WALKER LAKE AND THE PUBLIC TRUST IN NEVADA'S WATERS

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> *"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."*
>
> –Justice Robert Rose[2]

Walker Lake, a terminal desert lake in western Nevada's Mineral County was once home to a thriving trout fishery that sustained the Walker River Paiute Tribe. Now, it has become an ecological wasteland due to irrigation diversions. The county, seeking some restoration of the lake's water level, recently intervened in a longstanding federal water

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[1] Photograph of Walker Lake *in Water Conservation*, WALKER BASIN CONSERVANCY, https://www.walkerbasin.org/water-conservation [https://perma.cc/2ADB-7JYC] (last visited Feb. 3, 2022).

[2] Mineral Cnty. v. State, Dep't of Conservation & Nat. Res. (*Mineral County I*), 20 P.3d 800, 808 (Nev. 2001) (Rose, J., concurring).

rights adjudication and relied on the public trust doctrine to support its case.

In 2020, in a landmark decision, the Nevada Supreme Court ruled that the public trust doctrine applied to all waters and all water rights in the state. The court also recognized that the doctrine not only was embedded in the state's constitution and water code but also was inherent in the state's sovereignty. Consequently, the public trust doctrine is now antecedent to all water rights in the state. Despite the doctrine's seniority, however, the court ruled that the state's policy concerning the finality of water rights forbade reallocation of existing water rights. The court did not address how to fulfill both the public trust doctrine and junior water rights short of reallocation, a chore left for the federal district court that has been overseeing the Walker River adjudication for some 120 years.

This article explains the case, its context, and the questions that await resolution. We maintain that the district court can reconcile the public trust doctrine with the state's policy of finality, and substantially restore the lake's ecology. If we are correct, the Walker Lake decision will have precedential value throughout the West in a climate-changed era in which water will be in short supply and conflicts between water rights and public trust resources like Walker Lake are sure to increase.

INTRODUCTION

Walker Lake, a natural desert terminal lake in the shadow of majestic 12,000-foot Mount Grant, is a remnant of the massive Lake Lahontan which, in the Pleistocene Era, covered most of what is now northern

Nevada and parts of California and Oregon.[3] The lake is in western Nevada, about 70 miles from the California border, and is fed by the Walker River which flows about a hundred miles from the Sierra Nevada in California east into Nevada. The area was the ancestral home of the Agai-Dicutta Numa people—a Band of the Northern Paiute Nation. For tens of thousands of years they subsisted on the lake's trout, as well as small game, local grasses, berries, and nuts.[4] The lake's massive Lahontan cutthroat trout, which would migrate up the river to spawn each spring, formed the basis of the natives' diet,[5] and they came to be known as the "trout eaters people."[6]

In 1874, President Grant established the Walker River Paiute Reservation by executive order[7] after the native people successfully resisted removal to the Pyramid Lake Reservation, about 100 miles to the northwest.[8] The Reservation enabled the natives to remain on their traditional wintering grounds rather than be lumped together with all the other Paiutes in Nevada.

During the last quarter of the nineteenth century, western settlement brought farmers and ranchers to the Walker Basin. The settlers diverted Walker River flows to irrigate crops like hay and pasture for cattle. They proceeded to form the Walker River Irrigation District in 1919, building two dams on the east and west forks of the Walker River to expand

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[3] Brian Bahouth, *Walker Lake—The Legal Saga Continues with the Endgame in Question,* SIERRA NEVADA ALLY (Sept. 29, 2020), https://www.sierranevadaally.org/2020/09/29/walker-lake-the-legal-saga-continues-with-the-end-game-in-question/ [https://perma.cc/PZ6A-HD2M]. Terminal lakes are endorheic, meaning they have no outlet. Lake level of such lakes are therefore a balance between inflow and evaporation. *See id.*

[4] *See infra* note 6 and accompanying text.

[5] *See* Bahouth, *supra* note 3.

[6] According to the tribe, its name is Agai Dicutta, which means "Trout Eaters"; its name for Walker Lake is Agai Pah, meaning "Trout Water." Brief for Walker River Paiute Tribe as Amici Curiae Supporting Neither Party, at 1 n.1, Mineral Cnty. v. Lyon Cnty. (*Mineral County II*), 473 P.3d 418 (Nev. 2020) (No. 15-16342). In the indigenous language of the Paiutes, the word "pah" means water broadly, not "lake" narrowly. Thus, the names of various other places in Nevada and some of Utah like Tonopah, Ibapah, Pahranagat, and so forth. For background on Walker Lake, the Walker Lake Basin, its original inhabitants, and the effects of white settlement, see *History,* WALKER BASIN CONSERVANCY, https://www.walkerbasin.org/history-of-walker-lake [https://perma.cc/N644-XW5X]. *See also* WALKER RIVER PAIUTE TRIBE, https://www.wrpt.org/ [https://perma.cc/2LPD-GVYS] (last visited Feb. 3, 2022). Walker Lake is the namesake of the Walker Lane, a geological trough in which it sits that extends from Oregon to Death Valley and beyond. John C. Fremont, the explorer who crossed the Sierra Nevada in 1844, named the area after Joseph R. Walker, a mountain man who scouted the area for him in the 1840s. *See* Mark O. Rudo, Nat'l Park Serv., *Walker Pass*, *Nat'l Register of Historic Places—Nomination and Inventory* 2 (1989); NEV. ST. WRITERS' PROJECT, WORKS PROGRESS ADMIN., ORIGIN OF PLACE NAMES: NEVADA 53 (1941).

[7] President Grant's executive order of March 20, 1874, *in* THE INDIAN OFFICE, EXECUTIVE ORDERS RELATING TO THE INDIAN RESERVES FROM MAY 14, 1855, TO JULY 1, 1902, at 72 (1902).

[8] WALKER RIVER PAIUTE TRIBE, *supra* note 6.

irrigation to serve some 500 farms and ranches in Smith and Mason Valleys in Lyon County, Nevada, and Antelope Valley in Mono County, California.[9] In 1935, the federal government built Weber Dam on the lower portion of Walker River to supply irrigation on the Walker River Paiute Tribe's Reservation.[10] The increased irrigation dramatically reduced inflow to Walker Lake, increasing the concentration of total suspended solids in the lake to such an extent that it can no longer support native fish and wildlife populations.[11]

Due to the deteriorated condition of the diminished lake, the "trout eaters" can no longer fish for trout. Today, the Walker River Paiute Tribe is a federally recognized tribe of about 1,200 members.[12] The reservation, located about 100 miles southeast of Reno, consists of about 325,000 acres devoted mostly to grazing livestock. As the lake declined by about 170 feet from the nineteenth century to today,[13] the reservation's former riparian areas became uplands and now grow crops, largely alfalfa. The lake's trout were last harvested in 2009, the same year an annual local loon festival for migratory birds that use Walker Lake as a stopover on the Pacific Flyway was cancelled.[14]

The cause of this environmental disaster is not debatable; the desert lake's survival depends on inflow from the Walker River and its tributaries.[15] For over a century, the flows of the river have been dammed and diverted to produce forage crops. The reduced inflow severely damaged the water quality of the lake by raising the level of dissolved solids, making trout life impossible.[16] Trout restoration likely will require a substantial rise in lake level of about fifty feet in elevation,[17] a daunting

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[9] Bahouth, *supra* note 3; WALKER RIVER IRRIGATION DIST., http://www.wrid.us/ (last visited Feb. 3, 2022).

[10] *History,* WALKER BASIN CONSERVANCY, *supra* note 6.

[11] Suspended solids increase when inflows are insufficient to keep up with evaporation. *See* Benjamin Spillman, *How Nevada's Walker Lake Is Poised to Become 'Great Restoration Story of the West'*, RENO GAZETTE-JOURNAL (July 22, 2019), https://www.rgj.com/story/news/2019/07/22/nevada-walker-lake-environmental-recovery/1688518001/ [https://perma.cc/8R9X-9C9W].

[12] Sudhiti Naskar, *Nevada Native American Tribes Wait for Federal Aid, A "Second Thought"*, SIERRA NEVADA ALLY (Apr. 24, 2020), https://www.sierranevadaally.org/2020/04/24/nevada-native-american-tribes-wait-for-federal-aid-a-second-thought/ [https://perma.cc/LGR9-K32Z].

[13] *See infra* note 38 and accompanying text.

[14] *See* Bahouth, *supra* note 3 (describing the lake as a "saline puddle" and the intersection of the river and the lake as an "ooze of mud"); *History,* WALKER BASIN CONSERVANCY, *supra* note 6 (discussing the Loon Festival); *infra* text accompanying notes 41–46 (discussing overall ecologic decline of the lake).

[15] As discussed *infra* Part VII, a significant portion of the inflows to Walker Lake occur through surface and subsurface flows and precipitation—although not nearly enough to sustain the lake.

[16] *See infra* text accompanying notes 39–46.

[17] Second Amended Complaint in Intervention at 5, 7, United States v. Walker River Irrigation Dist. (*Walker River IV*), No. 3:73-CV-00128-MMD-WGC (In Equity No. C-125) (D. Nev. June 30, 2021) [hereinafter 2021 Amended Complaint].

prospect in an era in which climate change is producing rising water temperatures and diminishing water supplies.[18] Despite these circumstances, the Water Lake Conservancy, a nonprofit organization established in 2015 to administer a federally funded program of water rights acquisition to restore the lake,[19] has been acquiring water rights from willing sellers. As of 2021, the conservancy reportedly had acquired some 53 percent of the water necessary to reach an interim water quality goal.[20]

Acquisition of water rights on the market is a slow and uncertain process, however. Most water rights in the Walker Basin are quite old, and some pre-date the adoption of the Nevada Water Code in 1905. Old water rights usually lack the efficiencies required of more recent rights, yet under the state's temporally grounded prior appropriation doctrine, these rights enjoy the greatest legal protection.[21] Nevada could require efficiency improvements if it updated its definitions of "beneficial use" and "waste" because the scope of water rights-holders' entitlements are measured by the former, and no one may waste water.[22] There have been few serious efforts to modernize Western water law in this fashion, however.[23] Fortunately, the recent decision of the Nevada Supreme Court in *Mineral County v. Lyon County* (*Mineral County II*),[24] concerning the

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[18] *See Climate Change Indicators: Lake Temperature,* EPA (Apr. 2021), https://www.epa.gov/climate-indicators/climate-change-indicators-lake-temperature [https://perma.cc/9DLT-DCY9] (showing an increase in surface temperatures in lakes across North America from 1985–2009).

[19] Former Sen. Harry Reid authored the Desert Terminal Lakes Act in 2002, Pub. L. No. 107-171 (enacted May 13, 2002) that has been amended several times and now provides federal funding to help restore Walker, Pyramid, and Summit Lakes in Nevada. Over the years, Congress has appropriated about $300 million for the restoration of these lakes. *See* Spillman, *supra* note 11.

[20] *History,* WALKER BASIN CONSERVANCY, *supra* note 6.

[21] *See generally* FRED W. WELDEN, HISTORY OF WATER LAW IN NEVADA AND THE WESTERN UNITED STATES (Nevada Legislative Counsel's Bureau, Background Paper 03-2) (Jan. 2003), https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP03-02.pdf [https://perma.cc/VAA5-58AN].

[22] 1 WATERS AND WATER RIGHTS, § 12.02(c)(2) (Amy K. Kelley et al. eds., 3d ed. 2021). *See also* NEV. REV. STAT. §§ 533.460, 533.463 (establishing unlawfulness of waste); *id.* § 533.035 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

[23] *See generally* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENV'T L. 919, 961–62 (1998). For an overview of the inefficiencies in prior appropriation law, see Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 LAND & WATER L. REV. 1 (1989); see also Charles F. Wilkinson, *In Memoriam: Prior Appropriation, 1848–1991*, 21 ENV'T L. v (1991) (amusing apocryphal account). Reed Benson suggested some time ago that, based on case studies, prior appropriation had "lost its force" as controlling principle of Western water law. Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 714 (2012).

[24] 473 P.3d 418 (Nev. 2020).

application of the public trust doctrine to Walker Lake, may herald a new day.

Asked by the Ninth Circuit, which was reviewing the decision of a federal district court with jurisdiction over Walker Basin water rights, to clarify the state's public trust doctrine, the Nevada Supreme Court announced that the doctrine applied to all water in the state, including vested water rights.[25] The court confirmed the holding of its 2011 decision, *Lawrence v. Clark County*[26]: the public trust was not only embedded in the Nevada constitution and the state's water law statutes, but was also inherent in the state's sovereignty.[27] The court then concluded, however, that because the Nevada legislature had made clear that the policy of the state's water law concerned the finality of water rights, the public trust doctrine could not require the judicial reallocation of water to protect trust resources like Walker Lake, even though the doctrine antedated any water rights adjudicated under the state's prior appropriation doctrine.[28] The result of the decision seemed both potentially revolutionary and incoherent: the ancient public trust applied to and protected all waters and water rights but forbade reallocation. This article attempts to unpack the ambiguities in the court's decision and to suggest a way forward for Nevada as well as other Western states in reconciling the apparently divergent public trust and prior appropriation doctrines.

We maintain that the *Mineral County II* decision, although not entirely conceptually coherent,[29] should be understood as signaling a new day for

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[25] *Id.* at 421–26; *see infra* Part V (discussing *Mineral County II*).

[26] 254 P.3d 606 (Nev. 2011) (en banc).

[27] *Mineral County II*, 473 P.3d at 424 (construing *Lawrence*, 254 P.3d at 612–13); *see also infra* text accompanying notes 106–124 (reviewing *Lawrence*).

[28] *Mineral County II*, 473 P.3d at 429 (holding that "[t]o permit reallocation would create uncertainties for future development in Nevada and undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine"); *id.* at 425 (recognizing expressly 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"). *See also infra* Part V (discussing *Mineral County II*).

[29] In reaching the conclusion that the Nevada's public trust doctrine would not permit reallocation of settled water rights, the *Mineral County II* majority deferred to the Nevada legislature's century-old policy judgments enacted into law decades before the effects of over-appropriation on Walker Lake became evident. 473 P.3d at 426–30. In so doing, the court disregarded a fundamental principle of the public trust doctrine: the doctrine acts as a check on legislative action by empowering courts to override legislative policy determinations where state laws impermissibly convey interests in public resources without due consideration of public trust values. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 450–55 (1892) (holding that a state law through which the Illinois legislature attempted to convey property of "immense value" and "public concern" was, "if not absolutely void on its face," then at least "subject to revocation"); *see also* Joseph L. Sax*, The Public Trust Doctrine in Natural Resource Law: Effective Judicial*

public trust resources in Nevada. Though the court ruled that the reallocation of water rights is impermissible, that does not mean that prior appropriation water rights are insulated from the changes necessary to restore neglected trust resources like Walker Lake. In fact, the Nevada court's decision could augur significant changes ahead for water law in other Western states, as we explain in the conclusion of this article.

Section I of the article explains the Walker Lake ecosystem and its demise at the hands of the prior appropriation water rights system. Section II explores a critical 1936 federal court water rights decree that controls water rights in the basin but which shortchanged federal water rights that should have been reserved for the Walker River Paiute Tribe's fisheries. Section III explores the Nevada public trust doctrine prior to the *Mineral County II* decision, focusing on the important decision in *Lawrence* and former Justice Rose's influential concurring opinion in *Mineral County v. State of Nevada, Department of Conservation and Natural Resources* (*Mineral County I*).[30] Section IV turns to the *Mineral County II* decision's origins in the federal courts, culminating with the Ninth Circuit's certification of questions about the state's public trust doctrine to the Nevada Supreme Court. Section V analyzes the Nevada Supreme Court's decision in *Mineral County II*, including the dissent, which raised many issues that the majority avoided and which remain

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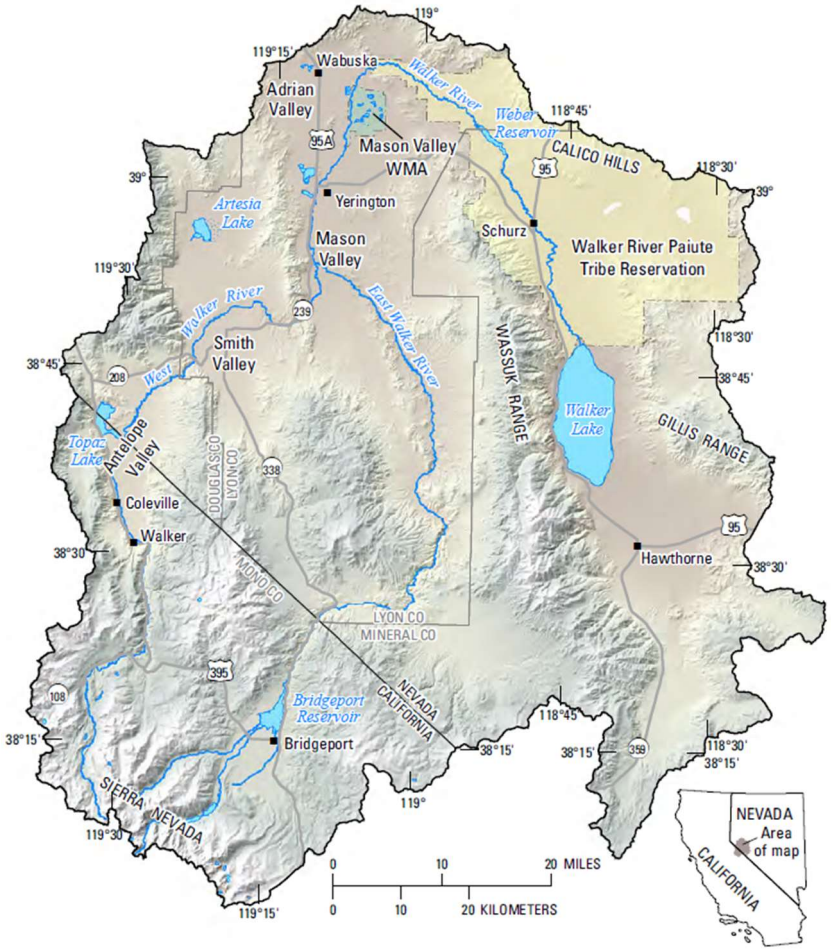
Intervention, 68 MICH. L. REV. 471, 509 (1970) (recognizing public trust law as "a technique by which courts may mend perceived imperfections in the legislative and administrative process"). The Nevada Supreme Court had recognized as much a decade earlier in *Lawrence*, in which the court understood that the public trust doctrine "arises from the inherent limitations on the state's sovereign power," and expressly concluded that "any legislation that purports to convey public trust lands is subject to judicial review." 254 P.3d at 613. Despite several favorable citations to *Lawrence*, *see Mineral County II*, 473 P.3d at 424–25, the court simply deferred to century-old legislative policy judgments about when water resource allocations would serve the public interest—judgments made long before Walker Lake's decline became evident. *See also infra* note 191 (discussing the court's deference to legislative policy judgments with respect to the importance of finality in water rights).

In addition, the *Mineral County II* court's conclusion that "Nevada's water statutes are consistent with the public trust doctrine," 473 P.3d at 426, is questionable. The court embraced an expansive notion of "public use" under the doctrine of prior appropriation, conflating the concepts of "public interest" and "public use." *Id.* As the dissent aptly noted, if beneficial use is by definition a "public use," and any "public use" is in the "public interest," then *any* benefit deriving from water use, including "reduc[ing] the price of beef for dinner," would justify even those allocations made "without regard to the deleterious impacts . . . on Nevada's natural resources." *Id.* at 434 (Pickering, C.J., concurring in part and dissenting in part). Moreover, the court's perfunctory conclusion that Nevada's statutory scheme "sufficiently places an affirmative duty" on the state to ensure "that public trust resources are available for future generations," *id.* at 427, is belied by Walker Lake's decline. As Mineral County asserted, "The proof is in the pudding . . . and the pudding in this case is the devastation of Walker Lake's fisheries, wildlife habitat, recreation[] and scenic trust values and uses due to the overappropriation of the system." Appellants' Reply Brief at 13, *Mineral County II*, 473 P.3d 418 (No. 75917).

[30] 20 P.3d 800, 807 (Nev. 2001).

open. Resolution of these issues involves reconciling the antecedent public trust doctrine with the subsequent prior appropriation rights. Such a resolution must thereby protect trust resources like the lake while also observing the policy of finality articulated by the court majority. Section VI turns to the Ninth Circuit's decision after the case returned to the federal courts post *Mineral County II.* Section VII reviews the arguments that Mineral County has raised on remand to the Decree Court. We suggest that the Nevada court's decision contains several interpretations of the public trust doctrine worthy of emulation in other states, particularly those states that consider water to be publicly owned.

I. THE WALKER LAKE ECOSYSTEM AND ITS DECLINE



The headwaters of the Walker River's two forks, the East Walker River and the West Walker River, emerge from snowmelt[31] in northern California's Sierra Nevada mountains. The two forks wind north and east respectively, crossing California's eastern border before merging near Yerington, Nevada, approximately forty miles east of Lake Tahoe. From that confluence, the Walker River flows north some twenty miles before turning sharply southeast as the river bends around the northern tip of Nevada's Wassuk mountain range, then runs south through the Walker River Paiute Indian Reservation where it flows through Campbell Valley and enters the Weber Reservoir.[32] Twenty-one miles south of the reservoir, the river empties its remaining water into Walker Lake, a thirteen-by-five mile desert lake nestled along the east side of the Wassuk Range in Nevada's Mineral County. By the time the river reaches Walker Lake, however, irrigators have diverted and consumed virtually all of its remaining water.[33]

Upstream agricultural diversions from the Walker River have exacted an enormous toll on the ecology of Walker Lake, and one of the few remaining perennial, natural terminal lakes in the Great Basin.[34] Prior to 1860, when western settlers began diverting flows from the river for irrigation purposes,[35] most of the Sierra Nevada snowmelt feeding the East and West forks of the Walker River that was not lost to evaporation flowed into Walker Lake.[36] But between 1882 (when the lake was first measured[37]) and 2021, upstream diversions dropped the lake's volume from approximately 9 million acre-feet to 1.135 million acre-feet—an 87 percent decline in 139 years—with a corresponding 168-foot drop in elevation, shrinking the lake's surface by half.[38] The plummeting water

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[31] *Hydrology of the Walker River Basin*, U.S. GEOLOGICAL SURV., https://nevada.usgs.gov/walker/index.html [https://perma.cc/L6RG-VJFP] (last visited Feb. 1, 2022).

[32] *Mineral County I*, 20 P.3d at 802.

[33] Except in exceptionally wet years, virtually no surface inflows have reached the lake in the past few decades. The Walker Basin Conservancy's water rights acquisition program, which purchases water rights on the open market and transfers those rights to instream use that benefits Walker Lake, has recently started to provide minor inflows to the lake. Supplemental Brief of Appellants Mineral County and Walker Lake Working Group at 5, United States v. Walker River Irrigation Dist. (*Walker River III*), 986 F.3d 1197 (9th Cir. 2021) (No. 15-16342).

[34] *Hydrology of the Walker River Basin*, U.S. GEOLOGICAL SURV., *supra* note 31.

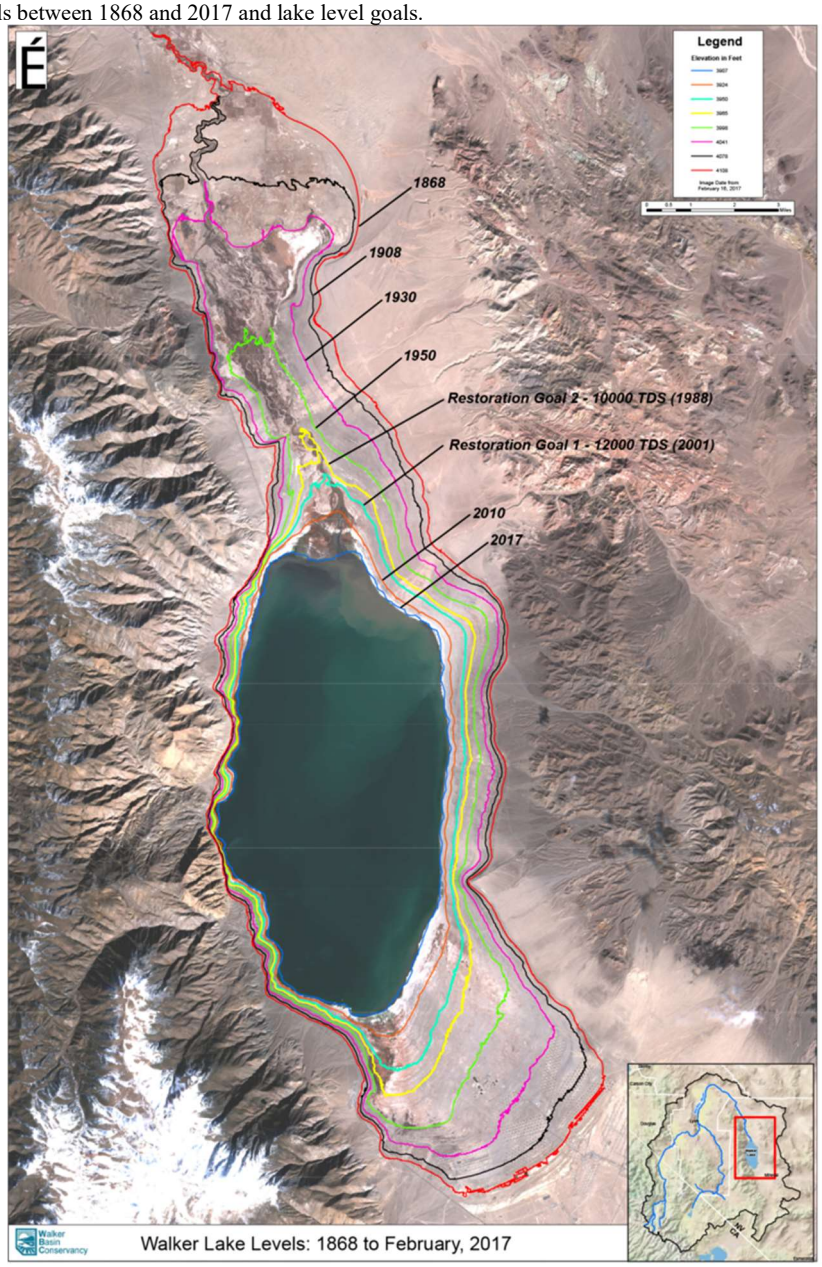
[35] United States v. Walker River Irrigation Dist., 104 F.2d 334, 335 (9th Cir. 1939).

[36] *Hydrology of the Walker River Basin*, U.S. GEOLOGICAL SURV., *supra* note 31.

[37] Mineral Cnty. v. Walker River Irrigation Dist. (*Walker River II*), 900 F.3d 1027, 1029 (9th Cir. 2018).

[38] 2021 Amended Complaint, *supra* note 17, at 5 (citing U.S. GEOLOGICAL SURV., SCIENTIFIC INVESTIGATIONS REPORT NO. 2007-5012, BATHYMETRY OF WALKER LAKE, WEST-CENTRAL NEVADA, at 1, app. A (2007), https://pubs.usgs.gov/sir/2007/5012/pdf/sir20075012.pdf [https://perma.cc/9B9T-D2AS] and referencing data available at USGS Station 10288500, Walker Lake near Hawthorne, NV, http://waterdata.usgs.gov/nv/nwis/uv/?site_no=10288500&

agency_cd=USGS&amp [https://perma.cc/GD33-N9JZ]). The map below contrasts historical lake levels between 1868 and 2017 and lake level goals.



Appellants' Opening Brief at 8, *Mineral County II*, 473 P.3d 418 (Nev. 2020) (No. 75917) (reproducing 2017 map from the Walker Basin Conservancy website).

volume produced a corresponding spike in salinity and total dissolved solids. In 1882, the lake's salinity was 2,500 milligrams per liter; by 2021, that number had increased eightfold, to some 22,000 milligrams per liter.[39] The result was severe eutrophication (degradation of water quality), which has altered the lake ecosystem chemically, physically, and biologically.[40]

The most apparent change over the last few decades has been a devastating loss of the lake's biodiversity.[41] Before the diversions, Walker Lake was the center of a thriving ecosystem that supported four native fish species—the tui chub, the speckled dace, the Tahoe sucker, and the Lahontan cutthroat trout[42] (the state fish of Nevada[43])—and the lake historically provided a rare and vital habitat for dozens of species of migratory fish-eating birds, including white pelicans, double-crested cormorants, herons, and avocets.[44] The last documented Lahontan cutthroat trout perished in 2009.[45] No fish remain.[46] Even the once-thriving insect populations have disappeared.[47] The decline in Walker

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[39] 2021 Amended Complaint, *supra* note 17, at 5 (citing *National Water Information System: Web Interface*, U.S. GEOLOGICAL SURV., https://nwis.waterdata.usgs.gov/usa/nwis/qwdata/?site_no=384200118431901 [https://perma.cc/KL3G-N7R2r]); Appellants' Opening Brief, at 9, *Mineral County II*, 473 P.3d 418 (No. 75917).

[40] DRS. SAXON E. SHARPE, MARY E. CABLK & JAMES M. THOMAS, DESERT RSCH. INST., THE WALKER BASIN, NEVADA AND CALIFORNIA: PHYSICAL ENVIRONMENT, HYDROLOGY, AND BIOLOGY, Pub. No. 41231, at 31 (May 1, 2008) ("Increased TDS, increased water temperature, and decreased dissolved oxygen concentration have played a role in altering nutrient cycling, changing biotic communities, and affecting the extent and quality of fish habitat, particularly in summer months.").

[41] Appellants' Opening Brief, at 9, *Mineral County II*, 473 P.3d 418 (No. 75917).

[42] SHARPE, CABLK & THOMAS, *supra* note 40, at 36.

[43] NEV. REV. STAT. § 235.075 (2021).

[44] SHARPE, CABLK & THOMAS, *supra* note 40, at 27–28. In 1885, the local *Walker Lake Bulletin* humorously reported "that Walker Lake was so crowded with Lahontan cutthroat trout that during the middle of the day long rows of the fish could be seen lying at the water's edge on the sand sunning themselves." GARY A. HORTON, WALKER RIVER CHRONOLOGY, II-12–13 (1996), http://images.water.nv.gov/images/publications/River%20Chronologies/Walker%20River%20Chronology.pdf [https://perma.cc/A882-4LPY].

[45] Email from Kris Urqhart, Fisheries Biologist, Nevada Dept. of Wildlife, to Glenn Bunch, President, Walker Lake Working Grp, (Aug. 31, 2021, 10:51AM) (on file with authors) [hereinafter Urqhart Letter].

[46] *Id.* The tui chub were present until 2013 or early 2014, and the last non-native game species were unable to survive as of several years before 2009. *Id.* In the past the Nevada Department of Wildlife stocked Lahontan cutthroat trout through a hatchery after dam construction prevented the native trout from spawning upstream, SHARPE, CABLK & THOMAS, *supra* note 40, at 32, but that program was discontinued in 2009. Appellants' Opening Brief, at 8, *Mineral County II*, 473 P.3d 418 (No. 75917); Urqhart Letter, *supra* note 45.

[47] U.S. FISH & WILDLIFE SERVICE, WALKER LAKE ECOSYSTEM: RESEARCH AND MONITORING SUMMARY REPORT 2006–2013, at 5–6 (2013), https://static1.squarespace.com/static/550a1fc8e4b0e1de27f15703/t/59533409b11be18d82b0b4b5/1498625059456/FWS-Walker-Lake-Ecosystem-Report-2013.pdf [https://perma.cc/35HV-ERW9].

Lake's ecology has, of course, devastated the lake's economic, recreational, and aesthetic values for the public at large.[48]

II. THE 1936 WALKER RIVER DECREE

The headwaters of the current Walker River litigation, a sub-proceeding of a case that has been ongoing for nearly a century, lie in a dispute that arose in the early twentieth century between two cattle ranchers. In 1902, Miller & Lux, a cattle and land company owned by Henry Miller (the "Cattle King of California"),[49] filed suit in Nevada federal court seeking to enjoin some 150 upper river water users in the Walker River Basin from diverting waters to which the company claimed a right[50]—users that included arch-rival Rickey Land & Cattle Co., owned by Thomas Rickey (the "Cattle King of the West").[51] In federal court, Miller claimed an appropriation water right to 943 cubic-feet per second (cfs) of the Walker River for use on his Nevada lands.[52] Two years later, Rickey filed a separate suit against Miller in California state court, claiming a right to a flow of 2,079 cfs for use on his California lands.[53] The Nevada federal court enjoined the state court proceedings, recognizing that where state and federal courts have concurrent jurisdiction over a dispute, "established fundamental rules" dictate that the court in which a suit is first filed holds prior and exclusive jurisdiction over the dispute and any ancillary matters.[54] The Ninth Circuit recently

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48 Appellants' Opening Brief at 9–10, *Mineral County II*, 473 P.3d 418 (No. 75917).

49 *See* Bernard Taper, *The King of Ranchers*, AM. HERITAGE (Aug. 1967); United States v. U.S. Bd. of Water Comm'rs, 893 F.3d 578, 588 (9th Cir. 2018). Miller and Lux were at the center of perhaps the most eventful water law case of nineteenth century California, in which the state supreme court, by a 4–3 vote, decided that the riparian rights of Miller and Lux prevailed over the prior appropriation rights of Haggin. Lux v. Haggin, 10 P. 674 (Cal. 1886).

50 Miller & Lux v. Rickey, 146 F. 574, 575–76 (C.C.D. Nev. 1906); Miller & Lux v. Rickey, 123 F. 604, 604–05 (C.C.D. Nev. 1903); *see also* Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 259–60 (1910) (discussing the history of Rickey and Miller's dispute). Miller brought the federal case in the Circuit Court for the District of Nevada, but Congress abolished the Circuit Court System in 1911, transferring jurisdiction to the U.S. District Court for the District of Nevada. *See The Structure of the Federal Courts*, FED. JUD. CTR., http://www.fjc.gov/history/timeline/8276 [https://perma.cc/5U2R-DXCE] (last visited Feb. 3, 2022); United States v. Walker River Irrigation Dist., 890 F.3d 1161, 1165 n.4 (9th Cir. 2018).

51 *U.S. Bd. of Water Comm'rs*, 893 F.3d at 588.

52 Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11, 12 (9th Cir. 1907), *aff'd* 218 U.S. 258 (1910).

53 *See id.* at 12–13 (discussing the parties' claims in the earlier proceedings). Rickey claimed 1,575 cfs from the West Fork of the Walker River, and 504 cfs from the East Fork. *Id.*

54 Miller & Lux v. Rickey, 146 F. at 586–88. As the Nevada federal court explained, "The enforcement of the rule that the court which first takes jurisdiction of the parties and subject-matter of a suit must retain and exercise it to the exclusion of any and all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree is absolutely essential to the due and proper administration of justice." *Id.* at 588.

explained the broad principle underlying its affirmance of the Decree Court's decision to enjoin the California state court proceedings:

> Because any given usufruct[ua]ry right to a flow has an inherent connection to all other such rights in the same stream, appropriative rights are conclusively established only by reference to all other competing rights. We [thus] held that this naturally requires jurisdiction over the entire *res* of the Walker River.[55]

In other words, because prior and exclusive jurisdiction of the federal court extended to all water rights in the Walker River, the Nevada federal court would adjudicate disputes involving withdrawals both in Nevada and upstream in California.[56] Rickey appealed, and, in an opinion authored by Justice Holmes, the Supreme Court affirmed, upholding federal jurisdiction.[57]

After nearly a decade of fact-finding and hearings, the federal district court issued the 1919 "Rickey Decree," temporarily settling water rights to the Walker River.[58] The Ricky Decree confirmed that the Nevada federal district court would retain jurisdiction to adjudicate any future disputes over water rights to the Walker River.[59]

The Walker River litigation began in 1924 when the United States, in its sovereign capacity and as trustee for the Paiute Tribe, filed an action in the Nevada district court seeking to quiet title to water rights for the reservation.[60] The federal government had set aside and begun to irrigate lands for the reservation in 1859, although an 1874 Executive Order officially withdrew the lands from sale and established the reservation.[61] In the 1936 adjudication, the federal government claimed a pre-existing, vested water right to 150 cubic feet per second (cfs) from the Walker River needed to irrigate some 11,000 acres of arable lands on the

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[55] *U.S. Bd. of Water Comm'rs*, 893 F.3d at 589 (italics added) (construing Ricky Land & Cattle Co. v. Miller & Lux, 152 F. 11).

[56] *See also Mineral County I*, 20 P.3d 806, 806 (Nev. 2001) (noting that "Nevada law treats water rights as real property" and that the "general rule is that the first court, whether state or federal, which assumes jurisdiction over real property is entitled to maintain continuing and exclusive jurisdiction over that property" (footnotes omitted)).

[57] Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 263 (1910).

[58] Pac. Livestock Co. v. Thomas Rickey, In Equity No. 731, Final Decree, 1919 WL 348439 (D. Nev. 1919). The Rickey Decree designated the State Engineer of Nevada as the "commissioner" responsible for apportioning and distributing the waters of the Walker River, in accordance with the decree, in both California and Nevada. *Id.* at 64.

[59] *Id.* at 64–65.

[60] United States v. Walker River Irrigation Dist., 11 F. Supp. 158, 159 (D. Nev. 1935).

[61] *Id.* at 159–60, 163.

reservation.[62] The government claimed no water for the fish that historically were a principal source of the tribe's subsistence.[63]

The district court denied the government's claim, holding that the government had "reserved no rights" to water for use on the reservation: the government's only rights came from Nevada state law of prior appropriation,[64] under which usufructuary water rights date from the time of, and are based on the extent of, actual use.[65] The court subsequently issued the "1936 Decree" (or "Decree"), which awarded water rights to the United States and other parties (including rights awarded in the court's 1919 Rickey Decree).[66] The government appealed, arguing that it possessed reserved water rights "to the extent necessary to supply the irrigable lands" of the reservation.[67] The Ninth Circuit agreed, reversing the district court. Relying on the Supreme Court's opinion in *Winters v.*

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[62] *Id.* at 159–60.

[63] *See infra* notes 76–77 and accompanying text. Even if the tribe was relying on irrigated agriculture at the time of the adjudication, it would not have abandoned its fisheries. Only Congress may terminate tribal usufructuary rights, and only if it does so clearly. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 (1999).

[64] *Walker River Irrigation Dist.,* 11 F. Supp. at 167. The Nevada Supreme Court confirmed Nevada's adoption of the law of prior appropriation soon after statehood (1864). Lobdell v. Simpson, 2 Nev. 274 (1866). Under the traditional doctrine of prior appropriation, "The 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 the appropriation." *Id.* at 277–78 (quoting Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 153–54 (1858)). The right of the first appropriator is "a perpetual right to continue taking the same amount for the same use, notwithstanding conflicting needs by those who come later—including the general public." Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of* National Audubon Society v. Superior Court, 45 ENV'T L. 561, 576–77 (2015). The doctrine of prior appropriation has now been codified in Nevada. *See, e.g.*, NEV. REV. STAT. § 533.370; *see also* Greg Walch, *Water Law: Treading Water Law—A Nevada Water Rights Primer*, 6 NEV. L. 18, 18 (1998) (discussing the history and codification of prior appropriation in Nevada). For a further discussion of the evolution of Nevada water law, see generally Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 UNIV. DENVER WATER L. REV. 148 (2001).

[65] *Walker River Irrigation Dist.*, 11 F. Supp. at 166–67.

[66] United States v. Walker River Irrigation Dist., No. C-125, Final Decree, at 10–11 (D. Nev. Apr. 1936), *amended by* Order for Entry of Amended Decree to Conform to Writ of Mandate Etc. at 2–3, United States v. Walker River Irrigation Dist., No. C-125 (D. Nev. 1940) [hereinafter Order for Amendment]. Based only on the federal government's prior diversions, the 1936 Decree awarded the federal government approximately 23 cubic feet per second, with priority dates ranging from 1868 to 1886. *Id*. at 10. The government sought reconsideration of the court's findings, asserting that under *Winters v. United States*, 207 U.S. 564 (1908), the government had made an "implied reservation" of water for the reservation. United States v. Walker River Irrigation Dist., 14 F. Supp 10, 11 (D. Nev. 1936). The district court, refusing to "destroy[] the rights of the white pioneers" for the benefit of the reservation, summarily dismissed the government's argument. *Id.*

[67] United States v. Walker River Irrigation Dist., 104 F.2d 334, 335 (9th Cir. 1939).

United States,[68] the court of appeals held that the federal government, through its 1859 order to set aside lands for the future reservation, impliedly reserved water "to the extent reasonably necessary to supply the needs of the Indians."[69] The Nevada district court subsequently amended the 1936 Decree to include increased flows to the reservation,[70] sufficient to irrigate 2,100 acres during the 180-day irrigation seasons and to support domestic and stock watering purposes.[71]

The amended 1936 Decree thus recognized the implied reserved water rights of the federal government as trustee for the Paiute Tribe.[72] The Decree also prohibited any party to the earlier litigation from thereafter relitigating any claim to water rights in the Walker River Basin.[73] Finally, the Decree affirmed that the Nevada district court will continue to "retain[] jurisdiction . . . for the purpose of changing the duty of water or for correcting or modifying th[e] decree."[74] The district court thereby became the so-called "Decree Court,"[75] adjudicating claims to water

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[68] 207 U.S. 564. In *Winters*, the Supreme Court held that the federal government, by creating the Fort Belknap reservation in its sovereign capacity as trustee for Indian tribes, had impliedly reserved water sufficient to fulfill the purposes of the reservation. *Id.* at 574–77.

[69] *Walker River Irrigation Dist.*, 104 F.2d at 339–40. The 1859 order came from the General Land Office. *Id.* at 338. The Ninth Circuit held that "[i]t would be irrational to assume that the [government's] intent was merely to set aside the arid soil without reserving the means of rendering it productive," and that "[t]he settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below." *Id.* at 339. The Court, however, ratified the special master's finding that only 26.25 cfs of water would be sufficient, based on the reservation's population trends over seventy years, to irrigate the requisite 2,100 acres, *id.* at 340—an increase of only 3.25 cfs above the water right granted to the federal government under the original 1936 Decree.

[70] Order for Amendment, *supra* note 66.

[71] *Walker River Irrigation Dist.*, 104 F.2d at 340. Recognized purposes also included "power purposes to the extent [then] used by the Government[] during the non-irrigating season." *Id.* No mention was made of water for fish.

[72] *See* United States v. U.S. Bd. of Water Comm'rs, 893 F.3d 578, 589 (9th Cir. 2018) (construing United States v. Walker River Irrigation Dist., No. C-125, Final Decree, 10–11 (D. Nev. Apr. 1936), *amended by* Order for Amendment, *supra* note 66, at 2–3).

[73] *See* United States v. Walker River Irrigation Dist., No. C-125, Final Decree, 71–72 (D. Nev. Apr. 1936), *amended by* Order for Amendment, *supra* note 66, at 2–3.

[74] *Id.* at 72–73. The Decree also provided that the court may designate a "Water Master" that will "apportion[] and distribut[e] the waters of the Walker River, its forks and tributaries in the State of Nevada and the State of California" in accordance with the decree. *Id.* at 71–72. In 1937, the court designated a "Water Master" by creating the U.S. Board of Water Commissioners, a six-member court-appointed body responsible for apportioning and distributing the waters of the Walker River in accordance with the Decree. *U.S. Bd. of Water Comm'rs*, 893 F.3d at 589. "The Board functions in a ministerial, as well as a quasi-judicial, capacity." Order, United States v. Walker River Irrigation Dist., No. C-125 (D. Nev. Feb. 13, 1990). Today, a federal Water Master works "as an officer of the court under the direction of the Board of Water Commissioners." Robert Perea, *New Watermaster Dedicated to Enforcing Decree*, RENO GAZETTE J. (Nov. 27, 2015), https://www.rgj.com/story/news/local/mason-valley/2015/11/27/new-watermaster-dedicated-enforcing-decree/76450452/ [https://perma.cc/NY7R-QAGC].

[75] *U.S. Bd. of Water Comm'rs*, 893 F.3d at 589.

rights in the Walker River Basin since 1902, when the dueling "cattle kings" entered the Nevada courthouse to settle their dispute.

The 1936 Decree warrants some scrutiny. Neither the government nor the Decree Court paid any attention to the tribe's view of the purposes of the reservation, although, two decades earlier, the Supreme Court in *Winters v. United States* had instructed that "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."[76] Although the tribe ceded the land surrounding Walker Lake to the federal government in 1906, that land cession would not necessarily terminate the tribe's right to continue to fish absent clear intent to terminate not only the land title but also the usufructuary rights.[77] By not inquiring what the tribe thought the purposes of its reservation were, the government made it impossible for the Decree Court to give effect to the rule of interpretation the Supreme Court laid down.

III. THE NEVADA PUBLIC TRUST DOCTRINE BEFORE THE WALKER LAKE DECISION

> *"In its most fundamental terms, the public trust doctrine provides that . . . all of a state's navigable waterways are held in trust by the state for the benefit of the people and that a state official's control of those waters is forever subject to that trust."*[78]

Although the Nevada Supreme Court failed to expressly recognize the public trust doctrine[79] under Nevada law until its 2011 decision in

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[76] 207 U.S. 564, 576 (1908). Although the federal government considered tribal fishing when it set aside lands, the government did not argue for a reserved right, *Walker River Irrigation Dist.*, 104 F.2d at 338–40, perhaps because there were plenty of fish in the lake 80 years ago and the government did not consider a reserved water right foreseeably necessary for the tribe to continue its fishing culture. Reserved water rights are limited to those "necessary" to carry out the purposes of a reservation. *See* Cappaert v. United States, 426 U.S. 128, 141 (1976) (holding that reserved rights are limited to the "amount of water necessary to fulfill the purpose of the reservation, no more").

[77] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 (1999) (upholding the usufructuary rights of the Chippewa because the land cessions failed to mention, let alone abrogate them); Menominee Tribe of Indians v. United States, 391 U.S. 404, 411–12 (1968) (refusing to find abrogation of usufructuary rights in a statute that terminated the tribe).

[78] *Mineral County I*, 20 P.3d 800, 807 (Nev. 2001) (Rose, J., concurring). As discussed below, the Nevada Supreme Court later relied on Justice Rose's *Mineral County I* concurrence when the court expressly recognized the Nevada public trust doctrine. *See infra* text accompanying notes 103–121.

[79] On the public trust doctrine and its origins, see MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3–11 (3d ed. 2021).

Lawrence v. Clark County,[80] the court acknowledged and applied public trust principles in several earlier decisions. In the early 1970s, the court recognized state ownership of water, stating that "it is settled law in this country that, by virtue of a state's admission into the United States," the state owns those waters and the beds beneath them that were navigable at the time of statehood.[81] The court acknowledged that states "hold title to the beds of navigable watercourses in trust for the people of their respective states," and that such titles are presumptively inalienable.[82] In other words, "[t]he State holds the subject lands *in trust for public use*."[83] The *Lawrence* court would later interpret these earlier decisions as implicitly recognizing the public trust doctrine,[84] although the *Lawrence* court did not define the scope of the public trust *res* beyond navigable waters and the lands beneath those waters (including formerly submerged lands).[85]

In a 2001 Nevada Supreme Court case, *Mineral County v. State of Nevada, Department of Conservation and Natural Resources* (*Mineral County I*),[86] Justice Robert Rose penned an influential concurring opinion, on which the Nevada Supreme Court relied twenty years later in *Mineral County v. Lyon County* (*Mineral County II*),[87] where the court finally addressed the merits of Mineral County's public trust claims.[88] In *Mineral County I*,[89] the county sued Nevada's Department of

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[80] 254 P.3d 606, 617 (Nev. 2011). The *Lawrence* Court noted that "although Nevada law embraces public trust doctrine principles, this court has never expressly adopted that doctrine." *Id.* at 611.

[81] *Id.* at 609–10 (quoting and construing State v. Bunkowski, 503 P.2d 1231, 1233 (Nev. 1972) (internal quotation marks omitted); State Eng'r v. Cowles Bros., Inc., 478 P.2d 159, 160 (Nev. 1970) ("When a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory, whether they be rivers, lakes or streams. If the body of water is classified as non-navigable at the time of the creation of the state, the underlying land remains the property of the United States, but if it is navigable under the definition hereinafter stated, the water and the bed beneath it becomes the property of the state." (citing United States v. Utah, 283 U.S. 64, 75 (1931); Shively v. Bowlby, 152 U.S. 1, 26–27 (1894))).

[82] *Bunkowski*, 503 P.2d at 1233–34, 1237.

[83] *Id.* at 1238 (emphasis added).

[84] *Lawrence*, 254 P.3d at 610.

[85] *See generally Lawrence*, 254 P.3d 606.

[86] 20 P.3d 800, 807 (Nev. 2001).

[87] 473 P.3d 418 (Nev. 2020).

[88] *Id.* at 424–29; *see* discussion of *Mineral County II*, *infra* Part V.

[89] *Mineral County I* was an original writ proceeding in the Walker Basin litigation. As Mineral County's motion to intervene was pending in the Decree Court, *see infra* Part IV, the county filed suit in Nevada court invoking the public trust doctrine and seeking a variety of remedies: (1) a writ of mandamus against the State of Nevada and various state officials to prevent them from granting additional rights to withdraw surface or groundwater from the Walker River system; and (2) a writ of mandamus "challenging [the officials'] public trust obligations in managing and appropriating water flows into Walker Lake." *Mineral County I*, 20 P.3d at 801. Mineral County was joined by

Conservation and Natural Resources and the State Engineer, claiming that both had "abrogated their duty to protect and maintain Walker Lake for the benefit of the public and, in doing so, ha[d] repudiated their public trust duties."[90]

The Nevada Supreme Court majority declined, on jurisdictional grounds, to address the merits of Mineral County's public trust claim. The court acknowledged that the federal Decree Court held continuing and exclusive jurisdiction over the Walker River Basin litigation, and that the Nevada Supreme Court could, therefore, adjudicate the public trust issue only on certification.[91] Justice Robert Rose, however, issued a concurring opinion reaching the merits of Mineral County's claims and maintaining that the court should nonetheless "affirmatively address the existence and role of the public trust doctrine in the State of Nevada."[92]

Justice Rose recognized that underlying the public trust doctrine were the core principles established by the U.S. Supreme Court: that "all of a state's navigable waterways are held in trust by the state for the benefit of the people," and that "state . . . control of those waters is forever subject to that trust."[93] Rose then explained that, although the original purposes of the public trust involved protecting the public's rights in navigation, commerce, and fishing, those purposes "evolved to encompass additional public values—including recreational and ecological uses."[94] Because the trust *res*—which originally encompassed navigable waters and the lands beneath those waters—evolved to encompass non-navigable tributaries that feed navigable waters, in Justice Rose's view, an "extension of the doctrine" was "natural and necessary" where—as in the case of Walker Lake—"the navigable

co-plaintiff Walker Lake Working Group, "a private, not for profit 501(c)(3) organization [whose members] use[] Walker Lake for fishing, birding, recreation, and for the enjoyment of its scenic beauty." *Id.* at 804. As of this writing, Walker Lake Working Group has ceased its legal efforts due to lack of funding. *See* WALKER LAKE WORKING GRP., http://www.walkerlake.org [https://perma.cc/GHT3-ZNEA] (last visited Feb. 17, 2022).

90 *Mineral County I*, 20 P.3d at 804. Respondents also included the Director of the Department of Conservation and Natural Resources. *Id.*

91 *Id.* at 806–07, 807 n.35. As discussed below in Part V, the court, in fact, adjudicated the public trust issue on certification almost two decades later in *Mineral County II*. Had the *Mineral County I* majority reached the merits, it would have addressed many of the same issues that the Ninth Circuit certified to the Nevada court almost two decades later. *See Walker River II*, 900 F.3d 1027, 1028 (9th Cir. 2018) (explaining that Mineral County had brought "essentially the same suit" in *Mineral County I*). Because the *Mineral County II* court addressed only a single, narrow legal issue on certification, the court left key questions unaddressed. *See infra* Parts V, VI, and VII.

92 *Mineral County I*, 20 P.3d at 807 (Rose, J., concurring). Justice Shearing joined Justice Rose's concurrence.

93 *Id.* (citing Pollard's Lessee v. Hagan, 44 U.S. 212, 230 (1845); *Illinois Central*, 146 U.S. 387, 452 (1892)).

94 *Id.*

water's existence is wholly dependent on tributaries that appear to be over-appropriated."[95] Rose relied on the California Supreme Court's decision in *National Audubon Society v. Superior Court of Alpine County* (*Mono Lake*), which extended the scope of the public trust beyond navigable waters.[96]

Justice Rose emphasized that both Nevada statutes and the common law established public ownership of water in Nevada. In 1913, Nevada Revised Statute (NRS) 533.025 announced that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public."[97] He explained that in 1997 the Nevada Supreme Court recognized public ownership of water to be the "most fundamental tenet of Nevada water law,"[98] and that owners of vested water rights "do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water."[99] He concluded that this usufructuary right must be "forever subject to the public trust, which at all times 'forms the outer boundaries of permissible government action with respect to public trust resources.'"[100] In his view, consistent with *Mono Lake*, the public trust doctrine "operates simultaneously" with Nevada's system of prior appropriation.[101] The *Mineral County II* court would agree.[102]

Justice Rose thought the public trust doctrine should apply to water in Nevada, just as it does in California. Quoting *Mono Lake*, Justice Rose underscored the judiciary's role in ensuring that states exercise power over public resources, including water, consistent with public trust principles:

> "[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right

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[95] *Id.* at 807–08.

[96] *Id.* (citing *Mono Lake*, 658 P.2d 709, 721 (Cal. 1983)).

[97] NEV. REV. STAT. § 533.025 (added 1913).

[98] *Mineral County I*, 20 P.3d at 808 (Rose, J., concurring) (quoting Desert Irrigation, Ltd. v. State, 944 P.2d 835, 842 (Nev. 1997)).

[99] *Id.* (Rose, J., concurring) (citing *Desert Irrigation*, 944 P.2d at 842).

[100] *Id.* (quoting Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983)).

[101] *Id.*; *Mono Lake*, 658 P.2d at 726–29 ("[B]oth the public trust doctrine and the [appropriation] water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.").

[102] 473 P.3d 418, 424 (Nev. 2020) (quoting with approval Justice Rose's *Mineral County I* concurrence). For discussion of *Mineral County II*, *see infra* Part V.

> of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." Our dwindling natural resources deserve no less.[103]

Rose maintained that the State Engineer, a public trustee, was responsible for "continuously consider[ing] in the course of his work the public's interest in Nevada's natural water resources."[104] But Rose did not clarify whether, to what extent, or how public trust principles should affect vested water rights previously acquired under the doctrine of prior appropriation and long-ago settled by judicial decree.[105]

In *Lawrence*, a 2011 case decided ten years after Justice Rose penned his *Mineral County I* concurrence, the Nevada Supreme Court formally recognized the public trust doctrine in Nevada.[106] In *Lawrence*, the court addressed the Nevada legislature's attempt to transfer state-owned land in the Fort Mohave Valley to Clark County, where the land was located.[107] The Nevada State Land Registrar, James Lawrence, had withheld from the transfer a portion of land adjacent to the Colorado River that had formerly been submerged because he believed the land was non-transferable under the public trust doctrine.[108] That doctrine, Lawrence asserted, required the state to hold the beds and banks of navigable waters in trust for the public, even those no longer submerged.[109]

The *Lawrence* court expressly recognized the public trust doctrine in Nevada and explained the origins of the doctrine. The court rejected Clark County's contention that the public trust doctrine was merely a "common law remnant" that the legislature could override through the legislation,[110] recognizing that, although the doctrine "has roots in the common law," it

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[103] *Mineral County I*, 20 P.3d at 809 (Rose, J., concurring) (quoting *Mono Lake*, 658 P.2d at 723).

[104] *Id.* at 808 (Rose, J., concurring).

[105] Justice Rose did express hope that all appropriators could be accommodated through a plan that would "save the essentials of everyone's water needs," and that such a plan would manifest through the federal court proceedings. *Id.* The Nevada Supreme Court only partially resolved the public trust issues in *Mineral County II* when a majority of the court finally addressed the merits of Mineral County's public trust claims. *See infra* Part V.

[106] *Lawrence*, 254 P.3d 606, 617 (Nev. 2011). Justice Rose retired in 2007, four years before *Lawrence* was decided.

[107] *Id.* at 608.

[108] *Id.*

[109] *Id.* The lower court had ruled that the disputed land was not subject to the public trust doctrine because the land was not "within the current channel of the Colorado River." Clark Cnty. v. Lawrence, No. A576003, 2003 WL 26082293 (Nev. Dist. Ct. July 16, 2003). Other states, such as Illinois, consider filled submerged lands to be subject to the public trust doctrine. *See, e.g.*, JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO 251, 276–79 (2021) (discussing the application of the public trust doctrine to filled land on which Soldier Field was built).

[110] *Lawrence*, 254 P.3d at 611–12. *See* KEARNEY & MERRILL, *supra* note 109, at 245, 298 (discussing legislative override in Illinois).

is distinct from traditional common law principles.[111] Relying in part on Justices Rose's *Mineral County I* concurrence, the court identified three sources of the public trust doctrine in Nevada: the state constitution, state statutes, and the "inherent limitations" on state sovereign power as recognized by the U.S. Supreme Court in its seminal 1892 decision, *Illinois Central Railroad Co. v. Illinois*.[112]

The *Lawrence* court first examined the Nevada Constitution's "gift clause," which, with limited exceptions, prohibits the gift or loan of public funds or credit.[113] The court understood the gift clause's constraints on legislative action, barring the state from dispersing public funds if not for a public purpose, as upholding the same principle underlying the public trust doctrine. Under the Nevada Constitution's gift clause, the legislature must act as a fiduciary for the public when disposing of public property; similarly, the public trust doctrine requires the state to "carefully safeguard public trust lands by dispensing them only when in the public's interest."[114] Because both the gift clause and the public trust doctrine "require[] the state to serve as trustee for public resources," the court concluded that the gift clause implicitly "constrain[s] the Legislature's ability to alienate public trust lands."[115]

In addition to the state constitution, the court found public trust principles embedded in two statutory provisions that impose fiduciary duties on the state with respect to both land and water. First, section 321.0005 of the Nevada Statutes provides that "state lands must be used in the best interest of the residents of [Nevada]."[116] That requirement, the court concluded, "contemplates fiduciary-type duties" concerning the administration of state-owned lands.[117] Second, the court agreed with Justice Rose's conclusion that section 533.025 of the Nevada Statutes, which recognizes public ownership of all water within Nevada, "provides grounding for the Nevada public trust doctrine."[118] The *Lawrence* court

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111 *Lawrence*, 254 P.3d at 613.

112 *Id.* at 613 (citing *Illinois Central*, 146 U.S. 387, 452 (1892)).

113 *Id.* at 612 ("The State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." (quoting NEV. CONST. art. VIII, § 9)).

114 *Id.*

115 *Id.*

116 *Id.* (emphasis omitted) (quoting NEV. REV. STAT. § 321.0005).

117 *Id.*

118 *Id.* at 612–13 (quoting NEV. REV. STAT. § 533.025 (providing that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public") and citing *Mineral County I*, 20 P.3d 800, 808 (Nev. 2001) (Rose, J., concurring)).

understood these two provisions to codify "the fiduciary principles at the heart of the public trust doctrine."[119]

Finally, the *Lawrence* court held that the public trust doctrine also arises from the "inherent limitations" on state sovereign power, as recognized by the U.S. Supreme Court in its 1892 holding in *Illinois Central*:[120] "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[121] As the *Lawrence* court explained, *Illinois Central* prohibited, apparently on the basis of inherent sovereign limits, a state legislature from disposing of such "public trust property" when doing so would not serve the public interest.[122] The court recognized that the public trust obligation established in *Illinois Central* not only restrained the alienation of trust lands, but also, more broadly, required that a state legislature act as a fiduciary of the public "in its administration of trust property."[123] Significantly, the *Lawrence* court recognized that the public trust doctrine of *Illinois Central* is not simply "common law easily abrogated by legislation": instead, the doctrine exists as an "inseverable restraint" on state sovereign power.[124]

The *Lawrence* court concluded that whether the land transfer at issue was consistent with the public trust doctrine turned on the resolution of two questions the district court needed to address on remand. First, it was unclear whether the state had held title to the disputed lands. The answer to that question hinged on whether the lands were submerged beneath a

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119 *Id.* at 613.

120 *Id.* (citing *Illinois Central*, 146 U.S. 387 (1892)).

121 *Id.* (quoting *Illinois Central*, 146 U.S. at 453). For a concise discussion of the facts and holding of *Illinois Central*, see Michael Benjamin Smith, *The Federal Public Trust Doctrine of* Illinois Central*: The Misunderstood Legacy of* Appleby v. City of New York, 51 ENV'T L. 515, 527–29 (2021).

122 *Lawrence*, 254 P.3d at 613.

123 *Id.*

124 *Id.* Other courts, both state and federal, have similarly ruled that the public trust doctrine inheres in sovereignty. *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016) ("Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away."), *rev'd on standing grounds*, 947 F.3d 1159 (9th Cir. 2020); *In re* Water Use Permit Applications (*Waiāhole Ditch*), 9 P.3d 409, 442–43 (Haw. 2000) (recognizing the public trust doctrine's "basic premise, that the state has certain powers and duties which it cannot legislatively abdicate" (citing *Illinois Central*, 146 U.S. at 453–54)); Robinson Twp. v. Commonwealth, 83 A.3d 901, 946–49 (Pa. 2013) (interpreting Article I of the Pennsylvania Constitution as recognizing preexisting "inherent and indefeasible rights" of all citizens, part of the "inviolate" social contract that imposes on the state government a fiduciary duty to "conserve and maintain" public natural resources for the benefit of all citizens).

navigable stretch of the Colorado River in 1864 when Nevada joined the United States on an equal footing with other states, taking title to lands under submerged waters.[125] Second, if the disputed lands were public trust lands, the district court needed to determine whether the proposed conveyance of those lands out of state ownership contravened the public trust doctrine.[126] To resolve the second question, the Nevada Supreme Court endorsed a three-prong test for evaluating dispensations of navigable waterways.[127] Under the framework, a court 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.'"[128]

In *Walker River II* (discussed in Part IV), the Ninth Circuit concluded that the *Lawrence* court's analysis had not definitively resolved Mineral County's public trust claims, which involved the interaction of the public trust and prior appropriation doctrines.[129] Although *Lawrence* formally recognized the public trust doctrine in Nevada, the decision did not clearly define the scope of the public trust *res* beyond navigable waters and the lands beneath them. Nor did it establish whether the public trust doctrine might permit reallocation of water rights previously settled by judicial decree under the doctrine of prior appropriation.[130] As discussed in Part V, the Nevada Supreme Court would address both questions in *Mineral County II*.

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[125] *Lawrence*, 254 P.3d at 614, 617. The district court also needed to determine whether the land became dry through reliction ("the gradual and imperceptible exposure of the land") or avulsion ("sudden changes in the course of a stream"). *Id.* at 614. If the land became dry through reliction, title would have passed from the state to the owners of the adjoining shorelands, but if the changes occurred through avulsion, the state would retain title. *See id.* at 614–15.

[126] *Id.* at 617.

[127] The Arizona Court of Appeals in *Arizona Center for Law v. Hassell*, 837 P.2d 158, 170–73 (Ariz. Ct. App. 1991), originally applied the test, which the *Lawrence* court adopted. *See Lawrence*, 254 P.3d at 615–16.

[128] *Lawrence*, 254 P.3d at 616 (construing and quoting *Hassell*, 837 P.2d at 170). Although the first two considerations would apply to a court's evaluation of any dispensation of public property, the *Lawrence* court considered the third "specific to navigable waterways under the public trust." *Id.*

[129] *See Walker River II*, 900 F.3d 1027, 1031–34 (9th Cir. 2018) (reviewing *Lawrence* and concluding "that whether, and to what extent, the public trust doctrine applies to appropriative rights settled under the Walker River Decree" remained "an open question").

[130] *See id.* at 1031–32 (evaluating *Lawrence*).

IV. THE BEGINNING OF THE WALKER LAKE LITIGATION

In 1994, Mineral County, in which Walker Lake is located, moved to intervene[131] in the ongoing Decree litigation, asserting that the public trust doctrine required a reallocation of the waters of the Walker River to preserve Walker Lake's resources. Declaring that "[m]inimum flowage guaranteed to Walker Lake was not dealt with, resolved, or considered in the original decree," Mineral County claimed that "[w]ithout reallocation of the waters to insure priority minimum flows to sustain the Lake, Walker Lake, its users and the citizens of Mineral County and the public w[ould] suffer substantial and irreparable damage."[132] The county argued that "maintenance of the public trust" consequently required certain minimum levels of flows to the lake and asked the Decree Court to (1) reopen and modify the Decree, recognizing the rights of Mineral County to have minimum lake levels necessary to sustain the lake's naturally occurring fish population, preserve wildlife, and support recreational, aesthetic, and economically beneficial uses of the lake; (2) order the State of Nevada to grant a certificate to Mineral County recognizing its right to minimum flows of 127,000 acre-feet per year to the lake (the minimum flows necessary to maintain the lake's naturally occurring fish populations); and (3) recognize that those minimum flows were "in the public interest" and "required under the doctrine of maintenance of the public trust."[133]

In 2013, almost twenty years after Mineral County moved to intervene in the Decree litigation, the Nevada district court finally granted the county's motion.[134] Two years later, in *United States v. Walker River Irrigation District* (*Walker River I*),[135] the court dismissed Mineral County's complaint on multiple grounds.[136] The Decree Court first ruled

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131 Notice of Motion and Motion of Mineral County of Nevada for Intervention, United States v. Walker River Irrigation Dist., No. 3:73-cv-00127-MMD-WGC (In Equity No. C-125-B) (D. Nev. Oct. 25, 1994).

132 Mineral County's Amended Complaint in Intervention at 4, United States v. Walker River Irrigation Dist. (*Walker River I*), No. 3:73-cv-00128-RCJ-WGC (In Equity No. C-125-C) (D. Nev., Mar. 10, 1995) [hereinafter 1995 Amended Complaint].

133 *Id.* at 4–6.

134 Minutes of Proceedings, *Walker River I*, No. 3:73-cv-00128 (In Equity No. C-125-C) (D. Nev. Sept. 23, 2013), ECF No. 726. Litigation at the Decree Court could not proceed until hundreds of potential upstream water rights holders had been served. *Mineral County I*, 20 P.3d 800, 804 (Nev. 2001).

135 *Walker River I*, No. 3:73-cv-00128 (In Equity No. C-125-C) 2015 WL 3439122 (D. Nev. May 28, 2015), *aff'd in part, vacated in part by Walker River III*, 986 F.3d 1197 (9th Cir. 2021). As discussed below, the Ninth Circuit overruled the *Walker River I* court in three separate rulings. *See infra* text accompanying notes 141–153.

136 *See id.* at *10–11. The district court's ruling followed a motion to dismiss the county's Amended Complaint in Intervention made by the Walker River Irrigation District, a party to the ongoing Decree litigation. *Id.* at *4.

that Mineral County had no standing to assert the public trust doctrine, reasoning that municipalities, which are not sovereigns, cannot sue to vindicate the public trust under the doctrine of *parens patriae*.[137] The court also decided that even if Mineral County did have standing to assert a public trust claim, the public trust doctrine could only factor into future allocations of water.[138] According to the court, any retroactive reallocation of water rights previously adjudicated under the doctrine of prior appropriation would amount to a taking requiring just compensation under either the federal or state constitutions, and the political question doctrine barred the court from effectuating such a taking.[139] Finally, the court held that Walker Lake is not within the "basin of Walker River" within the meaning of the 1936 Decree, thereby barring the intentional delivery of waters of the basin into Walker Lake, beyond those flowing naturally into the river.[140]

In 2018, the Ninth Circuit overruled each of *Walker River I*'s conclusions.[141] First, the court of appeals decided that the district court erred in dismissing Mineral County's complaint for lack of standing, holding that a political subdivision may sue to vindicate its own interest and that Mineral County satisfied Article III standing requirements.[142] The Ninth Circuit also addressed the merits of Mineral County's public trust claim, reasoning that whether the 1936 Decree could be amended "to allow for certain minimum flows of water to reach Walker Lake" depended on whether Nevada's public trust doctrine might apply to those water rights "previously adjudicated and settled under the doctrine of prior appropriation."[143]

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[137] *Id.* at *3–4. The court concluded, however, that the State of Nevada or any of its citizens *would* have standing to bring a public trust claim. *Id.* at *4.

[138] *Id.* at *9. In *Mineral County II*, the Nevada Supreme Court agreed that Nevada's public trust doctrine would not permit reallocation of adjudicated rights. *See infra* text accompanying notes 156–158.

[139] *Id.* at *6–9. The *Walker River I* court's merits ruling rested in part on the court's determination that the scope of the public trust *res* in Nevada did not extend to non-navigable waters. *Id.* at *6. The Nevada Supreme Court subsequently held otherwise in *Mineral County II*, when the court clarified that the public trust *res* in Nevada extends to all waters in the state, "whether navigable or nonnavigable." 473 P.3d 418, 425–26, 425 n.4 (Nev. 2020).

[140] *Walker River I*, 2015 WL 3439122, at *10.

[141] In a fourth ruling, the Ninth Circuit took the "rare and extraordinary" step of reassigning all Walker Basin litigation to a different judge, due to the then-current district court judge's demonstrated hostility toward federal attorneys. United States v. Walker River Irrigation Dist., 890 F.3d 1161, 1173–74 (9th Cir. 2018).

[142] Mono Cnty. v. Walker River Irrigation Dist., 735 F. App'x 271, 273–74 (9th Cir. 2018). The Ninth Circuit also concluded that Walker Lake is in fact within Walker Basin. United States v. U.S. Bd. of Water Comm'rs, 893 F.3d 578, 604–06 (9th Cir. 2018).

[143] *Walker River II*, 900 F.3d 1027, 1030–31 (9th Cir. 2018).

On the latter issue, the Ninth Circuit determined that neither appellants' nor appellees' arguments were convincing. The Ninth Circuit acknowledged "general principles" suggesting that Nevada's public trust doctrine "applies to Walker Lake in *some* form," but concluded that Mineral County had not conclusively established that the public trust doctrine held "absolute supremacy" over the doctrine of prior appropriation.[144] Lyon County—an upstream Nevada county opposing Mineral County's claim[145]—argued that water rights adjudicated and settled by judicial decree were vested, and, therefore, "no longer within the purview of the public trust doctrine."[146]

The Ninth Circuit agreed that the doctrine of prior appropriation was "largely a product of the compelling need for certainty"[147] and that "principles of finality" are "encapsulated in Nevada's statutes."[148] But the court also acknowledged the existence of "significant authority," including Justice Rose's *Mineral County I* concurrence, which had suggested that previously adjudicated rights might still be subject to the public trust doctrine.[149] Consequently, the Ninth Circuit concluded that "whether, and to what extent, the public trust doctrine applies to appropriative rights settled under the [1936] Decree" remained "an open

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[144] *Id.* at 1032. The Ninth Circuit understood Mineral County to assert that the public trust doctrine required the State Engineer to "reconsider previous allocations." *Id.* The county, however, had explained that it "does not seek a water right for Walker Lake," and that the public trust doctrine would not operate as "creating a water right"; instead, the county argued that the public trust doctrine required the state and the Decree Court to "affirmatively manage and regulate" flows to Walker Lake to "protect and maintain" the lake as a public trust resource. Mineral County's Response to Motions to Dismiss Concerning Threshold Jurisdictional Issues, Ex. 1, at 13–14, *Walker River II*, 900 F.3d 1027 (No. 15-16342).

[145] On the public trust issue, the court addressed the arguments of Lyon County and not the named appellee (Walker River Irrigation District) because the latter argued in favor of certifying the public trust question to the Nevada Supreme Court. *See* Brief of Appellee Walker River Irrigation District at 45–49, *Walker River II*, 900 F.3d 1027 (No. 15-16342), 2016 WL 4528234 (arguing for certification). An attorney representing Lyon County and several California water users argued on the merits of Mineral County's public trust claim before the Ninth Circuit. Oral Argument (unofficial transcript), *Walker River II*, 900 F.3d 1027 (No. 15-16342), 2017 WL 9476965.

[146] *Walker River II*, 900 F.3d at 1032.

[147] *Id.* at 1033 (quoting Arizona v. California, 460 U.S. 605, 620 (1983)).

[148] *Id.*

[149] *Id.* The court considered the Nevada Supreme Court's holding that "the most fundamental tenet of Nevada water law [is that] 'the water of all sources of water supply . . . *belongs to the public*,'" and that "even those holding . . . vested . . . water rights do not own or acquire title to water," *id.* (quoting Desert Irrigation, Ltd. v. State, 944 P.2d 835, 842 (Nev. 1997) (quoting with emphasis NEV. REV. STAT. § 533.025)); and Justice Rose's conclusion in his *Mineral County I* concurrence that even "those holding vested water rights" hold those rights "forever subject to the public trust," *id.* (quoting *Mineral County I*, 20 P.3d 800, 808 (Nev. 2001) (Rose, J., concurring)). The Ninth Circuit also looked to the California Supreme Court's opinion in *Mono Lake*, where the court balanced the competing values underlying the public trust and prior appropriations doctrines. *Id.* at 1033–34 (evaluating *Mono Lake*, 658 P.2d 709, 712 (Cal. 1983)).

question."[150] Since the court remained uncertain as to how the Nevada Supreme Court would resolve the issue,[151] the Ninth Circuit certified the following two questions to the Nevada Supreme Court:

> [1] Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?
>
> [2] If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?[152]

As discussed below, the Nevada Supreme Court rephrased and narrowed the first question, and in answering that first question in the negative, never reached the second.[153]

V. THE NEVADA SUPREME COURT'S DECISION IN *MINERAL COUNTY V. LYON COUNTY*

In *Mineral County v. Lyon County* (*Mineral County II*), the Nevada Supreme Court "rephrased"[154] the first question that the Ninth Circuit had certified: whether "the public trust doctrine *appl[ies]* to rights already adjudicated and settled under the doctrine of prior appropriation *and, if so, to what extent*."[155] Believing that the Walker River Basin could not

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150 *Walker River II*, 900 F.3d at 1034.

151 The *Walker River II* court also understood *Mineral County I* as "effectively invit[ing] the federal court to certify the public trust question." *Id.* at 1031 (construing *Mineral County I*, 20 P.3d at 807 n.35).

152 *Id.* at 1034.

153 Considering the *Mineral County II* court's conclusion that "the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right," 473 P.3d 418, 425 (Nev. 2020), it seems unlikely that any reallocation required by the public trust doctrine would constitute a taking. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992) (explaining that no taking occurs where state regulation is grounded in "background principles" of property law); Vandevere v. Lloyd, 644 F.3d 957, 963 (9th Cir. 2011) ("[W]e look to state law to determine what property rights exist and therefore are subject to 'taking' under the Fifth Amendment."). In *Mono Lake*, the California Supreme Court ruled that appropriative water rights had been acquired subject to the public trust, and thus opened the door to potential "revocation of previously granted [allocated] rights"; the court also emphasized that it had consistently "rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required." 658 P.2d at 723; *see also id.* ("We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will . . . hold it subject to the public trust." (quoting City of Berkeley v. Super. Ct., 606 P.2d 362 (Cal. 1980)). For a discussion of background principles serving as a government defense to takings claims, see Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165 (2019).

154 *Mineral County II*, 473 P.3d at 421.

155 *Walker River II*, 900 F.3d at 1034 (emphasis added).

meet the lake's needs "without abrogating the rights of more senior rights holders,"[156] the court asked only whether Nevada's public trust doctrine "permits *reallocating* water rights previously settled under Nevada's prior appropriation doctrine."[157] Although *Mineral County II* rejected reallocating adjudicated rights,[158] the court significantly expanded the scope of Nevada's public trust doctrine by including all waters and water rights as trust resources.[159] Moreover, given the narrow nature of the majority decision in the case, the court left substantial room for the Decree Court to provide meaningful public trust relief to Walker Lake.[160]

After an historical review of the public trust doctrine,[161] the *Mineral County II* court endorsed Justice Rose's *Mineral County I* concurrence, announcing that Nevada's public trust doctrine "applies to [water] rights

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156 *Mineral County II*, 473 P.3d at 430 n.8. The court's assumption that the only relevant question was whether the public trust doctrine permits reallocation of previously adjudicated rights was not without basis. In Mineral County's first amended complaint, filed in 1995, the county expressly sought an "adjudication and reallocation of the waters of Walker River to preserve the minimum levels in Walker Lake, as a condition to the water rights licenses of all upstream users." 1995 Amended Complaint, *supra* note 132, at 4. The Ninth Circuit in *Walker River II* had also appeared to assume that granting relief to Mineral County would require a reallocation of adjudicated rights. 900 F.3d at 1030–31 ("The remaining issue—whether the Walker River Decree can be amended to allow for certain minimum flows of water to reach Walker Lake—depends on whether the public trust doctrine applies to rights previously adjudicated and settled under the doctrine of prior appropriation *and permits alteration of prior allocations*." (emphasis added)). As noted above, however, the county had begun to characterize its requested relief in terms of "manage[ment] and regulat[ion]"—and the county emphasized that it "does not seek a water right for Walker Lake." *See* Mineral County's Response to Motions to Dismiss Concerning Threshold Jurisdictional Issues, Ex. 1, at 13–14, *Walker River II*, 900 F.3d 1027 (No. 15-16342); *see also* discussion *infra* note 144. In its 2016 briefing at the Ninth Circuit, the county asserted, "Mineral County's claim does not contemplate a reallocation of or change in priority of water rights. Rather, recognition of the public trust duty to preserve minimum flows to Walker Lake would affect the amount of water available for use by water rights holders just as drought might have an impact on availability of water." Reply Brief of Appellants Mineral County and Walker Lake Working Group at 12, *Walker River II*, 900 F.3d 1027 (No. 15-16342).

157 *Mineral County II*, 473 P.3d at 421.

158 *Id.* at 431. In this respect, *Mineral County II* stands in sharp contrast to *Mono Lake*. Although the *Mono Lake* court did not extend the trust *res* as far as the Nevada Supreme Court did in *Mineral County II*, the California Supreme Court recognized a more robust public trust doctrine with respect to settled appropriative rights. The *Mono Lake* court concluded that the state, acting as administrator of a public trust that "imposes a duty of continuing supervision over the taking and use of the appropriated water," had the power to *revoke* previously granted rights. *Mono Lake*, 658 P.2d at 723, 728. Recognizing that "no responsible body" had specifically considered the effect of the appropriations at issue, which diverted the "entire flow" of Mono Lake's tributaries into the Los Angeles Aqueduct, the California Supreme Court held that the public trust doctrine required that "some responsible body"—the California courts or the state water board—"reconsider" prior allocations of Mono Basin's waters. *Id.* at 728–29. That "reconsideration and reallocation" needed to account for the adverse effects of upstream diversions on the Mono Lake environment. *Id.* at 729.

159 *See infra* text accompanying notes 161–168.

160 *See infra* notes 169–182 and accompanying text.

161 *Mineral County II*, 473 P.3d at 423–25.

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*."[162] Relying on Justice Rose, the court "clarif[ied]" that the public trust *res* in Nevada extends to *all* waters in the state, "whether navigable or nonnavigable,"[163] thereby expanding the scope of the public trust in Nevada beyond the bounds of navigable waters to include non-navigable tributaries, ephemeral streams, wetlands, and groundwater. *Mineral County II* thus represents a pathbreaking, express expansion of the scope of the public trust doctrine in Nevada:[164] where the *Lawrence* court had confirmed that the trust *res* extended to navigable waters and submerged (or formerly submerged) lands,[165] the *Mineral County II* court held that the public trust doctrine not only applied to all waters within the state, but also inhered as a "qualification or constraint in every appropriated water right."[166] In so holding, the *Mineral County II* court expanded the scope of the Nevada public trust doctrine considerably beyond that of the California public trust doctrine as articulated in *Mono Lake*, in which the California Supreme Court expanded the doctrine's reach only to non-navigable tributaries that feed navigable waters.[167] *Mineral County II* extended the doctrine's reach to *all* waters—even isolated wetlands and groundwater unconnected to navigable waters.[168]

Although the court eschewed reallocation of water rights, it nonetheless recognized that water rights in Nevada "are subject to regulation for the public welfare."[169] The court did not, however, specify the sorts of potential 'regulatory' relief remaining to Mineral County. One potential remedy if the public trust inheres in all waters and in every water right is to conclude that water rights that unnecessarily damage

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[162] *Id.* at 424-25 (emphasis added).

[163] *Id.* at 425–26.

[164] As the dissent noted, the majority's holding on the scope of the public trust *res* was more than a "clarification": although a majority of the court had never expressly held otherwise, the majority's ruling "mark[ed] a significant expansion of the public trust doctrine." *Id.* at 433 (Pickering, C.J., concurring in part and dissenting in part).

[165] *See* discussion *supra* Part III.

[166] *Mineral County II*, 473 P.3d at 425.

[167] *Mono Lake*, P.2d 709, 721, 721 n.19 (Cal. 1983) (holding that "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries," but expressly not considering whether the doctrine's protections otherwise extended to nonnavigable streams (footnotes omitted)).

[168] *See Mineral County II*, 473 P.3d at 425; *id.* at 433 (Pickering, C.J., concurring in part and dissenting in part).

[169] *Id.* at 426; *id.* at 430 (Pickering, C.J., concurring in part and dissenting in part).

trust resources are equivalent to wasting water, which no water right holder may do.[170]

In her *Mineral County II* dissent,[171] Chief Justice Pickering sharply criticized the majority for rephrasing and narrowing the first question the Ninth Circuit had certified, such that the court only considered whether Nevada's public trust doctrine would permit reallocation of adjudicated rights.[172] Importantly, although the county originally framed potential relief primarily in terms of "reallocation,"[173] by the time the case reached the Nevada Supreme Court the county had shifted that framing,[174] maintaining that "the reallocation of water rights, adjudicated or permitted, is not truly an issue in this case."[175] Instead of seeking the creation of a new, senior water right with "greater priority," the county argued that the public trust doctrine should act "as a constraint on the availability of water for appropriation from the public trust water resource" of Walker River Basin.[176] The *Mineral County II* majority seemed to agree in its admonition that all water rights are subject to public welfare regulation.[177]

The county maintained that vested appropriative water rights are not absolute and do not guarantee a specific quantity of water. Instead, they argued that appropriative rights involve "quantitative shares of each claimant, in relation to each other" of the total water quantity available for appropriation.[178] Thus, any reduction in the availability of water

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[170] *See* NEV. REV. STAT. §§ 533.460, 533.463 (establishing unlawfulness of waste). In post-*Mineral County II* briefing, the county enumerated several remedies targeting waste of water by upstream appropriators. *See* 2021 Amended Complaint, *supra* note 17, at 7–9.

[171] Chief Justice Pickering concurred in part and dissented in part, although the points of agreement—involving the court's recognition of Nevada's public trust doctrine, as articulated in *Lawrence* and in Justice Rose's *Mineral County I* concurrence—were narrow. *See Mineral County II*, 473 P.3d at 432–33 (Pickering, C.J., concurring in part and dissenting in part).

[172] *Id.* at 431–32 (Pickering, C.J., concurring in part and dissenting in part).

[173] *See supra* note 156.

[174] In its 2016 briefing at the Ninth Circuit, the county asserted that "Mineral County's claim does not contemplate a reallocation of or change in priority of water rights. Rather, recognition of the public trust duty to preserve minimum flows to Walker Lake would affect the amount of water available for use by water rights holders just as drought might have an impact on availability of water." Reply Brief of Appellants Mineral County and Walker Lake Working Group at 12, *Walker River II*, 900 F.3d 1027 (9th Cir. 2018) (No. 15-16342). The County echoed this assertion in its subsequent briefing to the Nevada Supreme Court. Appellants' Reply Brief at 14, *Mineral County II*, 473 P.3d 418 (No. 75917).

[175] Appellants' Reply Brief at 14, *Mineral County II*, 473 P.3d 418 (No. 75917).

[176] *Id.* at 7.

[177] *Mineral County II*, 473 P.3d at 430.

[178] Appellants' Opening Brief at 25, *Mineral County II*, 473 P.3d 418 (No. 75917). Mineral County also relied on *Basey v. Gallagher*, in which the U.S. Supreme Court had recognized that appropriation water rights are "not unrestricted" but "must be exercised with reference to the general condition of the country and the necessities of the people." *Id.* at 23 (quoting 87 U.S. 670, 683 (1874)).

resulting from enforcement of the public trust doctrine "would be like any other natural constraint on the already variable availability of water to supply private appropriations and would not constitute a modification of water rights."[179] Maintaining that the public trust doctrine requires a change in how the Walker River system is *managed*, so that Walker Lake might be restored "to a reasonable state of health and functionality in terms of its trust uses and values," Mineral County suggested a number of remedial measures short of water rights reallocation that the Nevada Supreme Court failed to address.[180] Among these were changes in how surplus water is managed in wet years and how flows are managed outside the irrigation season. The county's suggested measures included requiring efficiency improvements, requiring the state to create a public trust plan for the lake, and getting water rights holders to develop consumptive use reduction plans[181]—methods similar to those adopted in the over-appropriated Diamond Valley Hydrologic Basin.[182]

Because the *Mineral County II* court addressed only the narrow question of reallocation, it never assessed the viability of these alternative forms of relief. The dissent, criticizing the majority for rephrasing the

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[179] Appellants' Reply Brief at 18, *Mineral County II*, 473 P.3d 418 (No. 75917).

[180] *Id.* at 18. Mineral County has expanded and refined its request for potential remedies. *See* discussion *infra* Part VII.

[181] Appellants' Reply Brief at 18, *Mineral County II*, 473 P.3d 418 (No. 75917) ("Such an order might involve, without limitation: (1) a change in how surplus waters are managed in wet years and how flows outside of the irrigation season are managed; (2) mandating efficiency improvements with a requirement that water saved thereby be released to the Lake; (3) curtailment of the most speculative junior rights on the system; (4) a mandate that the State provide both a plan for fulfilling its public trust duty to Walker Lake and the funding necessary to effectuate that plan; and/or (5) an order requiring water rights holders to come up with a plan to reduce consumptive water use in the Basin as was done by the [State Engineer] in Diamond Valley.").

[182] Nevada law authorizes the State Engineer to "designate as a critical management area any basin in which withdrawals of groundwater consistently exceed the perennial yield of the basin," and to regulate that basin as appropriate "for the welfare of the area involved," including designating preferred uses within that basin. NEV. REV. STAT. §§ 534.110, 534.120. Nevada law also grants to groundwater rights holders in a critical management area the right to petition the State Engineer to adopt a groundwater management plan, proposed by the stakeholders, that "set[s] forth the necessary steps for removal of the basin's designation as a critical management area." *Id.* § 534.037. In 2015, the State Engineer designated the Diamond Valley Hydrologic Basin as a critical management area, and in 2019 granted Diamond Valley groundwater rights holders' petition to adopt a proposed plan. Off. of the State Eng'r, State of Nev., Order Granting Petition to Adopt a Groundwater Management Plan for the Diamond Valley Hydrologic Basin (07-153), Eureka County, State of Nevada, Order No. 1302 (Jan. 11, 2019).

Although Nevada's water statutes expressly grant the State Engineer the above authority concerning over-appropriated groundwater, the statutes provide no similar express authorization in the surface water rights context. Mineral County has asserted that there exists an implicit analogous authority to administer surface water rights and to curtail by priority when circumstances so require—for example, when the public trust water resource is being unreasonably harmed—and to direct water rights holders to develop a plan to reduce consumptive use as an alternative if they wish to avoid curtailment. *See supra* note 181.

Ninth Circuit's question, contended that none of the remedial measures Mineral County had suggested required a reallocation.[183] Echoing the County's assertions as to the relative nature of appropriative rights, the dissent noted that "[e]ven the vested water rights at issue are only worth the maximum amount of water available for allocation in the Basin."[184] Citing *Mono Lake*, the dissent concluded that potentially limiting the availability of water through enforcement of the public trust would not, in fact, "effect a reallocation of vested water rights."[185] Instead, the dissent believed, it would only reduce the amount of water "available for allocation."[186]

Because the majority only addressed the reallocation issue, it never discussed the viability of other forms of relief. Therefore, much of the dissent's analysis became relevant to the Ninth Circuit's subsequent determination of whether those alternative forms of relief remained available. As the Ninth Circuit confirmed, *Mineral County II* supports the county's claim that the state and decree court, under the public trust doctrine, have a trust duty to protect the precarious resource of Walker Lake.[187]

VI. THE DOOR TO RELIEF: THE NINTH CIRCUIT'S SUSTAINING OF MINERAL COUNTY'S CLAIM

When the Walker River litigation continued in the Ninth Circuit following the Nevada Supreme Court's decision in *Mineral County II*, the county raised two key issues. First, the county argued that the court of appeals should remand the case to the Decree Court to determine whether the 1936 Decree itself violated the public trust doctrine because the Nevada Supreme Court had "made no finding as to whether adequate consideration of the public trust occurred in the individual allocative decisions of the [1936] Decree."[188] Second, the county maintained that its public trust claim remained viable because the *Mineral County II* court left open the possibility of remedies other than reallocation of adjudicated

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183 *Mineral County II*, 473 P.3d at 432 (Pickering, C.J., concurring in part and dissenting in part). Chief Justice Pickering also concluded that none of these remedial measures would "imping[e] on principles of finality." *Id.* at 436 (emphasis omitted).

184 *Id.* at 437.

185 *Id.*

186 *Id.*

187 As Mineral County explained, the Decree Court "stands in the shoes of the State Engineer, because the court took jurisdiction over the Walker River system." Supplemental Brief of Appellants Mineral County and Walker Lake Working Group at 8, *Walker River III*, 986 F.3d 1197 (9th Cir. 2021) (No. 15-16342).

188 *Id.* at 14. Mineral County noted that the 1936 Decree occurred long before the Nevada Supreme Court's *Lawrence* decision, in which that court adopted the three-part test for determining whether an alienation of a trust resource satisfies the public trust doctrine. *Id.* at 9–13.

rights.[189] In support of its second argument, Mineral County focused on the narrowness of *Mineral County II* court's holding, pointing to the court's acknowledgement that appropriative water rights "are subject to regulation for the public welfare."[190]

Although the Ninth Circuit rejected Mineral County's argument that the Decree Court should determine whether the 1936 Decree violated the public trust doctrine,[191] the court agreed with the county that its public trust claim remained viable because it "c[ould] seek remedies that would *not* involve a reallocation of adjudicated water rights."[192] On this point, the Ninth Circuit agreed with the *Mineral County II* dissent: the Nevada Supreme Court never ruled on whether those other remedies were available, although the state court did make clear that adjudicated water rights were subject to state regulation.[193] Moreover, as the Ninth Circuit noted, the *Mineral County II* court "squarely held that '[t]he public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation.'"[194] The Ninth Circuit consequently

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189 *Id.* at 20–26.

190 *Id.* at 15.

191 Such a challenge, the Ninth Circuit concluded, would violate the "'finality in water rights' that Nevada's water statutes," as interpreted by the Nevada Supreme Court, "deem important." *Walker River III*, 986 F.3d at 1204. The Ninth Circuit ruled that the county's challenge to the 1936 Decree itself, brought over eighty years after the decree became final, was untimely. *Id.*

In concluding that the public trust doctrine did not permit water rights reallocation, the *Mineral County II* court looked to state law, emphasizing that Nevada's water law "recognize[s] the importance of finality in water rights." 473 P.3d at 429. The court interpreted Nevada's water statutes to prohibit reallocation of adjudicated rights, except where water rights were lost "pursuant to an express statutory provision." *Id.* The court considered state statutory law binding, declaring that "[w]e cannot read into the statutes any authority to permit reallocation when the Legislature has already declared that adjudicated water rights are final, nor can we substitute our own policy judgments for the Legislature's." *Id.* at 430. Looking to U.S. Supreme Court cases, such as *Arizona v. California*, which recognized the "compelling need for certainty" in adjudicated water rights—a need with particular importance in arid western states like Nevada, *id.* at 429 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983))—the Nevada court concluded that the public's highest interest was in certainty and finality, vital to long-term planning for municipalities and state agricultural and mining industries, thus affecting the "prosperity of the state," *id. Mineral County II* can thus be understood as ruling that in Nevada, the public's interest in finality takes priority over any benefit that might accrue from a reallocation of adjudicated rights.

192 *Walker River III*, 986 F.3d at 1204.

193 *Id.* at 1205; *Mineral County II*, 473 P.3d at 431–32 (Pickering, C.J., concurring in part and dissenting in part). As noted above, although the *Mineral County II* court never reached the issue of relief other than reallocation, the court did recognize that "water rights are subject to regulation for the public welfare." 473 P.3d at 430.

194 *Walker River III*, 986 F.3d at 1205 (quoting *Mineral County II*, 473 P.3d at 425). The liberal pleading standard under the Federal Rules of Civil Procedure helped keep the county's case alive. The upstream defendants seized on language in the county's 1995 original amended complaint, in which the county had expressly sought the remedy of reallocation. *See* Supplemental Brief of Appellee Walker River Irrigation District at 9–10, *Walker River III*, 986 F.3d 1197 (No. 15-16342). The Walker River Irrigation Group argued that "[a]fter over 25 years, Mineral County should not be allowed to change its position" by seeking a different form of relief. *Id.* at 12. And Lyon County,

remanded the case to the Decree Court for Mineral County to pursue remedies other than reallocation of adjudicated rights.

VII. ARGUMENTS ON REMAND TO THE DECREE COURT

The *Mineral County II* majority focused on the specific relief the county originally sought—an annual allocation of minimum flows of 127,000 acre-feet per year—and concluded that Walker Basin could only "meet the county's needs" through reallocation of adjudicated rights.[195] By 2019, however, the Walker Basin Conservancy, with funds from the Walker Basin Restoration Program established by Congress in 2009,[196] had purchased almost half of the water rights necessary to restore the lake.[197] In addition, recent hydrologic studies of Walker Lake revealed that some—although certainly not all—of the increased annual inflows required to restore the lake occurred through surface and subsurface flows and precipitation.[198] In 2020, Mineral County, therefore, could maintain that there was "only a relatively modest need for additional increases to inflows from the Walker River system to the Lake"—increases

along with several holders of Walker River water rights, further asserted that any relief that would reduce the amount of water available to current water rights holders would necessarily involve the sort of reallocation that the Nevada Supreme Court had ruled impermissible. Supplemental Brief of Defendants Lyon County, et al. at 3–4, 3 n.3, *Walker River III*, 986 F.3d 1197 (No. 15-16342) [hereinafter Lyon County Brief].

The Ninth Circuit, however, rejected those arguments, holding that "the county's complaint is broad enough to encompass the remedies it now seeks, and, even if that were not the case, the liberal policies" of the Federal Rules of Civil Procedure "permit the demand to be amended either before or during trial." *Walker River III*, 986 F.3d at 1205 (quoting 5 ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1255 (3d ed. 2020) (quotation marks omitted and quotation normalized) (construing FED. R. CIV. P. 15(a), 15(b)). Moreover, the court noted, Rule 54(c) permits district courts "to grant any relief to which the evidence shows a party is entitled, even though that party has failed to request the appropriate remedy or remedies in [its] pleading." *Id.* at 1206 (quoting 5 ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1255 (3d ed. 2020)). It is worth noting that the county's first amended complaint also asked for "such other and further relief as [the court] deems proper," 1995 Amended Complaint, *supra* note 132, at 6—a detail the defendants failed to address in their *Walker River III* briefing.

195 *Mineral County II*, 473 P.3d at 430 n.8 (referencing 1995 Amended Complaint, *supra* note 132, at 5–6).

196 *See Water Conservation*, WALKER BASIN CONSERVANCY, *supra* note 1 (discussing the Act of Oct. 28, 2009, Pub. L. No. 111-85, §§ 207–208, 123 Stat. 2845, 2858–60 (2009) (codified at 16 U.S.C. § 3839bb-6)).

197 *See* Appellants' Reply Brief at 2, *Mineral County II*, 473 P.3d 418 (No. 75917).

198 Supplemental Brief of Appellants Mineral County and Walker Lake Working Group at 23, *Walker River III*, 986 F.3d 1197 (No. 15-16342). As Mineral County explained, despite these natural flows and the Walker Basin Conservancy's water rights acquisition program, "There remains a need for other measures to provide additional flows of water from the Walker River system into Walker Lake to restore the Lake's fishery and its other public trust values. 2021 Amended Complaint, *supra* note 17, at 6.

achievable entirely through changes to the "management regime" established by the 1936 Decree.[199]

After the Ninth Circuit remanded the case to the Decree Court, Mineral County amended its complaint, expanding potential remedies to over twenty specific forms of regulatory and administrative relief.[200] These remedies include (1) securing a judgment from the court amending the rules and regulations created by the U.S. Board of Water Commissioners,[201] thereby reducing the overall quantity of water available for diversion and increasing the annual flows reaching the lake;[202] (2) amending those rules to require that excess water in wet years be delivered to the lake rather than apportioned among existing water rights holders;[203] (3) canceling unperfected permits, declaring water rights that have not been put to use as abandoned, and allowing the abandoned water to flow into Walker Lake;[204] (4) calling upon the State of Nevada to provide funding for efficiency improvements to farm irrigation delivery systems;[205] (5) requiring the state to develop and fund the implementation of a plan for preserving the lake;[206] (6) requiring the Board of Water Commissioners to monitor appropriators for unreasonable use and waste of water and to impose penalties accordingly;[207] (7) mandating increased transparency in the management of the Walker River system, including real-time monitoring of diversions;[208] and (8) altering the makeup of the U.S. Board of Water Commissioners to ensure that interests of Mineral County and the public are adequately represented.[209]

Mineral County's amended complaint largely eschewed language suggesting that the county sought a superior appropriative water right. In its complaint filed twenty-six years prior, the county had sought a specific

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199 Supplemental Brief of Appellants Mineral County and Walker Lake Working Group at 24, *Walker River III*, 986 F.3d 1197 (No. 15-16342).

200 2021 Amended Complaint, *supra* note 17, at 8–11.

201 The 1936 Decree granted the board authority to enact, "with the approval of the [Decree] Court, . . . such rules as may be necessary" to enforce the Decree and carry out its "purposes and objects and the proper apportionment and distribution, . . . of the waters of [the] Walker River . . . , including water for storage and stored water." United States v. Walker River Irrigation Dist., No. C-125, Final Decree, 76–77 (D. Nev. Apr., 1936), *amended by* Order for Amendment, *supra* note 66, at 2–3.

202 2021 Amended Complaint, *supra* note 17, at 8.

203 *Id.*

204 *Id.* at 9.

205 *Id.* at 9–10.

206 *Id.* at 10.

207 *Id.*

208 *Id.* at 11.

209 *Id*.

"minimum flow[]" that would reach Walker Lake annually.[210] In contrast, Mineral County now framed its quantitative objective entirely in terms of preserving a specific lake level (or corresponding lake salinity level) adequate to sustain "a healthy put-grow-and-take Lahontan cutthroat trout fishery" and preserve the "economic, environmental, recreational, aesthetic, and wildlife habitat values" of the lake.[211]

CONCLUSION

Mineral County II represents a pathbreaking expansion of the public trust doctrine to include all waterbodies, including vested water rights, even if the decision provided no immediate relief to Walker Lake. Affirming the court's earlier holding in *Lawrence*, the *Mineral County II* court recognized that the state's declaration of the public's ownership of water exemplified the public's vital interest in water.[212] The *Lawrence* court found public trust principles embedded in the state's constitution and statutes to be inherent limitations on state sovereign power.[213] In *Mineral County II*, the court announced that the public trust obligation inheres in all water rights, some of which antedate any legislative

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[210] *See* 1995 Amended Complaint, *supra* note 132, at 4–5 (seeking "[t]he right to, at least, 127,000 acre feet of flows annually reserved from the Walker River that will reach Walker Lake."). Mineral County had also sought a declaratory judgment that a specific lake level was "necessary to maintain the viability of Walker Lake as a body of water to sustain its naturally occurring fish population and for recreational benefits, wildlife preservation, [and] aesthetic and economic benefits." *Id.* at 5.

[211] 2021 Amended Complaint, *supra* note 17, at 4–5, 7–8. The County asserted that the minimal lake level that will sustain a "reasonably healthy" fishery is 3,965 feet above sea level, *id.* at 7—just fifteen feet above the lake's 1993 level, *see* 1995 Amended Complaint, *supra* note 132, at 3. The corresponding salinity level, 10,000 milligrams per liter, is four times the lakes 1882 level. 2021 Amended Complaint, *supra* note 17, at 5 (citing *National Water Information System: Web Interface*, U.S. GEOLOGICAL SURV., https://nwis.waterdata.usgs.gov/usa/nwis/qwdata/?site_no=384200118431901 [https://perma.cc/KL3G-N7R2]).

Several upstream appropriators asserted to the court in *Walker River III* that any regulatory remedy reducing the total amount of water available to current water rights holders and increasing flows to Walker Lake would be equivalent to granting the county a superior water right—in other words, the sort of reallocation that the *Mineral County II* court had ruled impermissible. *See* Lyon County Brief, *supra* note 194, at 3–4; *id.* at 3 n.3. But even if the county sought an order from the court that would directly reduce the amount of water available to upstream appropriators, that remedy would be of a different nature than an allocated right. Whereas an allocated right under the doctrine of prior appropriation involves a specific quantity of water that will be deemed abandoned if not consistently used, the quantity of water required to sustain a "reasonably healthy" Lahontan trout fishery in Walker Lake would necessarily vary from year to year. Once the lake reached an acceptable level, for example, the amount of water that would be needed each year—if any—to maintain the lake would depend on several factors (*e.g.*, precipitation, groundwater flows, evaporative loss, and any excess flows from preceding wet years).

[212] 473 P.3d 418, 425 (Nev. 2020) (reviewing *Lawrence*, 254 P.3d 606 (Nev. 2011)). *See* discussion *supra* notes 118–119 and accompanying text.

[213] 254 P.3d at 612–13. *See supra* text accompanying notes 110–124.

recognition of private water rights.[214] The upshot of this recognition is that a water right in Nevada is never fully privatized. In California,[215] there are no vested water rights in Nevada against the public trust doctrine, which is inherent in the state's sovereignty.[216] That means that the doctrine cannot be renounced by the state legislature or state governors. As the Supreme Court instructed in *Illinois Central*, the state can no more abandon the public trust than it can abandon the state's police power.[217]

The *Mineral County II* decision, however, did not provide a direct or immediate path to the lake's restoration. The court concluded that even an expansive public trust applying to all waters and water rights in the state could not disturb the Nevada legislature's policy of finality of water rights. Therefore, the public trust doctrine cannot require reallocation of settled water rights.[218] Moreover, because it resolved only the narrow legal question of whether the public trust doctrine might permit reallocation, the court never clarified what the inherent public trust in water rights means for Walker Lake going forward.[219]

Because the trust means that, short of reallocation, water rights are not vested against the sovereign's duty to regulate them in the public interest,

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214 473 P.3d at 425. *See supra* text accompanying notes 161–168.

215 *Mono Lake*, 658 P.2d 709, 727 (Cal. 1983) ("The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."). The *Mineral County II* court diverged from the *Mono Lake* court in one key respect: the Nevada Supreme Court held that the public trust doctrine would not permit reallocation of water rights settled under the doctrine of prior appropriation. *Compare Mineral County II*, 473 P.3d at 430 (holding that the court lacked authority to permit reallocation), *with Mono Lake*, 658 P.2d at 729, 732 (holding that "plaintiffs can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin," and that "no vested [water] rights" bar reconsideration and reallocation of those rights). In his *Mineral County I* concurrence, Justice Rose extensively quoted and cited *Mono Lake*, and the *Mineral County II* court favorably cited that concurrence. *Mineral County I*, 20 P.3d 800, 807–09 (Nev. 2001) (Rose, J., concurring) (citing and quoting *Mono Lake*); *Mineral County II*, 473 P.3d at 424 (citing and quoting Justice Rose's *Mineral County I* concurrence).

216 *Mineral County II*, 473 P.3d at 425; *Lawrence*, 254 P.3d at 613. As noted above, Nevada joined several jurisdictions in recognizing that the public trust obligation inheres in sovereignty. *See supra* note 124.

217 *Illinois Central*, 146 U.S. 387, 453 (1892) ("The State can no more abdicate its trust over property in . . . navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.").

218 *Mineral County II*, 473 P.3d at 430; *see* discussion *supra* note 191.

219 To be sure, the *Mineral County II* court assumed that Nevada's public trust doctrine would not save Walker Lake. *See Mineral County II*, 473 P.3d at 430 (acknowledging the "tragic decline of Walker Lake"). That discussion, however, was classic dicta: the court only ruled on a single, narrow legal issue—whether Nevada's public trust doctrine would permit reallocation of settled water rights.

the Nevada Supreme Court should have instructed the Decree Court and the State Engineer that Nevada's public trust doctrine imposes a continuing supervisory duty to avoid unnecessary damage to the lake.[220] What *Mineral County II* requires is an accommodation between existing water diversions and the trust resource.[221] This duty might require the state to revise its definition of beneficial use, the measure of a water right,[222] to require diverters to improve the efficiency of their diversions. The Nevada Supreme Court's repudiation of water rights reallocation would not foreclose the administrative or regulatory remedies the county has recently proposed.[223] Since *Mineral County II* answered only a narrow, abstract legal question, the state court never considered what measures the forthcoming accommodation might require.[224] But neither the Decree Court nor the State Engineer can avoid the context: the impending destruction of Walker Lake.

The Nevada Supreme Court's decision in *Walker Lake* was both innovative and disappointing. The decision recognized bedrock trust principles and applied them to water rights but failed to clarify what that recognition meant for Walker Lake. The principles that the court articulated, however, offer considerable hope that public trust resources like Walker Lake will not be destroyed by a prior appropriation doctrine that historically failed to recognize the state's antecedent public trust doctrine, or by a state that fails to recognize its duty to make all feasible accommodations to preserve public trust resources like Walker Lake.

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220 *See Mono Lake*, 658 P.2d at 727, 729 (holding that "[t]he state as sovereign retains continuing supervisory control" over the public trust water resource and that "some responsible body ought to reconsider the allocation of the waters of the Mono Basin"); *Mineral County II*, 473 P.3d at 430 (barring reallocation of adjudicated rights, but nonetheless recognizing that "water rights are subject to regulation for the public welfare and are characterized by relative, nonownership rights").

221 *See Mineral County I*, 20 P.3d 800, 808 (Nev. 2001) (Rose, J., concurring) (explaining that "the public trust doctrine operates simultaneously with the system of prior appropriation" and urging the Decree Court "to determine if all appropriators can be accommodated by a plan that will save the essentials of everyone's water needs"); *Mono Lake*, 658 P.2d at 712 ("[B]efore state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.").

222 NEV. REV. STAT. § 533.035 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

223 *See* 2021 Amended Complaint, *supra* note 17, at 8–11; *see also supra* Parts V, VI.

224 *See supra* notes 154–157 and accompanying text.