this case is whether the public trust doctrine applies to rights to *use* water drawn from or affecting navigable waters. The only logical conclusion, if the public trust protecting navigable waters is to be upheld and meaningfully enforced, is that the public trust doctrine does apply to water rights associated with navigable waters.

In *Mineral County v. Department of Conservation & Natural Resources,* 117 Nev. 235, 20 P.3d 800 (2001), the Court was presented with a petition calling upon the Court to direct the Department of Conservation and Natural Resources to manage Walker River and Walker Lake in accordance with the public trust doctrine. The Court concluded that it was not appropriate to address the merits of that petition because the federal District Court in Nevada had (and still has)

exclusive jurisdiction to resolve water rights disputes in the Walker River basin. While two justices (Justice Rose, joined by Justice Shearing) concurred in the denial of the petition on this procedural ground, they argued that the Court should, on an appropriate occasion, recognize that the public trust doctrine applies to appropriative water rights. *See* 117 Nev. at 246-49; 20 P.3d at 807-09. The present certification from the U.S. Court of Appeals for the Ninth Circuit provides that occasion.

Amici submit that the Court should recognize that the public trust doctrine applies to appropriative rights for two independent reasons: first, this conclusion follows from existing principles of Nevada water law and a logical effort to arrive at respectful harmonization of these existing principles; and second, this conclusion comports with the inherently public, shared character of Nevada's rivers and lakes. We address each of these reasons below.

A. Harmonizing Water Rights and the Public Trust.

The prior appropriation system and the public trust doctrine are both well-established elements of Nevada water law, and the Court should now proceed to reaffirm and harmonize these pre-existing doctrines. Accordingly, the Court should continue to recognize private rights to the use of water in Nevada, but also recognize that these rights are held subject to the public trust doctrine.

Nevada Prior Appropriation Doctrine. Early in its history Nevada, like other western states, debated whether common law riparian doctrine, which assigns equal rights to the use of water to all those residing along a watercourse, can sensibly be applied in the arid West. *See generally* Thompson et al., Legal Control of Water Resources 188-200 (West Publishing, 5th Edition, 2006). In 1872, the Court initially concluded that riparian doctrine does apply in Nevada. *See Vansickle v. Haines*, 7 Nev. 249 (1872). Thirteen years later, however, in *Jones v. Adams*, 19 Nev. 78, 6 P. 442 (1885), the Court questioned the ruling in *Vansickle*, and four years later, in *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 280-82, 21 P. 317, 321 (1889), the Court definitively rejected riparian doctrine, declaring the "inapplicability" of riparian doctrine in the "arid' conditions of this state. Thereafter, Nevada joined the camp of so-called of "pure appropriation" (or "Colorado doctrine") states in which relative priorities among private water users to limited water supplies are determined based solely on the doctrine of prior appropriation.

The Court established the major principles of the State's prior appropriation doctrine in the late nineteenth century through a process of common law adjudication. *See* Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. Denv. Water L. Rev. 148, 160 (2001). Starting in 1903, the Nevada Legislature enacted a succession of comprehensive statutory measures defining

appropriative water rights, establishing how they can be acquired, and prescribing how they should be managed. *Id.* at 163-66. Today, the detailed provisions governing the appropriation and adjudication of surface water rights in Nevada are contained in Chapter 533 of the Nevada Revised Statutes.

The foundation of Nevada's prior appropriation doctrine is the principle that no one can own the water in a stream, meaning that water users can only acquire a usufructuary interest in the water. *See* NRS § 533.025 ("The 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."); *see also Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917) ("Water is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate."). In *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997), the Court described the public's ownership of water as "the most fundamental tenet of Nevada water law."

Allocation of water among different users rests upon the maxim "first in time, first in right." *See Lobdell v. Simpson*, 2 Nev. 274, 279 (1866). The first person to effectively claim use of water (a "senior appropriator") acquires the right (a "priority") to its future use as against later claimants ("junior appropriators"). Furthermore, a legal right to the use of water, regardless of its relative seniority, is limited to the "beneficial use" of water. *See* NRS § 533.035 ("Beneficial use shall

be the basis, the measure and the limit of the right to the use of water."). The Court has said that, "[t]he concept of beneficial use is singularly the most important public policy underlying the waters laws of Nevada and many of the western states." *Desert Irrigation, Ltd,* 113 Nev. at 1059, 944 P.2d at 842.

Nevada Public Trust Doctrine. Just as the State has long adhered to the doctrine of prior appropriation, the Court has long recognized that the navigable waters of the State are held in trust for the benefit of all the people . The Court did not "expressly" recognize the public trust doctrine until 2011. *See Lawrence*, 127 Nev. at 406, 254 P.3d at 617. But over a period of 40 years preceding *Lawrence* the Court issued a series of decisions embracing the "tenets" of the public trust doctrine, *id.* at 609, and "implicitly acknowledge[ing] the [existence of the] public trust doctrine." *Id.* at 610. For example, in *State v. Bunkowski,* 88 Nev. 623, 635, 503 P.2d 1231, 1238 (1972), a case involving a dispute over ownership of the bed of the Carson River, the Court held that the riverbed belonged to the State and that the State therefore held the lands "in trust for public use." *See also State Engineer v. Cowles Bros., Inc.,* 86 Nev. 872, 874, 478 P.2d 159, 160 (1970) (recognizing that the State's navigable waters and the beds beneath them became the property of the public upon Nevada's admission to statehood in 1864).

As discussed, in 2001, in *Mineral County*, the Court declined to specifically address whether and how to apply the public trust doctrine to appropriative water

rights because the Court lacked jurisdiction over the dispute. But Justice Rose (joined by Justice Shearing), in his concurring opinion, stated it was "appropriate, if not our constitutional duty, to expressly reaffirm" the State's "continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not 'substantially impair the public interest in the lands and waters remaining.'" *Mineral County,* 117 Nev. at 248, 20 P.3d at 808-09, quoting *Illinois Central R. Co v. Illinois,* 146 U.S. 387, 452 (1892). Justice Rose based his call for applying the public trust doctrine to water rights in part on its venerable history. *See* 117 Nev. at 246, 20 P.3d at 807. He also pointed to NRS § 533.025, which, as discussed above, states, "The 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." 117 Nev. at 247, 20 P.3d at 808. Justice Rose observed, "This court itself has recognized that this public ownership of water is the 'most fundamental tenet of Nevada water law.'" *Id.*, quoting *Desert Irrigation Ltd v. State of Nevada,* 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). He continued:

> Additionally, we have noted that those holding vested water rights do not 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 doctrine, which at all times, "forms the outer boundaries of permissible government action with respect to public trust resources."

Id., quoting, *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.,* 671 P.3d 1085, 1095 (ID 1983).

In 2011, in *Lawrence,* the Court finally expressly embraced the public trust doctrine, albeit not in a case specifically involving appropriative water rights The Court described the doctrine's deep roots dating back to Roman times, its adoption by English common law courts, and its eventual transfer to the original 13 American states. 127 Nev. at 393-94, 254 P. 3d at 608-09. The Court also discussed how, under the equal footing doctrine, as the nation expanded westward, each new sovereign state succeeded to the federal government's ownership of navigable waterways, with the result that Nevada and every other western state now "'hold[s] the absolute right to their navigable waters and the soil underneath them for their own common use.'" 127 Nev. at 394, 254 P.3d at 609, quoting *Martin v. Waddell*, 41 U.S. 367, 410 (1842). In addition, the Court grounded its recognition of the public trust "on policy reflected in the Nevada Constitution [specifically the Gift Clause, Article 8, section 9], Nevada statutes, and the inherent limitations on the state's sovereign power." 127 Nev. at 401, 254 P. 3d at 613.

The *Lawrence* Court's discussion of the State's statutory recognition of the public trust doctrine is especially instructive for the purpose of this present case. The Court referenced NRS § 533.025, which, as discussed above, provides: "The 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." 127 Nev. at

400, 254 P. 3d at 612-13. The Court stated: "Notably, NRS 533.025 does not provide that Nevada's water belongs to the state; rather, it belongs to the public." 127 Nev. 400, 254 P3d at 613. Then, significantly, the Court continued: "Thus, as Justice Rose proposed [in his concurring opinion in *Mineral County*], NRS 533.025 provides grounding for the Nevada public trust doctrine." *Id.*, citing *Mineral County,* 117 Nev. at 247, 20 P.3d at 808. NRS 533.025, the Court explained, "recognize[s] that the public . . . . water of this state do[es] 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." 127 Nev. 400, 254 P3d at 613. In sum, the Court said, "NRS 533.025 effectively statutorily codif[ies] the principles behind the public trust doctrine in Nevada." *Id.*

Although the *Lawrence* case involved application of the public trust doctrine to formerly submerged lands, rather than to appropriative water rights, the Court's analysis in *Lawrence* described above directly supports the conclusion that the public trust doctrine applies to appropriative rights. The *Lawrence* Court expressly adopted Justice Rose's analysis in *Mineral County* for *why* NRS § 533.025 supports the conclusion that the public trust doctrine applies to appropriative water rights. The logical next step is for the Court to rely on its prior reasoning in

Lawrence to support an explicit ruling that the public trust doctrine applies to appropriative water rights.[1]

Harmonizing Appropriative Water Rights and the Public Trust Doctrine. When diversions of water from or affecting navigable waterways may harm public trust uses, administration of water rights under the system of prior appropriation may be in tension with the public's interest in Nevada's waters. In cases where such tension exists, if the Court were to enforce the public trust doctrine in navigable waters to the fullest extent imaginable, there might be little or nothing left of private property interests in the use of water for irrigation or municipal water supply. On the other hand, if the Court were to ignore the public trust doctrine in the administration of water rights, it would fail in its duty as trustee to defend the interests and values protected by the public trust doctrine. In order to affirm and protect all relevant aspects of existing Nevada law the Court should uphold both legal doctrines and harmonize the application of these two important and equally well-established doctrines.

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[1] The focus of this case is the public trust in water resources. But it is noteworthy that the State of Nevada holds other types of resources in trust, including state – owned lands, *see* NRS § 321.0005 ("Lands must be used in the best interest of the residents of this State, and to that end the lands must be used for recreational activities, the production of revenue and other public purposes"), and the public's wildlife, *see* NRS § 501.100 ("Wildlife in this state not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada").

In 1983, in *National Audubon Society*, the California Supreme Court embraced just this kind of harmonization between the California appropriative water rights system and the California public trust doctrine. The California Court was presented with two sharply opposing arguments: first, that the public trust doctrine is "antecedent to and thus limits all appropriative water rights," a position which the Court believed implied "that most appropriative water rights in California were acquired and are presently being used unlawfully," *see* 33 Cal. 3d at 445; and second, that the public trust doctrine has been "absorbed" by state water law, and thus has "quietly disappeared," with the result that a water right holder "enjoys a vested right in perpetuity to take water without concern for the consequences to the trust." *See id.* The Court rejected both of these polar positions. "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 the state, or deny any duty to protect or even consider the values promoted by the public trust." *Id.*

Likewise, in *Nevada,* to accept either the position that water rights are exempt from the public trust doctrine, or that the public trust doctrine has no modern significance for the administration of water, would represent an abdication of the State's public trust responsibilities in navigable waters. Other states, in addition to California, faced with the same question, have ruled that the public trust

doctrine applies to appropriative water rights. *See, e.g. In the Matter of Water Use Permit Applications* (the "Waiahole Ditch decision"), 9 P.3d 409 (HI 2000). *Amici* respectfully urge this Court to pursue the same pragmatic harmonization of appropriative water rights with the public trust doctrine.

B. Recognizing the Public Nature of Public Trust Resources

The Court also should recognize that the public trust doctrine applies to appropriative water rights because navigable rivers and lakes, by their nature, represent – and have always represented -- inherently public, shared resources. The importance of shared public use of water resources is most obvious in the case of commercial navigation. Navigable waterways could not function as channels of commerce unless each member of the public enjoyed the right in common with the rest of the public to use waterways for transportation along their entire navigable length. This practical reality is reflected in the venerable federal navigational servitude, which recognizes that the private interests of landowners bordering a navigable stream are subordinate to the national government's need to keep waterways free from obstructions and otherwise promote commercial navigation. *See United States v. Willow River Power Co.*, 324 U.S. 499 (1945). The public right of navigation has long been recognized as a public use independently protected by state-law public trust doctrines. *Illinois Central,* 146 U.S. at 452.

The same principle applies to the recreational and ecological values served by the public trust in rivers and lakes. As Justice Rose eloquently explained in his concurring opinion in *Mineral County*:

> All parties are understandably concerned about the economic impact the lack of water in Walker River or Walker Lake would have on them or their communities. Hawthorne residents are concerned about the loss of a fabulous recreational site, the Paiute Reservation is concerned about keeping sufficient water in Weber Reservoir, and the Mason Valley ranchers are worried about sufficient irrigation water for their crops. While the issue today focuses on insufficient water flowing into Walker Lake, which itself is arguably the first actual appropriation, each appropriator may in the future have to worry about his or her water allocation not being sustained as the upstream use continues to absorb a vast majority of the water.

137 Nev. at 247-48, 20 P.3d at 808. He then continued:

> "[A] substantial diminution in any natural resource adversely impacts all of us, whether we are water appropriators or not. It is not just the water appropriators who have a vested interest in the water from the Walker River, but every citizen of Nevada as well. It is this water that will dictate whether Walker Lake survives in its present state or becomes a dry lake bed. The stakes at issue go well beyond those who are economically interested in the water from Walker River. The public expects this unique natural resource to be preserved and for all of us to always be able to marvel at this massive glittering body of water lying majestically in the midst of a dry mountainous desert.

Id.

Justice Rose's basic insight is that unconstrained pursuit of self-interest based on ownership of individual water rights cannot sustain citizens' broadly-shared interests in navigable waters, including the healthy functioning of the ecosystems upon which the livability of the State and its communities ultimately

depend. Or as Justice Oliver Wendell Holmes, Jr, stated nearly 90 years ago, "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

* * *

In sum, in order to achieve a logical harmonization of longstanding principles of Nevada water law, and in recognition of the inherently public, shared character of Nevada's navigable rivers and lakes, the Court should recognize that the public trust doctrine applies to appropriative water rights.

II. THE COURT SHOULD DEFINE THE SCOPE OF THE PUBLIC TRUST DOCTRINE IN A FASHION SUFFICIENT TO ALLOW THE STATE TO PROTECT CORE TRUST VALUES.

The next question is how the public trust doctrine should apply to appropriative water right and how these two doctrines can be effectively harmonized.

At the outset it is important to recognize that the rights the State holds in public trust resources are "different in character from that which the state holds in lands intended for sale." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892). First, the public trust doctrine places a constraint on the State's ability to alienate resources subject to the trust. More specifically, in Nevada, courts reviewing the "dispensation" (alienation) of public trust resources 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.'" *Lawrence*, 127 Nev. at 405, 254 P.3d at 616, quoting *Arizona Center for Law v. Hassell,* 837 P.2d 158, 170 (Az. App.1991).

Second, the public trust creates an authority and a duty on the part of the State to protect the values and uses of the public trust from harm for the benefit of present and future generations. Originally, the objectives of the public trust doctrine were to protect the public's rights in navigation, commerce, and fishing. *Mineral County,* 117 Nev. at 246, 20 P.3d at 807. But, as this Court has explained, as the public's values and interests have changed over time, "the trust has evolved to encompass additional public values – including recreational and ecological uses." 117 Nev. 246-47, 20 P.3d at 807; *see also National Audubon Society*, 33 Cal. 3d at 435, 189 Cal. Rptr. at 356 (recognizing that "recreational and ecological" values are protected by the public trust doctrine).

Applying the State's public trust duty to protect trust resources is especially important in the context of surface waters, which have long been subject to extensive exploitation in Nevada and across the West to support irrigated agriculture and other important economic activities. In *National Audubon*, the

California Supreme Court adopted a balanced approach to the application of the public trust doctrine to appropriative water rights, holding that both "are parts of an integrated system of water law." *Id.* at 452. The California Supreme Court's accommodation between the public trust doctrine and the appropriative water rights system contains the following essential elements:

1. The State has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id.* at 446.

2. The doctrine prevents any party from acquiring "a vested right to appropriate water in manner harmful to the interests protected by the public trust." *Id.* at 445.

3. "As a matter of current and historical necessity," the State "has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a different part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream." *Id.* at 446

4. "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water." *Id.* at 447. This duty allows the State to reconsider its previous allocations of public waters – even those initially "made after due

consideration of their effect on the public trust" – and "no vested rights bar such reconsideration." *Id.*

The Hawaii Supreme Court adopted a similar harmonizing approach in the *Waiahole Ditch* decision. *See* 9 P.3d at 453-54. This reasonable and balanced approach creates a mandate to ensure that the public trust is taken into account in any water management decision, and encourages conservation of trust resources "whenever feasible." At the same time, it leaves the State latitude to allow the exploitation of water resources, even to the point of permitting harm to be done to trust resources, when maximal protection of the resources is not feasible. *Amici* urge the Court to follow this balanced approach.

In addition, although the public trust doctrine was in its origins focused, geographically, on navigable waters and the lands below such waters, other courts have recognized that diversions of non-navigable waters may harm the public trust in navigable waters and that regulation of such upstream diversions may be necessary to protect trust values and uses in navigable waters. Thus, in the *National Audubon* case, the California Supreme Court concluded that the principles of the public trust doctrine "apply fully to a case in which diversions from a nonnavigable tributary impair the public trust in a downstream river or lake." 33 Cal. 3d at 436. The Court reasoned: "If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable

waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." *Id* at 436-437 (emphasis in original), quoting, Ralph Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. Davis L. Rev. 233, 257-58 (1980); s*ee also Environmental Law Foundation v. State Water Resources Control Board*, 26 Cal. App.5th 844, 859, 237 Cal. Rptr. 393, 402 (Cal. Ct. App. 2018) (ruling that the public trust doctrine applies to the extraction of groundwater to the extent the extraction adversely impacts flows in a navigable river).

In the *Mineral County* case, Justice Rose observed that, "although the original scope of the public trust reached only navigable waters, the trust has evolved to encompass non-navigable tributaries that feed navigable bodies of water." 117 Nev. at 247, 20 P.3d at 807-08. He contended, referring specifically to the Walker River and Walker Lake, "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." *Id. Amici* urge the Court to embrace Justice Rose's reasoning.

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III. FORMAL RECOGNITION OF THE PUBLIC TRUST DOCTRINE WILL NOT DESTABILIZE NEVADA'S WATER RIGHTS SYSTEM

Some parties and their *amici* may object that recognition that the public trust doctrine applies to appropriative water rights may have a destabilizing effect on Nevada's water rights system and the valuable economic activities that depend on this system. Without denying that the Court's affirmation that the public trust doctrine applies to appropriative water rights is important, *amici* submit there are several reasons to believe that the practical impact of the Court's decision will be modest.

First, an explicit ruling that the public trust doctrine applies to appropriative water rights will hardly represent an abrupt departure from prior law. As discussed, it was not until 2011 that the State "formally" recognized the existence of the public trust doctrine. See *Lawrence v. Clark County*, 127 Nev. 390, 254 P. 3d 606 (2011). But during the preceding 40 years the Court had already issued a series of decisions embracing the fundamental "tenets" on which the public trust doctrine is based. See 127 Nev. at 395-97; 254 P.3d at 609-11 (discussing *Mineral County v. Department of Conservation*, 117 Nev. 235, 20 P.3d 800 (2001); *State v. Bunkowski,* 88 Nev. 623, 503 P.2d 1231 (1972), and *State Engineer v. Cowles Bros., Inc.,* 86 Nev. 872, 478 P.2d 159 (1970)).

Second, the public trust doctrine is consistent with the fundamental nature of the appropriative water rights system, which restricts individual water users to protect other water users and broad public interests. The "fundamental requirement" for those seeking to appropriate water in Nevada is that water must be put to beneficial use. *Bacher v. Office of State Engineer*, 122 Nev. 1110, 1116, 146 P.3d 793, 797 (2006). Under Nevada law, beneficial use is "the basis, the measure, and the limit of the right to the use of water." NRS § 533.035. At its foundation, Nevada's beneficial use requirement protects the public's interest in preventing speculation and monopoly of water, the West's most important public resource. *See* David Schorr, The Colorado Doctrine 44-45 (Yale U. Press, 2012) *and Bacher*, 122 Nev. 1119, 146 P.3d at 799 (adopting Colorado's anti-speculation doctrine).

Third, while the public trust doctrine represents an independent legal doctrine that confers distinctive authority and duties on state water managers, it is comparable in nature and effect to other specific limitations on private water rights. For example, a corollary of the fundamental beneficial use requirement is that wasteful use of water is unlawful. *See United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983) (discussing how in Nevada and across the West, the right to beneficial use of water does not include the right to waste water); *see also* NRS § 533.460 ("the willful waste of water to the detriment of another . . .

shall be a misdemeanor"). In addition, water rights permits are subject to cancellation if the permittee fails to proceed in good faith and with reasonable diligence to perfect an appropriation, *see* NRS § 533.395, and a perfected surface water right is subject to "abandonment" under certain conditions. *See* NRS § 533.060 (listing "events or actions" that must be demonstrated to prevent a finding of abandonment).

All of these current limitations on private water rights support the general point that holders of usufructuary interests in water are subject to substantial obligations to ensure that their ownership of water serves valuable social purposes. It is unthinkable, for example, that an owner of real estate could lose her legal title because she is holding her land as a long–term speculative investment, or because she no longer has a personal need for the land. But just such significant conditions attach to private water interests under the beneficial use and "use it or lose it" principles. In light of the significant limitations on Nevada water rights that already exist, recognition that the public trust doctrine applies to Nevada water rights will not work a dramatic change in the scope and character of private property interests in water.

The close relationship between the public trust doctrine and other doctrines limiting usufructuary interests in water is confirmed by examining the experience in California, which recognizes the public trust doctrine alongside the reasonable

and beneficial use doctrine, the waste doctrine, and other significant limitations on private rights in water. The California Water Board has from time to time applied the public trust doctrine to curtail the exercise of water rights, *see, e.g.*, Cal. State Water Resources Control Bd., Revised Decision 1644, https://www. waterboards.ca.gov/waterrights/ board_decisions/adopted_orders/decisions/ d1600_d1649/wrd1644.pdf (2001), but the board has *never* relied *exclusively* on the public trust doctrine for authority to do so. At the same time, the California Water Board has, on other occasions, curtailed the exercise of vested water rights to protect the environment without even mentioning the public trust doctrine. *See* Cal. State Water Resources Control Bd., State Water Emergency Regulatory Action, https://www.waterboards.ca.gov/ waterrights/ water_issues/ programs/drought/mill_deer_antelope_creeks.html (March 30, 2015) (curtailing diversions in certain tributaries of the Sacramento River (Mill Creek, Deer Creek and Antelope Creek) when available flows were insufficient to support salmon and steelhead, based on California Water Code section 1058.5(b), which authorizes emergency regulations "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, flows."); *see also Light v. State Water Resources Control Board*, 226 Cal.App.4th 1463, 1480-81, 173 Cal.Rptr.3d 200, 211-12 (2014) (upholding water board regulation, issued based on the reasonable use doctrine, to require reductions in diversions from the Russian

River to protect salmonids, but suggesting that the board might also have invoked the public trust doctrine to justify the regulation).

Finally, the experience of California with the public trust doctrine in the aftermath of the *National Audubon* decision confirms that applying the public trust doctrine to appropriative water rights will not cause any serious disruption. A recent comprehensive scholarly survey of judicial and administrative rulings applying the *National Audubon* decision shows that it has "relatively modest importance for California water management." *See* Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. Davis L. Rev. 1099, 1151 (2012).

In addition, and more specifically, the *National Audubon* decision has not had an adverse effect on the availability of water for Los Angeles itself. In 1994, more than 10 years after the California Supreme Court decision, and after extensive administrative proceedings, the California Water Board issued an order establishing long-term restrictions on water exports from the basin to Los Angeles. *See* Cal. State Water Resources Control Bd., Water Right Decision D-1631, https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1631.pdf (1994). While the final order is quite complex, the net effect of the order, over the long-term, is to reduce the city's average annual

Mono Lake Basin exports by nearly sixty percent. *See* Gregory Weber, *Articulating the Public Trust: Text, NearText and Context*, 27 Ariz. St. L.J. 1155, 1191 (1995). Despite this reduction in water supply from Mono Lake, Los Angeles has continued to meet the water needs of an ever-expanding community. Adjustment to smaller water exports from Mono Lake have been made possible in part by efficient water reclamation and conservation projects. *See* Mono Lake Committee, "Replacement Water: Helping Los Angles Find Better Solutions," https://www. monolake.org/mlc/altwater).

To the extent application of the public trust doctrine will create a need to find replacement water for current water users, a variety of different strategies will no doubt need to be pursued. *See e.g.*, Southern Nevada Water Authority, "Conservation Facts and Achievement," https://www.snwa.com / drought-and-conservation/conservation-facts-and-achievements/index.html (describing how the authority has "developed and implemented one of the most comprehensive water conservation programs in the nation"). The availability of alternative strategies for meeting reasonable and beneficial water needs will also necessarily play a role in determining whether application of the public trust doctrine to appropriative water rights is economically feasible. If it is not, then under the California Supreme Court's approach in *National Audubon*, non-vested appropriations that harm trust resources may continue to be authorized on a permissive basis. Thus, under the

approach outlined in *National Audubon*, environmental protection and economic prosperity can readily co-exist when the public trust doctrine is applied to appropriative water rights.

IV. RECOGNIZING THAT THE PUBLIC TRUST DOCTRINE APPLIES TO APPROPRIATIVE WATER RIGHTS WILL NOT RESULT IN A "JUDICIAL TAKING"

The Ninth Circuit also posed to this Court the question whether recognition that the public trust doctrine applies to appropriative water rights would result in a compensable taking under the Nevada Constitution. The Court should answer this question in the negative.

First, while some scholars have speculated about whether judicial rulings can give rise to viable takings claims, *see, e.g.*, Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990), there is no applicable precedent supporting the "judicial takings" theory. So far as we know, this Court has never entertained, much less embraced, the judicial takings theory. The U.S. Supreme Court recently debated whether a judicial ruling can support a takings claim, but ultimately did not endorse the theory. *See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 715 (2010). Justice Antonin Scalia, joined by several other several justices, contended that a judicial ruling that "an established right of private property no longer exists" should support a takings claim. But other justices expressed grave doubts about the

judicial takings theory and declined to support it. *See id.* at 737 (Kennedy, J. concurring in part and concurring in the judgment); *id.* at 742 (Breyer, J. concurring in part and concurring in the judgment). Because no viewpoint gained support from a majority, the Court made no precedential ruling on the viability of the judicial takings theory.

Second, as Justice Kennedy explained at length in his concurring opinion in *Stop the Beach Renourishment,* there are substantial reasons to believe that the taking power is vested in the legislature and the executive, not the courts. He observed that the decision whether to take private property – including whether it makes "financial sense to do so" – represents a policy decision that, "as a matter of custom and practice," is assigned to the political branches. *Id.* at 775. He also observed that the drafters of the Takings Clause "most likely" did not believe it applied to judicial questions, and the Court should avoid extending the Takings Clause in a manner "inconsistent with historical practice." *Id.* at 739. Justice Kennedy did acknowledge that judicial rulings that eliminated or substantially changed established property rights might be so arbitrary and capricious as to violate the Due Process Clause (rather than the Takings Clause). *Id.* at 735-76. But in all events, he said, constitutional review of judicial rulings had to proceed on the premise that "owners may reasonably expect or anticipate courts to make certain changes in property law," *id.* at 738, and that "State courts generally

operate under a common-law tradition that allows for incremental modifications to property law." *Id.* at 736.

Third, even if a judicial takings claim were theoretically viable, no such claim is ripe for consideration in this case. As discussed above, the public trust doctrine does not prescribe a specific management regime for water resources; instead, it creates a duty on the part of the State to consider how water development may impact public trust uses and to protect those uses when feasible. At least in advance of some concrete application of the public trust doctrine in a way that alters pre-existing patterns of water use, there is no possible takings claim ripe for consideration.

Finally, even if judicial takings can occur, and assuming a takings claim was in a proper posture for consideration in this case, the claim should fail on the merits. This case does not call upon the Court to make any change in Nevada water law, much less destroy usufructuary interests in water. Instead, the Court is presented with two well-established bodies of law, the appropriative water rights system and the public trust doctrine, and is now called upon to harmonize these two doctrines. The kind of incremental clarification of the law in the common law tradition called for by this case does not begin to approach the level of a taking under any theory. It is already well established that the public trust doctrine applies to Nevada's navigable waters, and this Court's recognition that the public

trust doctrine can constrain the exercise of water rights affecting navigable waters will be merely a natural, logical application of existing law. Cf. *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 532, 606 P.2d 362, 372 (1980) (recognition that privately- owned tidelands are subject to the public trust doctrine does "not divest anyone of title to property; the consequence of [the] decision will be only that some [property owners] . . . will . . .hold it subject to the public trust").

CONCLUSION

Amici urge the Court to recognize that the Nevada public trust doctrine applies to appropriative water rights and to adopt a reasonable and balanced harmonization of these two doctrines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, double-spaced Times Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because, excluding the parts of the brief exempted from the word count, it contains 6,997 words.

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

December 3rd, 2018

Robert L. Eisenberg

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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