

Water Rights

Reconciling Priorities Under the Public Trust and Prior Appropriation Doctrines

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Courts in Nevada routinely reiterate a hard truth—Nevada is the driest state in the Union. Water is one of the state’s most precious natural resources. Most of Nevada is also in the geographic region of the Basin and Range province, where surface water flows to various inescapable basins and is left to evaporate. A guiding principle for deciding issues among competing water uses in Nevada is the public interest. But what use will take priority when there is inadequate water to meet multiple uses that are all considered to be in the public interest?

With population increases, drought cycles, and the doctrine of prior appropriation, the table is set for battles over water, or, as the saying attributed to Mark Twain puts it, “whiskey is for drinking; water is for fighting over.” One such battle centers on the Walker River Basin. The Walker River flows from the eastern Sierra mountains in California, through irrigable lands, and ends at Walker Lake in Nevada, where the water evaporates and infiltrates into the ground. With the arrival of settlers, and their surface water diversions and eventual groundwater pumping, Walker Lake became smaller, saline concentrations increased, and the local fauna along with migratory birds’ habitat became imperiled. As such, Walker Lake squarely raises the issue of how to manage the resource for water users with vested rights while still preserving the public interest in the local fauna and habitat.

Evolution of Nevada Water Law

While Nevada has long adhered to the doctrine of prior appropriation, *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866), this was not always the case. As a territory and during its infancy as a state, the “law of the district” applied, which was loosely based on miners’ rights. From 1861 to 1885, court rulings implemented a fact-based approach that applied both prior appropriation and the riparian doctrines. Not until 1885 did the Nevada Supreme

Court declare that the riparian doctrine was repugnant to the needs and wants of the arid West. *Jones v. Adams*, 19 Nev. 78, 84–86 (1885).

After the courts adopted the prior appropriation doctrine, the Nevada legislature began codifying water law, first adopting the Irrigation Act in 1903, which created the office of the State Engineer. A decade later, in 1913, the legislature codified the doctrines of prior appropriation and beneficial use for surface water. In 1939, the legislature codified groundwater regulation that separated groundwater from the surface water-specific laws of 1913.

Nevertheless, from the first codification of Nevada water law, the legislature has protected water rights put to beneficial use prior to the passage of the applicable statute—March 22, 1913, for surface water rights (Nev. Rev. Stat. § 533.085) and March 25, 1939, for underground water rights (*id.* § 534.100). Such pre-statutory water rights are known as *vested* rights. The legislature also established a process for judicially determining the relative rights of all the claimants on a water source in an adjudication. The adjudication process begins with the state engineer accumulating all claimant information and promulgating “final findings of fact,” which may then be appealed to court. While judicial review of these decisions generally is heard in state court, if diversity jurisdiction exists or the United States is a plaintiff, the judicial review can be brought in federal court. The court of proper jurisdiction then issues its “decree,” which establishes the relative rights of all the claimants. In 1924, the United States brought a case in the U.S. District Court for the District of Nevada seeking to establish water rights for the Walker River Paiute Indian Reservation and to settle all surface rights on the Walker River System. This adjudication resulted in the 1936 Walker River Decree, which also created the Walker River Commission and the U.S. Board of Water Commissioners, members of which were appointed

by the court to administer the Decree. *United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10 (D. Nev. 1936). The court maintains continuing jurisdiction over the waters of the Walker River Basin.

Through the years, Nevada water statutes also have adopted underpinnings of the public trust doctrine. Public trust principles are founded in the Gift Clause (art. 8, sec. 9) of the Nevada Constitution and, for water, portions of Nevada Revised Statutes chapter 533. Nevada courts expressly adopted the public trust doctrine in 2011. *Lawrence v. Clark Cnty.*, 127 Nev. 390, 406 (2011). The public trust doctrine establishes that the state holds its navigable waterways and lands thereunder in trust for the public, to be enjoyed for navigation, fishing, and commerce free of private parties' obstruction. The Gift Clause limits the legislature's ability to dispose of the public's resources and makes clear that the state serves as trustee for public resources. The Nevada Supreme Court has held that the state is without power to dispose of public trust property when it is not in the public's interest. *Id.* at 400.

At the Intersection of Public Trust and Prior Appropriation

A recent courtroom battle over the Walker River Decree centered on the intersection of the public trust doctrine and the prior appropriation doctrine. In 1994, nearly 70 years after appropriators started using their vested water rights, Mineral County sought to modify the Walker River Decree in order to ensure minimum flows into Walker Lake, arguing that Nevada's public trust doctrine required Walker Lake to be maintained because its decline was affecting the Mineral County economy. The U.S. District Court for the District of Nevada held that the public trust doctrine applies only prospectively to prevent or limit new appropriative rights and that any retroactive application of the public trust doctrine would constitute a taking—authority the court lacked under the statutory adjudication process. *United States v. Walker River Irrigation Dist.*, 2015 U.S. Dist. LEXIS 69160 (2015). Mineral County appealed to the U.S. Court of Appeals for the Ninth Circuit, which, due to the issues arising directly from Nevada's interpretation of its water law, certified two questions to the Nevada Supreme Court: whether Nevada's public trust doctrine applies to rights already adjudicated and settled under Nevada law; and, if so, whether the abrogation of such water rights would constitute a taking. *Mineral Cnty. v. Walker River Irrigation Dist.*, 900 F.3d 1027 (2018).

The Nevada Supreme Court accepted the certified question, and over 20 amicus briefs were filed in the case on behalf of nearly forty interested parties. On September 17, 2020, the court delivered its opinion, with the majority holding that the public trust doctrine applies in Nevada to all the waters within the state, including those previously allocated under prior appropriation. *Mineral Cnty. v. Lyon Cnty.*, 473 P.3d 418, 426–27 (Nev. 2020). The court ruled that because the state engineer is required to consider the public interest when allocating and administering water rights, the state's statutory water scheme is consistent with the public trust doctrine. *Id.* at 427. Nevertheless, given the interwoven interests in every decision the state

engineer makes, including those to decide water rights under the prior appropriation doctrine, and the importance of finality, the court held that water rights settled under the prior appropriation doctrine could not be reallocated, except by those means expressly established in Nevada's statutory scheme. *Id.* at 429. Having concluded that vested water rights could not be reallocated under the circumstances present at Walker Lake, the court declined to answer the second question. *Id.* at 430.

The two-justice dissent agreed that the public trust doctrine inheres in Nevada law, including the Nevada Constitution. *Id.* at 432 (Pickering & Silver, JJ., concurring in part and dissenting in part). On every other point, the dissenters disagreed with the majority. They argued that the majority misunderstood the role of the public trust doctrine and that the doctrine is not satisfied simply because the statutory scheme serves the public interest. *Id.* at 434. In addition, the public interests served by the statutes are not always equivalent to the values served by the public trust doctrine. The dissenters concluded that the public trust doctrine has greater power than the statutes in many ways and that limiting the operation of the public trust doctrine to the statutory scheme improperly eliminates those more powerful public protections. *Id.* at 436.

A Divided Court: Do Nevada Statutes Reconcile the Two Doctrines?

The majority opinion in the *Mineral County* case first sets forth the foundational principles of prior appropriation and the public trust doctrine as they apply in Nevada. Under prior appropriation, a water right “may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.” *Id.* at 423 (majority opinion) (citing *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1 (1997)). The court explained that a water right (considered to be real property under Nevada law) is a usufructuary right that has a basis, measure, and limit (Nev. Rev. Stat. § 533.035) that cannot conflict with other existing rights (*id.* § 533.370(2)). *Mineral Cnty.*, 473 P.3d at 430.

The majority opinion also identified a progression of cases embracing public trust principles after express adoption of the public trust doctrine in *Lawrence*. The parties in the *Mineral County* case were not only arguing whether the public trust doctrine applies to prior appropriation rights, but also “whether [the public trust] doctrine applies to nonnavigable water, navigable waters only, or no water at all.” *Id.* at 425. On this issue, the majority reasoned that when Nevada declared that all waters within the state belonged to the public, all waters, whether navigable or nonnavigable, within the state were subject to the limitation on the state's discretion to dispose of public trust resources. *Id.* On this basis, the majority concluded that “the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right.” *Id.*

The majority then analyzed Nevada's water statutes through the lens of the public trust doctrine, focusing on “beneficial

use” as the fundamental consideration underpinning Nevada’s water statutes. The majority identified numerous statutes ensuring that water is being beneficially used and ultimately found that “beneficial use” and its related considerations and constraints for using water are in line with the public trust. Therefore, the public interest inheres in all the state engineer’s decisions regarding water rights. *Id.* at 428.

In analyzing Nevada’s statutory scheme, the majority evaluated whether a dispensation of public trust property is valid under a three-part test adopted in *Lawrence*: “(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 States’ special obligation to maintain the trust for the use and enjoyment of present and future generations.” *Id.* at 427–28 (citing *Lawrence*, 127 Nev. at 405). The majority concluded that the beneficial use of water is a public use and therefore made for a public purpose and explained how the various beneficial uses at issue help boost the state’s economy in satisfaction of the requirement that the state receives fair consideration for its public trust resource. *Id.* at 428. It also noted that mechanisms are in place in Nevada’s water statutes to ensure the preservation of water for future generations. *Id.*

Turning to the question of reallocation of existing water rights, the majority focused on the finality associated with decreed water rights and the statutory provision that any “decree entered by [a] court . . . shall be final and shall be conclusive.” Nev. Rev. Stat. § 533.210(1). Apart from abandonment, forfeiture, or loss by another statutory means, the majority held that the statutory water scheme in Nevada “expressly prohibits reallocating adjudicated water rights.” *Mineral Cnty.*, 470 P.3d at 422. The majority emphasized that its ruling is “vital in arid states like Nevada” because users rely on the finality of water rights for long-term planning and capital investments. *Id.* at 429.

While the majority recognized “the plight of Walker Lake and the resulting negative impacts on the wildlife, resources, and economy in Mineral County” because of the “tragic decline of Walker Lake,” rather than adopt a model “more freely permitting reconsideration of prior appropriations,” it declined “to diminish the stability of prior appropriations and detract from the simultaneous operation of both prior appropriation and the public trust doctrine.” *Id.* at 429 n.10. The majority concluded that it could not justify using the public trust doctrine “as a tool to uproot an entire water system, particularly where finality is firmly rooted in [those] statutes.” *Id.* at 430.

The Dissent’s Concerns

As an initial matter, the dissent objected to the majority’s “rephrasing” of the certified question. In particular, the dissent opined that a revocation and reallocation of the vested rights was not at issue because Mineral County had sought a range of relief that included, but was not limited to, management, efficiency requirements, curtailment of speculative junior rights, a plan for the state to fulfill its public trust obligations, and/or reducing consumptive use. The dissent further opined that the “rephrased” question belied the fact that Nevada’s prior

appropriation system and the public trust doctrine developed independently of each other. As restated, the dissent interpreted the majority’s opinion to instead set those two doctrines on a collision course. Using California’s famous Mono Lake case, *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), as a guiding principle, the dissent wrote that the “rephrased” question “misdirects the analysis because it excludes the balancing that lies at the heart of the public trust doctrine.” *Mineral Cnty.*, 470 P.3d at 432 (Pickering & Silver, JJ., concurring in part and dissenting in part).

The dissent also expressed concern over the majority’s decision to clarify which waters of the state are protected within the public trust doctrine. The dissent would have assumed navigability of the entire Walker River Basin solely for the purpose of answering the question at issue rather than definitively include nonnavigable waters within the public trust. *Id.* at 433. It cautioned that by clarifying the public trust’s applicability to all waters of the state—both navigable and nonnavigable—the majority significantly and unnecessarily expanded the public trust doctrine and thereby increased the potential for conflict between the two doctrines. The dissent suggested, for example, that the public trust now includes groundwater connected to navigable waterways.

The dissent also objected to the majority’s conclusion that the state’s fiduciary duties to protect and conserve all of Nevada’s water sources under the public trust doctrine are vested in the state engineer, taking issue with the conclusion that as long as the state engineer executes their discretionary obligations under Nev. Rev. Stat. chapter 533, “there is no remedy or action to be taken to protect from the irreversible depletion of this state’s most precious natural resource.” *Id.* at 433. It reasoned that the Nevada Constitution expressly limits the legislature’s ability to freely dispose of public resources, and, when resources are disposed of, such action is subject to judicial review. The dissent argued that separation of powers principles prohibit the legislature from granting an executive officer such control in conflict with the constitution. *Id.* at 434. It viewed the public trust doctrine as being fluid and flexible enough to adapt to the changing times, properties not present in Nevada’s water statutes.

Finally, the dissent questioned the majority’s reliance on *Arizona v. California*, 460 U.S. 605 (1983), as authority for finding that water rights holders require reliance on finality. Both California and Arizona have established that the public trust doctrine exists independently of their respective water statutes, a conclusion contrary to the *Mineral County* majority’s ultimate ruling. With these issues in mind, the dissent concluded that a reexamination of water rights, if appropriate, would take into account the majority’s finality principle and reliance on prior allocations of water. This more comprehensive analysis would allow the Walker River Decree court to properly address current, and future, public trust concerns. *Id.* at 435.

Where Might This Road Lead Us?

The majority’s extension of Nevada’s public trust doctrine to all waters of the state will certainly prompt arguments that the doctrine now extends to groundwater. In certain basins (or

a series of basins), groundwater rights and navigable waters coexist. In addition, groundwater usage may be linked to a lowering of the water table, which, in turn, causes surface water to infiltrate into the ground, thereby allowing surface water rights holders to allege injury. This particular issue is already emerging in the Humboldt River system, where downstream senior appropriators claim that junior groundwater users have “captured” the Humboldt River’s surface flow, thereby robbing senior users of their water rights. The senior users at the end of the river system petitioned the court for a writ of mandamus ordering the state engineer to rectify the continuous water shortages. Ultimately, the case settled, and as a result of that settlement, the state engineer agreed to use scientific studies to determine which groundwater rights are interfering with the surface water flows. The state engineer has proposed that new groundwater appropriations that are projected to capture surface flows must offset such capture by providing in-stream water right replacement or withdrawing a portion of an existing groundwater right. Similarly, groundwater change applications must not result in more surface water capture. With the Nevada Supreme Court’s recent ruling, however, junior groundwater users may now raise the argument that their groundwater rights—which adhere to the same statutory and adjudicatory process as surface water rights—cannot be reallocated because the public trust was considered in their initial approval. It is not clear, however, that the *Mineral County* decision could or should be extended to such circumstances, which are less concerned with public trust modifications and more focused on traditional priorities of rights.

The Nevada Supreme Court and state engineer will continue to grapple with challenging issues as Nevada faces more and more resource restraints and demand exceeds supply. While the *Mineral County* case decided that the public trust doctrine does not require reallocation of water rights to mitigate impairments to recreational use and the community’s general economy, a different outcome may result in another pending high-profile case involving the Diamond Valley in Eureka County, Nevada. The state engineer has been working for years with the community and stakeholders on this over-appropriated basin, where water users are faced with accepting a groundwater management plan or being subject to curtailment. The Nevada Supreme Court is squarely faced with deciding whether to allow a groundwater management plan that the local community, or at least a majority of water rights holders in the basin, created and adopted, even though it does not strictly follow prior appropriation law. Under the groundwater management plan, all uses would be accommodated, although some more senior rights holders would accept less than their existing full allotment; strict prior appropriation would curtail more junior water rights, to the detriment of property and livelihoods. The Nevada Supreme Court heard oral arguments in

June 2021, and Nevadans are awaiting its decision. Given these two immediately pending conflicts—and a host of others waiting to take center stage—it remains to be seen whether future court decisions will carve out exceptions, limit the *Mineral County* court’s ruling, or engage in widespread curtailment of water rights.

Perhaps the most daunting question is whether an adjudication must occur to prevent any reallocation of water rights previously granted. On the one hand, under the *Mineral County* decision, the appropriation process includes the principles of the public trust doctrine, particularly the reliance on finality, and some water rights holders could argue that this should preclude any future reallocations. Conversely, the adjudication process requires a court to determine the relative rights on a water source, and that determination is based on actual, on-the-ground, beneficial use—a sentinel of prior appropriation. Notwithstanding the various arguments for or against this proposition, the legislature has required that all users claiming vested rights must submit their proofs by December 31, 2027 (Nev. Rev. Stat. § 533.087), effectively creating a deadline for the adjudication process to start for every unadjudicated basin in Nevada. The larger policy question raised by *Mineral County* will continue to infiltrate these ongoing water proceedings: Which public interest will yield when there is not enough of the resource to satisfy all demands? While the court in *Mineral County* found a way to reconcile the public trust and prior appropriation doctrines under those circumstances, the ongoing challenges in Diamond Valley and in the Humboldt River Basin will continue to test the court’s prioritization of public interests.

The dissent’s point that the public trust is necessarily elastic whereas the statutory provisions are rigid also raises an issue that, hopefully, can be alleviated. The public trust doctrine is seemingly fluid. As highlighted in *Audubon*, a large (and growing) population center appeared to be the catalyst that weighed heavily in the California Supreme Court’s opinion, ultimately allowing a separation of the two doctrines and a decision that public trust considerations could modify long-existing prior appropriation rights. As populations increase across Nevada, the need for water may become so insatiable that prior appropriations—which are now weighted in favor of finality and reliance—may yield in favor of municipal uses or the overall interests of the public. However, given the fact that the statutory laws cannot impair vested water rights, careful consideration must be given if the law needs to change in favor of the public’s consumption of water and, if that time does come, takings arguments will undoubtedly arise. ♡

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