



NEVADA DIVISION
OF WATER RESOURCES



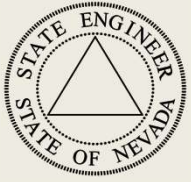
Nevada Department of
**CONSERVATION &
NATURAL RESOURCES**

Mineral Co. v. Lyon Co. **Public Trust Doctrine in Nevada**

Micheline Fairbank, Deputy Administrator
Nevada Division of Water Resources
October 15, 2020

Western States Water Council Fall Meeting

water.nv.gov



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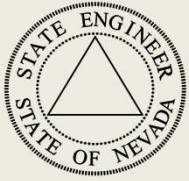
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Walker Basin – The Big Picture





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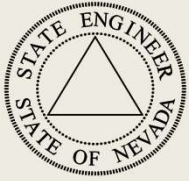
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Nevada's Public Trust Legal Foundation

- **Public Trust principals historically embraced in various matters relating to state ownership in navigable waters and beds beneath.**
- ***Lawrence v. Clark County*, 127 Nev. 390, 406, 254 P.3d 606, 617 (2011)**
 - Express adoption of the public trust doctrine in Nevada.
 - Public trust derived from Nevada's constitution, statutes, and common law.
 - Nevada Constitution Article 8, Section 9 provides that "[t]he 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 charitable purposes."



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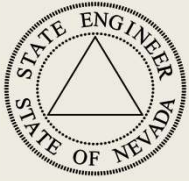
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Mineral County Litigation Background

- **October 1994:** Mineral County & Walker Lake Working Group Seek intervention (granted).
- **June 2000:** Mineral County seeks writ to Nevada Supreme Court to require State Engineer to manage Walker River System to fulfill public trust obligations related to Walker Lake.
 - Dismissed on the basis that the U.S. District Court is the proper venue.
- **May 2015:** Federal District Court dismisses Mineral County Action stating that the “public trust doctrine does not contemplate retroactive re-prioritization.”
 - Mineral County and Walker Lake Working Group Appeal to Ninth Circuit.



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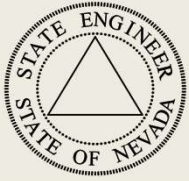
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9th Circuit Court of Appeal

- **Certifies Two Questions to 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?
 - If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudication or vested rights constitute a “taking” under the Nevada Constitution requiring payment of just compensation?





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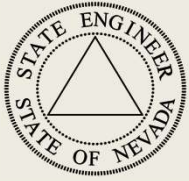
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Mineral County Decision- Majority Opinion

- **The Majority rephrased the 9th Circuit’s questions:**
 - Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation, and if so, to what extent?
 - 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?



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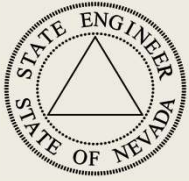
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Mineral County Decision- Majority Opinion Cont.

- **Question 1: The public trust doctrine in Nevada does not permit the reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation.**
- **Question 2: Based upon response to question 1, declined to consider the second question.**



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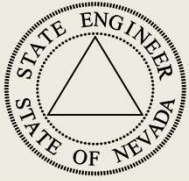
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Mineral County Decision- Majority Opinion Cont.

- **Recognized “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.”**
- **“[P]ublic trust doctrine applies to all waters of the state whether navigable or nonnavigable, and to the lands underneath navigable waters.”**
- **Nevada’s water laws “are already consistent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property.”**



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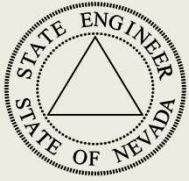
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Mineral County Decision- Majority Opinion Cont.

- **In finding Nevada’s water laws are consistent with public trust principals, the Court found:**
 - NRS 533.025: The “water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.”
 - NRS 533.050: Beneficial use is declared “a public use.”
 - 1969 recreation added as a beneficial use, including fishing and wildlife habitations added.
 - NRS 533.370 requires the State Engineer to consider the public interest in acting on water rights.
 - State Engineer has established 13 guidelines to assist in determining what constitutes the public interest.
- **“These considerations are consistent with the public trust doctrine.”**



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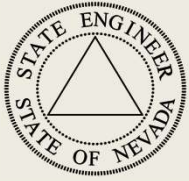
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Mineral County Decision- Majority Opinion Cont.

- **Nevada’s water laws are consistent with Nevada’s public trust (*Lawrence*) principals.**
 - Nevada’s water laws satisfy, as water allocations are appropriated only for a public purpose.
 - There is fair consideration for the allocation of water, which is a component to support Nevada’s economy.
 - The state’s limitations on water allocations, including requirements for beneficial use, loss through abandonment and forfeiture, etc. assures that the trust is “maintained . . . for the use and enjoyment of present and future generations.”



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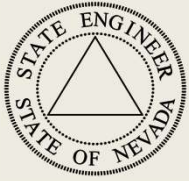
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Mineral County Decision- Majority Opinion Cont.

- **Public Trust doctrine does not permit reallocation water rights already adjudicated and settled under the doctrine of prior appropriation.**
 - Adjudicated rights are final and conclusive.
 - Plain reading of the law prohibits reallocation of adjudicated rights.
 - “Reallocation would create uncertainties for future development . . . And undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine.”
- **Adjudicated rights are final, and the court cannot substitute its policy judgement for the Legislature’s.**



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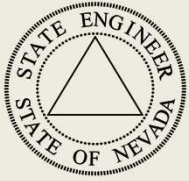
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Mineral County Decision – Minority Opinion

- **Disagreed with the recharacterization of the certified questions.**
 - Sees question 1, as rephrased, “effectively asks whether the public trust doctrine allows the Walker River Decree Court to revoke senior adjudicated upstream rights.”
 - Rephrasing question suggests an all-or-nothing approach.
- **Public trust doctrine in the context of Nevada’s water laws accomplished through the balance of the competing values, “not set them on a collision course.”**
 - “The redirected question misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine.”



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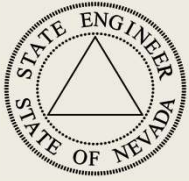
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Mineral County Decision – Minority Opinion Cont.

- Clarification by the majority results in the expansion of the public trust doctrine.
- Expansion of consideration of public trust doctrine to all waters far exceeds the scope of the questions and was unnecessary.
- The recasting of the question undermines the public trust, as it places the whole responsibility in an administrative agent, which is improper.
- Public trust interpretation may inform the interpretation and application of Nevada’s water laws.
- Public trust considerations are to be determined by the judiciary.



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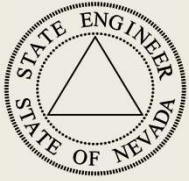
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Mineral County Decision – Minority Opinion Cont.

- **Public trust exists independent of laws of the legislature.**
- **Water rights in Nevada are “never permanent—even vested rights are granted only to the extent their holders do not over-appropriate or waste water.”**
- **“Public trust doctrine requires that the state affirmatively reassess the availability of water resources, as necessary to protect the public interest, ‘in light of current knowledge or . . . current needs . . . And demand feasible accommodations as necessary.”**
Citing to Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983)



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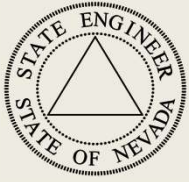
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Mineral County Decision – Minority Opinion Cont.

- “[W]hile enforcement of the doctrine could potentially alter the amount of Basin water available for private use—as Mineral County points out, just as ‘any other natural constraint on the already variable availability of water to supply private appropriations’—it does not effect a reallocation of vested water rights.”
- Protection of Walker Lake “would not divest anyone of any legal title they previously held.”
- As for question 1—enforcement of the public trust doctrine does not result in a reallocation of water rights.
- As for question 2—because there is no reallocation, there is no taking.



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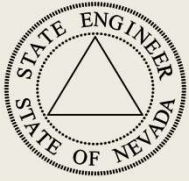
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What does this mean for Nevada?

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Questions?

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