No. 75917

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY, et al.,

Appellants,

v.

LYON COUNTY, et al.,

Respondents.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Case No. 15-16342

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Pacific Legal Foundation has no parent corporations, and that no publicly held company owns 10% or more of its stock. Steven M. Silva, an associate at Blanchard, Krasner, and French, is the only attorney who has appeared or is expected to appear on behalf of Pacific Legal Foundation in this case.

/s/ Steven M. Silva

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pacific Legal Foundation was founded in 1973 and is widely regarded as the most experienced and successful nonprofit legal foundation of its kind. PLF has participated as lead counsel or amicus curiae in many cases before the United States Supreme Court defending the right of individuals to make reasonable use of their property. *See, e.g.*, *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2018), *cert. granted*, 138 S. Ct. 1262 (Mem) (U.S. Mar. 5, 2018) (No. 17-647); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Ag.*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

PLF also has participated in cases, like this one, addressing the scope of the public trust doctrine. *See, e.g.*, *Envtl. Law Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 395 (Ct. App. 2018); *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1173 (Ind. 2018); *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 551 (Wash. 2018).

Moreover, PLF has contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1 (2002).

PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues on review in this case. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues certified to this Court involve the intersection of Nevada's protection for vested water rights and the public trust doctrine. Appellants propose a radical expansion of the public trust doctrine that would allow state officials or the judiciary to unsettle vested water rights. Appellants further argue that vested property rights can be curtailed by judicial decision without any form of compensation. Mineral County's Br. at 32–43.

Appellants create the illusion that this dramatic destruction of property rights is necessary by focusing almost exclusively on the public trust doctrine, ignoring or downplaying Nevada's vigorous and longstanding protection for vested water rights. By shifting attention away from this Court's prior appropriation case law, Appellants attempt to minimize the importance of protecting vested property interests.

This brief, however, places the importance of protecting water rights at center stage. Recognizing that certainty in water allocation is vitally important in the arid West, Nevada has long embraced strong protections for water rights. Unlike states such as California, Nevada has consistently rejected efforts to alter, eliminate, or curtail water rights to accommodate supposedly changing circumstances or new theories of water usage. Indeed, over a century ago, this Court unequivocally rejected efforts to unsettle prior appropriations in the name of environmental conservation. *See Tonkin v. Winzell*, 27 Nev. 88, 73 P. 593, 595 (1903). Moreover, this brief explains how Nevada's water appropriation system already balances private property rights and the public interest. Under that system, new appropriations are permitted only if they are for a beneficial use and do not harm the public interest.

NRS 533.030(1). Importantly, however, once vested such appropriative rights are protected against diminishment. *Application of Filippini*, 66 Nev. 17, 21, 202 P.2d 535, 537 (1949).

The balance that Nevada has struck is consistent with the public trust doctrine. That doctrine neither requires nor permits the disruption of vested property interests. Indeed, states have always been allowed to allocate public trust property for private use so long as doing so does not destroy trust property. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("[I]t has been long established that the individual States have the authority to define the limits of the [property] held in public trust and to recognize private rights in such [property] as they see fit."). To be sure, this Court's decision in *Lawrence v. Clark County*, 127 Nev. 390, 254 P.3d 606 (2011), recognizes that state officials should take the public trust into account when allocating trust resources. But this Court has never suggested that long-settled property rights can be reexamined—and undermined—in the name of the public trust. It should not now expand that doctrine so as to create uncertainty and instability in already allocated water rights.

If, however, this Court believes that a radical expansion of the public trust doctrine is legally plausible, it should nevertheless reject such an interpretation to avoid the serious questions that it would raise about uncompensated takings of private property rights. Appellants argue that the public trust doctrine is a background principle of property law and therefore that the Takings Clause is irrelevant. Mineral County's Br. at 32–43. But, once again, this argument would impermissibly compel the Court to ignore how the diminishment of water rights has always been considered a taking in Nevada, and how water rights holders have never had their rights diminished in such a manner. Moreover, the argument depends on the propriety of distinguishing legislative and executive takings of property from judicial takings of property—but the Nevada Constitution countenances no such distinction.

ARGUMENT

I. Longstanding Nevada Law Protects Water Rights While Ensuring the Most Efficient and Least Environmentally Damaging Uses

A. Nevada Law Provides Substantial Protection for Vested Water Rights

Nevada has always robustly protected vested water rights. In Nevada, as in most western states, water rights are allocated under the doctrine of prior appropriation. Under prior appropriation, "[t]he first appropriator of the water of a stream passing through the public lands . . . has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation." *Lobdell v. Simpson*, 2 Nev. 274, 277–78 (1866). Water rights are "regarded and protected as real property." *Filippini*, 66 Nev. at 21, 202 P.2d at 537. Once water rights are vested, "either by actual diversion and application to beneficial use or by appropriation," those rights are fixed and must be "regarded and protected as property." *Id.* at 22, 202 P.2d at 537. Such rights are "among the most valuable property rights known to the law." *White v. Farmers' High Line Canal & Reservoir Co.*, 43 P. 1028, 1030 (Colo. 1896). "[T]he legislature cannot constitutionally enact laws

impairing rights already in existence." *Filippini*, 66 Nev. at 30, 202 P.2d at 541. The prior appropriation doctrine thus helps to guarantee "certainty in the holding and use of water rights." *Arizona v. California*, 460 U.S. 605, 620 (1983).

Water rights obtained under the prior appropriation doctrine are extensively protected both under statute and the Nevada Constitution. *See, e.g.*, NRS 533.087–533.320 (process for the adjudication of vested water rights); NRS 533.210 (water rights settled by decree are "final" and "conclusive"); NRS 533.0245 (requiring the Nevada State Engineer to avoid conflicts with a "decree or order issued by a state or federal court"); NRS 533.3703 (forbidding any change in water use that "is inconsistent with any applicable federal or state decree"). Indeed, this Court has declared that both the national and state governments have a duty to protect appropriative water rights. *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 21 P. 317, 321 (1889) ("The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect."). That duty derives from constitutional principle: "the protection afforded by the due process clause of the Fourteenth Amendment to the

United States Constitution extends to prevent retrospective laws from divesting vested rights." *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 167, 826 P.2d 948, 950 (1992). Accordingly, the owners of water rights that are divested by government action are entitled to just compensation under the Nevada Constitution. *Carson City v. Lompa's Estate*, 88 Nev. 541, 542, 501 P.2d 662, 662 (1972).

This Court has rejected efforts to alter, eliminate, or curtail water rights based on changing circumstances or new theories of water usage. Traditionally, water rights that were appropriated could only be lost through intentional abandonment. *In re Manse Spring & Its Tributaries, Nye Cty.*, 60 Nev. 280, 108 P.2d 311, 315 (1940). In 1913, Nevada enacted a law declaring that water rights can be forfeited if their holder fails to put the water to "beneficial use" for five years. *Id.* at 314. This forfeiture rule may not, the Court has held, be applied retroactively, because doing so would "take[] away much of the stability and security of the right to the continued use of such water." *Id.* at 316. Such protection is necessary to "refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act." *Id.* at 315.

Even more to the point, this Court has expressly rejected efforts to unsettle prior appropriations even in the name of environmental conservation. The Court has emphasized that conservation "should be encouraged by all legitimate means, but not to the extent of depriving the owner of water already acquired by prior application to a beneficial use." *Tonkin*, 27 Nev. 88, 73 P. at 595. Efforts to unsettle existing rights in the name of conservation would "overthrow the long well–established and just principles of the law, and result in legal confiscation." *Id.*

B. Nevada's Longstanding System for the Allocation of Water Rights Recognizes the Importance of and Takes into Account the Public Interest in Productive and Environmentally Responsible Use

Nevada's prior appropriation system maintains a fair balance between the productive use of water and other considerations, such as the environment. In fact, under that system the efficient allocation of water for private use is itself in the public interest. *Filippini*, 66 Nev. at 25, 202 P.2d at 539 ("The public welfare is very greatly interested in the largest economical use of the waters of the state for agricultural, mining, power and other purposes."). *See Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 165 (1935) ("[I]n the aridland states the use of water for irrigation, although by a private individual, is a public use.").

But the system tempers the need for productive use of water with reasonable concern to minimize waste and environmental harm. For example, no water right may be recognized unless the water is used for "beneficial use." NRS 533.030(1). Moreover, new or expanded use permits may not be granted if the use "threatens to prove detrimental to the public interests." NRS 533.370(2). And part of that public-interest analysis includes the environmental impact of an appropriation. *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 746, 918 P.2d 697, 699 (1996). Thus, the more-than-a-century-old permitting system established by Nevada law already takes into full account the impact that the allocation of water rights will have on the public interest.[1]

[1] Although pre-1913 water rights are not subject to the five-year-forfeiture rule, they are still generally subject to the public-interest-protecting requirement of beneficial use. *In re Manse Spring & Its Tributaries, Nye Cty.*, 60 Nev. 280, 108 P.2d 311, 316 (1940) ("We do not wish to be understood as holding that because a person may have established a water right prior to 1913, such acquisition insures him in the right to the use of such water indefinitely, without regard to placing it to beneficial use.").

II. Novel Interpretations of Nevada's Public Trust Doctrine Do Not Justify the Subversion of the State's System for the Allocation of Water Rights

A. The Public Trust Doctrine as Generally Understood Allows for the Existence and Protection of Private Property Rights in Trust Resources

The balance that Nevada's system for the allocation of water rights has struck between certainty and the public interest is fully compatible with the state's public trust doctrine.

The history of the public trust doctrine is highly contentious. *See, e.g.*, James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 7 (2007) ("Much ink has been spilled over the past four decades, both in academic articles and judicial decisions, on the public trust doctrine and its historic foundations."). Originally, the public trust doctrine in this country applied only to submerged lands beneath tidelands and navigable waters. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892). And when it applied, the trust protected only navigation, commerce, and fishing uses, not such considerations as the environment. *See id.*

Over time, the public trust doctrine has been expanded beyond its original scope to apply to certain non-navigable waters and to protect

additional uses such as recreational and ecological uses. *See State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239 (1981); *In re Water Use Permit Applications,* 9 P.3d 409 (Hawai'i 2000). This radical expansion has garnered heavy criticism. *See* James L. Huffman, *Inconvenient Truths*, 18 Duke Envtl. L. & Pol'y F. 1; Janice Lawrence, Lyon and Fogerty: *Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982).

But even under its most expansive guise, the public trust doctrine has not been understood to divest a state of its authority to grant permanent property rights in land or water subject to the public trust, so long as the government has acted with the public interest in mind.[2] *See Bowlby v. Shively*, 30 P. 154, 160 (Or. 1892), *aff'd sub nom. Shively v. Bowlby*, 152 U.S. 1 (1894) (the state may dispose of the lands beneath navigable waterways as it sees fit, "subject only to the paramount right of navigation and commerce"). *See also Morse v. Oregon Division of State Lands*, 590 P .2d 709, 712 (Or. 1979) (the public trust doctrine allowed a

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[2] Most of the cases addressing public trust property deal with the ownership or use of submerged lands rather than the right to use the water itself, but the same principles largely apply to water rights, which are after all protected in much the same way as interests in real property. *See supra* Section I.A.

grant to a private party so long as it did not "result[] in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize"); *Hogg v. Beerman*, 41 Ohio St. 81, 95 (1884) ("So long as navigable waters are left free to the public, . . . we know of no reason why . . . any state, holding ownership and jurisdiction of land and water, may not vest in a private grantee such a body of land, marsh and water . . . .").

Rather, "it has been long established that the individual States have the authority to define the limits of the [property] held in public trust and to recognize private rights in such [property] as they see fit." *Phillips Petroleum Co.*, 484 U.S. at 475. Indeed, if done "in order to subserve the general good," trust property may be given in fee simple free of the trust, *Eldridge v. Cowell*, 4 Cal. 80, 80 (1854), and "then be alienated irrevocably by the state for private use to private individuals." *People ex inf. Webb v. California Fish Co.*, 138 P. 79, 88 (Cal. 1913). Thus, states have great discretion to decide whether trust resources "should be thus excluded from navigation, and sold to private use," a determination "conclusive upon the courts." *Id.*

Importantly, private property interests granted in public trust property are not mere licenses or limited easements, but are full-fledged property interests. *See Commonwealth v. Alger*, 61 Mass. 53, 70 (1851) (a private property owner's interest in land subject to the public trust is "not an easement, an incorporeal right, license, or privilege, but a *jus in re,* a real or proprietary title to, and interest in, the soil itself"). Such interests are permanent and backed by the full weight of property law and constitutional guarantees. *Cf. Martin v. Waddell's Lessee*, 41 U.S. 367, 381 (1842) ("If there was in the people of New Jersey a common right of fishery, the legislature, exercising plenary sovereignty, could, unquestionably, dispose of it, modify it, lease it, and exercise every act of ownership and control over it."); *Den v. Ass'n of the Jersey Co.*, 56 U.S. 426, 432–33 (1853) (following *Martin*).

The U.S. Supreme Court's oft-cited decision in *Illinois Central R.R.* is consistent with these public trust principles.[3] In that case, a railroad

[3] Even though *Illinois Central* has been frequently cited and relied upon by states applying the public trust doctrine, there is substantial evidence that the decision has been undermined or significantly narrowed by subsequent Supreme Court pronouncements. *See* Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law,* 15 Va. Envtl. L.J. 713, 740 (1996) (discussing how subsequent Supreme Court decisions

company claimed title in fee simple to 1,000 acres of submerged lands under Lake Michigan, stretching for nearly a mile along Chicago's shoreline. The railroad company proposed to fill and develop the land. The Supreme Court concluded that the state could not convey or otherwise alienate the entire parcel in fee simple free of the public trust. The state could, however, sell small parcels of public trust land for development, so long as this could be done without impairing the public's right to make use of the remaining submerged land and water. 146 U.S. at 450–64. The Court emphasized that ownership could be granted in property "for the improvement of the public interest" or in such circumstances which "do not substantially impair the public interest in the lands and waters remaining." *Id.* at 453. *Accord Shively v. Bowlby*, 152 U.S. 1, 47 (1894) (public trust resources, although "belong[ing] to the respective states within which they are found, [may be] use[d] or dispose[d] of . . . when that can be done without substantial impairment of the interest of the public in such waters"). *See Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 292 (1983) (a state's interest

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have undercut *Illinois Central* by emphasizing that degree of deference owed to legislative determinations of the scope of the public trust).

in public trust resources may be lost through the operation of a statute of limitations). *Cf. Phillips Petroleum Co.*, 484 U.S. at 483 ("[E]ach State has dealt with the lands under the tide waters within its borders according to its own view of justice and policy.").

As the foregoing demonstrates, state governments have long exercised substantial discretion in allowing private ownership and development of trust property. So long as the public's interest in trust resources is not ignored or destroyed, the public trust doctrine allows states to strike their preferred balance between private property and public trust uses. And nothing in that balancing precludes the full recognition and protection of private property rights in trust resources.

B. The Court's Decision in *Lawrence v. Clark County* Is Consistent with the Proposition That the Public Trust Doctrine Can Coexist with the Existence of Vested Property Rights in Public Trust Resources

Nevada's interpretation of the public trust is similarly consistent with the protection of vested property rights, including water rights.

In *Lawrence v. Clark County*, 127 Nev. 390, 254 P.3d 606, this Court formally embraced the public trust doctrine. However, the Court acknowledged that "under certain circumstances the Legislature could alienate public trust lands without breaking the public trust." *Id.* at 396,

254 P.3d at 610 (citing *State v. Bunkowski*, 88 Nev. 623, 634, 503 P.2d 1231 (1972)). The Court held that Nevada's public trust responsibility is rooted in the state's fiduciary duty to serve as a "trustee for public resources" and to "carefully safeguard public trust lands by dispensing them only when in the public's interest." *Lawrence*, 127 Nev. at 399, 254 P.3d at 62. Accordingly, "any legislation that purports to convey public trust lands is subject to judicial review."[4] *Id.* at 401, 254 P.3d at 613.

However, in *Lawrence* the Court dealt with an ongoing dispute over a recent land transaction. The case did not raise the possibility of the unsettlement of long-vested property rights, and the Court's opinion contains no suggestion that the Court would have the authority to reopen and reconsider long-settled property rights. Indeed, no majority opinion from this Court has ever suggested that the public trust doctrine grants

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[4] To determine whether a transfer of property is in the public interest requires a consideration of three factors: "(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 (internal quotation marks omitted). With respect to the third factor, whether a transfer satisfies the state's "special obligation" requires an analysis of its impact on the public trust and the type of use at issue. *Id.* at 406, 254 P.3d at 617.

the judiciary the ability to perpetually supervise property rights in the public trust. To the contrary, in *Lawrence,* this Court emphasized that the same principles that govern the Gift Clause also apply to the public trust doctrine, *Id.* at 399, 254 P.3d at 612, and cited to a case which held that so long as transactions involving public property are at arm's length and subject to open deliberation they will not be subject to judicial reconsideration after-the-fact. *Clark Cty. v. Lewis*, 88 Nev. 354, 357–58, 498 P.2d 363, 365 (1972).

In a concurring opinion joined by only one other member of this Court, Justice Rose argued that the public trust doctrine demanded that the state continually "allocate and supervise water rights so that the appropriations do not 'substantially impair the public interest in the lands and waters remaining.'" *Mineral Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 248, 20 P.3d 800, 808–09 (2001) (Rose J., concurring). However, this argument was not embraced by the majority, and Justice Rose's concurrence has never been adopted as the law of Nevada. Moreover, its reasoning is not persuasive, as it fails to engage any of the Nevada prior appropriation cases cited above, and instead relies almost exclusively on a single California Supreme Court decision.

But California's approach is far less protective of water rights than Nevada's has been, and its decision is an outlier which goes far beyond the traditional scope of the public trust doctrine, making Justice Rose's reliance on California case law rather than Nevada property principles particularly inapt.

C. California's Approach to the Public Trust Doctrine Is Incompatible with Nevada's System of Water Rights Allocation, and for That Reason Should Be Rejected

In *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), the California Supreme Court considered the interaction between the prior appropriation doctrine and the public trust doctrine, declaring the two doctrines to be on a "collision course." *Id.* at 712. The California Supreme Court correctly emphasized that "prosperity and habitability . . . require[] the diversion of great quantities of water . . . for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use," and therefore that water rights may be granted "even if diversions harm public trust uses." *Id.* But water allocation also requires "consider[ation] [of] public trust values" to avoid the extinguishment of the public trust. *Id.* As noted above, these principles are compatible with the traditional understanding of the public trust doctrine's scope, as well

as with the protection of vested water rights in trust resources. But the court went far beyond these traditional principles when it ruled that, under California law, settled water rights are subject to continual revaluation and reconsideration for conformity with the public trust doctrine. *Id.* at 721 ("[P]arties acquiring rights in trust property," including usufructory rights, "hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust."), and therefore may be taken away without compensation.[5]

California's approach in the *National Audubon* decision has largely been treated as an outlier, and many western states have refused to adopt it. *See* Jonathan S. Clyde, *Limiting the Public Trust Doctrine As Applied to Appropriative Water Rights*, ABA Water Resources Committee Newsl.[6], Feb. 2013, at 6 ("California's application of the Public Trust in this manner is still largely viewed as an outlier".); Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 270–71 (1992) (critiquing the *Nat'l Audubon* case for "mak[ing] property

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[5] The court did, however, allow that "any improvements made on [public trust] lands could not be appropriated by the state without compensation." *Nat'l Audubon Soc'y*, 658 P.2d at 723 n.22.

[6] https://www.clydesnow.com/images/stories/Articles/aba%20water%20resources%20newsletter-%20feb%202013.pdf (last visited Apr. 17, 2019).

law, and individual holdings in property more uncertain"); R. Prescott Jaunich, *The Environment, the Free Market, and Property Rights: Post-Lucas Privatization of the Public Trust*, 15 Pub. Land L. Rev. 167, 196 (1994) ("This approach ... casts a harmful shadow on the sanctity of property rights."); Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. Ill. L. Rev. 407, 428 (1986) ("[T]he prior appropriation system is superior to riparianism and eastern water permit systems because it gives water users greater security. Arguably, by giving the state Water Conservation Board the power to modify existing water permits, the court in *National Audubon* impaired this security."). For example, Colorado has rejected the application of the public trust doctrine in the water rights context and has instead developed alternative methods to promote recreational water use and environmental protection within the framework of the doctrine of prior appropriation. *See People v. Emmert*, 597 P.2d 1025 (Colo. 1979). S*ee also* Lauren R. Bushong, *How Colorado's Prior Appropriation System Addresses Environmental and Recreational Concerns Without A Public Trust Doctrine,* 18 U. Denv. Water L. Rev. 462, 467 (2015). Colorado's approach is particularly relevant to Nevada,

in that both states—unlike California—are exclusive prior appropriation jurisdictions. *See In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 573 (Colo. 2012) (*National Audubon* is inapplicable to a "'pure' prior appropriation system" because it "improperly lumps land and water interests together in derogation of the historical and doctrinal framework of public trust law"). Utah has amended its water law to emphasize that the public trust doctrine cannot override constitutionally protected water rights. Utah Code Ann. § 73-1-1 (2010). Similarly, recent Montana legislation provides that appropriated water rights trump the public's interest in the waters of the state. Mont. Code Ann. §§ 75-5-705, 75-7-104, 85- 1-111 (2009). Idaho also has enacted legislation emphasizing that the public trust doctrine does not limit the state's ability to recognize appropriative water rights. Idaho Code Ann. § 58-1203(1) (2009). Nevada has a rich heritage of protecting property rights, *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006) (noting Nevada's rich heritage in the protection of property rights), and this Court should rule consistently with those western states with a similar heritage of protecting water rights, rather than following California's idiosyncratic lead.

The State of California in its amicus brief calls its approach a "balanced" one. California Br. at 15. But there is little balance in California's version of the public trust doctrine, for according to it, those who possess waters rights have no basis to contest a public-trust-ordered elimination of those rights. The truly "balanced" approach to water appropriation rights is the one that Nevada has employed for over 100 years. The public interest can and should be taken into account when making new allocations or modifying existing claims. *See Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah 1990) (explaining that the critical question is whether the grant of trust property "impaired the public interest in any way *at the time the State granted him the right*") (emphasis added). However, the public interest is not served by the destruction of the vital certainty that the prior appropriation system provides. And as discussed above, this Court has routinely rejected efforts to unsettle water rights in the name of new theories of efficient use or ecological preservation. This Court should reject California's unwarrantedly expansive approach, and reaffirm that vested water rights are not subject to public-trust divestment.

III. The Use of the Public Trust Doctrine To Subvert Vested Property Rights Would Raise Serious Concerns Under the Takings Clause of the Nevada Constitution, and for That Reason Alone Such Use Should Be Rejected

Under the Nevada Constitution, "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured." Nev. Const. art. 1, § 8, cl. 6. That the state constitution "contemplates expansive property rights" is not surprising given Nevada's "rich history of protecting private property owners against government takings." *Sisolak*, 122 Nev. at 670, 137 P.3d at 1127. Pursuant to these constitutional protections, just compensation must be provided when water rights are condemned or otherwise confiscated. *Lompa's Estate*, 88 Nev. at 542, 501 P.2d at 662. *Accord Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.11 (1954) (the deprivation of water rights is a "compensable taking by condemnation of [a] recognized right to use the water").[7]

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[7] Indeed, the Nevada Constitution provides more protection for property owners than the Federal Constitution does, *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006), although this Court still "look[s] to federal caselaw for guidance." *Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001).

Appellants recognize that the elimination of vested water rights would ordinarily constitute a taking. However, they attempt to avoid the obvious implications of Nevada law in two ways. First, they argue that the novel extension of the public trust doctrine that they urge this Court to adopt is actually a longstanding background principle of property law. Mineral County's Br. at 36–44. Second, they argue that, if a judicial rather than a legislative or executive body reallocates water rights in the name of the public trust, then there can be no taking. Mineral County's Br. at 44–50. Neither of these arguments holds up to scrutiny.

A. A Radically Expanded Public Trust Doctrine Is Not a Background Principle Which Forecloses a Taking

Under the federal constitutional doctrine of "background principles," a deprivation of property is not a compensable taking if it is consistent with "the restrictions that . . . the State's law of property and nuisance already place upon land ownership." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Appellants argue that reallocated water rights under the public trust doctrine fall under this exception.

This Court, however, has never employed the background principles exception to exempt newly defined limitations on private

property from any takings protection. To be sure, the Court has upheld a municipality's use of a "pre-existing limitation upon the landowner's title" to avoid takings liability. *City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. 1, 12, 293 P.3d 860, 867 (2013). But that pre-existing limitation was an express easement contained in a land patent. And in any event, a background principle of property law "cannot be newly legislated or decreed." *Lucas*, 505 U.S. at 1029. *Accord Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) ("A law does not become a background principle for subsequent owners by enactment itself."). Rather, a restriction on property can function as a background principle only if it is "part of shared and traditional limitations [of] state law." Callies & Breemer, 36 Val. U. L. Rev. at 375.

Although some aspects of the public trust doctrine may qualify as background principles to Nevada property law, certainly no aspect of the radically expanded doctrine that Appellants seek from this Court would so qualify. This was the conclusion that the Massachusetts Supreme Judicial Court reached when it considered a state law that granted a public easement across beach property for recreational purposes. The court emphasized that the common law had reserved to the public

easements for fishing, fowling, and navigation, but not for other uses. Because the right of recreational use could not be said to be the "natural derivative of the rights preserved" by common law, the legislature's action—even though arguably a development of the traditional public trust doctrine—was a taking requiring just compensation. *Opinion of the Justices*, 313 N.E.2d 561, 566 (Mass. 1974). *Accord Bell v. Town of Wells,* 557 A.2d 168, 176–77 (Me. 1989) (a legislatively imposed easement that provided the public "much greater rights in the intertidal zone than are reserved by the common law . . . on its face constitutes an unconstitutional taking of private property"); *Colman*, 795 P.2d at 635–36 (rejecting the argument that all government regulation of public trust resources alleged to be in the public interest is exempt from takings liability); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000) (the federal government's interest in maintaining navigability of the nation's waters does not exempt all regulation of such waters from takings liability). This same reasoning has been applied to water rights. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 458 (2011) (although a state can "exercise continuing supervisory control over its navigable waters to protect the public trust . . . the traditional

water rights system—with its recognition and protection of water rights as property—remains in place"). *See also Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 843–44 (Tex. 2012) ("[T]he Takings Clause ensures that the problems of a limited public resource—the water supply—are shared by the public, not foisted onto a few. . . . [T]he burden of the Takings Clause on government is no reason to excuse its applicability.").

The use of the public trust doctrine to reopen vested water rights cannot in any respect be said to be a background principle of property rights, especially in Nevada. This Court formally recognized the public trust doctrine only in 2011. And to the extent that the public trust doctrine is a background principle of property law, it should be limited to traditional trust interests such as navigation, fishing, and commerce. Application of the public trust doctrine to novel concerns such as recreation or ecological preservation cannot be seen as a "natural derivative" of the historic public trust doctrine. *See* James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in A Constitutional Democracy*, 19 Envtl. L. 527, 549 (1989) (exploring how proponents of the public trust doctrine have "manufacture[d] new rights while claiming simply to uphold existing rights"); Callies & Breemer, *supra*, at 372

("There is no uniform public trust doctrine and often no clear doctrinal limits . . . .").

That conclusion follows all the more strongly here in Nevada, given the longstanding protection that the state has afforded water rights along with this Court's only very recent recognition of the public trust doctrine.[8] Water rights holders in this state therefore have had no reasonable expectation that their vested appropriative right could be subject to uncompensated curtailment in the name of ecological preservation. Applying the public trust doctrine without a concomitant right to compensation under takings law would frustrate investment-backed expectations, contravene due process, and greatly diminish the value of appropriated water rights. *Eureka Cty. v. Seventh Judicial Dist. Court in & for Cty. of Eureka*, 134 Nev. Adv. Op. 37, 417 P.3d 1121, 1125 (2018) (junior water rights holders are entitled to due process, including the right to notice and the right to protect their rights from infringement).

[8] It could be fairly said that the prior appropriation of water rights is, in fact, a background principal that properly limits the public trust.

B. The Judiciary Has No More Power Than Any Other Branch of Government To Create a Background Principle That Would Foreclose a Taking

Appellants argue that the Nevada Takings Clause does not apply to judicial actions. But the applicability of just compensation principles has never turned on the source of the government action effecting the taking.[9] *See Chicago Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 241 (1897) ("[A] judgment of a state court . . . whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is . . . wanting in the due process of law required by the fourteenth amendment . . . ."). Neither the legislature nor the courts may "by *ipse dixit* . . . transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). *See also PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (applying

[9] The same is true of many other constitutional protections. *See Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964) ("If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.").

takings doctrine to a state judiciary's actions). After all, "it would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 714 (2010) (plurality opinion).

Were it otherwise, a state judiciary could abolish property rights by merely "interpreting" existing property rights to be subject to supposedly long-extant limitations.[10] The government should not be encouraged, or permitted, to avoid paying just compensation by way of formalistic trickery. Courts, no less than state legislatures, declare what the law is. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (the law of a state may be declared "by its Legislature in a statute or by its highest court in a decision"). Because state courts are permitted to "make real law on behalf of the state," a state court's departure from established law should

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[10] Appellants rely on Justice Kennedy's concurring opinion in *Stop the Beach Renourishment* to argue against the recognition of the possibility of a judicial taking. Their reliance on that opinion is unwarranted. To begin with, Justice Kennedy did not definitively speak to the propriety of a judicial takings claim, instead merely noting that the idea raised for him "certain difficulties." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 733–34 (2010) (plurality opinion) (Kennedy, J., concurring in part and concurring in the judgment). More importantly, Justice Kennedy went on to explain that a radical judicial reworking of property rights would likely be unconstitutional under the Due Process Clause. *Id.* at 736.

be treated "as [the] wielding [of] real lawmaking power" subject to the limitations of the Takings Clause. W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1496–97 (2004). That conclusion is particularly apt here, given that the public trust doctrine in Nevada derives from judicial decision rather than legislative codification.

To be sure, not every judicial interpretation of a background principle would result in a judicial taking. But under the well-established canon of constitutional avoidance, the Court should avoid interpretations of law that raise serious constitutional difficulties. *See Degraw v. The Eighth Judicial Dist. Court of the State of Nevada in & for Cty. of Clark*, 134 Nev. Adv. Op. 43, 419 P.3d 136, 139 (2018) ("[A] court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."). An expansion of the public trust doctrine to undue long-settled water rights raises a serious enough question of constitutional propriety to counsel this Court's rejection of that expansion.

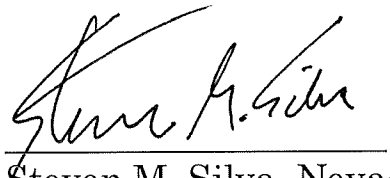
To the extent that this Court could conclude that the public trust doctrine permits the government to deprive water rights owners of their vested water rights, this Court must also conclude that such a novel

application of the public trust doctrine is not a "background principle" that is merely being recognized by the Court. Rather, this Court must acknowledge that, for over a century, the owners of prior appropriated water rights have had actual property interests. The deprivation of those rights would be a taking, regardless of which branch of government is responsible, and could only occur with the payment of just compensation.

CONCLUSION

The Court should answer the first certified question in the negative, and the second in the affirmative.

Dated: April 19, 2019. Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, Steven M. Silva 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font. I further certify that this brief complies with the type-volume limitations and NRAP 29(e) because it contains 6,911 words which is one-half of the maximum length authorized for an answering brief under of NRAP 32(a)(7).

Further, I hereby certify that I have read this 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.

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CERTIFICATE OF SERVICE

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