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# Public Trust Doctrine & Water Rights

The Walker Case: Does the Public Trust Doctrine Apply to Water Rights Established in Judicial Decrees?

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## INTRODUCTION

A case currently pending in the Ninth Circuit raises a significant and novel issue of western water law. The case addresses whether the public trust doctrine can authorize modification of a water rights decree and reallocation of water rights adjudicated in the decree. *Mineral County, et al. v. Walker River Irrigation Dist., et al.*, No. 15-16342, U.S. Court of Appeals, Ninth Circuit (hereinafter "Walker River case").

No federal or state court has ever addressed or decided this significant issue of water law. The issue arises in the context of the Walker River Decree, a 1940 decree that adjudicated all water rights in the Walker River, which is an interstate river that flows from California into Nevada and terminates at Walker Lake in Nevada. Mineral County, a county in Nevada, has brought an action alleging that the public trust doctrine requires that the Walker River Decree be modified in order to provide additional flows of water into Walker Lake for the protection of public trust resources in the lake. Mineral County's action, if successful, would result in a reallocation of water rights adjudicated in the Walker River Decree.

Mineral County's action raises a conflict between two important principles of law: 1) the public trust principle that the state has continuing authority to regulate water rights in the public interest; and 2) the principle that water rights decrees are final and certain. This article will argue that — although public trust principles play an important role in the administration of water rights, and properly apply in formulating water rights decrees — they do not provide a basis for modifying existing decrees and reallocating decreed water rights. Otherwise water rights decrees would never be final and certain and the holders of the decreed rights would never be able to fully rely on their decreed rights. This article will also argue that if the public trust doctrine nonetheless applies as a basis for modifying water rights decrees and reallocating decreed rights, such application would result in an unconstitutional taking of the decreed water rights

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in violation of the Takings Clause of the US Constitution, thus requiring that the holders of the decreed rights be compensated for the reallocation of their rights.

## **BACKGROUND OF THE CASE**

The Walker River is an interstate river that flows from California into Nevada. The river originates as two forks in California — the West Fork and the East Fork — and the two forks flow into Nevada and converge near the town of Yerington. The river flows southward through the Walker River Indian Tribe's reservation and eventually reaches Walker Lake, where the river terminates. Water from the river is diverted by ranchers, water districts, public agencies and others in California and Nevada for their varied irrigation, municipal, domestic, and other needs. Most of the precipitation that feeds the river occurs in California, but most of the consumptive use of the river takes place in Nevada.

In 1936, a federal district court in Nevada adjudicated the water rights of Walker River water users in Nevada and California and issued a final decree. *United States v. Walker River Irr. Dist., et al.*, 14 F.Supp. 10 (1936). On appeal, the Ninth Circuit required that the decree be modified to reflect the fact that the United States had impliedly reserved water rights for the Walker River Indian Tribe by creating the Tribe's reservation in 1859. *United States v. Walker River Irr. Dist., et al.*, 104 F.2d 334 (1939). On remand, the district court modified the decree as required by the Ninth Circuit, and issued the final decree in 1940. *United States v. Walker River Irr. Dist., et al.*, No. C-125 (April 24, 1940).

Many decades later in 1994, Mineral County — which is the Nevada county where Walker Lake is located — filed an intervention action in the Walker River litigation, alleging that the Walker River Decree must be modified in order to provide additional flows of Walker River water into Walker Lake. The additional flows are necessary, Mineral County argues, in order to protect fish and other public trust resources in Walker Lake. Mineral County's action is based on the public trust doctrine, which Mineral County argues requires that the additional flows reach the lake in order to protect the public trust resources. The effect of Mineral County's action, if successful, would be to reallocate the water rights of Walker River water users in Nevada and California whose rights were adjudicated in the Walker River Decree.

The federal district court (district court) dismissed Mineral County's action. First, the district court held that Mineral County lacked "standing" to bring its action, because the County had no proprietary interests in Walker Lake that it was seeking to protect, and the County could not represent its citizens in a *parens patriae* capacity. Citing the Ninth Circuit's decision in *United States v. City of Pittsburg, California*, 661 F.2d 783, 786-787 (9th Cir. 1981), the district court ruled that only the federal government and the states, and not cities and counties, may represent their citizens in a *parens patriae* capacity. [Editor's Note: "*parens patriae*" means "parent of the nation" and represents the power

of the state to act as guardian for those who are unable to care for themselves].

Second, notwithstanding that the district court held that the County lacked standing, the court nonetheless addressed the merits of Mineral County's public trust claim. The court rejected Mineral County's claim on the merits because, the court concluded, the public trust doctrine does not apply to "vested" water rights. The court also stated that the state has discretion to apply the public trust doctrine to vested rights, and that whether the state chooses to do so is a "political question" that is beyond judicial purview. The court also held that if the public trust doctrine were applied to vested water rights, the holders of the rights, at least in California, would be entitled to compensation under the Takings Clause of the US Constitution.

It is not certain that the Ninth Circuit will reach and decide the merits of Mineral County's public trust claim — apart from whether the County may lack standing to maintain its action — because the Ninth Circuit may decide to refer the public trust issue to the Nevada Supreme Court rather than decide the issue itself. As will be explained, the public trust issue involves the interpretation of Nevada's public trust doctrine, and the Nevada courts have never decided whether the public trust doctrine applies to regulation of water rights, much less whether it applies to decreed water rights that have been established in judicial decrees. In a similar public trust case in California many years ago, a federal district court referred to the California courts the issue of whether California's public trust doctrine applies to regulation of water, and the referral resulted in the California Supreme Court's landmark decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), which held that the public trust doctrine applies to the state's regulation of water rights. That case came to known as the "Mono Lake case." The Ninth Circuit might follow the same approach and refer the public trust issue to the Nevada Supreme Court, as some parties and amici are urging the court to do and other parties and amici are urging the court not to do.

This article will not address issues unrelated to the merits of Mineral County's action, namely whether Mineral County has standing and whether its action should be referred to the Nevada Supreme Court. Instead, this article will address the merits of Mineral County's action, specifically whether the public trust doctrine authorizes modification of the Walker River Decree and reallocation of the decreed water rights.

## **THE PUBLIC TRUST DOCTRINE AS APPLIED TO THE WALKER RIVER**

### **The Public Trust Doctrine**

At the time of the American Revolution, the original thirteen states acquired sovereign authority over their navigable waters and underlying lands that had formerly belonged to the English Crown, subject to the federal government's

constitutional power to regulate navigable waters in furtherance of interstate commerce. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 589-590 (2012); *Shively v. Bowlby*, 152 U.S. 1, 13 (1894); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). Under the federal equal footing doctrine, new states, upon their admission to statehood, acquire the same sovereign authority over navigable waters and underlying lands as the original thirteen states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively*, 152 U.S. at 49-50. Thus, when Nevada was admitted to statehood in 1864, Nevada acquired sovereign authority over all navigable waters and underlying lands within its borders.

Under the public trust doctrine, as defined by the US Supreme Court in its seminal decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the state holds its navigable waters and underlying lands in trust for the public, for purposes of commerce, navigation, and fisheries. *Illinois Central*, 146 U.S. at 452; *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 433-444 (1983); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 519 (1980). In *Illinois Central*, the US Supreme Court held that the Illinois Legislature was authorized under its public trust authority to revoke its grant of a fee interest to a private railroad company in the Chicago waterfront, which bordered the navigable waters of Lake Michigan, in order to provide for commercial development of the waterfront for the benefit of the public. The US Supreme Court stated that 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." *Illinois Central*, 146 U.S. at 453.

The public trust doctrine is a common law doctrine, because it has been fashioned by the courts, as in *Illinois Central*, rather than established by the legislatures. If a state legislature adopts public trust principles as part of the state's statutory system for regulating water rights, the public trust doctrine ceases to exist as a common law doctrine and becomes part of the state's statutory system for regulation of water rights. The reference to the "public trust doctrine" generally refers to the common law doctrine, not to statutory systems that may codify the common law doctrine.

### **Whose Public Trust Doctrine Applies: Nevada's or California's?**

The US Supreme Court has held that the public trust doctrine is a state law doctrine, not a federal law doctrine. *PPL Montana*, 565 U.S. at 603; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). In *Coeur d'Alene*, for example, the US Supreme Court stated that its decision in *Illinois Central* was "necessarily a statement of Illinois law." 521 U.S. at 285. Thus, although the states acquire sovereign authority over navigable waters and underlying lands under the federal equal footing doctrine, each state is responsible for determining the nature and scope

of its public trust authority over the waters and lands. The public trust doctrine is not a generic federal law doctrine that applies equally in all states, but instead is a state law doctrine that may vary from state to state, depending on how broadly or narrowly a state interprets its public trust authority.

Since the Walker River is an interstate river that flows from California into Nevada, the initial question posed in Mineral County's action is whether Nevada's public trust doctrine or California's doctrine applies in determining whether the doctrine authorizes modification of the Walker River Decree. No court has ever addressed or decided which state's public trust doctrine applies to an interstate body of water. Typically, disputes over water rights in interstate waters are resolved by the US Supreme Court under its original jurisdiction, in which the Court applies its own common law doctrine of "equitable apportionment." *Colorado v. New Mexico*, 467 U.S. 310, 323-324 (1984); *Nebraska v. Wyoming*, 325 U.S. 589, 617 (1945). The Nevada district court in the Walker River case, however, acquired jurisdiction over water rights in both Nevada and California in the original Walker River litigation, and thus the court, in addressing Mineral County's public trust claim, might face a choice of law issue that does not normally arise when the US Supreme Court resolves disputes concerning interstate waters under its original jurisdiction.

Logically, one might assume that a state's public trust doctrine applies to the portion of an interstate waterway located in the state, and thus that Nevada's doctrine applies to the portion of the Walker River located in Nevada and California's doctrine to the portion located in California. Because of the nature of the relief sought by Mineral County, however, it is reasonably clear that Nevada's public trust doctrine applies in the Walker River case, and that California's doctrine does not apply. Mineral County's action seeks to apply the public trust doctrine to protect public trust resources in Walker Lake, which is located wholly in Nevada. A state's public trust doctrine applies only for the purpose of protecting public trust uses within the state, and not for the purpose of protecting public trust resources in other states. In *Illinois Central*, for example, the US Supreme Court held that each state has authority to regulate navigable waters "within its limits," and that the waters are held in trust "for the people of the State." *Illinois Central*, 146 U.S. at 452. Since Mineral County's action seeks to protect public trust resources located wholly in Nevada, Nevada's public trust doctrine applies to the controversy, and California's public trust doctrine does not apply.

### **Nevada's Public Trust Doctrine as Applied to the Walker River Controversy**

The Nevada courts have never decided whether Nevada's public trust doctrine applies to regulation of water rights, much less whether the doctrine authorizes modification of water rights decrees and reallocation of the decreed rights.

In *Lawrence v. Clark County*, 254 P.3d 606 (Nev. 2011), the Nevada Supreme Court held that the public trust doctrine applies in Nevada, and that the doctrine restricts Nevada's authority to transfer lands underlying navigable waters. Nevada's authority to transfer the lands, the Nevada Supreme Court held, depends on several factors, such as whether the lands were navigable when Nevada was admitted to statehood and whether transfer of the lands contravenes public trust purposes. *Lawrence*, 254 P.3d at 607, 613-617. *Lawrence* did not, however, address whether the public trust doctrine applies to regulation of water or as a basis for modifying a water rights decree.

Nonetheless, *Lawrence* provided some guidelines for how the public trust issue raised in Mineral County's action might be resolved under Nevada law. The Nevada Supreme Court stated that Nevada's public trust doctrine is based on Nevada's Constitution and statutes and the principles established by the US Supreme Court in *Illinois Central*. *Lawrence*, 254 P.3d at 613. Thus, the viability of Mineral County's public trust claim would appear to depend on whether the claim is supported by Nevada's Constitution and statutes or the principles established in *Illinois Central*. Nevada's Constitution and statutes, at least on their face, do not suggest that the public trust doctrine authorizes modification of a water rights decree and reallocation of the decreed rights. Although Nevada's Constitution contains no provision directly relating to water rights, the Nevada statutes provide for comprehensive regulation of water rights. Nevada Revised Statutes (NRS) §§ 533.005 et seq. Under the statutes, the Nevada State Engineer is responsible for administering the statutory water rights system, and for regulating water rights. *Id.* at §§ 533.325. The State Engineer is authorized to issue a permit to appropriate water if the proposed use is "beneficial," and a beneficial use of water is considered a "public use." *Id.* at §§ 533.050, 533.353, 533.050. The State Engineer cannot issue a permit if the proposed use is "detrimental to the public interest." *Id.* at §533.070(2). The Nevada statutes do not authorize the State Engineer to modify a water rights decree and reallocate the decreed water rights. On the contrary, the Nevada statutes establish a comprehensive system for court adjudications of water rights, *id.* at 533.090 et seq., and provide that the adjudicated rights are "final" and "conclusive." *Id.* at § 533.210. Thus, Nevada's Constitution and statutes do not appear to support Mineral County's public trust claim.

The principles established in *Illinois Central* also do not indicate that the public trust doctrine authorizes modification of a water rights decree and reallocation of the decreed rights. As mentioned above, *Illinois Central* held that the Illinois Legislature could revoke its grant of a fee interest in lands bordering the navigable waters of Lake Michigan in order to provide commercial development of the Chicago waterfront. No issue was raised in *Illinois Central* concerning whether the state could revoke or modify water rights that had been established in a judicial decree, at least without payment of compensation to the

holders of the decreed rights. It is one thing for the Legislature to revoke its own grant of a fee interest, as in *Illinois Central* — i.e., to simply undo what the Legislature has done — and something entirely different for the state to revoke or modify a water right established through the judicial process. As we next explain, general principles of finality and repose apply to water rights decrees, and *Illinois Central* did not consider how these general principles apply to a state's authority to regulate water under the public trust doctrine, or whether these general principles might limit the state's regulatory authority.

### **General Principles of Finality and Repose Applicable to Water Rights Decrees**

The US Supreme Court has stated that "general principles of finality and repose" apply to water rights decrees. *Arizona v. California*, 460 U.S. 605, 619 (1983). As the Court has stated, "[c]ertainty of water rights is particularly important with respect to water rights in the Western United States," because "[t]he development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the county." *Id.* at 620. Similarly, the US Supreme Court has stated that a water rights decree "enables a court of equity to acquire jurisdiction of all the rights involved... and thus settle and permanently adjudicate in a single proceeding all the rights...of all the claimants to the water taken from a common source of supply." *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983). Based on these principles, the US Supreme Court in *Arizona* and *Nevada* barred the United States from asserting additional water rights claims for Indian tribes and others that could have been, but were not, asserted in earlier water rights decrees.

An action to adjudicate all water rights in a stream system is generally considered an in rem action, because the action is intended to establish all rights in a particular res, namely a body of water. *Nevada*, 463 U.S. at 143-144; *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013-1014 (9th Cir. 1999). [Editor's Note: an "in rem" lawsuit or other legal action is directed toward property, rather than toward a particular person]. A water right adjudicated in an in rem action would appear to be the most secure, certain, and reliable form of water right under our system of laws, because the right has been adjudicated in relation to all other rights by a court of law, applying principles of law that apply to all such rights. Thus, the holder of a decreed water right has the most reasonable expectation of the right to use, and continue to use, the water that is the subject of the decree. Although public trust concerns are properly considered in the formulation of a water rights decree, such concerns are not appropriate as a basis for *modifying* a decree once the decree has been issued and the decreed water rights holders have begun exercising their rights. In the *Walker River* case, for example, the holders of the decreed water rights acquired their rights and have been exercising them for several decades prior to Mineral County's action. Thus, the general principles

of finality and repose that apply to water rights decrees preclude the public trust doctrine from being construed as a basis for modifying a water rights decree and reallocating the decreed rights.

If the result were otherwise, a water right adjudicated in a decree would never be final and certain, because the right would always be subject to reallocation based on the changing values and perceptions of the public trust doctrine. The contours of the public trust doctrine have never been fully defined as the doctrine might apply in the water rights context. Indeed, one of the issues raised in the *Walker River* case is whether Nevada's public trust doctrine even applies in the water regulation context. Although the need to protect public trust resources may weigh heavily in a state's administration of its water rights system, the need for finality and certainty of water rights decrees weighs in favor of the conclusion that — once water rights have been adjudicated in a final court decree and the holders have begun exercising their decreed rights — their decreed rights are not subject to reallocation based on public trust principles.

### **The California Supreme Court's Decision in National Audubon**

Mineral County's public trust claim substantially relies on the California Supreme Court's decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), which held that California's public trust doctrine applies to regulation of water rights. Since California's public trust doctrine does not apply in the *Walker River* case, *National Audubon* would apply, if at all, only as an analogy.

In *National Audubon*, the California Supreme Court held that the State Water Resources Control Board (Board), which administers California's statutory water rights system, was authorized under the public trust doctrine to reconsider its earlier decision granting an appropriative water right permit to the Los Angeles Department of Water and Power (DWP), in order to determine whether to impose conditions to protect public trust uses in Mono Lake. DWP argued that the Board was not authorized to reconsider its decision because DWP had a "vested right" as the result of the Board-issued permit. The California Supreme Court rejected DWP's argument. The California Supreme Court held that the state has "continuing supervisory authority" over water rights under the public trust doctrine; that the Board therefore had authority to reconsider its decision granting a permit to DWP in order to determine whether to impose conditions; and that DWP's claimed vested right does not bar the state from reconsidering its decision. *National Audubon*, 33 Cal.3d 445-457.

*National Audubon's* conclusion that the Board had public trust authority to reconsider its decision notwithstanding DWP's claimed vested right might appear, on its face, to support Mineral County's claim that the courts have public trust authority to modify the Walker River Decree notwithstanding any claimed vested rights by Walker River water users. The vested rights claims in *National*

*Audubon* and the *Walker River* case, however, are entirely different. The claimed vested right in *National Audubon* was based on a permit issued by the Board, not, as in the *Walker River* case, on a decree issued by the judicial branch as the result of an adjudication of all water rights in a stream system. Thus, the "general principles of finality and repose" that apply to water rights decrees (*Arizona*, 460 U.S. at 619), did not come into play in the *National Audubon* case. In light of these general principles, it is not clear that the *National Audubon* Court itself would have interpreted the public trust doctrine as a basis for reallocating decreed water rights. In any event, since California's public trust doctrine does not apply to the *Walker River* controversy, it is immaterial whether *National Audubon* might otherwise support Mineral County's claim.

## **CONSTITUTIONAL TAKINGS ISSUES**

### **The Takings Clause**

The Takings Clause prevents the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 354 U.S. 40, 49 (1960). See generally R. Walston, "Takings and Water Rights," *The Water Report*, p. 1 (TWR #93) (Nov. 15, 2011).

If the public trust doctrine were construed as authorizing reallocation of water rights adjudicated in judicial decrees, this would raise questions concerning whether the doctrine as so construed results in an unconstitutional taking of property in violation of the Takings Clause of the US Constitution. The Takings Clause prohibits the taking of private property for public use without payment of compensation. U.S. Const., amends. V, XIV; *Kelo v. City of New London*, 545 U.S. 469, 472 (2005). Thus, if the Ninth Circuit in the *Walker River* case concludes that Nevada's public trust doctrine authorizes reallocation of water rights adjudicated in the *Walker River* Decree, the Ninth Circuit would face the question whether the doctrine violates the Takings Clause and requires payment of compensation to the holders of the decreed rights.

The Takings Clause applies and requires compensation not only when the government physically seizes property for public use, such as for schools, hospitals and roads, but also when government regulates property, if the regulation goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The US Supreme Court has applied a balancing test in determining whether a government regulation goes "too far"— this balancing test focuses on the "economic impact" of the regulation on the property owner, the extent to which the regulation interferes with his "distinct investment-backed expectations," and the "character of the government action." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-125 (1978); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-539 (2005). A regulation results in a categorical taking per se — and the balancing test does not apply — if the

regulation results in a "physical taking" of the property (*Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 434-435 (1982)), or causes the property owner to lose "all economically beneficial uses" of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). On the other hand, no taking occurs if the government regulation is supported by "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029.

The US Supreme Court has held that a water right — even though usufructuary (use right) — is a form of "property" within the meaning of the Takings Clause. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737, 752-754 (1950); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-408 (1931). The US Supreme Court has not, however, definitively decided whether the Takings Clause applies to and limits government regulation of water rights. If the Ninth Circuit concludes that Nevada's public trust doctrine authorizes reallocation of decreed water rights in the Walker River and that the Takings Clause does not apply, the US Supreme Court would have an opportunity to review important issues of water law and takings law that the US Supreme Court has never decided.

In *National Audubon*, the California Supreme Court held that takings claims do not arise when the government restricts vested water rights under the public trust doctrine, because the water right is held subject to the public trust and the holder of the right is not divested of "title" to his property. *National Audubon*, 33 Cal.3d at 440. The US Supreme Court has held, however, that whether a property right has been unconstitutionally taken does not depend on whether the property owner is divested of title or other incidents of ownership, but instead depends on the various factors that the US Supreme Court applies in its takings jurisprudence — such as the "economic impact" on the property owner, *Penn Central*, 438 U.S. at 124-125, whether the regulation results in a "physical taking" of the property, *Loretto*, 458 U.S. at 434-435, and whether the property owner has lost "all economically beneficial uses" of the property, *Lucas*, 505 U.S. at 1019. Thus, takings jurisprudence under US Supreme Court decisions focuses on various factors other than incidents of ownership, contrary to the California Supreme Court's *National Audubon* decision.

### **Judicial Takings?**

If the public trust doctrine is applied to reallocate decreed water rights established in the Walker River Decree, any unconstitutional taking of the decreed rights would result from the judiciary's interpretation of the public trust doctrine, and not, as in the usual taking case, from legislative or executive action. This would raise the question whether there can be a "judicial taking" of property. Under the doctrine of judicial taking, an unconstitutional taking may occur if a court defines or redefines property in a way that causes the property owner to suffer the same loss of the right to use property, or diminution in the

value of property, that would be caused by legislative or executive action restricting the right. See B. Thompson, *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

A recent four-justice US Supreme Court plurality opinion, written by the late Justice Antonin Scalia, argued that a judicial taking of property may occur and require payment of compensation if a court significantly changes the definition of property by imposing restrictions on property use not previously recognized under state law. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env. Quality*, 560 U.S. 702, 713-728 (2010) (plurality opinion). As the plurality opinion stated, "the Takings Clause bars the State from taking property without paying for it, no matter which branch is the instrument of the takings." *Id.* at 715. Justice Scalia's plurality opinion did not command a majority of the US Supreme Court, however, and it remains to be seen whether a Court majority will adopt the judicial taking principle in a future case. Perhaps the *Walker River* case may provide the US Supreme Court with this opportunity.

### **Per Se Taking?**

The *Walker River* water users who oppose Mineral County's public trust claim argue that — if their decreed water rights are reallocated under the public trust doctrine — the reallocation would constitute a categorical per se taking of their water rights, because the doctrine as so applied would result in a "physical taking" of their water rights, as in *Loretto*, and would cause them to lose "all economically beneficial uses" of their rights, as in *Lucas*. The water users argue that a per se taking would occur because — even though they may not lose all of their water rights — they would lose all rights to use the portion of the water that is reallocated under the public trust doctrine. Their argument may be supported by the US Supreme Court's recent decision in *Horne v. Dep't of Agriculture*, 135 S.Ct. 2419 (2015), which held that a government regulation requiring raisin producers to give a percentage of their raisin crop to the government free of charge resulted in a per se taking of the producers' raisins, because they lost all rights in the raisins that they were required to give to the government.

### **"Background Principles" of State Law**

Several law professors have submitted an amicus brief in the *Walker River* case arguing that government regulation of water rights based on the public trust doctrine does not give rise to takings claims, because western water law has "evolved" over time and such evolution could not have occurred if takings claims had been asserted and upheld at every step of the evolutionary process. Certainly western water law has evolved from the early days, when the early miners adopted the rule of prior appropriation as a local custom, to the modern age, in which the right to use water is based on principles of reasonable use. It is equally true that the Takings Clause does not and cannot apply at every step of the evolutionary process; otherwise, the development of western water law might not have taken place. For example, most western states have adopted

the doctrine of reasonable use, which provides that water rights are limited by reasonable use, and the courts have applied the reasonable use doctrine to limit water rights without requiring payment of compensation to the holders of the rights. See, e.g., *Joslin v. Marin Mun. Wat. Dist.*, 67 Cal.2d 132, 137-138 (1967); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 365-368 (1935). In the context of land use regulation, the US Supreme Court has held that the states may reasonably restrict the zoning of property in order to protect the public health, welfare and safety, without necessarily being required to pay compensation to property owners whose property is zoned. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). As Justice Holmes has commented, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

Nonetheless, if the public trust doctrine is applied as a basis for reallocating water rights established in a judicial decree, the reallocation of the decreed rights would appear to give rise to legitimate takings claims, regardless of whether and how the public trust doctrine might apply in other contexts. As noted earlier, a water right adjudicated in a court decree may be the most secure, certain, and reliable form of water right under our system of laws, and the holder of the decreed right has the most reasonable expectation of the right to use, and continue to use, the right. Thus, the holder of a decreed water right does not have a reasonable expectation that his right may be reallocated on the basis of public trust principles that were not applied or deemed applicable when he acquired his decreed right — and that have never been applied to water rights in Nevada, or to water rights in California prior to the California Supreme Court's 1983 decision in *National Audubon*, or, more importantly, to water rights established in judicial decrees in Nevada, California, or any other state. Since the public trust doctrine has not been applied in this context, its application would not be supported by "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029. Since the doctrine has never been applied or held to apply in this context, its application would cause a sudden, abrupt, and unpredictable change in the law, and would not be part of the gradual evolution of western water law in which takings principles have not been applied.

## **CONCLUSION**

The *Walker River* case raises significant issues concerning the relationship between public trust principles and the "general principles of finality and repose" that apply to water rights decrees. These issues are of national importance, and are particularly important in the western states, where water is chronically in short supply. Neither the US Supreme Court nor any other courts has ever decided these nationally-important issues. If the Ninth Circuit decides these issues on the merits, the US Supreme Court will have an opportunity to directly review the Ninth Circuit decision and decide the issues for itself. If, instead, the

Ninth Circuit refers the issues to the Nevada courts, the Nevada Supreme Court presumably will decide the issues and its decision would be subject to direct review by the US Supreme Court. Either way, the public trust issues raised in Mineral County's action may eventually reach the US Supreme Court, if Mineral County's action is not dismissed on standing grounds. Once the merits of Mineral County's action are decided, if they are decided, whether by the US Supreme Court, the Nevada Supreme Court, or the Ninth Circuit, the decision will establish a major precedent in the continuing development of western water law.

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