

<p style="text-align: center;">REGIONAL WATER SYSTEM & FLOOD COMMITTEE OF THE CARSON WATER SUBCONSERVANCY DISTRICT</p>

NOTICE OF PUBLIC MEETING

DATE: August 13, 2018
TIME: 9:00 A.M.
LOCATION: Carson Water Subconservancy District Conference Room
777 E. William St., #110
Carson City, NV

Please Note: A quorum of the CWSD Board of Directors will not be present at this committee meeting. Any action on the part of the committee is for recommendation to the full CWSD Board of Directors for ultimate action. Reasonable efforts will be made to assist and accommodate individuals with disabilities who wish to attend the meeting. Please contact Toni Leffler at (775) 887-7450 (<mailto:toni@cwsd.org>), at least three (3) days in advance so that arrangements can be made.

AGENDA

- 1) Call to order of the Carson Water Subconservancy District's (CWSD) Regional Water System & Flood Committee
- 2) Roll Call
- 3) Discussion Only: Public comment - Action may not be taken on any matter brought up under public comment until scheduled on an agenda for action at a later meeting.
- 4) For Possible Action: Approval of the Regional Water System & Flood Committee Minutes from August 29, 2017.
- 5) For Possible Action: Discuss CWSD's position on the use of the Public Trust Doctrine to be applied to water rights already adjudicated and settled under the Doctrine of Prior Appropriation and to submit an Amicus Brief to the Court.
- 6) Discussion Only: Public comment - Action may not be taken on any matter brought up under public comment until scheduled on an agenda for action at a later meeting.
- 7) For Possible Action: Adjournment

Supporting material for this meeting may be requested from Toni Leffler at 775-887-7450 (<mailto:toni@cwsd.org>) and is available at the CWSD offices at 777 E. William St., #110A, Carson City, NV 89701 and on the CWSD website at www.cwsd.org.

In accordance with NRS 241.020, this notice and agenda has been posted at the following locations:

-Dayton Utilities Complex
34 Lakes Blvd
Dayton, NV

-Minden Inn Office Complex
1594 Esmeralda Avenue
Minden, NV

-Lyon County Administrative Building
27 S. Main St.
Yerington, NV

-Churchill County Administrative Complex
155 N Taylor St.
Fallon, NV

-Carson City Hall
201 N. Carson St.
Carson City, NV

-Carson Water Subconservancy District Office
777 E. William St., #110A
Carson City, NV

-Alpine County Administrative Building
99 Water St.
Markleeville, CA

-CWSD website:
<http://www.cwsd.org>

-State public meetings website:
<http://notice.nv.gov>

AFFIDAVIT OF POSTING

The undersigned affirms that on or before 9:00 A.M. on August 7, 2018, he/she posted a copy of the Notice of Public Meeting and Agenda for the August 13, 2018, meeting of the Administrative Committee of the Carson Water Subconservancy District in accordance with NRS 241.020; said agenda was posted at the following location:

_____.

SIGNATURE

Name: _____

Title: _____

Date & Time of Posting: _____

**CARSON WATER SUBCONSERVANCY DISTRICT
AND THE CARSON RIVER/ALPINE COUNTY WATER SUBCONSERVANCY
JOINT POWERS AUTHORITY**

REGIONAL WATER SYSTEM & FLOOD COMMITTEE

August 29, 2017, 2:00 P.M.

DRAFT Meeting Minutes

Directors Present:

Brad Bonkowski, Carson City
Carl Erquiaga, Churchill County
Barry Penzel, Douglas County
Fred Stodieck, Douglas County Ag

Directors Not Present:

Ken Gray, Lyon County

Staff Present:

Ed James, General Manager
Toni Leffler, Administrative Assistant

Others Present:

Rob Holley, DVCD
Austin Osborne, Storey County
Rich Wilkinson, CVCD

Director Erquiaga called the meeting of the Carson Water Subconservancy District's Regional Water System and Flood Committee to order at 2:00 pm. in the Conference Room of Carson Water Subconservancy, 777 East William Street, Suite 110, Carson City, Nevada. A quorum of the Regional Water System and Flood Committee was present in person.

Item #3 – Discussion Only: Public Comment - None

Item #4 - For Possible Action: Approval of the Regional Water System and Flood Committee minutes from March 29, 2016.

Since the March 29, 2016, minutes were not included in the Board package, this item was postponed to next meeting. Director Penzel made the motion to table this item until next Regional Water System and Flood Committee meeting. The motion was seconded by Director Stodieck and unanimously approved by the Regional Water System and Flood Committee.

**RECESS TO CONVENE AS
THE CARSON RIVER/ALPINE COUNTY WATER SUBCONSERVANCY
JOINT POWERS AUTHORITY BOARD**

Item #5 – Roll Call for the Carson River/Alpine County Water Subconservancy Joint Powers Authority (JPA) Board.

Directors Present:

Brad Bonkowski, Carson City
Carl Erquiaga, Churchill County
Don Jardine, Alpine County
Barry Penzel, Douglas County
Fred Stodieck, Douglas County Ag

Item #6 – Discussion Only: Public Comment - None

Item #7 - For Possible Recommendation: Discuss what possible financial assistance, if any, CWSD would want to provide for repairs to the grade control/diversion structures and/or provide to the conservation districts to assist in the repairs along the Carson River that were damaged by the January and February 2017 floods. Mr. James explained that when CWSD worked with FEMA after past flooding, CWSD would administer the FEMA funds and also contribute funding. Now that the structures are considered private, CWSD can't provide funding to private entities. Rich Wilkinson and Rob Holley attended the meeting to explain the work that needs to be done and how the conservation districts can help. Director Stodieck divulged that he could be a recipient of some funding under discussion and thereby would recuse himself from the decision-making process. Director Penzel asked why it is better to give funding to the conservation districts if CWSD can't give funding to private organizations. Mr. James responded that we can provide funding to the conservation districts as public entities who provides services on private property.

Director Penzel asked how to determine how much to give the conservation districts. Mr. James suggested that perhaps we can help pay for the conservation districts' staff time for working on flood recovery projects. Mr. Wilkinson who is working with landowners in Carson Valley explained that the Nevada Department of Water Resources (NDWR) can provide funding from the State but the conservation districts need match from private landowners, the county, or CWSD. The conservation districts can do all the work since it would be difficult for landowners to get the permits. The conservation districts can also get bids and administer the grant paperwork, etc.

Carson Valley Conservation District recently received State Clearing and Snagging Fund grants for \$75,000 and \$100,000 for the Cradlebaugh Slough Bridge and Lutheran Bridge projects. There are significant sandbars that need to be cleared out. These will create a bigger impact with next event. Some of this funding will be for sandbar removal. To do the work they must have permits from the U.S. Army Corps of Engineers (US ACE), the Nevada Division of Environmental Protection (NDEP), and a right-of-entry permit from the State of Nevada. Dealing with grade control structures is grey area because they were in place before the State declared the river navigable. The Cottonwood grade control structure suffered a big loss. The county has verbally committed \$100,000 to help with this process toward the 50/50 match. The biggest benefit of CWSD's support would be to provide match funds toward these other grants. This will be multiple years' worth of work. The grants from NDWR will have a start date as

soon as full funding is in place. The US ACE has given a little leeway because this is considered maintenance. The right-of-entry permit from the State will be expedited.

Director Penzel noted that CWSD funding is limited and asked if grade control structures are a funding priority. Mr. James responded that CWSD's priorities have been to support river work and flood protection. Funding to the conservation districts could be used as match which stretches our funding.

Mr. Wilkinson mentioned that the conservation district may ask for possible ongoing annual maintenance funding from the state or counties. Mr. James pointed out that there are two issues on the table: grants and maintenance funding.

When asked what Dayton Valley Conservation District (DVCD) needs, Rob Holley responded that DVCD is working with contractors and with Tom Minor who suffered the most catastrophic damage. There are only eight diversions in the Lyon County stretch of river. Mr. Minor is hoping through preliminary permitting to work with the U.S. Department of Agriculture (USDA) through the Farm Service Agency (FSA) to follow up on their funding commitment which is reimbursable at 75%. Mr. James noted that there is a meeting tomorrow (8/30/17) with FSA to see if we can get the committed funding released. There will also be a tour with U.S. Representative Mark Amodei's representative of the Minor Ranch damage on Thursday, 8/31/17.

Mr. Holley reported that DVCD has started resurveying the topography of this reach of the river to see if projects from last fall are still practical or whether the river has changed too much. He noted that he doesn't expect that the project near the Ft. Churchill area has changed much. There are funds available for DVCD to work with grantors to change projects. The Minor Ranch is the highest priority.

Mr. James noted that the Finance Committee will discuss budgeting to replenish the Floodplain Management Fund. He asked Mr. Wilkinson what he estimates that CVCD's administrative costs to be. Mr. Wilkinson responded that estimate of damages that CVCD received from a NRCS engineer was \$1 million. He estimates for CVCD administrative costs, including permitting and reporting, to be 13.5% of \$1 million or \$135,000. As an example of the time requirement he anticipates, he mentioned that he has already spent 84 hrs. for permitting on the Hussmann project. He also mentioned that the US ACE permit fee is \$250 and the NDEP permit fee is another \$250.

Mr. Holley estimated that he is spending 8-10 hrs./wk. on flood-related work. They can't see the extent of the damage at Cardelli structure due to the amount of water still flowing in the river. He estimated \$140/week of administrative time for the last month, the next two months, and next summer, with some maintenance during the winter and spring months, or approximately \$15,000 to \$20,000. Director Penzel suggested that CWSD writing a letter to the Governor and Nevada's federal delegates requesting that permit fees for repairs for this declared emergency. CWSD

would pay for conservation district administration up to \$150,000 to be used as match, split with Douglas County. CWSD will work cooperative with Douglas County to determine amount.

Director Bonkowski made the motion that the JPA Board members of the Regional Water System and Flood Committee recommend that CWSD cover Carson Valley Conservation District's administrative time working on flood repairs up to \$135,000. The motion was seconded by Director Penzel, with the caveat that he also serves on Douglas County Board but doesn't feel this is a conflict of interest. The motion was unanimously approved by the JPA Board members of the Regional Water System and Flood Committee, with Director Stodieck abstaining.

Public Comment: Director Stodieck commented that all this is only a band aid. If he loses any more of the diversion, he won't be able to get water in his ditch. He has spent more than \$12,000 just to get water, not to preserve the diversion. Mr. James noted he will be having meeting with State Lands to discuss what to do in event of next flood. Director Penzel suggested that CWSD may need a policy to make each county responsible for its donations to private landowners. Director Bonkowski noted that since Carson City is owner of 90% of land along river that might not be equitable.

Director Bonkowski made the motion that the JPA Board members of the Regional Water System and Flood Committee recommend that CWSD cover Dayton Valley Conservation District's administrative time working on flood repairs up to \$15,000. The motion was seconded by Director Penzel. The motion was unanimously approved by the JPA Board members of the Regional Water System and Flood Committee.

Public Comment: Director Stodieck commented that when filling out paperwork for the Farm Service Agency, they suggested noting all funding needed to help cover the costs.

Item #8 - For Possible Recommendation: Discuss possible changes to the Funding Assistance for Regional Water System Policy and Procedure and the possibility of including regional wastewater collection systems as eligible projects for funding assistance.

Mr. James explained that there are several regional wastewater collection systems being discussed. He noted that the CWSD Regional Water System Policy does not include funding sewer projects. Regional wastewater collection systems are good to promote but CWSD has limited funds for regional systems. Director Bonkowski expressed his concern that CWSD would be opening a Pandora's box by getting involved in wastewater systems and recommended caution about getting involved. CWSD's focus is on water. Mr. James noted that there is approximately \$750,000 in the Acquisition/Construction Fund now, but \$1.5 million in water projects have already been identified for potential funding.

Director Penzel noted that Douglas County is also considering a regional wastewater collection system. Director Penzel mentioned several wastewater collection systems being considered in Douglas County but there is not a clear understanding if any of them will be considered regional collection systems. Director Penzel suggested a "dig once" policy and plan for those lines but not get into the business of wastewater treatment. There was consensus by the committee

members to not include regional wastewater collection systems into the Regional Water System Policy.

No action required for this item.

Item #9 – For Possible Recommendation: Discuss the possibility of providing funding assistance to evaluate the 100-year flows downstream of Lahontan Dam. Mr. James explained that the flooding in Churchill County is different from the other counties in the watershed. He is setting up a meeting with interested parties about how to evaluate the floodplains in Churchill County. There may be money from FEMA to create the new flood maps but we need to determine what is the 100-yr flow. He suggested hiring a consultant to work on flooding issues in Churchill County. This is probably several months away with an estimated cost of \$30,000-\$50,000 from CWSD. Controlling flooding below Lahontan Dam also involves regulation of the reservoir.

Director Bonkowski noted that this year should be a good template for how to handle flood releases in the future. The early precautionary releases from Lahontan Reservoir saved Fallon from flooding.

No action required for this item.

Item #10 – Discussion Only: Public Comment – None

**ADJOURN TO RECONVENE AS
THE CARSON WATER SUBCONSERVANCY DISTRICT BOARD OF DIRECTORS**

Item #11 – For Possible Recommendation: Discuss what possible financial assistance, if any, CWSD would want to provide for repairs to the grade control/diversion structures and/or provide to the conservation districts to assist in the repairs along the Carson River that were damaged by the January and February 2017 floods.

This topic having been discussed with Item #7, Director Erquiaga noted that there was a consensus that the Regional Water System and Flood Committee will forward the recommendation of the JPA to the Board with directions to the staff to put it on the next Board meeting agenda.

Item #12 - For Possible Recommendation: Discuss possible changes to the Funding Assistance for Regional Water System Policy and Procedure and the possibility of including regional wastewater collection systems as eligible projects for funding assistance.
This topic was discussed with Item #8. No action required for this item.

Item #13 – For Possible Recommendation: Discuss the possibility of providing funding assistance to evaluate the 100-year flows downstream of Lahontan Dam. This topic was discussed with Item #9. *No action required for this item.*

Item #14 – Discussion Only: Public Comment. None

Item #15 – Adjournment. There being no further business to come before the Regional Water System and Flood Committee, Director Penzel made the motion to adjourn, Director Stodieck second, and the meeting adjourned at 2:51 p.m.

Respectfully submitted,

Toni Leffler
Secretary

**CARSON WATER SUBCONSERVANCY DISTRICT
REGIONAL WATER SYSTEM AND FLOOD COMMITTEE**

TO: REGIONAL WATER SYSTEM AND FLOOD COMMITTEE

FROM: EDWIN D. JAMES

DATE: AUGUST 13, 2018

SUBJECT: Agenda Item Background Information

Item # 5 – For Possible Action - Discuss CWSD's position on the use of the Public Trust Doctrine to be applied to water rights already adjudicated and settled under the Doctrine of Prior Appropriation and to submit an Amicus Brief to the Court.

CWSD received a letter from Gordon DePaoli with Woodburn/Wedge requesting an amicus brief to oppose the use of the Public Trust Doctrine to be applied to water rights already adjudicated and settled under the Doctrine of Prior Appropriation (see attached letter). Mineral County and the Walker Lake Working Group have filed a lawsuit to intervene in the Walker River Decree to recognize a minimum flow of 127,000 acre/feet per year into Walker Lake using the Public Trust Doctrine (see attached filing).

Although this lawsuit is associated with the Walker River, staff's concern is that this case could set a precedent for someone to use the Public Trust Doctrine to request water already adjudicated under the Alpine Decree. Attached are some discussion points opposing this use of the Public Trust Doctrine. Listed below is a summary of concerns that could be incorporated into an Amicus Brief opposing the use of the Public Trust Doctrine to be applied to water rights already adjudicated and settled under the Doctrine of Prior Appropriation.

Water Resource Stability: The reason why the arid western states use the Doctrine of Prior Appropriation is to establish water allocation for all water users in a given watershed to determine how much water they can plan on receiving based on the projected water year runoff. Many of the decreed water rights in given watersheds are based on historic practices that were codified by court action and are used today and into the future. Many water users invest in their infrastructure based on the assurance of the priority of their water right. Using the Public Trust Doctrine to reallocate water will undermine the established practices and create uncertainty to all water right owners.

Whose Water Will Be Taken? In most years the demand for water on the Walker River exceeds the available water supply. If the court was to grant a minimum flow of 127,000 acre-feet per year, who will lose their water rights? In drought years the flow in both the East and West Walker is less than 127,000 acre-feet.

A Bi-State Watershed: The Walker River's headwaters start in California and flow into Nevada. The Walker River Decree allocates water in both states. How will the Nevada Public Trust Doctrine be used in the water allocation? Will only the water users in Nevada be impacted?

How much Is Enough? Mineral County is requesting under the Public Trust Doctrine a minimum of 127,000 acre-feet per year flow into Walker Lake. If this request is granted, what will stop someone else in the future from requesting more water under the Public Trust Doctrine?

What Do You Protect, the Flower or the Butterfly? Every watershed in the arid west has been involved in litigation over water rights. On the Walker River this litigation began in 1902. The reason for the litigation is the limited water resources. Over the years the amount of water flowing into Walker Lake has decreased due to the use of water upstream of Walker Lake. The fact is there is not enough water to meet all the water demands on the Walker River system. If one claims the Public Trust Doctrine to get water to Walker Lake, what about the use of the Public Trust Doctrine to maintain riparian corridors established by irrigation upstream of Walker Lake? It gets to the question: "What do you protect, the flower or the butterfly?" If you get rid of either one of them, the other will suffer.

Working Within the River Decrees For over twenty years CWSD has been working on projects to enhance river flow for multiple benefits in the Carson River Watershed. An example of this is the water rights that CWSD owns in Lost Lakes Reservoirs. Lost Lakes Reservoirs are located at the headwaters of the West Fork of the Carson River in Alpine County, California. Water is stored during the summer for recreation. In the fall water is released to enhance the stream flow on the West Fork. This water is then used by Carson City or by the farmers in Churchill County. All of this is done in accordance with the Alpine Decree for the Carson River. There are currently programs on the Walker River whose main purpose is to purchase water rights and transfer the water to Walker Lake. Working within the decree enables water users to plan or adapt to change in water allocation.



July 20, 2018

Gordon H. DePaoli
E-MAIL: gdepaoli@woodburnandwedge.com
DIRECT DIAL: (775) 688-3010

Ed James, P.E., General Manager
Carson Water Subconservancy District
777 E. William Street
Carson City, Nevada 89701

Re: ***Mineral County; and Walker Lake Working Group, Appellants vs. Walker River Irrigation District, et al., Respondents, In the Supreme Court of the State of Nevada, Case No. 75917***
Our File No. 1709. 0286

Dear Ed:

We represent the Walker River Irrigation District in the referenced matter. This matter was before the Ninth Circuit Court of Appeals on a Rule 12(b) jurisdictional dismissal from the United States District Court for the District of Nevada. Mineral County contends that fully perfected water rights recognized by and administered under the Walker River Decree, which was entered in 1936, must be modified to preserve minimum levels in Walker Lake. It alleges that those water rights must be modified so that "at least 127,000 acre feet of flows annually [are] reserved from the Walker River" for the benefit of Walker Lake, and that the public trust doctrine mandates that modification.

The Ninth Circuit has certified the following question to the Nevada Supreme Court: "Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" In addition, if the Nevada Supreme Court determines the public trust doctrine does apply and allows for or requires the reallocation of rights settled under the doctrine of prior appropriation, the Ninth Circuit has also invited the Nevada Supreme Court to consider an additional question. That additional question is "Does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?" A copy of the Ninth Circuit's Order is enclosed.

We have now received an Order from the Nevada Supreme Court. It has accepted the first question and has established a briefing schedule. Our brief will be due in about 60 days, assuming this schedule does not change. We will keep you informed of any changes to the schedule. A copy of the Nevada Supreme Court's Order is enclosed.

It is our position that Nevada's comprehensive water law does not provide for involuntary modifications of fully perfected water rights. It is also our position that Nevada's water law does not violate the public trust doctrine because it does not allow for modification of fully perfected water rights. Finally, it is our position that if the Court determines that the public

Ed James, P.E., General Manager, Carson Water Subconservancy District
July 20, 2018
Page 2 of 2

trust doctrine requires that Nevada's water law provide for modification of fully perfected water rights, it is for the legislature, in the first instance, to amend the law to provide the standards for when such modifications would be required and to what extent.

A ruling otherwise from the Nevada Supreme Court would mean that all perfected Nevada water rights, whether perfected under the law prior to Nevada's statutory water law or perfected under that statutory water law, and whether surface or underground water could be involuntarily modified. Such a ruling will substantially undermine the reliability of all Nevada water rights, and that will adversely affect Nevada's present and future economy.

We are asking that you consider submitting an amicus brief on behalf of your entity or agency supporting our position. You should be aware that in the Ninth Circuit, Mineral County had the amicus support of 35 law professors from 33 law schools and from the Sierra Club and the Natural Resources Defense Council. Mineral County may very well receive similar support before the Nevada Supreme Court.

In addition, should it be an issue, we ask that you support the District's position that allowing the modification of fully perfected water rights as Mineral County seeks here would constitute a taking under the Nevada Constitution, and require just compensation. As you can see from the Nevada Supreme Court's Order, it is not yet clear whether it will consider that question. At present, it does not appear that it will consider that issue. We will keep you informed of any changes on that issue.

If you would like to have copies of all of the briefs before the Ninth Circuit, please let us know, and we will provide them to you. In addition, if you have any questions, please do not hesitate to contact us.

Sincerely,



Gordon H. DePaoli

GHD:hd
Enclosures

FILED

MAY 22 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 23 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

No. 75917

No. 15-16342

D.C. No.

3:73-cv-00128-RCJ-WGC

ORDER CERTIFYING A
QUESTION TO THE SUPREME
COURT OF NEVADA

MONO COUNTY, County Counsel,

Plaintiff-Appellee,

MINERAL COUNTY,

Intervenor-Plaintiff-
Appellant,

WALKER LAKE WORKING GROUP,

Defendant-Appellant,

and

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Intervenor-Plaintiff,

v.

WALKER RIVER IRRIGATION
DISTRICT; NEVADA DEPARTMENT
OF WILDLIFE; FENILI FAMILY
TRUST, c/o Peter Fenili and Veronica
Fenili, Trustees; SIX N RANCH, INC., c/o
Richard and Cynthia Nuti; MICHAEL
NUTI, NANCY NUTI; RALPH E. NUTI;

RECEIVED

MAY 23 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

18-19831

MARY E. NUTI; LAWRENCE M. NUTI;
LESLIE NUTI; MICA FARMS, LLC, c/o
Mike Faretto; JOHN AND LURA
WEAVER FAMILY TRUST, c/o Lura
Weaver, Trustee; SMITH VALLEY
GARAGE, INC., c/o Dan Smith and
Shawna Smith; DONALD GIORGI;
LORIE MCMAHON; MERLE
MCMAHON; CENTENNIAL
LIVESTOCK; LYON COUNTY;
ANNETT'S MONO VILLAGE; F.I.M.
CORPORATION; R.N. FULSTONE
COMPANY; JAMES T. FOUSEKIS,
Trustee; CHRIS H. GANSBERG, Jr.;
FAYE E. GANSBERG; TODD
GANSBERG; HUNEWILL LAND &
LIVESTOCK CO., INC.; DAVID
SCEIRINE; PAMELA HAAS; VIRGINIA
LAKE MUTUAL WATER COMPANY,

Defendants-Appellees.

Before: A. Wallace Tashima, Raymond C. Fisher and Jay S. Bybee, Circuit
Judges.

ORDER

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we
respectfully certify to the Supreme Court of Nevada the question of law set forth in
Section III of this order. The answer to the certified question may determine an
issue pending before this court and its resolution will have significant implications

for Nevada state water law. There is no clearly controlling precedent in the decisions of the Nevada Supreme Court.

We hold Mineral County's public trust claim for the reallocation of the waters of Walker River and the Takings Clause claim in abeyance pending the result of certification.

I. Background

The circumstances here are virtually identical to those that led to the Nevada Supreme Court's decision in *Mineral County v. Nevada Department of Conservation & Natural Resources*, 20 P.3d 800, 802-05 (Nev. 2001), in which Mineral County and the Walker Lake Working Group (the "Working Group") brought essentially the same suit as this one. In *Mineral County*, the Nevada Supreme Court ultimately declined to exercise jurisdiction in light of the federal district court's continuing and exclusive jurisdiction over the Walker River Basin litigation. *See id.* at 807. We reproduce the relevant background here in brief.

A. The Walker River Basin and Walker Lake's Decline

The Walker River Basin covers about 4000 square miles, running northeast from its origins in the Sierra Nevada Mountains in California before turning south and ultimately flowing into Walker Lake in Nevada. The first quarter of the basin lies in California, and California accounts for a majority of the precipitation and

surface water flow into the basin. The vast majority of the water is consumed across the border in Nevada.

Walker Lake is about 13 miles long, five miles wide and 90 feet deep – a large lake by most any measure. But its size and volume have shrunk significantly since they were first measured in 1882. By 1996, Walker Lake had retained just 50 percent of its 1882 surface area and 28 percent of its 1882 volume. Today's Walker Lake also suffers from high concentrations of total dissolved solids ("TDS") – meaning it has a high salt content, low oxygen content and a high temperature.

These conditions have drastically degraded the lake's environmental and economic well-being. The high TDS concentrations have proven so inhospitable to fish species that, according to Mineral County, much of the lake's fishing industry "has been eliminated for the time being." Walker Lake's decline also threatens its status as an important shelter for migratory birds, and it has "drive[n] away the many Nevadans and other Americans who used Walker Lake for recreational enjoyment and economically productive activities." Although the parties dispute the cause of Walker Lake's troubles, it seems clear that upstream appropriations play at least some part, together with declining precipitation levels and natural lake recession over time.

B. Litigation Over Water Rights in the Basin

In an effort to protect and rehabilitate Walker Lake, Mineral County intervened in the long-running litigation over water rights in the Walker River Basin. That litigation began in 1902, when one cattle and land company sued another in the United States District Court for the District of Nevada over appropriations from the Walker River. After considerable back and forth in state and federal court – including a Supreme Court decision holding that the Nevada federal court had prior, exclusive jurisdiction over the action, *see Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258, 262 (1910) – the case ended in 1919.

Five years later, the United States brought a new action in Nevada federal court, seeking to establish the water rights of the Walker Lake Paiute Tribe. After 12 more years of litigation – bringing us to 1936 – that proceeding resulted in the Walker River Decree. The Walker River Decree adjudicated the water rights of hundreds of claimants under the doctrine of prior appropriation.¹ The Decree also created the Walker River Commission and the United States Board of Water

¹ Under the doctrine of prior appropriation, “[t]he first appropriator of the water of a stream passing through the public lands . . . has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation.” *Lobdell v. Simpson*, 2 Nev. 274, 277-78 (1866) (quoting *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, 153-54 (1858)).

Commissioners. The federal district court in Nevada has maintained jurisdiction over the Decree and its administration ever since.

In 1987, the Paiute Tribe intervened in the Walker River litigation to establish procedures for reallocating water rights under the Decree. Since that proceeding's conclusion in 1988, the Nevada State Engineer reviews all applications to change allocations under the Decree in Nevada, subject to review by the Nevada federal district court. It appears that Nevada's prior appropriation law, which has largely been codified, governs the Engineer's decisions and the district court's review. *See, e.g., Nev. Rev. Stat. § 533.370; see also Greg Walch, Water Law: Treading Water Law — A Nevada Water Rights Primer*, 6 Nev. Law. 18, 18 (Nov. 1998) (discussing the history of prior appropriation and its codification in Nevada). Next, in 1991, the Paiute Tribe and the United States sought recognition of the Tribe's right to a certain additional amount of water from the Walker River, under a principle that Native American tribes have superior water rights based on their relationship to the federal government. That case is pending before this panel. *See United States v. Walker River Irrigation Dist.*, No. 15-16478.

C. Mineral County's Intervention

In 1994, Mineral County moved to intervene in the Decree litigation. The district court granted the motion in 2013. The amended complaint in intervention alleges that “[a]ctivities and businesses attributable to the presence and use of Walker Lake represent[] approximately 50% of the economy of Mineral County.” The complaint asks the Decree court, “pursuant to its continuing jurisdiction under . . . the . . . Decree, [to] reopen and modify the final Decree to recognize the rights of Mineral County . . . and the public to have minimum levels [of water] to maintain the viability of Walker Lake.” Mineral County seeks recognition “that a minimum of 127,000 acre/feet [of water] per year to Walker Lake is . . . required under the doctrine of maintenance of the public trust.”²

The Working Group – already a party to this litigation as a right-holder under the Decree – supports Mineral County’s position. Because of the posture of this case, the Working Group is considered a defendant as to Mineral County’s intervention. But the Working Group “always has supported efforts to transfer

² Under the public trust doctrine, states hold navigable waterways within their borders in trust for the good of the public. *See Lawrence v. Clark County*, 254 P.3d 606, 607 (Nev. 2011); *see also Mineral County*, 20 P.3d at 807 (Rose, J., concurring) (“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.”).

water rights for use in Walker Lake . . . and has supported the enforcement of the public trust doctrine for this same purpose.”

In 2015, the district court dismissed the amended complaint in intervention. First, the district court held Mineral County lacked standing to assert its public trust claim. It concluded Mineral County’s claim “was based purely on a *parens patriae* theory” of standing – i.e., that Mineral County did not assert any of its own interests, only those of its citizens – and that a county lacks the ability to sue as *parens patriae*.

Notwithstanding its conclusion on standing, the district court also addressed the merits of Mineral County’s public trust claim. It concluded the public trust doctrine may factor into *future* allocations of water, but that using the doctrine to reallocate rights already adjudicated under the Decree would constitute a taking and require just compensation. Invoking the political question doctrine, the court concluded it lacked authority to order Nevada to effectuate such a taking. The district court also held, without analysis, that Walker Lake is not part of the Walker River Basin under the Decree, and therefore that the Decree prohibits allocating any water specifically to the lake.

Mineral County timely appealed. We have concluded the district court erred in dismissing the amended complaint in intervention for lack of standing.³ 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.⁴ This is an important question of Nevada water law we believe should be decided by the Nevada Supreme Court.

II. Discussion

The Nevada Supreme Court expressly recognized the public trust doctrine under Nevada law in *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011). *Lawrence* involved an attempt by the Nevada legislature to transfer state-owned land to Clark County. *See id.* at 608. Because the land may have been a navigable waterway when Nevada joined the United States, the Nevada State Land Registrar refused to transfer title, citing the public trust's prohibition on alienating land held

³ In a concurrently filed memorandum disposition, we hold Mineral County has standing to assert its public trust claim. Furthermore, we have concurrently decided that Walker Lake is within the Walker River Basin. *See United States v. U.S. Bd. of Water Comm'rs*, No. 15-16316.

⁴ We hold the subsequent takings claim in abeyance pending the result of certification.

in trust for the public. *See id.* The Nevada Supreme Court remanded after setting out a three-part test for assessing whether the public trust doctrine permits alienation of state land. *See id.* at 616-17.⁵

Lawrence, although formally recognizing the doctrine for the first time, traced public trust principles in Nevada law back to the state's founding, concluding the doctrine was "based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power." *Id.* at 613. The court also noted it had applied public trust principles in several of its earlier decisions. One of those decisions, *Mineral County v. Nevada Department of Conservation & Natural Resources*, appears to be particularly relevant here.

Mineral County involved the very case now under consideration, filed by Mineral County and the Working Group directly in the Nevada Supreme Court while the county's motion to intervene in this case was pending. Although the Nevada Supreme Court dismissed the action based on the federal court's prior exclusive jurisdiction, two aspects of *Mineral County* are relevant here. First, the

⁵ This test appears to be of limited relevance here because it addresses alienation of trust lands. The issues here involve the scope of the public trust doctrine and its relationship to the doctrine of prior appropriation and Nevada's statutory water law.

Nevada Supreme Court effectively invited the federal court to certify the public trust question at issue here. *See Mineral County*, 20 P.3d at 807 n.35 (“[Mineral County and the Working Group] argue that if their motion to intervene in the federal court is eventually granted, they will seek to have this court decide the scope of the public trust doctrine pursuant to the federal abstention doctrine. If the federal court reviews this question, it can certify a question regarding the public trust doctrine pursuant to NRAP 5; therefore, the issue need not necessarily be addressed via the extraordinary remedy of a writ.”).

Second, in *Mineral County*, Justice Rose (joined by Justice Shearing) wrote a concurrence addressing in broad strokes the public trust doctrine’s application in this case. Justice Rose opined:

Although the original objectives of the public trust were to protect the public’s rights in navigation, commerce, and fishing, the trust has evolved to encompass additional public values – including recreational and ecological uses. Additionally, although the original scope of the public trust reached only navigable water, the trust has evolved to encompass non-navigable tributaries that feed navigable bodies of water. This extension of the doctrine is natural and necessary where, as here, the navigable water’s existence is wholly dependent on tributaries that appear to be over-appropriated.

. . . [T]he existence of the public trust doctrine in Nevada appears to be beyond debate. . . . This court has itself recognized that . . . public ownership of water is the

most fundamental tenet of Nevada water law. Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times forms the outer boundaries of permissible government action with respect to public trust resources. In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

....

If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not substantially impair the public interest in the lands and waters remaining.

Id. at 807-09 (footnotes and internal quotation marks omitted). No Nevada Supreme Court decision has formally adopted Justice Rose's concurrence, but *Lawrence* discussed it as persuasive authority in the development of Nevada's public trust law. *See* 254 P.3d at 610-11.

In light of *Lawrence*, all parties agree the public trust doctrine exists in Nevada. They disagree, however, over the doctrine's scope and whether it permits reallocation of rights settled under the separate doctrine of prior appropriation by

the Walker River Decree. No controlling Nevada precedent reconciles these doctrines, and the parties advance conflicting proposals.

Mineral County, for example, contends the public trust doctrine requires the State Engineer to reconsider previous allocations and, in doing so, to reserve a specified minimum flow for Walker Lake regardless of any other rights or considerations. Although Mineral County points to a number of general principles suggesting the public trust doctrine applies to Walker Lake in *some* form, it has not presented authority for a version of the doctrine that holds absolute supremacy over the competing doctrine of prior appropriation.

The Lyon County appellees sit at the opposite end of the spectrum. They contend, essentially, that once water rights have been adjudicated and settled by decree, they are vested and no longer within the purview of the public trust doctrine. Lyon County is correct that Nevada considers water rights settled by decree “vested.” *See* Nev. Rev. Stat. § 533.090 *et seq.* (entitled “Adjudication of Vested Water Rights”). Nevada law refers to water rights settled by decree as “final” and “conclusive,” *id.* § 533.210, and the Nevada State Engineer – charged with administering Nevada’s statutory water law – may neither “carry out his or her duties . . . in a manner that conflicts with any . . . decree or order issued by a state or federal court,” *id.* § 533.0245, nor authorize any change in water use that

“is inconsistent with any applicable federal or state decree,” *id.* § 533.3703. There is, moreover, significant authority stressing the importance of finality in the adjudication of water rights. *See, e.g., Arizona v. California*, 460 U.S. 605, 620 (1983) (“Certainty of rights is particularly important with respect to water rights in the Western United States. . . . The doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights.”).

Lyon County’s position nonetheless appears to suffer from the same shortcoming as that of Mineral County. It does not explain why the public trust doctrine must completely yield to the doctrine of prior appropriation (or, more precisely, to the decrees resulting from adjudications under the prior appropriation doctrine and Nevada’s statutory water law). The principles of finality on which Lyon County rests are encapsulated in Nevada’s statutes and endorsed by the Supreme Court, but it is not clear they would compel Nevada to conclude that rights already adjudicated are exempt from the public trust.

There is significant authority suggesting rights already adjudicated may not be always and forever exempt from the public trust. For example, the Nevada Supreme Court has held:

the most fundamental tenet of Nevada water law [is that] “the water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, *belongs to the public*.” Indeed, even those holding certificated, vested, or perfected water rights do not own or acquire title to water.

Desert Irrigation, Ltd. v. Nevada, 944 P.2d 835, 842 (Nev. 1997) (alteration omitted) (quoting Nev. Rev. Stat. § 533.025). Based on this statement, Justice Rose concluded in *Mineral County* that even “those holding vested water rights” hold “[t]his right . . . forever subject to the public trust.” 20 P.3d at 808. Quoting Justice Rose, *Lawrence* said the same thing in its exposition of the public trust doctrine (albeit without holding that vested water rights are subject to the public trust). See 254 P.3d at 611; see also *Mineral County*, 20 P.3d at 808-09 (Rose, J., concurring) (opining that “the public trust doctrine operates simultaneously with the system of prior appropriation” and urging the Nevada Supreme Court “to expressly reaffirm the [Nevada State] [E]ngineer’s continuing responsibility as a public trustee to allocate and supervise water rights [pursuant to the public trust doctrine]”). Thus, Nevada might not altogether exempt vested, adjudicated rights from the public trust doctrine.

Under Justice Rose’s view, that water rights have been settled by adjudication and decree may be relevant to balancing the public trust doctrine

against competing principles of Nevada water law. But it does not necessarily mean the public trust – itself a fundamental principle of law – cannot disturb them.

Faced with a similar question in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), the California Supreme Court outlined the competing values underlying the public trust doctrine and doctrine of prior appropriation and, rather than deeming one doctrine supreme, balanced them:

This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values, the two systems of legal thought have been on a collision course. They meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing diversions substantial.

... The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values.

Id. at 712 (citations omitted). This approach appears similar to the one Justice Rose described – albeit in only general terms – in his *Mineral County* concurrence. An approach along these lines would permit, but not require, reallocation of water rights that were previously settled. *See Mineral County*, 20 P.3d at 808-09 (Rose, J., concurring) (the two systems operate simultaneously, and the State Engineer must at least “consider” the public trust in making allocation decisions).⁶

We conclude that whether, and to what extent, the public trust doctrine applies to appropriative rights settled under the Walker River Decree is an open question. Because this question has significant implications for Nevada’s water laws and because we cannot be certain how the Nevada Supreme Court would resolve this matter, certification on this question of law is appropriate.

III. Question Certified to the Nevada Supreme Court

The question of law we certify is:

⁶ Lyon County and the Nevada Department of Wildlife (NDOW) also suggest Nevada law already incorporates the public trust doctrine by requiring that appropriated water be put to a “beneficial use.” The Nevada Supreme Court has not yet considered this question. As in *National Audubon*, “no responsible body has ever” expressly considered the public trust in making allocation decisions. *Nat’l Audubon*, 658 P.2d at 728; *see also Mineral County*, 20 P.3d at 808 (Rose, J., concurring) (“If the current law governing the water engineer does not clearly direct the engineer to continuously consider . . . the public’s interest in Nevada’s natural water resources, then the law is deficient.”).

Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?⁷

IV. Conclusion

Mineral County's appeal presents an open and important question under Nevada law that may be determinative of an issue essential to the resolution of the claims raised in the present case. We therefore respectfully request that the Supreme Court of Nevada accept and decide the question certified. "We recognize that the [Nevada Supreme] Court may, in its discretion, reword the certified question." *Progressive Gulf Ins. Co. v. Faehnrich*, 627 F.3d 1137, 1140 (9th Cir. 2010). We further agree to abide by the decision of the Nevada Supreme Court as specified in Rule 5 of the Nevada Rules of Appellate Procedure, which states "[t]he written opinion of the Supreme Court stating the law governing the questions certified . . . shall be res judicata as to the parties." Nev. R. App. P. 5(g).

In light of our decision to certify the issue set forth above, the submission of this appeal for decision is withdrawn, and all further proceedings in this case before our court are stayed pending final action by the Supreme Court of Nevada,

⁷ If the Nevada Supreme Court determines the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, it may wish to answer a further question: does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

save for any petition for rehearing regarding this order or the concurrently filed memorandum disposition. The Clerk is directed to administratively close this docket, pending further order. The Clerk of this court shall forward a copy of this order, under official seal, to the Supreme Court of Nevada, along with copies of all briefs and excerpts of record that have been filed with this court. The parties shall notify the Clerk of this court within 14 days of any decision by the Nevada Supreme Court to accept or decline certification. If the Nevada Supreme Court accepts certification, the parties shall then notify the Clerk of this court within 14 days of the issuance of the Nevada Supreme Court's opinion.

Supplemental Material

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, we include here the designation of the parties who would be the appellants and respondents in the Nevada Supreme Court, as well as the names and addresses of counsel.

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QUESTION CERTIFIED; PROCEEDINGS STAYED.


Jay S. Bybee
United States Circuit Judge, Presiding

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 75917

FILED

JUL 18 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER ACCEPTING CERTIFIED QUESTION AND
DIRECTING BRIEFING*

This matter involves a legal question certified to this court under NRAP 5 by the United States Court of Appeals for the Ninth Circuit. Specifically, the Ninth Circuit has certified the following question of law to this court:

Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?

In determining whether to accept a certified question, this court considers three factors: (1) will this court's answer be determinative of part of the federal case, (2) is there any clearly controlling Nevada precedent, and (3) will the answer help settle important questions of law. *Volvo Cars of N. Am. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006). We conclude that those factors are met with respect to the above question. *See Mineral Cty. v. Nev. Dep't of Conserv. & Natural Res.*, 117 Nev. 235, 237, 245 n.35, 20 P.3d 800, 801, 807 n.35 (2001) (refusing to entertain writ petition raising this question because case was pending in another forum (federal district

court) that had exclusive jurisdiction and observing that federal court could certify the legal issue to this court); *id.* at 246, 248, 20 P.3d at 807, 808 (Rose, J., concurring) (discussing importance of the legal issue regarding the public trust doctrine and its impact on adjudicated water rights, particularly those that impact the continued viability and existence of Walker Lake). Accordingly, we accept the certified question.¹

Appellants shall have 30 days from the date of this order to file and serve an opening brief addressing the certified question. Respondents shall have 30 days from the date the opening brief is served to file and serve answering briefs. Appellants shall then have 20 days from the last-filed answering brief to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31, and 32. *See* NRAP 5(g)(2). The parties may file a joint appendix containing any portions of the record before the Ninth Circuit that are necessary to this court's resolution of the certified question and were not already provided to this court with the Certification Order. *See* NRAP 5(d), (g)(2).

It is so ORDERED.²

Douglas, C.J.

¹The Certification Order mentions a second legal question in a footnote: "Does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?" But, we do not read the Certification Order as certifying that question. If the Ninth Circuit intended to do so at this time, we would entertain an amended Certification Order.

²The clerk of this court shall not charge a filing fee in this case. *See* NRS 2.250(1)(d)(1).

cc: Mineral County District Attorney
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