Lawrence v. Clark County and Nevada's Public Trust Doctrine: Reconsidering Water Rights in the Desert

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> Aridity, and aridity alone, makes the various Wests one. The distinctive western plants and animals, the hard clarity (before power plants and metropolitan traffic altered it) of the western air, the look and location of western towns, the empty spaces that separate them, the way farms and ranches are either densely concentrated where water is plentiful or widely scattered where it is scarce, . . . [the] noticeable federal presence as dam builder and water broker, . . . those are all consequences, and by no means all the consequences, of aridity.[1]

Given the dry climate of the western United States, it is only through creative engineering that states like Nevada accommodate settlement and development. In pursuit of development, man has "acted upon the western landscape with the force of a geological agent."[2] This engineering has indeed fostered significant growth in the desert, but "aridity still calls the tune, directs our tinkering, prevents the healing of our mistakes; and vast unwatered reaches still emphasize the contrast between the desert and the sown."[3] With aridity at the helm, the future of water law in Nevada remains unpredictable. This Note discusses the impact that Nevada's explicit adoption of the public trust doctrine may have on the administration of water in the desert climate that dominates the state.

The public trust doctrine is based on the premise that certain resources belong to the public and a state holds those resources in trust for its people. In 2011, Nevada adopted the doctrine and although the entire impact is uncertain, one thing is clear: it opens the door for judicial challenges. Specifically, the most logical extension of the doctrine in Nevada is to water law. If, in fact, this extension occurs, the allocation of water resources by government officials may be significantly impacted. California, a state to which Nevada often looks for persuasive legal precedent,[4] has already liberally extended the doctrine to water

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[1] Wallace Stegner, Where the Bluebird Sings to the Lemonade Springs 61 (1992).

[2] *Id.* at 47.

[3] *Id.*

[4] *See, e.g.*, Elham Roohani, Note, *Covenants Not to Compete in Nevada: A Proposal*, 10 Nev. L.J. 260, 282 (2009) (arguing that Nevada traditionally looks to California when it is adopting new laws); Clark v. Lubritz, 944 P.2d 861, 865 n.6 (Nev. 1997) (quoting Craigo v.

allocation cases. If Nevada follows suit, two states—each with rapidly increasing populations and one with a notoriously dry climate—will be set to collide in a battle over the public interest in water rights along their shared borders.

Part I of this Note discusses the origins of the public trust doctrine, followed by a brief review of its adoption in the United States. Parts II and III explain the progression of the doctrine in California and Nevada, respectively. California is included in the analysis because of its proximity to Nevada, its liberal expansion of the doctrine, and possible conflicts that may arise between the neighboring states. Part IV describes the Nevada Supreme Court decision that prompted this note: *Lawrence v. Clark County*. Part V discusses current water law in the neighboring states. Part VI provides argument for and against applying the public trust doctrine to Nevada water law. Finally, Part VII discusses possible conflicts between Nevada and California.

I. History of the Public Trust Doctrine

The public trust doctrine is a principle of law that dates back as far as Roman law and the work of Emperor Justinian.[5] According to Justinian, "the public possesses inviolable rights to certain natural resources,"[6] and "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea."[7] Under this notion of resource law, the government preserves certain property, such as that used for navigation and fishing, for the benefit of the public.[8] Thus, unlike "general public property," the state could not transfer these property interests to those who might impair the public's access to such resources.[9]

Taking its cue from Roman law, England's public trust doctrine prohibited the monarchy from granting away lands that were subject to the public trust.[10] The common law of England maintained that " 'title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King' and that such title 'is held subject to the public right.' "[11] Parliament, on the other hand, had the ability to transfer public trust lands, subject to the public trust doctrine.[12] To abide, Parliament would confer an easement on the conveyed land for public fishing and navigation, creating more of a "use-dependent conception" of the public trust doctrine.[13]

Circus-Circus Enters., 786 P.2d 22, 23 (Nev. 1990)) (recognizing that "Nevada's statute on punitive damages is a verbatim copy of the California punitive damages statute").

[5] Lawrence v. Clark Cnty., 254 P.3d 606, 608 (Nev. 2011).

[6] *Id.*

[7] *Id.* (quoting J. Inst. 2.1.1 (Thomas Collett Sandars trans., 1970)).

[8] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475 (1970).

[9] *Id.*

[10] *Id.* at 476.

[11] *Lawrence*, 254 P.3d at 609 (quoting Shively v. Bowlby, 152 U.S. 1, 13 (1894)).

[12] Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. Envtl. L.J. 412, 425 (2010).

[13] *Id.*

In 1821, the United States began adopting public trust principles through the common law.[14] However, the law in the United States emerged as a hybrid of Roman and English law.[15] For example, similar to Roman law, in the United States "the seashore between high and low tide may not be routinely granted to private owners."[16] Rather, upon admission to the Union, the states hold that portion of the seashore in "trusteeship for the public."[17] However, similar to English law, U.S. law allows the states to maintain some power in regulating the use and distribution of public trust resources such as the seashore.[18]

The extent of the states' power to transfer resources, subject to the public trust doctrine, remains a topic of debate.[19] If the states' trusteeship puts public resources out of state government reach, then the use of those resources would be unchangeable and the land inalienable.[20] Conversely, if states are constrained only to actions consistent with their police power, the states can dictate the use of public resources as long as the conduct of the state government is "exercised for a public purpose" and not a gift of "public property for a strictly private purpose."[21]

A brief review of the public trust doctrine's development helps set the framework for a review of the roles of not only state governments but also the judiciary in the application of the doctrine to water rights.

In 1892, the Supreme Court decided *Illinois Central Railroad Co. v. Illinois*, the seminal case in American public trust law.[22] *Illinois Central* involved an act of the state legislature that granted a railroad company nearly the entirety of submerged lands in the Chicago Harbor of Lake Michigan.[23] After four years, the state tried to rescind the transfer, claiming that the land was subject to the public trust and thus, the state did not have the authority to transfer the land.[24]

Moving beyond England's doctrine, the Court declared that the public trust doctrine was not limited to land affected by tidal waters.[25] Rather, the geography of the United States, where rivers used for commerce stretch for thousands of miles before the tide affects them,[26] necessitated an extension of

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[14] *Lawrence*, 254 P.3d at 609 (citing Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821)).
[15] Sax, *supra* note 8, at 476–77.
[16] *Id.* at 476.
[17] *Id.* (internal quotation marks omitted).
[18] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988).
[19] Sax, *supra* note 8, at 476–77.
[20] *Id.* at 477.
[21] *Id.*
[22] *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).
[23] *Id.* at 451.
[24] *Id.* at 438.
[25] *Id.* at 437.
[26] *Id.* at 436. *Compare* J.C. KAMMERER, U.S. DEP'T OF INTERIOR, WATER FACT SHEET: LARGEST RIVERS IN THE UNITED STATES, U.S. GEOLOGICAL SURVEY REP. NO. 87-242 (1990), *available at* http://pubs.usgs.gov/of/1987/ofr87-242/pdf/ofr87242.pdf (detailing the length of the longest rivers in the United States: Missouri River 2,540 miles and Mississippi River 2,340 miles from source to mouth), *with Seven Man Made Wonders: The River Severn*, BBC HOME, http://www.bbc.co.uk/england/sevenwonders/west/severn-river/ (last visited Nov. 19, 2012) (detailing the length of the River Severn, Britain's longest river, at 220 miles from source to mouth).

the doctrine to navigable waters.[27] As a body of water heavily used for navigation and commerce,[28] Lake Michigan fell squarely within the Court's definition of non-tidal, navigable waters. Accordingly, the lake's waters and the land underneath the lake were granted to Illinois upon its admission to the Union.[29] However, that land was "different in character from that which the state holds in lands intended for sale," the Court held.[30] Specifically, the Court determined that Illinois possessed only "title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[31] Thus, Illinois held the lake and underlying land in trust for the people and, because the land was subject to the public trust, Illinois' transfer was void and the railroad was not entitled to compensation for the value of the property.[32]

Although the *Illinois Central* Court recognized that public rights are paramount, it refused to label those rights absolute. Rather, the Court held the state could transfer trust resources if (1) transferring the property would improve public access to the resource, or (2) the conveyance would not substantially impair "the public interest in the lands and waters remaining."[33] Thus, a state holding land in the public trust can privatize public resources, but it must consider the significant interest of the public in any dispensation or use of that resource. Further, the Court made clear that governmental conduct that reallocates trust resources in a way that restricts public uses or makes the use of those resources vulnerable to self-interested private parties will be subject to skepticism through judicial review.[34]

Despite establishing the public trust doctrine in the United States and extending it to navigable waters, the *Illinois Central* Court did not address the scope of the waters to be included. Lake Michigan provided an obvious example of a navigable body of water, but the navigability of smaller bodies of water remained unsettled. In 1922, the Court revisited the issue in *Brewer-Elliott Oil & Gas Co. v. United States*, setting forth a federal standard for determining navigability.[35] The test defines navigable water as that which is

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[27] The U.S. Supreme Court uses a "navigability in fact" standard to define navigability in the context of the public trust doctrine. *See, e.g.*, *Illinois Cent. R.R.*, 146 U.S. at 436; Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 89 (1922). According to *Illinois Central*, navigable waters included "public, navigable water[s], on which commerce is carried on between different states or nations," regardless of whether those waters were subject to the tide. *Illinois Cent. R.R.*, 146 U.S. at 436. The Supreme Court clarified the "navigability in fact" standard in *Brewer-Elliott Oil*, defining navigability as a body of water that is "used, or is susceptible of being used in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade, and travel on water." The mode by which commerce is conducted thereon, or the difficulties attending navigation is not conclusive. *Brewer-Elliott Oil*, 260 U.S. at 86.

[28] *Illinois Cent. R.R.*, 146 U.S. at 454.

[29] *Id.* at 434–35.

[30] *Id.* at 452.

[31] *Id.*

[32] *Id.* at 455.

[33] *Id.* at 452–453.

[34] Sax, *supra* note 8, at 490.

[35] Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922).

> susceptible of being used in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade, and travel on water. It does not depend upon the mode by which commerce is conducted upon it, whether by steamers, sailing vessels or flat boats, nor upon the difficulties attending navigation, but upon the fact whether the river in its natural state is such that it affords a channel for useful commerce.[36]

With federal adoption of the doctrine and federal standards for qualifying resources, application of the public trust doctrine seemed to emerge as an issue for the federal courts. However, early in public trust jurisprudence, the Supreme Court clarified that the states determine the limits of the doctrine.[37] In *Shively v. Bowlby*, the Court declared that each state has the authority to determine the use of public resources "according to its own views of justice and policy . . . as it consider[s] for the best interests of the public."[38] The *Shively* Court applied the equal footing doctrine[39] and stipulated that states "admitted into the Union since the adoption of the constitution" were entitled to sovereignty over the "tide waters, and in the lands below the high-water mark, within their respective jurisdictions."[40] More recently, the Court reiterated this state-specific application in *Phillips Petroleum Co. v. Mississippi*.[41] Thus, state governments retain the discretion to apply the public trust doctrine. The Court, however, did not resolve whether this discretionary application has any limitations.

In 1970, Professor Joseph Sax argued for a movement to expand the public trust doctrine beyond navigable waterways and the land underneath them.[42] Professor Sax argued, "[p]ublic trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals."[43] According to Professor Sax, the frequency of these "public trust problems" dictated an expansion of the doctrine to include environmental issues such as air pollution and wetland filling.[44]

To protect public interests when expanding this doctrine, Professor Sax suggested that the judiciary should act as a democratic tool for a "diffuse majority."[45] In his estimation, a "concerted minority" will often have substan-

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[36] *Id.*

[37] Shively v. Bowlby, 152 U.S. 1, 26 (1894).

[38] *Id.*

[39] The equal footing doctrine relates back to the English common law and the principle that the Crown held sovereign title to lands underlying navigable waterways. Utah Div. of State Lands v. United States, 482 U.S. 193, 196 (1987). Accordingly, "[w]hen the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown." *Id.* (citing *Shively*, 152 U.S. at 15). Since all States admitted to the Union after the original thirteen enter on an "equal footing," they hold title to land under navigable waters within their borders upon receiving statehood. *Id.* (citing Pollard's Lessee v. Hagan, 3 How. 212, 11 L. Ed. 565 (1845)).

[40] *Shively*, 152 U.S. at 26.

[41] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988).

[42] Sax, *supra* note 8, at 477.

[43] *Id.* at 556.

[44] *Id.* at 556–57.

[45] *Id.* at 560.

tial influence on the administration of trust resources.[46] Thus, the judiciary process must "remand[ ] appropriate cases to the legislature after public opinion has been aroused."[47] With judiciary safeguards in place, the court simply seeks an even playing field for interested parties and leaves the final determination to a more democratic process.[48]

Although a significant number of states have embraced Professor Sax's theory of expanding the doctrine,[49] the extent of this expansion remains a state-specific concern. Thus, to analyze the doctrine's application to water law in Nevada and California and the impact this application may have on water issues between the neighboring states, it is necessary to review each state's adoption and development of the doctrine.

II. Development of the Public Trust Doctrine in California

Prior to the adoption of its constitution in 1879, California regularly granted fee simple absolute ownership to extensive tracts of land completely submerged under the ocean.[50] Recognizing the danger of conveying lands that held considerable public value for navigation and fishing, California courts began limiting fee simple grants.[51] For instance, in *Kimball v. MacPherson*, the California Supreme Court held that "[n]othing short of a very explicit provision . . . would justify us in holding that the Legislature intended to permit the shore of the ocean, between high[-] and low-water mark, to be converted into private ownership."[52] *Kimball*, along with other California cases, developed the proposition that the state government may not convey the public trust to private parties.[53]

However, subsequent California cases loosened this absolute rule against land conveyance. For instance, the landmark case of *People v. California Fish Co.* adopted the proposition that the grantee of trust resources will take "at most, only the title to the soil subject to the public right of navigation."[54] Thus, courts no longer invalidated grants of trust resources. Instead, courts began upholding the grants, labeling them subject to the public's right to access those resources.[55] Therefore, the public received rights akin to an easement in the resource.[56]

Consistent with Professor Sax's theory, California has broadly expanded the scope of the public trust doctrine.[57] For instance, in *Marks v. Whitney*, the

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Spiegel, *supra* note 12, at 430.
[50] Sax, *supra* note 8, at 525.
[51] *Id.* at 525–26.
[52] Kimball v. Macpherson, 46 Cal. 103, 108 (1873).
[53] Sax, *supra* note 8, at 528.
[54] People v. California Fish Co., 138 P. 79, 84 (Cal. 1913); Sax, *supra* note 8, at 528.
[55] Sax, *supra* note 8, at 528.
[56] *Id.*; *California Fish Co.*, 138 P. at 87–88.
[57] *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721–22 (Cal. 1983) (expanding the doctrine to include protection for aesthetic and recreational values associated with water).

California Supreme Court recognized that California has expanded public trust easements beyond the traditional areas of "navigation, commerce and fisheries."[58] The expansion included "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[59] Additionally, the *Marks* court recognized that the public trust doctrine is well suited to protecting tidelands in their natural state.[60] This includes preservation of these resources for their value as "ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."[61]

Perhaps the most significant expansion of the public trust doctrine in California came in *National Audubon Society v. Superior Court*. The predominant form of water administration in California is prior appropriation, a "first in time, first in right" standard.[62] Essentially, "the first person who acts toward the diversion of water from a natural stream and the application of such water to a beneficial use has the first right, provided he diligently continues his enterprise to completion and beneficially applies the water."[63] *National Audubon* recognized that California's system of prior appropriation was on a "collision course" with the public trust doctrine.[64] The case involved a public trust challenge brought by environmental groups concerned with the impact of water diversion[65] on Mono Lake, California.[66] The California Supreme Court held that the state has an affirmative duty to consider the public interest in planning and allocating water resources.[67] This duty includes consideration of the diversion of non-navigable tributaries to navigable bodies of water when such diversions significantly affect the recreational or ecological value of a body of water.[68] Seeking to accommodate the public trust and appropriative rights, the *National Audubon* court found that the concept of the public trust prevents any party from acquiring and using water rights in "a manner [that is] harmful to

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[58] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Nat'l Audubon*, 658 P.2d at 724.

[63] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 98 (1938). *See also* discussion *infra* Part V.

[64] *Nat'l Audubon*, 658 P.2d at 712.

[65] In prior appropriation, diverting water for use away from the source "traditionally served dual purposes providing notice of a user's intent to appropriate water, and defining the extent of the use." *In re* Adjudication of the Existing Rights to the Use of All the Water, 55 P.3d 396, 402 (Mont. 2002). Today, diversion has lost some of its significance because beneficial use is now the "touchstone of the appropriation doctrine." *Id.* at 399. Further, most appropriation states now operate under a permitting system that satisfies the "notice of intent" requirement. *Water Law: An Overview*, NAT'L AGRIC. LAW CENTER, http://www.nationalaglawcenter.org/assets/overviews/waterlaw.html (last visited Nov. 3, 2012). *See also* discussion *infra* Part V.

[66] *Nat'l Audubon*, 658 P.2d at 711–12.

[67] *Id.* at 728.

[68] *Id.* at 719, 721.

the interests protected by the public trust."[69] Thus, the government has an affirmative duty to ensure proper water allocation that is consistent with the public trust doctrine.

Finally, the *National Audubon* court determined that the public trust doctrine requires supervision over the allocation of not just future water rights but also existing water rights.[70] The significance of this concept is that established water rights may be subject to challenge. As the *National Audubon* court saw it, "[i]n exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs."[71] Additionally, "any member of the general public has standing to raise a claim of harm to the public trust."[72] Thus, all water allocation decisions, both past and present, are subject to judicial review in challenges brought by members of the public.

III. Development of the Public Trust Doctrine in Nevada

Although *Lawrence v. Clark County* marked the first explicit adoption of the public trust doctrine in Nevada, prior case law recognized several of the doctrine's fundamental principles.[73] For instance, Nevada jurisprudence began recognizing public trust principles in *State Engineer v. Cowles Bros., Inc*.[74] Cowles owned lands adjacent to the dry Winnemucca Lake and sought a permit to drill a well on the lakebed.[75] The *Cowles* court determined that:

> When a territory is endowed with statehood[,] one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory, whether they be rivers, lakes or streams. If the body of water is classified as non-navigable at the time of the creation of the state, the underlying land remains the property of the United States, but if it is navigable under the definition hereinafter stated, the water and the bed beneath it becomes the property of the state.[76]

Thus, *Cowles* recognized the right of the states in lands or waterways that were "navigable" at the time of statehood.

Two years after *Cowles*, the Supreme Court of Nevada implicitly acknowledged the public trust doctrine in *State v. Bunkowski*.[77] The court stated, "[i]t has been held, in what appears to be a majority of cases, that the states hold title to the beds of navigable watercourses in trust for the people of their respective states,"[78] ultimately concluding that "[t]he State holds the subject lands in trust for public use."[79] However, the *Bunkowski* court found that

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[69] *Id.* at 727.
[70] *Id.* at 728.
[71] *Id.*
[72] *Id.* at 716 n.11 (citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)).
[73] Lawrence v. Clark Cnty., 254 P.3d 606, 609 (Nev. 2011).
[74] State Eng'r v. Cowles Bros., Inc., 478 P.2d 159, 160 (Nev. 1970).
[75] *Id.*
[76] *Id.* (citing United States v. Utah, 283 U.S. 64, 75 (1931)).
[77] State v. Bunkowski, 503 P.2d 1231, 1237 (Nev. 1972).
[78] *Id.*
[79] *Id.* at 1238.

legislation could "alienate public trust lands without breaking the public trust."[80] The only clarification of that finding was that the legislature must make an "express" and "proper" determination.[81]

Recently, in *Mineral County v. State Department of Conservation*, Supreme Court of Nevada Justice Rose advocated, in a concurring opinion, for adoption and clarification of the public trust doctrine.[82] The case was an original writ proceeding in which the petitioner, Mineral County, sought writs of mandamus and prohibition to prevent "future actions that threaten to decrease future water flows into Walker Lake."[83] The court denied the petitions in *Mineral County* on procedural grounds, but Justice Rose asserted that:

> This court has itself recognized that this 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.[84]

In Justice Rose's opinion, it is the affirmative duty of the state to protect "the people's common heritage of streams, lakes, marshlands and tidelands."[85] Further, Justice Rose argued that states could surrender this "right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[86] However, *Mineral County* fell short of the explicit adoption of the public trust doctrine Justice Rose sought.

Along with scattered support in case law, public trust principles appear in Nevada statutory and constitutional provisions.[87] First, the gift clause found in Article 8, Section 9 of the Nevada Constitution limits the state's ability to dispose of public resources: "The State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes."[88] In consideration of the gift clause, the Supreme Court of Nevada stated, "transactions disbursing public funds must be struck down if not made for a public purpose."[89] Thus, under the gift clause, the state serves as trustee for public resources under the public trust doctrine.[90]

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[80] Lawrence v. Clark Cnty., 254 P.3d 606, 610 (Nev. 2011) (citing *Bunkowski*, 503 P.2d at 1237–38).

[81] *Id.* (citing *Bunkowski*, 503 P.2d at 1237–38).

[82] Mineral Cnty. v. State, 20 P.3d 800, 807 (Nev. 2001) (en banc) (Rose, J., concurring).

[83] *Id.* at 801.

[84] *Id.* at 808 (Rose, J., concurring) (citations omitted).

[85] *Id.* at 809 (quoting Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983)).

[86] *Id.* (quoting *Nat'l Audubon*, 658 P.2d at 724).

[87] *See* NEV. CONST. art. VIII, § 9; NEV. REV. STAT. § 321.0005 (2009); NEV. REV. STAT. § 533.025 (2011).

[88] NEV. CONST. art. VIII, § 9.

[89] Lawrence v. Clark Cnty., 254 P.3d 606, 612 (Nev. 2011) (citing State *ex rel.* Brennan v. Bowman, 512 P.2d 1321 (Nev. 1973)).

[90] *Id.*

Second, Nevada Revised Statute ("NRS") 321.0005 and NRS 533.025 provide further statutory support for the public trust doctrine. NRS 321.0005 provides in part:

> The Legislature declares the policy of this State regarding the use of state lands to be that state lands must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes.[91]

NRS 533.025 provides that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public."[92] Essentially, these statutes "recognize that the public land and water of this state do not belong to the state to use for *any* purpose, but only for those purposes that comport with the public's interest in the particular property, exemplifying the fiduciary principles at the heart of the public trust doctrine."[93] With scattered support in the judiciary and clear statutory support, explicit adoption of the doctrine under *Lawrence* was nearly a foregone conclusion.

IV. LAWRENCE V. CLARK COUNTY

Lawrence v. Clark County, a case that began as a debate over the dispensation of land once under the Colorado River, should have major implications for the future of Nevada water law. By enacting the Fort Mohave Valley Development Law ("FMVDL"), Nevada allowed the Colorado River Commission ("CRC") "to acquire federal land in the Fort Mohave Valley near Laughlin, within Clark County limits."[94] Subsequently, under a recent amendment to the FMVDL, CRC was required to transfer its Fort Mohave Land to Clark County.[95] James R. Lawrence, in his capacity as the Nevada State Land Registrar, transferred all of the Fort Mohave Land, with the exception of 330 acres.[96] Mr. Lawrence contended that those 330 acres were submerged under the Colorado River at the time that Nevada received statehood and were thus subject to the public trust doctrine.[97]

After Mr. Lawrence refused to transfer the 330 acres, Clark County filed a complaint for declaratory relief, seeking an order to require the transfer of the land.[98] Mr. Lawrence filed a counterclaim "seeking a declaration that the disputed land was subject to the public trust doctrine and therefore was not transferable."[99] The district court granted a motion for a judgment on the pleadings in favor of Clark County and ordered Mr. Lawrence to deed the land to the county.[100] In the opinion of the district court, the land was not within the current channel of the Colorado River and thus was not subject to the public trust

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[91] NEV. REV. STAT. § 321.0005.
[92] NEV. REV. STAT. § 533.025.
[93] *Lawrence*, 254 P.3d at 613 (emphasis added).
[94] *Id.* at 608.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*

doctrine.[101] On appeal, the Supreme Court of Nevada considered whether "state-owned land that was once submerged under a waterway can be freely transferred to respondent Clark County, or whether the public trust doctrine prohibits such a transfer."[102]

After a review of the doctrine, the Supreme Court of Nevada expressly adopted the public trust doctrine.[103] The explicit adoption, in turn, crystallized the case-specific question: Was the land subject to the public trust doctrine? The *Lawrence* court ultimately left this determination to the district court but laid out a clear test to make the decision. The first crucial determination is "whether the land was submerged beneath navigable water when Nevada joined the United States on October 31, 1864."[104] Navigability turns on whether "[a] body of water . . . is used or is usable in its ordinary condition as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[105] Second, "[i]f land was beneath navigable waters when Nevada joined the United States, but is now exposed, whether that land remains subject to the public trust doctrine generally depends on the manner in which it became dry—whether by reliction or avulsion."[106]

Reliction is "the gradual and imperceptible exposure of the land."[107] Avulsion, on the other hand, refers to "sudden changes in the course of a stream."[108] When the land becomes dry through reliction, "title to the dry water bed is passed to the adjoining shoreland owners," even if artificial means prompted the change.[109] Conversely, when the land becomes dry through avulsion, "title is not taken away or bestowed."[110] Reliction can occur through artificial means, but so can avulsion.[111] In *Lawrence*, the reliction/avulsion distinction was critical because if the land became dry through reliction, "the public trust doctrine does not apply to that land. But if the portion of the Colorado River covering the land was navigable at the time of Nevada's statehood, and the land thereafter became dry through avulsion, the public trust doctrine applies."[112]

The final guidelines set by the *Lawrence* court involved the transferability of land subject to the public trust doctrine. The court held that:

> [W]hen assessing [public trust] dispensations, courts of this state must consider (1) whether the dispensation was made for a public purpose, (2) whether the state received fair consideration in exchange for the dispensation, and (3) whether the dispensation satisfies "the state's special obligation to maintain the trust for the use and enjoyment of present and future generations."[113]

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[101] *Id.*
[102] *Id.* at 607.
[103] *Id.* at 617.
[104] *Id.* at 614.
[105] *Id.* (quoting State Eng'r v. Cowles Bros., Inc., 478 P.2d 159, 160 (Nev. 1970)).
[106] *Id.*
[107] *Id.* (citing *Cowles*, 478 P.2d at 161).
[108] *Id.* at 614–615 (quoting Peterson v. Morton, 465 F. Supp. 986, 997 (D. Nev. 1979)).
[109] *Id.* at 614 (citing *Cowles*, 478 P.2d at 161).
[110] *Id.* at 614–15 (citing *Peterson*, 465 F. Supp. at 997).
[111] *Id.* at 615.
[112] *Id.*
[113] *Id.* at 616 (citing Arizona Ctr. for Law v. Hassell, 837 P.2d 158, 170 (Ariz. Ct. App. 1991)).

The court labeled the first of these two considerations as "common to any dispensation of public trust property," and the third as particularly applicable to "navigable waterways under the public trust."[114] Additionally, aware of the fact that public trust resources may change over time, the court laid out factors to consider in determining whether a dispensation comports with the state's duty as trustee.[115] These factors are:

> [T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource . . . ; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, *i.e.* commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.[116]

Although it laid out specific tests for appropriate public trust considerations, the court made it clear that legislative intent is entitled to deference.[117] However, courts will closely examine any legislative action when the public trust doctrine applies.[118]

The *Lawrence* court remanded the case to determine whether the land was submerged at the time of Nevada's statehood and the manner in which the land became dry.[119] To understand the implications of this decision and the impact it may have on interstate conflicts in water law, the next section provides a brief review of current water law in Nevada and California, followed by a careful analysis of the likely impact of this decision on water law in Nevada.

V. Current Water Law in California and Nevada

In the United States, water is allocated through two methods: riparian rights and prior appropriation.[120] Under the riparian system, those who own land adjacent to a water source have rights to use that water on their adjacent land.[121] This is the predominant system in the eastern United States, where water is abundant.[122] In the arid west, relatively few landowners live adjacent to a body of water.[123] Accordingly, prior appropriation allows those with water rights to divert water and use it on land that is not adjacent to the water source.[124] Nevada, like most other western states, operates under a system of prior appropriation.[125]

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[114] *Id.*
[115] *Id.*
[116] *Id.* (quoting *Hassell*, 837 P.2d at 170–71).
[117] *Id.* at 617.
[118] *Id.*
[119] *Id.*
[120] John W. Johnson, United States Water Law: An Introduction 35 (2009).
[121] *Id.* at 36.
[122] *Id.*
[123] *Id.* at 45.
[124] *Id.*
[125] Publications Unit, Research Division, Legislative Counsel Bureau, Water Resources: 2010–2011 Policy and Program Report 1 (2010), *available at* http://www.leg.state.nv.us/Session/76th2011/Exhibits/Assembly/NRAM/ANRAM111H.pdf.

Under the doctrine of prior appropriation, the first to acquire a water right and put that water to beneficial use obtains a right to divert water from its source, senior to all subsequent appropriators.[126] In this context, "[b]eneficial use means the water is actually put to use for such recognized beneficial uses as: commercial, industrial, irrigation, mining, municipal, power generation, recreation, wildlife, storage, or stockwatering."[127] Generally, the senior appropriator maintains this right, until abandonment or commission of waste.[128] Thus, the senior appropriator receives a secure right in a "definite quantity of divertible water."[129] The secure right of a specified amount of water, coupled with the beneficial use requirement incentivizes senior appropriators to put the water to good use.[130] This system continues to facilitate development in Nevada—an environment more suited to fostering cacti.

Unlike Nevada, California uses a "dual system" in which both the riparian and appropriation doctrines apply to water rights.[131] Early in the settlement of California, homesteads were set up along rivers and the riparian system of water law proved sufficient.[132] However, as the gold rush permeated California, mining operations changed the nature of water distribution. Specifically, miners had to divert water away from the source, for use at distant sites.[133] In recognition of this need, the system of prior appropriation also took hold in California.[134] The emergence of this dual system led to a conflicting scheme of water administration.[135] As is also true in Nevada, those with a right of prior appropriation in California were required to put the water to beneficial use in order to maintain their right.[136] In contrast, holders of riparian rights were not held to the same standard.[137] To address these inconsistencies, California amended its constitution to require all water users to put allocated water to reasonable use.[138] Thus, California adopted a "reasonable use" standard that subjects all rights holders, whether riparian or appropriative, to the oversight of the State Water Resources Control Board.[139]

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126 JOHNSON, *supra* note 120, at 45.

127 PUBLICATIONS UNIT, RESEARCH DIVISION, LEGISLATIVE COUNSEL BUREAU, *supra* note 125, at 1.

128 John P. Sande, IV, Note, *A River Runs to It: Can the Public Trust Doctrine Save Walker Lake?*, 44 SANTA CLARA L. REV. 831, 841–42 (2004).

129 *Id.* at 843.

130 *Id.*

131 CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, DIVISION OF WATER RIGHTS, STATE WATER RESOURCES CONTROL BOARD, A GUIDE TO CALIFORNIA WATER RIGHT APPROPRIATIONS 9 (2000) *available at* http://www.swrcb.ca.gov/publications_forms/publications/general/docs/l578.pdf.

132 *Id.*

133 STATE WATER RESOURCES CONTROL BOARD, *The Water Rights Process*, http://www.swrcb.ca.gov/waterrights/board_info/water_rights_process.shtml#public (last visited Nov. 11, 2012) (outlining the California Environmental Protection Agency's water rights processes and water issues).

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 CAL. CONST. art. X, § 2.

139 STATE WATER RESOURCES CONTROL BOARD, *supra* note 133.

VI. Applying the Public Trust doctrine to Nevada Water Law

Given the statutory and judicial foundation for the public trust doctrine, as it relates to water law, it seems inevitable that the doctrine will apply to future adjudications related to water rights. Specifically, NRS 533.025 provides that all water within the boundaries of the state belongs to the public; the statute classifies water as a public resource.[140] Further, although *Lawrence* did not explicitly extend the doctrine to include protection for water, the decision opened the window for this extension. Thus, members of the public arguing for protection of water resources will likely find the public trust doctrine useful.

Still, even with support in statutory provisions and public trust jurisprudence, application of the doctrine to water resources in Nevada remains uncertain. *Lawrence*'s reliance on the gift clause makes it difficult to discern which resources the public trust doctrine will encompass. As detailed by the *Lawrence* court, the public trust doctrine, as an expression of the gift clause, requires the state to act as "trustee for public resources."[141] However, which "resources" are included? As Professor Sax noted, certain resources "have a peculiarly public nature."[142] Water is an obvious example of just such a resource. Unlike owners of other property rights, water appropriators own a right to the beneficial use of the property, the water; they do not own the water itself.[143] Further, the right to use water is subject to the water rights of other appropriators.[144] In Professor Sax's opinion, this peculiar nature makes it "incumbent upon the government to regulate water uses for the general benefit of the community."[145] Several states, each with considerably more water resources than Nevada, have adopted this reasoning in applying the public trust doctrine to water use within their boundaries.[146] It seems logical for Nevada to follow suit, particularly since it is historically the driest state in the nation.[147]

However, even with constitutional, common law, and statutory support, Nevada may choose to minimalize the impact of the public trust doctrine on water law. Indeed, Nevada would not be alone in this minimalist approach. Arizona, for instance, adopted the public trust doctrine in 1991 in a case similar to *Lawrence*.[148] Despite this adoption, the Arizona legislature refused to extend

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[140] Nev. Rev. Stat. § 533.025 (2011).

[141] Lawrence v. Clark Cnty., 254 P.3d 606, 612 (Nev. 2011).

[142] Sax, *supra* note 8, at 485.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See In re* Water Use Permit Applications, 9 P.3d 409, 445 (Haw. 2000) (declaring "the public trust doctrine applies to all water resources without exception or distinction"); Vt. Stat. Ann. tit. 10, § 1390(5) (West 2011) (extending the public trust to include protection of groundwater resources); National Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983) (applying the public trust doctrine to tributaries to navigable bodies of water).

[147] Liz Osborn, *Driest States in America*, Current Results, http://www.currentresults.com/Weather-Extremes/US/driest-states.php (last visited Nov. 11, 2012); *see also* United States v. State Eng'r, 27 P.3d 51, 55 (Nev. 2001) (recognizing Nevada as the driest state in the Nation and explaining the doctrines adopted to deal with the scarcity of water in Nevada).

[148] Arizona Ctr. for Law v. Hassell, 837 P.2d 158, 168 (Ariz. Ct. App. 1991).

the doctrine to water rights.[149] Ultimately, the Arizona Supreme Court declared this refusal unconstitutional,[150] but the court has yet to apply the doctrine to water rights.[151] This is particularly relevant to this discussion because Arizona, like Nevada, based its public trust authority on the gift clause in the Arizona Constitution[152] and implicit statutory support.[153] Further, considering their proximity and similar climates, Nevada and Arizona face similar water administration problems.[154] Thus, it is entirely plausible that Nevada will choose not to apply the doctrine to water law.

If Nevada overcomes these hurdles and ultimately applies the doctrine to water law, which bodies of water will it affect? In *Lawrence*, the court limited the doctrine to waters that were navigable at the time of statehood. However, considering the impact that diversion of non-navigable streams can have on navigable bodies of water,[155] extending the doctrine to include those non-navigable tributaries, as California did in *National Audubon*, seems inevitable. Water sources in arid western states like California and Nevada are often composed of relatively small rivers feeding manufactured reservoirs designed to foster population growth and economic development.[156] Thus, limiting the doctrine to those rivers that were navigable at the time of statehood severely limits

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[149] ARIZ. REV. STAT. ANN. § 45-263(B) (1995), *invalidated by* San Carlos Apache Tribe v. Superior Ct., 972 P.2d 179, 201–02 (Ariz. 1999).

[150] *San Carlos Apache Tribe*, 972 P.2d at 199.

[151] Sharon Megdal, Joanna Nadeau & Tiffany Tom, *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENVTL. L. & POL'Y 243, 264 (2011).

[152] *Hassell*, 837 P.2d at 166.

[153] *See* ARIZ. REV. STAT. ANN. § 45-141 (1995) (declaring "[t]he waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter"), *invalidated in part by San Carlos Apache Tribe*, 972 P.2d at 201.

[154] *Compare* Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. DENV. WATER L. REV. 148, 149 (2001) (describing the scarcity of water in Nevada as the "defining circumstance of its water laws"), *and* Felicity Barringer, *Las Vegas's Worried Water Czar*, N.Y. TIMES GREEN BLOG (Sept. 28, 2010, 12:10 PM), http://green.blogs.nytimes.com/2010/09/28/las-vegass-worried-water-czar/ (explaining the growth of Nevada and the challenges that growth and current drought conditions present to the administration of water in the state) *with* Aaron Citron, *Working Rivers and Working Landscapes: Using Short-Term Water Use Agreements to Conserve Arizona's Riparian and Cultural Heritage*, 1 ARIZ. J. ENVTL. L. & POL'Y 7, 12–14 (2010) (attributing the development of Arizona's water laws to the aridity of the environment), *and* KAREN L. SMITH, GRAND CANYON INSTITUTE, ARIZONA AT THE CROSSROADS: WATER SCARCITY OR WATER SUSTAINABILITY? 1–4 (2011), *available at* http://www.gwresources.com/Documents/publications/gci-arizona_at_the_crossroads.pdf (detailing the increasing pressure on Arizona's water resources caused by a growing population and years of drought conditions).

[155] National Audubon Soc'y v. Superior Court, 658 P.2d 709, 720–22 (Cal. 1983).

[156] *See, e.g.*, Nevada Division of Water Resources Department, *The Role of Water in the Early Development of Nevada*, NEVADA WATER FACTS 1 (1992), http://www.pg-tim.com/files/NV_Water_Facts.pdf (detailing the sources of water in Nevada); Kim Ross et al., *Economic Impacts of Climate Change on Nevada*, UNIVERSITY OF MARYLAND CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH REVIEW AND ASSESSMENT 7 (2008), http://www.cier.umd.edu/climateadaptation/Nevada%20Economic%20Impacts%20of%20Climate%20Change.pdf (detailing Nevada's reliance on Lake Mead and Lake Powell and the effect of a water shortage on economic and population development).

the scope of the doctrine in western states.[157] Faced with this restraint, California determined that the purpose of the doctrine dictated expanding the doctrine to protect non-navigable tributaries and the aesthetic and recreational values of navigable bodies of water.[158]

Critics of expanding the doctrine to non-navigable waters argue that "the application undervalues the right to private property; the doctrine gives a court authority over complex administrative decisions where it lacks expertise; and . . . the doctrine has an undemocratic nature."[159] The first of these objections warrants in-depth consideration. However, adherence to the principles outlined in Professor Sax's article alleviates the democratic concerns in the second and third criticisms. Professor Sax saw judicial intervention in cases involving the public trust doctrine as a safeguard against legislative overreaching and one designed to ensure protection for a "diffuse majority."[160] Rather than leaving complex water-allocation decisions to the judiciary, the doctrine should arouse public interest in the water law debate and spark reconsideration in a democratic body.[161] Further, the doctrine gives a voice to private individuals impacted by water law administration. Thus, a private citizen, seeking redress for perceived shortcomings in water law administration, can voice his concern in the courts and force reconsideration in the legislature.

The debate over private property concerns is another matter entirely. If Nevada follows the lead of *National Audubon*, as suggested by Justice Rose in *Mineral County*, Nevada may import several critical considerations from the pivotal California case. First, the government would have an "affirmative duty" to protect the public interest.[162] In *Mineral County*, Justice Rose suggested this would be the responsibility of the state engineer as part of the engineer's obligations under Nevada water law.[163] Second, allocations of previously adjudicated stream systems that prove harmful to the public interest may be subject to judicial review.[164] Further, "any member of the general public has standing to raise a claim of harm to the public trust."[165] Additionally, the considerations crucial to the decision in *National Audubon* dealt exclusively with protecting the aesthetic and recreational value of Mono Lake.[166] Thus, if Nevada applies the public trust doctrine to water law in a manner similar to California, any member of the public can challenge existing or proposed diversions of water that negatively affect the aesthetic value of a body of water. Accordingly, fol-

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[157] *See, e.g.*, NEV. REV. STAT. ANN. § 537.010–30 (LexisNexis 2012) (limiting navigability to three bodies of water).

[158] *Nat'l Audubon*, 658 P.2d at 719, 721, 728–29.

[159] Elise L. Larson, Note, *In Deep Water: A Common Law Solution to the Bulk Water Export Problem*, 96 MINN. L. REV. 739, 759 (2011).

[160] Sax, *supra* note 8, at 560. *See also* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 708 (1995) (defining the goal of the court in Mono Lake as an accommodation approach, designed to accommodate trust values and appropriation considerations when determining water rights).

[161] Sax, *supra* note 8, at 560.

[162] *Nat'l Audubon*, 658 P.2d at 728.

[163] Mineral Cnty. v. State, 20 P.3d 800, 808–09 (Nev. 2001) (en banc) (Rose, J., concurring).

[164] *Nat'l Audubon*, 658 P.2d at 729.

[165] *Id.* at 716 n.11 (citations omitted).

[166] *Id.* at 719.

lowing *National Audubon* and adopting these public trust concepts introduces uncertainty in an otherwise well-established water law system.

The system of prior appropriation used in Nevada fosters production by affording water users certainty in water rights.[167] Without this certainty, developers will likely hesitate to invest in projects that require constant water supply. Furthermore, *National Audubon* advocated reevaluation of existing water rights, introducing uncertainty in the administration of established rights.[168] This upheaval may impair future and existing private property values, a major criticism of expanding the doctrine.

The question then becomes whether to protect water resources in non-navigable waters at the expense of private property owners' certainty or limit the doctrine to the protection of navigable waterways, leaving fewer disturbances in the current appropriation system. In his *Mineral County* concurrence, Justice Rose endorsed an expansion of the doctrine in a manner similar to *National Audubon*, anticipating a significant extension of the doctrine.[169] According to Justice Rose:

> [A]lthough 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 . . . the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated.[170]

Several factors weigh in favor of Justice Rose's notion of expanding the public trust. First, limiting the public trust doctrine to navigable waters in Nevada significantly reduces the protection the doctrine offers vital bodies of water in Nevada. Most of Nevada's navigable bodies of water depend on non-navigable tributaries.[171] With Nevada's water resources increasingly strained, failure to protect the tributary means failure to protect the navigable body of water. As the *National Audubon* court recognized, this limitation contravenes the purpose of the public trust doctrine.[172]

Additionally, extending the doctrine to include non-navigable tributaries does not automatically introduce uncertainty in all existing and future water appropriations. Rather, it simply provides one more tool for those considering the impacts of water administration. This is particularly important in protecting environmental, aesthetic, and recreational values. Unlike water rights in commercial and residential developments, the value of protecting environmental, aesthetic, and recreational concerns is difficult to quantify. For instance, consider the difficulty of proving the economic value of protecting the habitat of a migratory bird compared with the relative ease of proving the value of a multi-

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[167] K. William Easter, Mark W. Rosengrant & Ariel Dinar, *Formal and Informal Markets for Water: Institutions, Performance, and Constraints*, 14 WORLD BANK RES. OBSERVER 99, 100 (1999).

[168] *See Nat'l Audubon*, 658 P.2d at 729–30.

[169] Mineral Cnty. v. State, 20 P.3d 800, 807–08 (Nev. 2001) (en banc) (Rose, J., concurring).

[170] *Id.* (citing *Nat'l Audubon*, 658 P.2d at 721).

[171] *See, e.g.*, Nevada Division of Water Resources Department, *supra* note 156, at 4; *see also* NEV. REV. STAT. ANN. § 537.010–30 (LexisNexis 2012) (limiting navigability to three bodies of water).

[172] *Nat'l Audubon*, 658 P.2d at 720–21.

million dollar commercial project. The developer of the commercial project appears to have a distinct advantage. However, forcing administrators to consider the public trust lends credence to the environmental concerns, leveling the playing field somewhat. Further, Professor Sax's notion of a judiciary safeguard ensures that water administrators fully consider these interests. Thus, the public trust doctrine provides support for considerations otherwise incompatible with economic valuation, while allowing water administrators to continue considering the economic interests of other stakeholders.

As a check on water administration, rather than a tool to obliterate the certainty of prior appropriation, the public trust doctrine allows private citizens to speak out about the water administration process, through the courts, without significantly affecting the existing system. In this fashion, the doctrine simply adds another voice to the water allocation conversation. Given the scarcity of water in Nevada and growing population demands, the need to consider and protect *all* values associated with this precious resource must be of paramount concern.

Although the impact on Nevada water law of adopting the public trust doctrine remains unclear, it is certain that the adoption opens the door for public trust challenges. At a minimum, the doctrine will apply to lands underneath the navigable waters of the state. Ideally, however, Nevada courts will follow California's lead and make public trust considerations an integral part of every water allocation decision, even if the water at issue is simply a non-navigable tributary.

VII. Conflicts between California and Nevada

Generally, two water allocation issues cause conflicts between neighboring states.[173] First, states may disagree on the allocation of "interstate waters," meaning water that crosses state lines or forms the boundaries of states.[174] Second, when neighboring states export, by diversion, water that would otherwise be exclusively subject to intrastate water laws, conflicts may arise.[175] This Note focuses primarily on conflicts regarding interstate waters. Typically, individual citizens or the individual states initiate challenges to the inequitable distribution of interstate water through either diversion or state specific allocation decisions.[176]

Historically, the first method adopted to resolve interstate water disputes was private suits between individual water users.[177] The typical private suit involved a downstream user in one state challenging the upstream user in another.[178] However, as water use increased, states began taking a more active

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[173] Douglas L. Grant, *Interstate Water Allocation*, *in* 3 Waters and Water Rights § 43.01, at 43-3 (Amy L. Kelley, ed., 3d ed. LexisNexis/Mathew Bender 2011).
[174] *Id.*
[175] *Id.*
[176] *Id.*; *Nat'l Audubon*, 658 P.2d at 716 n.11 (citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)).
[177] Grant, *supra* note 173, § 44.01, at 44-1.
[178] *See, e.g.*, Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 259 (1910) (involving a challenge brought by a downstream user in Nevada against an upstream user in California).

role in defending the water rights of their citizens, particularly in the western United States.[179] To resolve these disputes, states began using two tools: equitable apportionment[180] suits and water apportionment compacts[181] between states.[182] Considering the nature of the public trust doctrine, this Note will focus exclusively on private suits. However, it is important to note that apportionment compacts and equitable apportionment each contributed to a decline in the prevalence of private suits.[183]

The development of water law also led to a decline in private litigation.[184] By the time states began taking an active role in water allocation disputes, the law governing private suits was relatively settled.[185] Accordingly, an upstream state with the same water law as a downstream state could enforce the rights of a downstream plaintiff as if both parties were from the same state.[186] This resulted in a significant reduction in the modern role of private suits.[187] However, evolution in water law may result in a reemergence of the private suit.[188] In particular, the public trust doctrine provides an impetus for this increase. For example, a California citizen may challenge a Nevada citizen because water used in Nevada is affecting the aesthetic value of a lake in California. Given California's expansive use of the doctrine and Nevada's recent adoption, this type of dispute is more likely to arise.

One of the most important considerations is which state's governing law should apply in private suit adjudications involving multiple states.[189] When state laws are the same, modern constitutional thought suggests that choosing which state law to apply results in a false conflict.[190] Essentially, "[t]here can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to th[e] suit."[191] Although this does not fully explain how a law in one state can be enforced against a citizen of another, the "rule against extraterritorial operation of state law stated in *Pennoyer v. Neff* has become more flexible."[192] Thus, a state is less likely to restrict the application

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[179] Grant, *supra* note 173, § 44.01, at 44-1–44-2.

[180] Equitable apportionment refers to the U.S. Supreme Court's power to apportion water among states with interstate water disputes "in such a way as will recognize the equal rights of both and at the same time establish justice between them." Kansas v. Colorado, 206 U.S. 46, 98 (1907).

[181] Water apportionment contracts, or interstate compacts, refer to interstate agreements regarding the allocation of water rights among states. *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 95–96 (1938).

[182] Grant, *supra* note 173, § 44.01, at 44-2.

[183] *Id.*

[184] *Id.* § 44.01, at 44-4.

[185] *Id.*

[186] *Id.*; *see also* Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 262 (1910) (declaring that the laws of Californian and Nevada were similar enough that the first court to obtain jurisdiction, in this case the Nevada federal court, should decide the matter without interference from the foreign court).

[187] Grant, *supra* note 173, § 44.01, at 44-4.

[188] *Id.* § 44.01, at 44-5.

[189] *Id.* § 44.02, at 44-5.

[190] *Id.* § 44.05(a)(3), at 44-24.

[191] *Id.* (alteration in original) (citing Phillips Petr. Co. v. Shutts, 472 U.S. 797, 816 (1985)).

[192] *Id.*

of another state's water laws when the outcome of the adjudication would be essentially the same if it applied its own law.[193]

Although California operates under a dual system of water law, the state's predominant water law scheme is the appropriative water rights system.[194] Thus, a conflict between California and Nevada involving a body of water subject to prior appropriation laws may produce the "false conflict" issue discussed above. However, the adoption of the public trust doctrine in both states, assuming that Nevada expands the doctrine in a manner similar to California, may upheave the settled law of both states and result in something akin to a true conflict. True conflicts of law result when the outcome of a case differs depending on the law applied.[195] These conflicts may occur even when each state applies the same water law doctrine to the disputed body of water because the laws of the states "might differ in some particular important to the dispute."[196] The variability of public trust considerations introduces such a particular.

To illustrate, compare California's expansion of the public trust doctrine in *National Audubon* with Nevada's adoption of the doctrine in *Lawrence*. *National Audubon* expanded the doctrine to include the aesthetic value of Mono Lake.[197] *Lawrence*, on the other hand, limited application of the doctrine to land beneath navigable waters.[198] While Justice Rose advocated adopting the doctrine in a manner similar to California in *Mineral County*,[199] Nevada has yet to take that step. Further, it appears that California's expansion of the doctrine remains a minority position throughout the nation.[200] Assuming Nevada eventually applies the public trust doctrine to water law, but refuses to extend the doctrine to aesthetic values, a true conflict will indeed exist, regardless of the governing water law doctrine. One of the hallmarks of the *National Audubon* decision is the ability of the individual citizen to sue water users whose actions have a negative impact on the public trust.[201] Thus, for instance, a California citizen can initiate these true conflicts when a Nevada water user's actions affect a resource belonging to California's public trust.

Which law should these neighboring states apply to resolve true public trust conflicts in water law? In cases involving the same doctrine of water law, one possible solution is the situs rule of property law.[202] "Under th[is] rule[ ], the existence of an appropriation, and the quantity of the right, would be gov-

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193 *Id.* § 44.05(a)(3), at 44-25.
194 Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983).
195 Grant, *supra* note 173, § 44.05(b), at 44-26.
196 *Id.*
197 *Nat'l Audubon*, 658 P.2d at 728–29.
198 Lawrence v. Clark Cnty., 254 P.3d 606, 617 (Nev. 2011).
199 Mineral Cnty. v. State, 20 P.3d 800, 808 (Nev. 2001) (en banc) (Rose. J., concurring).
200 Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 71 (2010) (discussing Hawaii and California's unique extensions of the doctrine to natural resources).
201 *Nat'l Audubon*, 658 P.2d at 730.
202 Grant, *supra* note 173, § 44.05(b)(1), at 44-27. For a specific definition of the situs rule, see RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 211 (1934) (declaring "[t]he original creation of property in a tangible thing is governed by the law of the state where the thing is at the time of the events which create the interests"); *see also* RESTATEMENT (SECOND) OF

erned by the law of the state in which the right is situated."[203] However, when cases deal with interrelated property rights in two states and application of the appropriate state law to each of the property rights would change the outcome of the suit, the situs rule is indeterminate.[204] Because of this indeterminacy, some courts have abandoned the property law approach and instead applied tort choice-of-law principles.[205] Under traditional tort doctrine, the place where the injury occurs governs the dispute.[206] Thus, a downstream user in one state suffering an injury at the hands of an upstream user in another state would subject the upstream user to the laws of the downstream state. However, these choice-of-law principles have been abandoned by many modern courts.[207] Thus, even in interstate water cases involving the same doctrine, the applicable law remains uncertain.

Resolving choice-of-law questions in cases where different water law doctrines apply has proven more difficult.[208] For instance, if a dispute involves an interstate body of water governed by California's riparian system and Nevada's prior appropriation system, whose law governs? Of the possible solutions previously discussed, the situs rule has "continuing wide appeal."[209] However, "[a]s a corollary of this notion, the attributes of real property should not be determined by the law of a foreign state."[210] This makes it less likely that a court would choose to apply the law of one state and disregard the law of the other.[211] Another possible solution involves adopting a middle ground approach, in which the court applies a special case-specific rule to resolve the conflict.[212]

One possible example of this middle ground approach is *Anderson v. Bassman*.[213] *Anderson* involved a stream that flowed from California into Nevada.[214] The downstream plaintiffs had appropriations in Nevada and the defendants had appropriations and riparian rights in California.[215] During the dry season, each party claimed the right to divert the entire flow of the stream to the exclusion of the other.[216] The court recognized that California law applied to the defendants and Nevada law applied to the plaintiffs.[217] However, because each state allowed water diversion only for reasonable use, the court determined that a "reasonable apportionment" of the water supply was the cor-

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CONFLICT OF LAWS ch. 9, topic 2, intro. note (1971) (declaring "questions involving interests in immovables are governed by the law of the situs").

[203] Grant, *supra* note 173, § 44.05(b)(1), at 44-27.

[204] *Id.*

[205] *Id.* § 44.05(b)(1), at 44-28.

[206] *Id.*; RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377, 379 (1934).

[207] Grant, *supra* note 173, § 44.05(b)(1), at 44-28, 44-29.

[208] *Id.* § 44.05(b)(1), at 44-29.

[209] *Id.* § 44.05(b)(2), at 44-29.

[210] *Id.*

[211] *Id.* § 44.05(b)(2), at 44-29, 44-30.

[212] *Id.* § 44.05(b)(2), at 44-30.

[213] *Id.*; Anderson v. Bassman, 140 F. 14 (N.D. Cal. 1905).

[214] *Anderson*, 140 F. at 15.

[215] *Id.* at 16–17.

[216] *Id.* at 18.

[217] *Id.* at 21–22.

rect standard.[218] Thus, the court found a broad rule of law followed by both states and applied that rule to resolve a conflict involving opposing state laws.

Although *Anderson* appeared to involve a true conflict of laws, resolved by a middle ground approach, the application of a standard followed by both states arguably resembles a false conflict of laws.[219] After all, the court did not adopt a new equitable law to resolve a true conflict, but rather recognized a rule of law common to both states. In the public trust context, it is unclear whether a court will be able to find a mirror-image rule of law in the application of the doctrine in California and Nevada. For instance, contrary to California's extension of the doctrine in *National Audubon*, Nevada may refuse to extend the doctrine to include water that is not navigable within the federal definition—a plausible interpretation considering the importance the *Lawrence* court extended to the navigability standard.[220]

Under these differing interpretations of the public trust doctrine, diversions of an interstate stream that is not navigable may be subject to entirely different regulations. For example, a California resident negatively impacted by a diversion of water may argue that the diversion must be subject to public trust considerations. Conversely, an opposing Nevada resident may argue that the water is not navigable and therefore not subject to the trust. The result would be a body of water governed by conflicting doctrines and a true conflict of laws, even if, in the absence of the public trust doctrine, the same substantive water law would apply. Thus, the *Anderson* approach is unlikely to resolve the conflict of laws presented by varying interpretations of the public trust doctrine unless each state agrees on an equivalent adoption of the doctrine. Such uniformity is difficult to conceive, considering the variations in the expansions of the doctrine throughout the country.[221]

If true conflicts in the application of the public trust doctrine are inescapable and no middle ground approach exists, one way to resolve these conflicts is adherence to a federal common law.[222] On the day that the Supreme Court decided *Erie Railroad v. Tompkins*, declaring that there is no "federal general common law,"[223] it stated in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* that state law is not conclusive in apportioning interstate streams.[224] Rather, the Court declared that state courts should apply federal common law in apportionment decisions between states.[225] Although it never expressly overruled *Hinderlider*, the Court has since advocated for deference to

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[218] *Id.* at 24, 29.

[219] Grant, *supra* note 173, § 44.05(b)(2), at 44-30, 44-31.

[220] Lawrence v. Clark Cnty., 254 P.3d 606, 614 (Nev. 2011).

[221] *See, e.g.*, Melissa Kwaterski Scanlan, Comment, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 137 (2000); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change From Within*, 15 SOUTHEASTERN ENVTL. L.J. 223, 228 (2006).

[222] Grant, *supra* note 173, § 44.05(b)(2), at 44-32.

[223] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

[224] Grant, *supra* note 173, § 44.05(b)(2), at 44-33.

[225] *Id.*; Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

state laws in the adjudication of private water suits, leaving the governing power of federal common law in question.[226]

One final possible resolution for true conflicts of law comes from the idea that law can accommodate the competing interests involved. Courts routinely hear disputes internal to their particular state and seek a resolution that accommodates the conflicting interests.[227] Applying this concept to water law means that courts can apply particular state laws to resolve the conflict, but instead of considering only the interests of parties within the state, the court considers the interests of parties from outside the state.[228] The court seeks to accommodate these interests "in a manner that best promotes net aggregate long-term common interests."[229] Thus, state-specific law may govern interstate water disputes, but may differ from intrastate law due to the expanded consideration of interests outside of the state.[230] Although not without limitations, this accommodation approach seems the most plausible in public trust doctrine disputes involving interstate waters.

Specifically, this final approach provides support for the fundamental concept of the public trust: providing a voice to all interested parties. In an ideal scenario, Nevada will follow California's lead and expand the doctrine to include protection for aesthetic and environmental concerns. However, regardless of the state law applied, the forum for adjudication, or the breadth of Nevada's public trust doctrine expansion, public trust principles would factor into the final determination under this common interest approach. Suppose, for instance, that a Nevada court hears a water appropriation case in which a California plaintiff argues for protection of aesthetic values under the public trust doctrine. Under the common interest approach, even if Nevada refuses to extend the doctrine to protect these interests, a Nevada judge must consider them because California affords them public trust consideration. Thus, the concerns materialize in the judiciary regardless of whether Nevada expands the doctrine. Consistent with Professor Sax's argument, this ability to raise the concern in the judiciary may ultimately prompt legislative action, leading to a democratic determination regarding the water rights at issue. Of course, the counter-argument is that the judge will choose which issues to consider, but the ability to make the argument is a step in the right direction. This "step in the right direction," however, assumes that protection of Nevada's water supply and the associated aesthetic and recreational values is necessary.

VIII. Conclusion

Prior to *Lawrence*, private individuals in Nevada seeking protection for public resources under the public trust doctrine, specifically in water law, had a tenuous argument based on piecemeal statutory support and judicial approval. Although the expansion of the doctrine remains uncertain, private individuals

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[226] California v. United States, 438 U.S. 645, 653 (1978); Grant, *supra* note 173, § 44.05(b)(2), at 44-34.
[227] Grant, *supra* note 173, § 44.05(b)(2), at 44-35.
[228] *Id.*
[229] *Id.*
[230] *Id.*

can now make a compelling public trust argument. This argument, while not without limitations, is a useful tool for protecting the aesthetic and recreational value of Nevada's water resources. However, regardless of one's feelings toward the public trust doctrine or the aesthetic and recreational value of water, it seems that common ground exists in the notion of providing a voice for all concerns. Living and adapting to Nevada's dry climate requires careful consideration of water administration and fully informed decisions make it more likely that water will be allocated in the most efficient and productive manner possible, both now and in the future. Thus, adopting the public trust doctrine and applying it to Nevada water law is another useful tool for the state in its continuing struggle to adapt to this arid environment.