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Mineral County v. Lyon County, 136 Nev. Adv. Op. 58 (Sept. 17, 2020)

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WATER RIGHTS: THE PUBLIC TRUST DOCTRINE & THE DOCTRINE OF PRIOR APPROPRIATION

Summary

The Nevada Supreme Court considered whether the public trust doctrine permits reallocating rights already adjudicated and settled under the doctrine of prior appropriation. The Court held that the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. The Court also held that Nevada's water statutes are consistent with the public trust doctrine and that it applies to all waters within the state.

Background

Walker River Basin and Walker Lake's decline

The Walker River Basin covers about 4,000 square miles from the Sierra Nevada mountain range in California to Walker Lake in Nevada. Walker Lake has declined in size and volume from when it was first measured in 1882. While declining precipitation and natural lake recession has contributed to the decline in size, upstream appropriations have also played a role. According to appellants, the decline of Walker Lake has harmed the shelter of migratory birds and the lake's fishing industry.

Litigation over water rights in Walker River Basin

In 1902, a company sued another to enjoin it from interfering with the company's use of the Walker River in Nevada. A final decree from the United States District Court for the District of Nevada ended that litigation almost two decades later. The United States brought a case in 1924 which resulted in the Walker River Decree (the Decree). The Decree adjudicated water rights under the doctrine of prior appropriation and created the Walker River Commission and the United States Board of Water Commissioners. In 1987, the Walker Lake Paiute Tribe successfully advocated to establish procedures to change allocations of water rights under the Decree. Subsequently, the Nevada State Engineer now reviews all change applications under the Decree in Nevada. The Walker Lake Paiute Tribe pursued additional water rights in 1991 under the implied federal reserved water right.

Mineral County's intervention

In 1994, Mineral County moved to intervene to modify the Decree and sought an allocation of minimum flows of 127,000 acres/foot per year to Walker Lake. The U.S. District Court for the District of Nevada granted the intervention in 2013. Two years later, the U.S. District Court for the District of Nevada dismissed Mineral County's amended complaint in intervention, finding that (1) Mineral County lacked standing; (2) the public trust doctrine could only prospectively prevent granting appropriative rights, and any retroactive application of the public trust doctrine would constitute a taking; (3) the court lacked authority to effectuate a taking; and (4) Walker Lake is not encompassed in the Walker River Basin. On appeal, the Ninth

¹ By Brady Bathke

Circuit Court of Appeals concluded that Mineral County had standing and determined in a concurrent case that Walker Lake is a part of the Walker River Basin. Furthermore, the Ninth Circuit held that whether Mineral County could seek minimum flows depended on whether the public trust doctrine permits reallocating rights adjudicated and settled under the doctrine of prior appropriation and certified two questions to the Nevada Supreme Court.

Discussion

Prior appropriation doctrine in Nevada

The prior appropriation doctrine grants an appropriative right that allows the use of a certain amount of water for a beneficial use if the water is available in the source unrestricted from the claims of others with earlier appropriations.²

The public trust doctrine in Nevada

The public trust doctrine restricts the state from alienating public trust resources by requiring the state to hold its navigable waterways and lands covered by those waters in trust for the public.³ The United States Supreme Court stated that when states were admitted into the United States, they were granted ownership to the navigable waters and the lands covered by those waters.⁴ The navigable waters were to be freely enjoyed by the people of the states for navigation, fishing, and commerce.⁵ The Nevada Supreme Court deemed the Carson River navigable and therefore it was owned by the state for public use.⁶

Nevada expressly adopted the public trust doctrine in 2011.⁷ The Court stated that the public trust doctrine is similar to the gift clause because it requires the state to serve the public as a trustee for public resources.⁸ The Legislature has declared that state lands must be used in the best interest of the people of Nevada.⁹ The Legislature has also declared that all water in Nevada belongs to the public, not the state.¹⁰ This displays that the state can only use public land and water for purposes in the best interest of the people of Nevada.¹¹ The parties here do not argue whether the public trust doctrine is applicable in Nevada. However, the parties dispute whether the public trust doctrine applies to rights already settled under the doctrine of prior appropriation and if such doctrine applies to nonnavigable waters, navigable waters, or neither.

The public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation

The Court recognizes that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right. The state has

² Desert Irrigation, Ltd. v. State, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997).

³ See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–53 (1892).

⁴ *Id.* at 434–35.

⁵ *Id.* at 452.

⁶ State v. Bunkowski, 88 Nev. 623, 633–34, 503 P.2d 1231, 1237 (1972).

⁷ Lawrence v. Clark County, 127 Nev. 390, 406, 254 P.3d 606, 617 (2011).

⁸ *Id.* at 399, 254 P.3d at 612.

⁹ NEV. REV. STAT. § 321.0005(1) (2020).

¹⁰ NEV. REV. STAT. § 533.025 (2020).

¹¹ *Lawrence*, 127 Nev. at 400, 254 P.3d at 613.

always been restricted in its ability to dispose of public resources such as navigable waters.¹² Therefore, the public trust doctrine applies to water rights allocated before and after the express adoption of the doctrine in *Lawrence*.

The public trust doctrine applies to all waters within the state, whether navigable or nonnavigable

The Court held that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters. To restrict the public trust doctrine to only navigable waterways would disregard that flowing water that feeds into the navigable waters is allocated along the way.

Nevada's water statutes are consistent with the public trust doctrine

Nevada's water statutes are equivalent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property.¹³

Nevada's statutes regulating water use require the State Engineer to consider the public interest in allocating water rights

Nevada's water statutes hold prior appropriation as a core value because water rights are distributed subject to existing rights.¹⁴ Another important principle that the water statutes hold is beneficial use. A beneficial use of water is a public use that includes irrigation, power, municipal supply, domestic use, mining, livestock watering, and storage.¹⁵ In 1969, any recreational purpose was added to the list of beneficial uses, which includes fishing and wildlife habitations.¹⁶

The State Engineer is in charge of approving and rejecting reallocation applications.¹⁷ The State Engineer must determine whether a proposed action is beneficial to public interest. Consistent with the public trust doctrine, Nevada's water statutes only allow water allocations for public uses.

Appellants argue that Nevada's water statutes do not place an affirmative fiduciary duty on the state to guarantee that public trust resources will be existing for years to come. The Court disagrees and explains that the statutes are in place to restrict water usage to necessary purposes and cease water rights when the water is not used for a beneficial purpose.¹⁸ Additionally, the State Engineer is permitted to regulate water usage in the interest of public welfare.¹⁹ The Court concludes that Nevada's water statutes guard against wasteful use of water and limit water rights when needed.

¹² See NEV. CONST. art. 8, § 9; *Ill. Cent. R.R.*, 146 U.S. at 453.

¹³ See *Lawrence*, 127 Nev. at 405, 254 P.3d at 616.

¹⁴ NEV. REV. STAT. § 533.430(1) (2020).

¹⁵ NEV. REV. STAT. § 533.050 (2020); NEV. REV. STAT. § 533.340 (2020).

¹⁶ NEV. REV. STAT. § 533.030(2) (2020).

¹⁷ NEV. REV. STAT. § 533.325 (2020).

¹⁸ NEV. REV. STAT. § 533.045 (2020).

¹⁹ NEV. REV. STAT. § 534.120 (2020).

Nevada's water statutes satisfy Lawrence

To determine whether the dispensation of public trust property is valid, the Court adopted a three-part test.²⁰ The Court determined that courts 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.²¹ When a particular dispensation is in the interest of public welfare, it will be given deference.²²

Respondents argue that Nevada's water statutes satisfy the requirements of *Lawrence*. The Court agrees for three reasons. First, the statutes only allow water allocations that are for a beneficial use.²³ Therefore, allocations are only distributed for a public purpose because the Legislature has deemed a beneficial use a public purpose.²⁴

Second, the state satisfies the second requirement of *Lawrence* because the state received fair consideration in allocating water for beneficial use.²⁵ When water is allocated for public purposes, the people of the state benefit by receiving water, electricity, and other resources. Also, residents are able to grow food, and the farming and mining industries are aided by the allocation.

Third, the state satisfies the third requirement of *Lawrence* because the state has implemented mechanisms that ensure the conservation of water for future generations. The state's water statutes contain certain requirements and limitations that ensure water is not wasted or used detrimental to the public interest. The Court therefore holds that Nevada's water statutes are consistent with the public trust doctrine.

The state's water statutes recognize the importance of finality in water rights and therefore do not permit reallocation of adjudicated water rights

Respondents argue that the plain language of Nevada's water statutes prohibit reallocating adjudicated water rights. The Court agrees and reasons that language should be given its ordinary meaning only when that language of a statute is plain and unambiguous.²⁶ Nevada's water statutes provide that decreed water rights shall be final, a decree can be modified only within three years, and the State Engineer is prohibited from allocating water that clashes with such finality.²⁷ Therefore, Nevada's water statutes prohibit reallocating adjudicated water rights that have not been abandoned, forfeited, or lost pursuant to an express statutory provision.

The Court notes that such acknowledgment of finality is important to an arid state like Nevada. Finality of water rights are often relied upon for long-term planning and capital investments by municipal, social, and economic institutions. Also, agricultural and mining industries rely on the finality of water rights, which can impact and influence other businesses in

²⁰ *Lawrence v. Clark County*, 127 Nev. 390, 405, 254 P.3d 606, 616 (2011).

²¹ *Id.*

²² *Id.* at 406, 254 P.3d at 617.

²³ *See* NEV. REV. STAT. § 533.035 (2020); NEV. REV. STAT. § 533.050 (2020).

²⁴ *Lawrence*, 127 Nev. at 405, 254 P.3d at 616.

²⁵ *See id.*

²⁶ *See City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

²⁷ NEV. REV. STAT. § 533.210 (2020); NEV. REV. STAT. § 533.0245 (2020).

the state. In order to keep the public interest in finality and administer resources consistent with the public trust doctrine, reallocation should not be permitted.

However, appellants argue that a water right is not exempt from regulation to protect the public welfare simply because it has vested or been adjudicated. Furthermore, they argue that water rights are not absolute. The Court agrees and holds that water rights are subject to regulation for the public welfare and are not absolute, but are relative, nonownership rights. The Court goes on to explain that this means water rights holders must abide by the water statutes and use water beneficially or lose their water rights. Therefore, the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.

Second certified question

The Ninth Circuit certified a second question to the Court, which asked if the abrogation of such adjudicated or vested rights constitute a taking under the Nevada Constitution. However, the Court does not address the second certified question because the Court held that the public trust doctrine does not permit reallocation of rights.

Conclusion

The public trust doctrine is already integrated into Nevada's water statutes, which protects the public interest in the navigable and nonnavigable waters of the state, as well as the land underneath navigable waters. Allocations of water rights have finality so water can be beneficially used without waste, which is in the public interest. The public trust doctrine is applied to Nevada's waters in order to conserve them for the future use and enjoyment.

Therefore, the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. The Court need not consider the second certified question.