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THE PUBLIC TRUST DOCTRINE: THE NEVADA AND CALIFORNIA SUPREME COURTS' DIVERGENT VIEWS IN MINERAL COUNTY AND NATIONAL AUDOBON SOCIETY

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TABLE OF CONTENTS

I. INTRODUCTION

In *Mineral County v. Lyon County* (*Mineral County*),[1] the Nevada Supreme Court recently interpreted the public trust doctrine fundamentally differently from

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the California Supreme Court in *National Audubon Society v. Superior Court* (*National Audubon*),[2] the well-known *Mono Lake* decision. The public trust doctrine, which derives from the English common law and is traceable to ancient Roman law, holds that the state has sovereignty over its navigable waters and underlying lands and that the state holds the waters and lands in trust for the public for certain common public uses.

In *Mineral County*, the Nevada Supreme Court held that the public trust doctrine applies to all waters and water rights in Nevada, but does not authorize modification or reallocation of water rights adjudicated by the courts in order to provide water for public trust uses. In *National Audubon*, conversely, the California Supreme Court held that the public trust doctrine requires that the state maintain continuing authority over water rights, with authority to modify and reallocate the rights to protect public trust uses. Thus, while *National Audubon* held that the public trust doctrine authorizes reallocation of water rights to protect public trust uses, *Mineral County* held that the doctrine does *not* authorize reallocation of court-adjudicated water rights for such purposes.

The *Mineral County* and *National Audubon* cases also differ more broadly on the nature and scope of the public trust doctrine itself. In *Mineral County*, the Nevada Supreme Court held that the public trust doctrine requires the state to regulate water in the public interest and that the Legislature fulfilled its public trust responsibility by enacting a statutory water rights system that provides for the regulation of water in the public interest. The court also held that the statutory system provides that court-adjudicated water rights are final and non-reallocable and that such finality serves the public interest by facilitating development of water supplies to meet the public's present and future needs, such as food production, domestic use, hydropower generation, and the like. The court thus deferred to the Legislature's judgment that finality of water rights is in the public interest and held that the public trust doctrine does not mandate a contrary result by authorizing reallocation of the rights.

In *National Audubon*, on the other hand, the California Supreme Court held that the public trust doctrine and California's statutory water rights laws represent two different principles of law that are on a "collision course," and the court undertook to integrate these different legal principles into a unified system of regulation. The court held that the state is required to consider—but not necessarily preserve—public trust uses in regulating water rights and may

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County and *National Audubon Society* cases that are the subject of the article; as a California Deputy Attorney General, he represented the State of California in the *National Audubon Society* case in the California Supreme Court, and in his current practice he represented Lyon County in the *Mineral County* case in the Nevada Supreme Court. The views expressed herein are those of Mr. Walston and should be attributed to no one else.

1. 473 P.3d 418 (Nev. 2020).

2. 658 P.2d 709 (Cal. 1983).

reallocate water rights if necessary to protect public trust uses. The court thus fashioned common law public trust principles that apply to and potentially override the legislative judgment. For example, while the Legislature's statutory water rights laws provide that domestic water use is the highest use of water in the state, the court held that the state must preserve public trust uses if "feasible," which suggests that "feasible" public trust uses are the highest use of water.

Thus, while *National Audubon* held that the public trust doctrine and the statutory laws are on a "collision course" and must be integrated by the courts into a unified system of regulation, *Mineral County* held that the statutory laws incorporate the public trust doctrine and the doctrine is already integrated into the statutory system of regulation. While *National Audubon* established common law principles that bind and potentially override the legislative judgment in protecting the public interest, *Mineral County* deferred to the legislative judgment that its statutory laws are in the public interest. Although *National Audubon* held that the public interest is served by preserving public trust uses for present and future generations, *Mineral County* held that the public interest is served by the finality of water rights because finality ensures that water will be available for the public's present and future needs. *Mineral County* and *National Audubon* thus diverge on the nature of the public interest served by the public trust doctrine and on the very nature and scope of the doctrine itself.

Indeed, *Mineral County* and *National Audubon* even diverge concerning the nature and location of public trust uses protected by the public trust doctrine. *Mineral County* held that public trust uses consist of water uses that the Legislature has deemed to be beneficial to the public and in the public interest—which includes not only environmental uses such as fisheries and recreation but also economic uses such as food production and domestic uses—and that such public uses may be within the source stream or elsewhere. *National Audubon*, on the other hand, held that the public trust doctrine protects only uses within the source stream, and—although acknowledging that the doctrine protects both commerce and environmental uses—the court focused so extensively on instream environmental uses that it appeared to regard the doctrine as primarily protecting such uses rather than other uses of water. The decisions thus diverge on whether the public trust doctrine protects only instream uses or out-of-stream uses as well, and whether the doctrine primarily protects instream environmental uses rather than other uses that are beneficial to the public. The question, more broadly, is whether the public trust doctrine is a state sovereignty doctrine, as *Mineral County* indicated, or primarily an environmental law doctrine, as *National Audubon* suggested.

In examining these issues, this article will be structured as follows: Part I will describe the foundation of the public trust doctrine. The United States Supreme Court has held that the states have sovereignty over their navigable waters and underlying lands under the equal footing doctrine of the United States Constitution and that the states hold the waters and lands in trust for the public's common use. This principle, as shall be seen, is the foundation of the public trust doctrine as it exists today. The western states, in exercising their sovereignty over the waters and

lands, have enacted comprehensive statutory water rights laws that provide for the regulation of the use of water, and the statutory laws provide significant protection of public uses and the public interest in the waters and lands.

Part II will describe the public trust doctrine itself, as developed by the United States Supreme Court in its seminal decision in *Illinois Central Railroad Company v. Illinois*.[3] *Illinois Central* determined that the State of Illinois holds its navigable waters and underlying lands in trust for the public, and therefore the State had the right to revoke its grant of a private property interest to a railroad company in lands underlying Lake Michigan in order to utilize the lands for public purposes, which in that case was commerce.[4]

Part III will describe the California Supreme Court's decision in *National Audubon Society v. Superior Court*, which undertook to "integrate" the public trust doctrine—a judicially-fashioned doctrine of common law—into California's statutory system for regulation of water rights. *National Audubon* held that the public trust doctrine, as integrated, provides that the state has continuing supervisory authority over water rights, with the authority to modify and even reallocate the rights if necessary to protect public trust uses.

Part IV will describe the Nevada Supreme Court's recent decision in *Mineral County v. Lyon County*, which held that the public trust doctrine requires the state to regulate water in the public interest and that the Nevada Legislature fulfilled its trust responsibility by enacting statutory water rights laws in the public interest. *Mineral County* also held that—since the Legislature determined that finality of adjudicated water rights is in Nevada's public interest by providing for the development of water supplies for the public's present and future needs—judicially-adjudicated water rights are final and conclusive and not subject to reallocation.

Finally, Part V will compare the *National Audubon* and *Mineral County* decisions and describe how they diverge. The decisions diverge on specific elements of the public trust doctrine such as the nature of public trust uses protected by the doctrine, but also on the broader question of the nature and function of the doctrine itself, specifically whether the courts should defer to the legislative judgment in regulation of water rights or should instead establish common law principles that apply to and bind, and potentially override, the legislative judgment in regulating the rights. The decisions thus diverge not only on the more narrow issue of how to define the public interest in regulation of water, but also on the broader question of the respective roles of the legislative branch and the judicial branch in determining the public interest in regulation of public resources. The decisions may also diverge on whether a state's reallocation of water rights under

3. 146 U.S. 387 (1892).

4. *Id.* at 463–64.

public trust principles would result in a "taking" of water rights that would require the state to pay compensation to the holders of the rights.

In sum, *Mineral County* and *National Audubon* establish two different lodestars for interpretation of the public trust doctrine. These different lodestars may guide the courts of other states in fashioning their own public trust doctrines, and in determining which lodestar to follow.

II. FOUNDATION OF THE PUBLIC TRUST DOCTRINE: STATES' SOVEREIGNTY OVER NAVIGABLE WATERS

A. State Sovereignty Under Equal Footing Doctrine

Prior to the American Revolution, the American colonies, as part of the British empire, were governed by the English common law.[5] Under the English common law, the British Crown possessed sovereignty over all navigable and tidal waters, including lands underlying the waters, but the Crown's sovereignty was subject to certain "common rights" of the public, particularly the public's right of navigation, free passage, and fishing.[6] Under the English common law, "the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King," and "this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing."[7] Thus, in the American colonies the Crown had sovereignty over navigable and tidal waters and the underlying lands, subject to certain public "common rights" such as navigation and fishing.

In *Martin v. Waddell*,[8] one of the great landmark decisions in American judicial history, the Supreme Court in 1842 held that, as a result of the American Revolution, the Crown's sovereignty over navigable waters and underlying lands was transferred to the original thirteen states.[9] The decision, written by Chief Justice Roger B. Taney, held that "when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to their navigable waters and the soil under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."[10] Although the Supreme Court might have held that the Crown's

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5. Shively v. Bowlby, 152 U.S. 1, 13 (1894).

6. PPL Mont., LLC v. Montana, 565 U.S. 576, 589–90 (2012); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283–84 (1997); *Shively*, 152 U.S. at 13.

7. *Shively*, 152 U.S. at 13.

8. Martin v. Waddell, 41 U.S. 367 (1842).

9. *Id.*

10. *Id.* at 410. Under the Commerce Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 3, the United States has the right to regulate navigable waters in furtherance of interstate commerce. *E.g.,* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899); *Shively*, 152 U.S. at 57–58. Under the Property Clause of the Constitution, U.S. CONST. art. VI, cl. 2, the United States may reserve

sovereignty over the waters and lands was transferred to the new national government, perhaps under its constitutionally-delegated power to regulate interstate commerce,[11] the Court instead held that the Crown's sovereignty was transferred to the new states.[12]

Moreover, *Waddell* held that the states did not hold the waters and lands in a traditional propriety capacity but instead for the "common use" of the public.[13] As the Supreme Court contemporaneously explained in another decision, "this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish."[14] The principle established in *Waddell*—that the states have sovereignty over navigable waters and underlying lands that are held for the public's common use—has been followed in numerous Supreme Court decisions, and is the settled law of the land.[15] The states' ownership of the waters and lands, the Supreme Court has held, is "an essential attribute of sovereignty."[16]

Although *Waddell* followed the English common law in holding that the states have sovereignty over waters that are both navigable and tidal, the Supreme Court later departed from the English common law in holding that the states' sovereignty applies to navigable waters regardless of whether they are tidal.[17] As the Court explained, all navigable waters in England—a relatively small country located on an island—are influenced by the tide, but many navigable waters in

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water for use on federal lands that have been reserved from the public domain for specific purposes, such as for Indian reservations, national monuments, and the like. *E.g.,* Cappaert v. United States*,* 426 U.S. 128, 138 (1976); United States v. New Mexico, 438 U.S. 696, 699–702 (1978).

11. The Supreme Court has held, for example, that the federal government, "[a]s the owner of the public domain, . . .possessed the power to dispose of land and water thereon, or to dispose of them separately." Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

12. *Waddell*, 41 U.S. at 367.

13. *Id.*at 410.

14. Smith v. Maryland, 59 U.S. 71, 74–75 (1855).

15. *See, e.g.*, PPL Mont., LLC v. Montana, 565 U.S. 576, 589–91 (2012); *Coeur d'Alene Tribe*, 521 U.S. at 283–84; Oregon *ex rel.* State Land Bd. v. Corvallis Sand, 429 U.S. 363, 372–74 (1977); United States v. Texas, 339 U.S. 707, 717 (1950); United States v. Oregon, 295 U.S. 1, 14 (1935); *Shively*, 152 U.S. at 26–27, 49–50; Hardin v. Jordan, 140 U.S. 371, 381–82 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1877).

16. Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987).

17. The Daniel Ball, 77 U.S. 557, 563 (1870); *Barney*, 94 U.S. at 337–38; *PPL Mont., LLC,* 565 U.S. at 590; *Coeur d'Alene Tribe*, 521 U.S. at 285–86. As the Supreme Court explained in *Daniel Ball*, while the ebb and flow of the tide was the general test in England, because no waters are navigable that are not also tidal, the situation in America is fundamentally different, because many waters are navigable for great distances by large vessels but are not affected by the tide. 77 U.S. at 563. On the other hand, if the waters are nonnavigable rather than navigable, the United States retains title to the underlying lands and its title is unaffected by admission of the new state. *Oregon*, 295 U.S. at 14.

America are located far from tidal waters and are unaffected by the tide.[18] Thus, the English rule limiting sovereignty to navigable waters that are tidal does not apply in America.

Shortly after *Waddell* was decided, the Supreme Court issued another landmark decision, *Pollard v. Hagan*,[19] which held that all states are admitted to the Union on an equal footing with other states in terms of their sovereignty, and thus that newly-admitted states acquire the same sovereignty over their navigable waters and underlying lands as the original thirteen states.[20] This principle—the equal footing doctrine—has been followed in numerous Supreme Court decisions and is also the settled law of the land.[21] Under this doctrine, the United States holds navigable waters and underlying lands in trust for the future state prior to its admission to statehood, and fulfills its trust responsibility by conveying the waters and lands to the state when it joins the Union.[22] The equal footing doctrine rests on a constitutional rather than statutory foundation; the state's title in the waters and lands "is conferred not by Congress but the Constitution itself."[23] Thus, the state's sovereignty over the waters and lands does not depend on the terms of the congressional statute admitting the state to statehood, but instead derives from the Constitution itself. Under the equal footing doctrine, when the western states were admitted to statehood, such as California in 1850 and Nevada in 1864, the states acquired sovereignty over their navigable waters and underlying lands by force of the Constitution itself.[24]

In sum, *Waddell* and *Pollard* established the bedrock constitutional principle that the states have sovereignty over their navigable waters and underlying lands that had formerly belonged to the British Crown under the English common law, and that the states hold the waters and lands for the common use and benefit of the public. The seeds of the public trust doctrine—which, as will be explained later, provides that the states hold their navigable waters and lands in trust for the public for its common use—were planted in the soil of the English common law and transported to American law as a consequence of the Revolution.

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18. *See* Smith v. Maryland, 59 U.S. at 74–75.

19. Pollard v. Hagan, 44 U.S. 212 (1845).

20. *Id.* at 228–29.

21. *See, e.g.*, *PPL Mont., LLC*, 565 U.S. at 590; *Coeur d'Alene Tribe*, 521 U.S. at 284; *Shively*, 152 U.S. at 26–27, 49–50; *Barney*, 94 U.S. at 338; *Hardin*, 140 U.S. at 381–82.

22. Montana v. United States, 450 U.S. 544, 551 (1981); *Texas*, 339 U.S. at 717. The United States is deemed to transfer the waters and lands to the state in the absence of "some international duty or public exigency," United States v. Holt State Bank, 270 U.S. 49, 55 (1926), but, "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government," there is a "strong presumption against conveyance by the United States." *Montana*, 450 U.S. at 552.

23. *Oregon ex rel. State Land Bd.*, 429 U.S. at 374; *PPL Mont., LLC*, 565 U.S. at 591.

24. *In re* Waters of Hallett Creek Stream Sys., 749 P.2d 324, 330 (Cal. 1988); Nevada v. Bunkowski, 503 P.2d 1231, 1233–34 (Nev. 1972).

B. The Western States' Water Rights Laws

i. The Appropriation and Riparian Doctrines

The western states, in exercising their sovereignty over surface waters, have adopted two principal doctrines of water law: the appropriation doctrine and the riparian doctrine. The Supreme Court has held that the states have the right to adopt either doctrine under the Tenth Amendment of the Constitution,[25] which reserves to the states the powers not delegated to Congress, and that "Congress cannot enforce either rule upon any State."[26]

The riparian doctrine derives from the English common law.[27] The doctrine provides that an owner of land has, as an incident of ownership, the right to use water flowing across or adjacent to the land, subject to reasonable use by other riparian landowners.[28] The riparian right attaches to the soil and is not personal to the landowner; thus, the right is not created by the landowner's use of the water nor lost by the landowner's nonuse.[29] The riparian doctrine is well suited to areas that have ample rainfall and relatively abundant water supplies, such as England, where the doctrine originated, and the eastern states, which have generally adopted the riparian doctrine as their basic water law.[30]

The riparian doctrine is less well suited, however, to the arid and semiarid states of the western United States, which lack the relatively abundant water supplies found elsewhere in the nation. The maps of the early cartographers often labeled the area west of the 100th meridian as the "Great American Desert,"[31] reminiscent of the Sahara and Gobi Deserts found on other continents. Because of their lack of adequate water supplies, the western states developed a different doctrine of water law—the doctrine of prior appropriation, or simply the appropriation doctrine—that provides for more efficient use of limited water

25. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."); Kansas v. Colorado, 206 U.S. 46, 89–90 (1907).

26. *Kansas*, 206 U.S. at 94; *Cal. Or. Power Co.*295 U.S. at 163–64;*Rio Grande Dam & Irrigation Co.,* 174 U.S. at 702–03.

27. United States v. Gerlach Live Stock Co., 339 U.S. 725, 744 (1950); *Rio Grande Dam & Irrigation Co.,* 174 U.S at 774–75.

28. *Gerlach Live Stock Co.*, 339 U.S. at 965–66; Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 891–92 (Cal. 1967); Lux v. Haggin, 10 P. 674, 753 (Cal. 1886); ANTHONY DAN TARLOCK & JASON ANTHONY ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 3.1031-32 (Thomson Reuters 2017 ed.); WELLS A. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS, at 178–80 (1956).

29. *Lux*, 10 P. at 753.

30. United States v. U.S. Bd. of Water Comm'r, 893 F.3d 578, 597–98 (9th Cir. 2018).

31. California v. United States, 438 U.S. 645, 648 (1978).

supplies and enables them to be more efficiently allocated for public needs and uses.

The appropriation doctrine originated as a custom among the miners who rushed to California after the discovery of gold in 1849.The miners needed water to separate the gold from the dross, but could not claim riparian water rights because the lands on which their mining claims were located were owned by the federal government. The miners, ignoring the niceties of the riparian doctrine, adopted a simple custom under which the first miner who "appropriated"—that is, diverted and used—water had a prior right to its use as against subsequent appropriators; to be "first in time" was to be "first in right."[32] This simple mining custom was recognized by local courts and legislatures, and ripened into the doctrine of prior appropriation that is the prevalent water law of the West today.

Under the appropriation doctrine, a water user has the right to appropriate water if, and only so long as, the water is put to "beneficial use," and the first appropriator has a prior right as against subsequent appropriators.[33] Congress recognized the appropriation doctrine as the basic water law of the western states and territories in enacting mining acts in 1866 and 1870[34] and in particular the Desert Land Act of 1877; the latter Act provided that settlers who acquired federal patents in the public domain lands of the western states and territories were required to comply with the appropriation laws of the states and territories.[35] In *California Oregon Power Company v. Beaver Portland Cement Company*,[36] the Supreme Court held that these enactments, particularly the Desert Land Act, had effected a "severance" of the waters of the western states and territories from the lands themselves, as a result of which the federal government regulated and controlled the lands but the water rights on the lands were subject to regulation and control by the western states and territories.[37] The appropriation doctrine has been a major factor in the growth and development of the western states, by authorizing transfers of water—often by massive federal and state water projects, such as the federal Central Valley Project in California—from rural and mountainous regions where most of the water supply originates to distant farmlands and urban areas, where the water is needed for human use, such as agricultural and domestic uses.[38]

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32. Jennison v. Kirk, 98 U.S. 453, 457–58 (1879); Irwin v. Phillips, 5 Cal. 140, 146–47 (1855); *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 330 (1988).

33. *E.g.*, *Hallett Creek,* 749 P.2d at 330; *Joslin*, 429 P.2d at 891–92; TARLOCK & ROBISON, *supra* note 28, §§ 5.3–5.4 at 246–249; HUTCHINS, *supra* note 28, at 130–37.

34. Act of July 26, 1866, 14 Stat. 251, 253; Act of July 9, 1870, 16 Stat. 217, 218.

35. 43 U.S.C.A. § 321 (West) (originally enacted as Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377) (water rights of settlers depend on "bona fide prior appropriation," and "shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation"); *Cal. Or. Power Co.*, 295 U.S. at 156; *Hallett Creek*, 749 P.2d at 463.

36. 295 U.S. at 142.

37. *Id.* at 162; *Hallett Creek*, 749 P.2d at 331.

38. *See, e.g.*, *California*, 438 U.S. at 651–53 (describing federal Central Valley Project in California).

Although California recognizes appropriative water rights based on the early mining custom, California also recognizes riparian rights by virtue of its adoption of the English common law shortly after its admission to statehood.[39] In *Lux v. Haggin*, the California Supreme Court in 1886 held that California, having adopted the English common law as its rules of decision, adopted the riparian doctrine that is part of the English common law.[40] California thus has a dual system of water law, which recognizes both appropriative and riparian rights.[41] Effective in 1914, the California Legislature enacted a statutory system that regulates appropriative water rights; under the statutory system, a state agency, the State Water Resources Control Board (State Water Board), is responsible for regulating appropriative water rights, and may issue permits for appropriation of water to those who meet the statutory requirements.[42]

Many other western states, unlike California, do not recognize riparian rights, and instead recognize only appropriative rights in regulation of surface waters.[43] In Nevada, for example, the Nevada Legislature enacted a statutory system in 1913 that regulates appropriative water rights,[44] and that authorizes the State Engineer, who administers the statutory system, to issue permits for appropriation of water.[45] Nevada, however, does not recognize riparian rights.[46]

The riparian and appropriation doctrines differ in many fundamental respects. The riparian doctrine derives from the English common law, and the appropriation doctrine from the custom of the early miners. The riparian doctrine establishes parity among competing riparian users, and the appropriation doctrine establishes priority among competing appropriators. Justice Robert Jackson, writing

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39. CAL. CIV. CODE § 22.2. (West 1850).

40. *Lux,* 10 P. at 746–51.

41. *Hallett Creek*, 749 P.2d at 332; People v. Shirokow, 605 P.2d 859, 864 (Cal. 1980); HUTCHINS, *supra* note 28, at 40–41.

42. CAL. WATER CODE § 1250 (West 1943); *Shirokow*, 605 P.2d at 863–65. Water rights in California, whether appropriative or riparian, were originally based on the common law, in that they were recognized by the courts but not established by the Legislature. California's statutory water rights system, as adopted by the Legislature in 1914, applies to appropriative water rights acquired subsequently to the date of the enactment, 1914 but does not apply to pre-1914 appropriative rights recognized prior to that date or to riparian rights. *Shirokow*, 605 P.2d at 863–65; *see Hallett Creek,* 749 P.2d at 324. The State Water Board may, however, prioritize and quantify riparian rights that have not been exercised. *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 667–69 (Cal. 1979). In sum, appropriative and riparian water rights in California are governed by a mixture of statutory and common law principles.

43. Peabody v. City of Vallejo, 40 P.2d 486, 490 (Cal. 1935); TARLOCK & ROBISON, *supra* note 28, § 5:11.

44 Ormsby County v. Kearney, 142 P. 803, 805–06 (Nev. 1914).

45. NEV. REV. STAT. ANN. § 533.324 (West 1993).

46. Walsh v. Wallace, 67 P. 914, 917 (Nev. 1902); *Peabody*, 40 P.2d at 490.

for the Supreme Court, once characterized the riparian doctrine as socialistic—because it is based on egalitarianism among riparian users—and the appropriation doctrine as capitalistic, because it awards priority to the first appropriator as against subsequent appropriators.[47]

The appropriation and riparian doctrines are similar in one important respect, however. Both provide that a water right is a usufructuary and not a possessory right, in that the water user has a right to use water but does not own the water or its corpus in a conventional proprietary sense.[48] Rather, the water is "owned" by the public, which may grant rights to its use.[49] This fundamental precept, as shall be seen, is a pivotal feature of the public trust doctrine, which is based on the principle that ownership and dominium of water belongs to the public and not the water user.

ii. Public Interest in Regulation of Water

Although the appropriation doctrine as originally conceived established priority among competing appropriators, the doctrine as it has evolved provides significant protection of the public interest in regulation of water.

First, the appropriation doctrine even as conceived does not authorize appropriation of water for any use but only for a "beneficial use,"[50] which is a use that is beneficial to the public and not just the water user. Examples of beneficial uses are uses for irrigation, domestic and urban needs, hydropower, recreation, protection of fish and wildlife, and the like[51]—all of which benefit the public and not just the water user. The United States Supreme Court has declared that the use of water for irrigation in the arid western states is a "public use," because it enables the production of food needed for the public.[52] Indeed, Nevada law expressly provides that beneficial use of water as a "public use."[53] As the Nevada Supreme Court has stated, "the concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western

47. *Gerlach Live Stock*, 339 U.S. at 745, 750.

48. *See* Eddy v. Simpson, 3 Cal. 249, 252 (1853); United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 101 (1986); HUTCHINS, *supra* note 28, at 36–38.

49. *E.g.*, CAL. WATER CODE § 102 (West 1943) ("All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."); NEV. REV. ANN. STAT. § 533.025 (West 1913) ("The water of all sources of water supply within the boundaries of State, whether above or beneath the surface of the ground, belongs to the public.").

50. *Cal. Or. Power Co.*, 295 U.S. at 154; Cent. Delta Water Agency v. State Water Res. Control Bd., 20 Cal.Rptr.3d 898, 904 (2004); CAL. WATER CODE §§ 100, 1240 (West 1943); TARLOCK & ROBISON, *supra* note 28, § 5:68.

51. CAL. WATER CODE § 1257 (West 1955).

52. *Cal. Or. Power*, 295 U.S. at 165; *see also* NEV. REV. STAT. ANN. § 533.050 (West 1913) ("The beneficial use of water is hereby declared a public use . . . .").

53. NEV. REV. STAT. ANN. § 533.050 (West 1913).

states."[54] Beneficial uses are not static, however, and may change as public needs change. As the California Supreme Court has declared, "[w]hat is a beneficial use at one time may, because of changed circumstances, become a waste of water at a later time."[55] Thus, the concept of beneficial use ensures that appropriation of water serves the public interest and not just the private economic interest.

Second, many states have modified their appropriation laws to provide that the use of water must be not only beneficial but also reasonable in light of all relevant circumstances. The people of California adopted a constitutional amendment in 1928, now codified in article X, section 2 of the California Constitution, which provides that the right to use water in California exists only to the extent that the water is put to "reasonable and beneficial use."[56] This rule, often referred to as the rule of reasonable use, is regarded as California's basic water law.[57] The rule of reasonable use requires that the water use must not only be beneficial to the public, but must also be reasonable in light of other competing water needs dependent on the same water resource.[58] The California Supreme Court has held, for example, that the commercial use of water to produce sand and gravel was not reasonable when compared with the competing needs of a municipal water agency to provide water for local citizens and residents.[59] As the court stated, whether a water use is reasonable depends on the circumstances of the case, and must take into account "statewide issues of transcendent importance," such as "the ever increasing need for conservation of water in this state."[60] Other western states, following California's example, have also adopted the rule of reasonable use.[61] The rule of reasonable use further provides protection of the public interest in the regulation of water.

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54. Desert Irrigation, Ltd. v. State, 944 P.2d 835, 842 (Nev. 1997).

55. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. 1935).

56. CAL. CONST. art. X, § 2; CAL. WATER CODE § 100 (West 2021); *Nat'l Audubon Soc'y*, 658 P.2d at 725–26; *Joslin*, 429 P.2d at 892–93; *Peabody*, 40 P.2d at 492–93; Chow v. City of Santa Barbara, 22 P.2d 5, 15–16 (Cal. 1933). The 1928 constitutional amendment overturned the California Supreme Court's decision in *Herminghaus v. Southern California Edison Company*, which held that riparian rights based on the common law have priority over appropriative rights based on custom where the rights are in conflict. Herminghaus v. S. Cal. Edison Co., 252 P. 607, 619 (Cal. 1926). As the result of the constitutional amendment, both appropriative and riparian rights exist only to the extent water is put to "reasonable and beneficial" use. CAL. CONST. art. X, § 2.

57. People *ex rel*. State Water Res. Control Bd. v. Forni, 126 Cal.Rptr. 851, 855 (1976) ("[T]he overriding principle governing the use of water in California is that such use be reasonable.")

58. Joslin v. Marin Mun. Water Dist., 492 P.2d 889, 892–93 (Cal. 1967); *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 665 (Cal. 1979).

59. *Joslin*, 492 P.2d at 894–96.

60. *Id.* at 894.

61. *See* TARLOCK & ROBISON, *supra* note 28, § 5:11.

Third, many states, including California and Nevada, have further modified their water rights laws to explicitly provide that the appropriation of water must be in the "public interest," which further ensures that the appropriation of water is in the public interest and not just the interest of the water user. Under California law, for example, the State Water Board is authorized to issue an appropriative water right permit only if the proposed use is in the "public interest," and the Board may impose conditions in the permit to ensure that the use is in the "public interest."[62] Similarly, Nevada law prohibits the State Engineer from issuing an appropriative permit for a proposed use that is "detrimental to the public interest."[63] The public interest requirement, by definition, protects the public interest in regulation of water.

Thus, while the appropriation doctrine as originally conceived established priority among competing appropriators, the doctrine in its modern form provides significant protection of the public interest, by providing that water may be appropriated only for uses that are reasonable and beneficial and in the public interest. The doctrine in its modern form is not simply capitalistic, as Supreme Court Justice Jackson has opined, because the modern doctrine provides that, regardless of priority of use, the right to use water exists only if the use serves the needs and interests of the public.[64] The modern appropriation doctrine is consistent with the principles envisioned by the Supreme Court in its landmark decisions in *Martin v. Waddell* and *Pollard v. Hagan*, and the English common law principles on which those decisions are based, which, as described earlier, provide that the state has sovereignty over navigable waters and that its sovereignty is subject to the public's common use.[65]

II. THE PUBLIC TRUST DOCTRINE: THE SUPREME COURT'S DECISION IN ILLINOIS CENTRAL

In *Illinois Central Railroad Company v. Illinois*, the Supreme Court in 1892 held that the State of Illinois has sovereignty over its navigable waters and underlying lands, which are held in trust for the public, and therefore the State has the right to revoke a private property interest in the lands in order that they may be utilized for other public purposes.[66] Although *Illinois Central* is generally regarded as the seminal public trust decision in America,[67] the decision did not in fact create a new doctrine of law, but rather clarified and expanded the principle previously established in *Martin v. `Waddell* and *Pollard v. Hagen* and that derived from the English common law, namely that the state has sovereignty over navigable

62. CAL. WATER CODE §§ 1253, 1255, 1257 (West 2021).

63. NEV. REV. STAT. ANN. § 533.370(2) (West 2019).

64. *See Gerlach Live Stock*, 339 U.S. at 745, 750.

65. *Martin*, 41 U.S. at 410; *Pollard*, 44 U.S. at 228–29; *see supra* text accompanying notes 5–24.

66. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

67. *See, e.g.*, City of Berkeley v. Superior Court, 606 P.2d 362, 365 (Cal. 1980).

waters and lands that are held in trust for the public's common use.[68] Indeed, the roots of the public trust doctrine are traceable to ancient Roman law; the Institutes of the Roman Emperor Justinian declared that "[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."[69]

In *Illinois Central,* the State of Illinois, through its Legislature, had granted to a private railroad company a fee interest in the tidal and submerged lands of Lake Michigan, which had been reclaimed and formed much of the Chicago waterfront.[70] Illinois later decided to develop the waterfront as a harbor to accommodate commerce and shipping on Lake Michigan, and sought to rescind its grant of a fee interest to the railroad company.[71] The railroad company argued that it owned the lands and thus Illinois did not have the right to rescind title to the lands.[72] Illinois brought an action against the railroad company in the Illinois courts to rescind the fee grant, claiming that Illinois owned the tidal and submerged lands and did not have the power to divest itself of its ownership of the lands.[73] The case, after being removed to the federal courts by the railroad company, eventually reached the United States Supreme Court.[74] The issue was whether Illinois or the railroad company owned the tidal and submerged lands of Lake Michigan that had been conveyed to the railroad company.[75]

The Supreme Court, in a decision written by Justice Stephen Field, upheld Illinois' claim that it owned the tidal and submerged lands and could rescind its grant of a fee interest to the railroad company.[76] The Court stated that Illinois, having been admitted to statehood on an equal footing with other states, acquired sovereignty, ownership and dominium over lands covered by navigable waters, with the right to dispose of the lands if that can be done "without substantial impairment of the interest of the public in the waters."[77] The state's title in the lands, the Court held, is different from that held by the state in other lands intended for sale; rather, the title is "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

68. *PPL Mont., LLC*, 565 U.S. at 603; *Coeur d'Alene Tribe*, 521 U.S. at 284–86; *Shively*, 152 U.S. at 13; *Ill. Cent. R.R. Co.*, 146 U.S. at 458; Arnold v. Mundy, 6 N.J.L. 1, 12–13 (N.J. 1821); *see supra* text accompanying notes 5–24.

69. *Nat'l Audubon Soc'y*, 658 P.2d at 718 (quoting Institutes of Justinian 2.1.1); *see Gerlach Live Stock Co.*, 339 U.S. at 744–45.

70. *Ill. Cent. R.R. Co.*, 146 U.S. at 433.

71. *Id.* at 433–34.

72. *Id.* at 438–39.

73. *Id.* at 439.

74. *Id.* at 433.

75. *Id.* at 439.

76. *Id*. at 435.

77. *Id.*

of fishing therein."[78] The Court stated that "[t]he state can no more abdicate its trust over the property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[79] The Court stated that the state can never lose control of the lands for purposes of the trust except for parcels that "are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[80] The Court concluded that the legislature did not have the power to grant lands underlying navigable waters, and thus the Legislature's grant of lands to the railroad company was "subject to revocation" if not "absolutely void on its face."[81]

Thus, *Illinois Central* held that Illinois, which has sovereignty over lands underlying navigable waters, holds the lands in trust for the public, and had the right to rescind its grant of a private property interest in the lands in order to utilize them for other public purposes, such as commerce and shipping. Although *Illinois Central* substantially rested on the Supreme Court's decisions in *Waddell* and *Pollard*, which had held that the states have sovereignty over their navigable waters and underlying lands under the equal footing doctrine and that the states hold the waters and lands for the public's common use, *Illinois Central* went beyond the earlier decisions by holding that the state's obligation to hold the lands in trust for the public authorized the state to revoke a private property interest that it had earlier granted in the lands. *Illinois Central* described the nature of the state's obligation to hold the waters and lands in trust for the public in much greater detail than the earlier decisions.

The public trust doctrine, as *Illinois Central* and other courts have recognized, is a common law doctrine rather than a constitutional or statutory one, because it has been fashioned by the courts rather than adopted as part of the state's constitutional and statutory laws.[82] Many states have, however, adopted constitutional or statutory provisions that codify, at least in part, the principle of the public trust doctrine that the waters within the state belong to the state, and that the state has an obligation to regulate the waters on behalf of the public.[83] To the extent that the public trust doctrine has been codified in the states'

78. *Id.* at 452.

79. *Id.* at 453.

80. *Id.*

81. *Id.* at 437.

82. *Id*. at 452, 458; *see* City of Long Beach v. Mansell, 476 P.2d 423, 437 (Cal. 1970); People v. Truckee Lumber Co., 48 P. 374, 375 (Cal. 1897).

83. CAL. WATER CODE § 102 (West 2021) ("All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."); NEV. REV. STAT. ANN. § 533.025 (West 2021) ("The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.").

constitutions and statutes, the doctrine is a constitutional or statutory doctrine rather than a common law one.

On its face, *Illinois Central* appeared to suggest that the public trust doctrine is a federal law doctrine. *Illinois Central* extensively cited the United States Supreme Court's own decisions in support of its decision, such as *Waddell* and *Pollard*, that held that the states have sovereignty over their navigable waters for the common use of the public, and the Court cited only a smattering of Illinois decisions on minor and technical points.[84] Thus, *Illinois Central* appeared to regard the public trust doctrine as a corollary of the federal law principle established in *Waddell* and *Pollard*—that, just as the states acquire sovereignty over their navigable waters under the constitutional equal footing doctrine and hold the waters in trust for the public, the states have a concomitant responsibility under federal law to regulate the waters on behalf of the public. It is not entirely surprising that *Illinois Central* may have viewed the public trust doctrine as one of federal law, because the Supreme Court during this earlier period in its history was more prone than the modern Court to adopt general principles of federal common law.[85]

Several years later, however, the Supreme Court declared that *Illinois Central* was based on Illinois law, not federal law.[86] As the Supreme Court recently stated, each state is responsible for developing its own public trust doctrine, and for determining the nature of the state's own public duties in regulating navigable

84. *Ill. Cent. R.R. Co.*, 146 U.S. at 457–58.

85. *See, e.g.*, Swift v. Tyson, 41 U.S. 1, 8–12 (1842) (holding that federal courts apply federal common law rather than state common law in diversity cases), *overruled by* Erie v. Tompkins, 304 U.S. 64, 77–78 (1938); Wyoming v. Colorado, 259 U.S. 419, 464–65 (1922) (applying federal common law doctrine of equitable apportionment rather than state water law in resolving interstate water dispute); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that federal courts may select state law as applicable federal rule of decision, but may develop federal common law if state law is inadequate to serve federal purposes). The modern Supreme Court appears much more reluctant than the earlier Court to adopt federal common law. The Court has held that that federal courts, unlike state courts, are not general common-law courts, but may develop federal common law where "Congress has not spoken" or there is "significant conflict between some federal policy or interest and the use of state law." City of Milwaukee v. Illinois, 451 U.S. 304, 312–13 (1981). Notably, the Ninth Circuit Court of Appeals—in a collateral proceeding to the California Supreme Court's decision in *Nat'l Audubon*, 658 P.2d 709, to be discussed below—rejected the California Supreme Court's claim in *National Audubon Society* that LADWP's diversions from Mono Lake tributaries violate the federal common law of nuisance, stating there is no federal common law of nuisance. Nat'l Audubon Soc'y v. Dep't of Water & Power, 869 F.2d 1196 (9th Cir. 1988).

86. Appleby v. City of New York, 271 U.S. 364, 395 (1926) (*Illinois Central* "was necessarily a statement of Illinois law").

waters and underlying lands.[87] Thus, the public doctrine, in defining the state's obligation to regulate waters in the public interest, is unequivocally a doctrine of state law and not federal law.

Even so, the public trust doctrine is a federal law doctrine to the extent it holds that under the U.S. Constitution the states acquire sovereignty over their navigable waters upon their admission to statehood, and in determining whether the waters were navigable at that time and thus the states have jurisdiction over them.[88] Thus, federal law determines whether the waters were navigable when the state was admitted to statehood and whether the state has jurisdiction over the waters, and state law determines the nature of the state's public trust responsibilities once it is determined that the waters are navigable and subject to the state's jurisdiction.[89] As the Supreme Court recently stated, "the contours of [the] public trust do not depend upon the Constitution"; rather, "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."[90]

In sum, although the public trust doctrine has some features of both federal law and state law, the doctrine is a state law doctrine in determining the rights and responsibilities of the state in regulating navigable waters and underlying lands on behalf of the public. There is no national public trust doctrine that uniformly applies to all states and defines their duties in regulating public trust uses. Rather, each state is responsible for developing its own public trust doctrine and defining its own public trust duties. The public trust doctrine and the state's trust duties may vary from state to state, depending on how each state defines its doctrine and trust duties.[91]

As the nation's population and economy have grown, and the states have become more aware of the need to protect their navigable waters and underlying lands for present and future generations, the courts of several states have followed the principles established in *Illinois Central* in defining their own public trust duties.

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87. PPL Mont., LLC v. Montana, 565 U.S. 576, 603-04 (2012) (first citing *Appleby*, 271 U.S. at 395; and then citing *Coeur d'Alene Tribe*, 521 U.S. at 285) (the public trust doctrine "remains a matter of state law"); *see also Oregon ex rel. State Land Bd.*, 429 U.S. at 374; *Montana*, 450 U.S. at 551.

88. United States v. Utah, 283 U.S. 64, 75 (1931); *Oregon*, 295 U.S. at 14.

89. *PPL Mont., LLC*, 565 U.S. at 604.

90. *Id.*

91. In *Summa Corp. v. California ex rel. State Land Comm'n,* 466 U.S. 198 (1984), the Supreme Court held that California's public trust doctrine does not apply to water rights encompassed in Spanish and Mexican land grants made prior to the Treaty of Guadalupe Hidalgo, which was signed in 1848 and ended the war between the United States and Mexico. As the Court stated, the United States established a commission in 1851 to implement the treaty and determine the validity of the land grants under Mexican law, and authorized the commission to issue patents confirming the validity of the land grants. *Id.* at 203. The Court held that—since California did not appear in the proceedings before the commission to claim that the land grants were subject to California's public trust doctrine—California's public trust doctrine does not apply to the land grants. *Id.* at 206–09.

The California Supreme Court has held, for example, that the state holds lands underlying navigable waters, such as tidelands, in trust for the public, and that the state can convey the property interest in the lands if the lands are "substantially valueless" for trust purposes, but cannot convey the property interest if the lands are still physically adaptable for trust uses.[92] While *Illinois Central* defined public trust uses as navigation, commerce, and fisheries, the California Supreme Court has expanded public trust uses to also include various environmental uses, such as hunting, bathing, swimming, recreation, and preserving tidelands in their natural state.[93] The California Supreme Court has also held that the legislature is responsible for administering the public trust and that its judgments are "conclusive,"[94] which suggests that the legislature's public trust judgments are not reviewable by the courts, or, if reviewable, are entitled to substantial deference.

The courts of other states have also followed *Illinois Central* in defining their own public trust doctrine and duties. The Nevada Supreme Court has held that the public trust doctrine applies in Nevada, and that the doctrine is based on the state's constitution and statutes and the "inherent limitations on the state's sovereign power" established in *Illinois Central*.[95] Applying these principles, the Nevada Supreme Court has held that the state has sovereign ownership of the beds and banks of navigable waters; that any private rights in the beds and banks are subject to the state's overriding sovereign ownership; and that the public trust doctrine requires the state to meet several conditions in granting private rights in the beds and banks.[96] The North Dakota Supreme Court has held that the public trust doctrine requires the state to consider public trust uses in planning the

92. City of Berkeley v. Superior Court, 606 P.2d 362, 373 (Cal. 1980); *see also* California v. Superior Court (Lyon), 629 P.2d 239 (Cal. 1981) (holding that land between natural high and low water marks is subject to private ownership but is impressed with the public trust); California v. Superior Court (Fogerty), 625 P.2d 256 (Cal. 1981) (determining boundary between public and private ownership as to dam that altered natural level of Lake Tahoe).

93. Marks v. Whitney, 491 P.2d 374, 379 (Cal. 1971).

94. City of Long Beach v. Mansell, 476 P.2d 423, 437 n. 17 (Cal. 1970); Mallon v. City of Long Beach, 282 P.2d 481, 486 (Cal. 1955); *see Marks*, 491 P.2d at 391 ("It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished, and to take the necessary steps to free them from such burden.").

95. Lawrence v. Clark County, 254 P.3d 606, 614 (Nev. 2011).

96. *Id.* at 607 (public trust doctrine provides that state's authority to transfer beds and banks of navigable waters depends on various factors, such as whether the waters were navigable when Nevada was admitted to statehood and whether the lands became dry by reliction or avulsion); State Eng'r v. Cowles Bros., Inc., 478 P.2d 159, 162 (Nev. 1970) (doctrine of reliction of public lands applies against the state); Nevada v. Brunkowski, 503 P.2d 1231, 1235–37 (Nev. 1972) (since Carson River was navigable when Nevada was admitted to statehood, Nevada acquired ownership of the river bed and patents granting ownership of the bed are subject to Nevada law).

allocation and use of water.[97] The Montana Supreme Court has held that under the public trust doctrine and the state's constitution any surface waters capable of use for recreational purposes may be used by the public irrespective of who owns the stream bed.[98] The Idaho Supreme Court has held that the public trust doctrine does not preclude the state from leasing docketing facilities on the bay of a navigable lake to a private entity.[99]

Although these and other state supreme court decisions have applied the public trust doctrine in various contexts, none of the decisions directly addressed whether and how the doctrine—a common law doctrine fashioned by the courts—applies to the states' regulation of water rights, where the states have enacted statutory systems that comprehensively regulate water rights and provide for allocation of water under the doctrine of prior appropriation. Although the states may have an abstract public trust duty to regulate water in the public interest, the decisions did not indicate how this abstract duty applies to the states' actual regulation of appropriative water rights under their statutory laws. The question, more broadly, is whether and how to amalgamate and integrate the public trust principles fashioned by the courts into the states' statutory systems for regulating appropriative water rights. This was the question addressed by the California Supreme Court in *National Audubon Society v. Superior Court (Mono Lake),* and more recently by the Nevada Supreme Court in *Mineral County v. Lyon County, et al.* This article will now describe these decisions.

III. CALIFORNIA SUPREME COURT'S DECISION IN *NATIONAL AUDUBON SOCIETY*

In *National Audubon Society v. Superior Court*, decided in 1983, the California Supreme Court stated that the public trust doctrine and the state's appropriative water rights laws "exist independently of each other" and represent "two systems of legal thought" that are on a "collision course," and the court undertook to "integrate" these principles into a single, unified system of regulation.[100]

In the case, the Los Angeles Department of Water and Power (LADWP), a public water agency that develops and provides water for the people of Los Angeles in southern California, obtained part of the water by diversions from tributaries flowing into Mono Lake, which is located in northern California.[101] LADWP was authorized to divert the water pursuant to an appropriative permit issued by California's State Water Board in 1940.[102] Several decades later, the National

97. United Plainsman Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

98. Montana Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 169–71 (Mont. 1984).

99. Kootenai Env't All. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094–96, 105 Idaho 622, 631–33 (1983).

100. *Nat'l Audubon Soc'y*, 658 P.2d at 712, 732.

101. *Id.* at 712.

102. *Id.*

Audubon Society (NAS) brought an action against LADWP in the California courts to enjoin the diversions.[103] NAS claimed that the diversions violated the public trust doctrine and were illegal because they reduced inflows into Mono Lake and thus impaired environmental values in the lake, such as aesthetics and recreation.[104] LADWP argued that it had a vested right to divert the water and that its diversions were legal, because its permit issued by the State Water Board did not impose conditions to protect the environmental values in the lake.[105] In issuing its permit to LADWP in 1940, the State Water Board believed that it lacked power to impose such conditions because the statutory laws provided then, as now, that domestic water use is the highest use of water in the state.[106] The State of California intervened and argued that the State Water Board was authorized under the constitutional and statutory water rights laws, and particularly the rule of reasonable use, to impose new conditions in LADWP's permit to protect Mono Lake's environmental uses.[107]

In its decision, the California Supreme Court held that the public trust doctrine authorizes "reconsideration of the allocation of the waters" of the Mono Lake basin.[108] The court held that the doctrine authorized the State Water Board to reconsider LADWP's permit and impose conditions to preserve Mono Lake's environmental uses, and that LADWP did not have a vested right that precluded such reconsideration.[109] The court rejected both NAS's and LADWP's arguments, stating that they were arguing, respectively, either that the public trust doctrine displaces the statutory water rights laws or that the public trust doctrine plays no

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103. NAS brought its action in the Mono County Superior Court, and the action was transferred to the Alpine County Superior Court. *Id.* at 712. After LADWP filed a cross-complaint against several parties, including the United States, the United States removed the action to the federal courts. *Id.* The federal district court abstained on grounds that the action raised state law claims rather than federal claims and directed NAS to file its action in state court. *Id.* NAS then filed a new action in the Alpine County Superior Court, and, after the Superior Court ruled against NAS's claim, NAS then filed a petition for writ of mandate in the California Supreme Court seeking review its claim, which the Supreme Court granted. *See generally id.* at 716–18.

104. *Nat'l Audubon Soc'y*, 658 P.2d at 715–16, 726–27; National Audubon Society's Memorandum of Points and Authorities at 26–62, *Nat'l Audubon Soc'y*, 658 P.2d 709 (No. 24368) (on file with author).

105. *Nat'l Audubon Soc'y*, 658 P.2d at 726–27; Los Angeles Dep't of Water and Power's Memorandum of Points and Authorities at 18–46, *Nat'l Audubon Soc'y*, 658 P.2d 709 (No. 24368) (on file with author).

106. CAL. WATER CODE § 106 (West 2021) ("It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.").

107. State of California Memorandum of Points and Authorities at 18–54, *Nat'l Audubon Soc'y*, 658 P.2d 709 (No. 24368) (on file with author).

108. *Nat'l Audubon Soc'y*, 658 P.2d at 732.

109. *Id.*

role in the regulation of water rights, and that the court was "unable to accept either position."[110]

The California Supreme Court described more specifically how the public trust doctrine applies to the state's regulation of water rights, stating:

- Under the public trust doctrine, the state as sovereign retains "continuing supervisory control" over its navigable waters and the underlying lands.[111] Thus, no one has a "vested right" to appropriate water in a manner harmful to the public trust.[112]
- As a matter of "current and historical necessity," the Legislature, or its designated agency the State Water Board, is authorized to approve licenses and permits to appropriate water even though this "does not promote, and may unavoidably harm" trust uses in the source stream.[113]
- Nonetheless, the state has "an affirmative duty to take the public trust into account in the planning and allocation of water resources" and to "protect public trust uses whenever feasible."[114] The state must, however, preserve public trust uses only to the extent "consistent with the public interest."[115]
- Once the state has approved an appropriation, the state has "a duty of continuing supervision" over the taking and use of the appropriated water and is "not confined by past allocation decisions," which "may be incorrect in light of current knowledge or inconsistent with current needs."[116] Accordingly, the state may "reconsider allocation decisions" and impose new conditions "even though those decisions were made after due consideration of their effect on the public trust."[117]

National Audubon also held that the public trust doctrine applies not only to navigable waters but also to nonnavigable tributaries of such waters because diversions from tributaries can cause harm to public trust uses in the navigable waters themselves.[118] Thus, the court held that the doctrine applies to LADWP's diversions from the Mono Lake tributaries.[119]

The California Supreme Court also noted that it had held in earlier mining cases that, under the state's nuisance statutes, the state holds "the absolute right to all navigable waters and the soils under them," and that mining activities that altered the bed of a river and impeded navigation or the public's access to the

110. *Id*. at 727, 732.

111. *Id.* at 727.

112. *Id.* at 726, 728.

113. *Id.*

114. *Id*. at 728.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 719–21.

119. *Id.*

waters are nuisances and thus unlawful.[120] Although the earlier mining decisions were based on legislatively-enacted nuisance statutes, *National Audubon* viewed the decisions as establishing a predicate for the court's conclusion that the common law public trust doctrine protects public interests in regulation of water.

In sum, *National Audubon* held that the state must consider public trust uses in planning and managing the state's navigable waters and their tributaries, and in granting permits to appropriate water. The state is not required necessarily to preserve public trust uses but only to *consider* public trust uses in regulating use of water. The state is required to preserve public trust uses if "feasible," however, unless this is inconsistent with the "public interest."[121] As a matter of "current and historical necessity" the state may approve water diversions even though this may impair trust uses in source streams.[122] Once the state has granted an appropriative water right permit, the state has a duty of continuing supervision over the permit, and may impose additional conditions in the permit to protect public trust uses; thus, no one has a vested right to use water adversely to the public trust.[123]

IV. NEVADA SUPREME COURT'S DECISION IN MINERAL COUNTY

In *Mineral County v. Lyon County, et al*.,[124] the Nevada Supreme Court in 2020 considered whether the public trust doctrine authorizes restriction, modification or cancellation—in a word, reallocation—of water rights that have been adjudicated by the courts in order to provide water for public trust uses. The court, ruling *en banc*, held that the public trust doctrine does not authorize reallocation of adjudicated water rights, and deferred to the Nevada Legislature's

120. *Id*. at 720 (first citing People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1159 (Cal. 1884); and then citing People *ex rel.* Robarts v. Russ, 64 P. 111, 112 (Cal. 1901)). Under the California statutes, a "nuisance" is anything that "unlawfully obstructs the free passage or use . . . of any navigable lake, or river, bay, stream, canal, or basin . . .," CAL. CIV. CODE § 3479 (West 2021), and a "public nuisance" is one that affects "any considerable number of persons." *Id.* § 3480.

121. *Nat'l Audubon Soc'y*, 658 P.2d at 728.

122. *Id.* at 726, 728.

123. In post-*National Audubon* cases, the California courts have stated that *National Audubon* held that the state is required only to consider but not necessarily preserve public trust uses in regulating water. California v. Superior Ct. of Riverside County, 93 Cal. Rptr. 2d 276, 286 n. 18 (Cal. Ct. App. 2000); Carstens v. Cal. Coastal Comm'n, 227 Cal. Rptr. 135, 143 (Cal. Ct. App. 1986); *see* Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 459, 461 (2011). *National Audubon* was followed by the Hawaiian Supreme Court's decision in *In re* Water Use Permit Applications, 9 P.3d 409, 444–45, 452–54 (Haw. 2000), although, because Hawaii is not an arid or semiarid state like the continental western states that follow the doctrine of prior appropriation, the Hawaiian Supreme Court's decision would seem to have only limited value in integrating the public trust doctrine and the appropriative water rights laws of the continental western states.

124. *Mineral County*, 473 P.3d at 421.

judgment that finality of the water rights serves Nevada's public interest by promoting development of water resources necessary to meet the public's present and future needs.[125] The court declined to follow the California Supreme Court's decision in *National Audubon*.[126]

In the case, Mineral County, a county in Nevada, brought an action in a federal district court in Nevada against several water users who had adjudicated water rights in the Walker River. Mineral County claimed that their water rights were reducing inflows into Walker Lake, where the river terminates, thus causing harm to public trust uses in the lake, which consisted primarily of a fishery and recreational uses.[127] The Walker River is an interstate river that originates in California and flows into Nevada.[128] The defendant water users' rights had been adjudicated in a judicial decree, the Walker River Decree, which had been issued many decades earlier, in the 1930s.[129]

Mineral County argued that Nevada's public trust doctrine required the district court to modify the Walker River Decree to reallocate the water users' adjudicated rights in order to provide additional inflows into Walker Lake.[130] Mineral County's public trust claim relied heavily on the California Supreme Court's decision in *National Audubon*.[131] The defendant water users argued variously that the public trust doctrine does not apply to appropriative water rights, or at least not to appropriative water rights that have been adjudicated in judicial decrees, or—if the doctrine does apply—that the doctrine does not authorize reallocation of the adjudicated rights.[132] Thus, the issue raised in *Mineral County* was whether the public trust doctrine authorizes reallocation of adjudicated water rights to provide water for public trust uses.

The district court rejected Mineral County's public trust claim, ruling that the public trust doctrine applies prospectively to the state's future issuance of appropriative permits but not retrospectively to water rights that have already been adjudicated, and that—if the doctrine did apply—this would result in an unconstitutional taking of the water users' property rights.[133]

On appeal, the Ninth Circuit Court of Appeals ruled that the public trust issue is one of Nevada law and not federal law, and therefore that the issue should be decided by the Nevada Supreme Court.[134] Accordingly, the Ninth Circuit certified to the Nevada Supreme Court the question whether the public trust doctrine

125. *Id.* at 431.

126. *Id.* at 430 n.10.

127. *Id.* at 422–24.

128. *Id.* at 422.

129. *Id.*

130. *Id.* at 421.

131. *See Nat'l Audubon*, 33 Cal.3d at 726–28.

132. *Mineral County*, 473 P.3d at 429.

133. Mineral County v. Walker River Irrigation Dist., 900 F.3d 1027, 1030–31 (9th Cir. 2018).

134. *Id.*

applies to water rights that have been adjudicated and settled under the appropriation doctrine.[135] The Ninth Circuit also certified the question whether the public trust doctrine, if applied to such water rights, would result in a "taking" of property requiring payment of compensation under the Nevada Constitution.[136]

Responding to the first certified question, the Nevada Supreme Court held that the public trust doctrine *applies* to adjudicated water rights, but does not authorize *reallocation* of the rights to provide water for public trust uses.[137] Since the court held that the public trust doctrine does not authorize reallocation of the rights, the court did not reach the second certified question of whether reallocation would result in a "taking" of property.[138]

In answering the first question, the Nevada Supreme Court stated that the public trust doctrine, first recognized by the U.S. Supreme Court in *Martin v. Waddell* and expanded in its "seminal" decision in *Illinois Central*,[139] provides that the state holds its navigable waters and underlying lands in trust for the public, and requires that the state regulate the waters and lands in the public interest.[140] The public trust doctrine derives not only from the common law, the court stated, but also from Nevada's Constitution and statutes, and from the "inherent limitations" on the state's sovereignty established in *Illinois Central*.[141] Citing *Illinois Central*, the court stated that the state cannot use water for any purpose, but instead only for purposes that "comport with the public's interest"; the state is "simply without power" to dispose of public trust property when it is not in the public interest.[142] The public trust doctrine, the court stated, is based on the same principle that underlies Nevada's constitutional gift clause,[143] which prohibits gifts of public funds, because both the public trust doctrine and the gift clause provide that the state acts as a fiduciary for the public when administering and disposing of the public's

135. *Id*. at 1034.

136. *Id.*

137. *Mineral County*, 473 P.3d at 421–22. The Nevada Supreme Court rephrased the question certified by the Ninth Circuit—whether the public trust doctrine "applies" to adjudicated water rights—to read whether the doctrine "permits reallocating" of the rights. *Id.* Although the Nevada Supreme Court held that the doctrine "applies" to adjudicated rights, the court apparently assumed, correctly, that the Ninth Circuit wanted to know whether the doctrine authorizes reallocation of the rights, because Mineral County contended that the doctrine authorizes such reallocation. If the Nevada Supreme Court had simply held that the doctrine "applies" to the rights, the court would not have answered the question that the Ninth Circuit had in mind in certifying the issue to the Nevada Supreme Court.

138. *Id.* at 430.

139. *Id.* at 424 (first citing *Martin*, 41 U.S. 367, and then citing *Ill. Cent. R.R. Co.*, 146 U.S. 387).

140. *Mineral County*, 473 P.3d at 423–25.

141. *Id*. at 424.

142. *Id*. at 425.

143. NEV. CONST. art. VIII, § 9.

valuable property, and cannot dispose of the property except when in the public interest.[144]

The Nevada Supreme Court also held that the Legislature's statutory system for regulation of water rights "incorporates" the public trust doctrine, by "giving force" to the "constitutional and inherent limitations" on the state's authority that protect the "public interest" in the waters of the state.[145] The Legislature's statutory system incorporates the public trust doctrine, the court reasoned, because the statutory system provides that water "belongs to the public"; requires that water may be used only for a "beneficial use," which is defined as a "public use"; provides that a water right ceases to exist when the water is no longer put to beneficial use; and requires the State Engineer, who administers the statutory water rights system, to consider the "public interest" in granting appropriative water rights permits.[146] The court stated that the Legislature's statutory system of regulation does not "supersede" the public trust doctrine, but instead represents the Legislature's application of the doctrine to water rights.[147] The court also held that the public trust doctrine applies to all waters in the state, navigable or nonnavigable,[148] which is consistent with *National Audubon*'s view that the doctrine applies to tributaries of navigable waters.[149]

Turning to water rights adjudicated in judicial decrees, the court stated that the public trust doctrine applies to adjudicated water rights, and that adjudicated rights must be based on public trust principles, such as that water may be used only for a beneficial use and in the public interest.[150] The court also ruled, however, that the Legislature has expressly provided in the statutory laws that appropriative water rights that have been adjudicated in final judicial decrees are

144. *Mineral County,* 473 P.3d at 424.

145. *Id.* at 431; *id.* at 424 ("[T]he Legislature effectively codified the principles behind the public trust doctrine . . . " in enacting the statutory water rights laws).

146. *Id.* at 426–27.

147. *Id.* at 429 n.7.

148. *Id.* at 425–26.

149. The Nevada Supreme Court, in holding that the public trust doctrine applies to "all waters within the state, whether navigable or nonnavigable," seemingly implied that the doctrine applies to groundwater. *Mineral County*, 473 P.3d at 425. In *National Audubon*, on the other hand, the California Supreme Court stated that the public trust doctrine applies to surface waters and their tributaries, but specifically declined to consider whether the doctrine applies to groundwater. *Nat'l Audubon Soc'y* , 658 P.2d at 721 n.19. Subsequent to *National Audubon*, a California Court of Appeal held that the public trust doctrine applies to groundwater to the extent that activities in groundwater may affect public trust uses in navigable surface waters. Env't Law Found. v. State Water Res. Control Bd., 237 Cal. Rptr.3d 393, 406 (Cal. Ct. App. 2018).

150. *Mineral County*, 473 P.3d at 425.

final and conclusive and not subject to reallocation.[151] This statutory principle is consistent with public trust principles, the court stated, because it ensures the development of water for the public's present and future needs; these public needs, the court stated, include water for irrigation, power, municipal supply, mining, storage, recreation and other purposes—all of which benefit the people of Nevada and boost its economy.[152] The court described these public needs more fully, stating:

> Municipal, social, and economic institutions rely on the finality of water rights for long-term planning and capital investments. Likewise, agricultural and mining industries rely on the finality of water for capital and output, which derivatively impacts other business and influences the prosperity of the state. To permit reallocation would create uncertainties for future development in Nevada and undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine.[153]

The court, stating that "recognition of finality is vital in arid states like Nevada," also cited the United States Supreme Court's statement in a water rights dispute between Arizona and California that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States," and that "[t]he doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights."[154]

The Nevada Supreme Court also stated that its conclusion that adjudicated water rights are non-reallocable is supported by the court's prior decision in *Lawrence v. Clark County*, [155] which established a three-part test in determining whether the Legislature may dispose of a public trust resource; under this test, the Legislature may dispose of a trust resource only if the disposition is for a public purpose, the state receives fair consideration, and the state maintains the trust for

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151. *Id.* at 429 (citing NEV. REV. STAT. § 533.210(1) (2020)) ("The decree entered by the court . . . shall be final and conclusive upon all persons and rights lawfully embraced within the adjudication."); *id.* § 533.0245 ("The State Engineer shall not carry out his or her duties . . . in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court.").

152. *Mineral County*, 473 P.3d at 429.

153. *Id.*

154. *Id*. at 429 (*citing* Arizona v. California, 60 U.S. 605, 620 (1983)). The Nevada Supreme Court had previously declared that "[t]he public welfare is very greatly interested in the largest economic use of the waters of the state for agricultural, mining, power and other purposes." Application of Filippini, 202 P.2d 535, 539 (Nev. 1949) (quoting Ormsby County v. Kearney, 142 P. 803, 805 (Nev. 1914)).

155. Lawrence v. Clark County, 254 P.3d 606, 617 (Nev. 2011).

present and future generations.[156] *Mineral County* held that its decision is consistent with this three-part test because water may be used only for a beneficial use, which is a public use; the public receives fair consideration by gaining the benefit of water allocations for irrigation, power and other such uses; and the trust will be maintained for present and future generations by providing for development of water to meet the public's present and future needs.[157]

The Nevada Supreme Court declined to follow the California Supreme Court's decision in *National Audubon*, stating that *National Audubon* would "diminish the stability of prior allocations" and "detract from the simultaneous operation of both prior appropriation and the public trust doctrine.[158] Although the Nevada Supreme Court recognized the "tragic decline of Walker Lake," the court stated that it could not "use the public trust doctrine as a tool to uproot an entire water system, particularly where finality is firmly rooted in our statutes."[159]

In sum, *Mineral County* held that—although the public trust doctrine applies to adjudicated water rights and provides that the rights must be based on the public interest—the doctrine does not authorize reallocation of adjudicated rights to provide water for public trust uses because the Legislature has determined that finality of the rights is in Nevada's public interest by ensuring development of water supplies for the public's present and future needs. The court thus deferred to the Legislature's judgment that finality of adjudicated water rights is in the public interest, and held that the public trust does not mandate a contrary result by authorizing reallocation of the rights.

V. COMPARISON OF MINERAL COUNTY AND NATIONAL AUDUBON SOCIETY

The Nevada Supreme Court's and the California Supreme Court's respective interpretations of the public trust doctrine in *Mineral County* and *National Audubon* are similar in many important respects. Both decisions hold that the state possesses sovereign interests in navigable waters and underlying lands that are held in trust for the public. Both hold that the state has a public trust duty to regulate the waters and lands in the public interest, and not solely in the interests of the water users. Both hold that the public trust doctrine applies to existing water rights—including, in *Mineral County*, water rights that have been adjudicated by the courts. Both hold that the public trust doctrine applies not only to navigable waters, but also to nonnavigable tributaries of navigable waters.[160]

But the *Mineral County* and *National Audubon* decisions diverge in other significant respects, and establish two different and conflicting views of the public trust doctrine.

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156. *Mineral County*, 473 P.3d at 427–28.

157. *Id.*

158. *Id.* at 430 n.10.

159. *Id.* at 430.

160. *Mineral County*, 473 P.3d at 425 n.4; *Nat'l Audubon Soc'y*, 658 P.2d at 719–22.

A. Reallocation of Water Rights

First, and most obviously, *Mineral County* and *National Audubon* diverge on whether the public trust doctrine authorizes reallocation of water rights, at least water rights that have been adjudicated by the courts as in *Mineral County*. *Mineral County* held that while the public trust doctrine applies to adjudicated water rights, the doctrine does not authorize reallocation of the rights. *Mineral County* reasoned that the public trust doctrine requires the Legislature to regulate water in the public interest, and that the Legislature fulfilled its public trust responsibility in determining that finality of adjudicated rights is in the public interest—and therefore the public trust doctrine does not establish separate duties that override the legislative judgment.[161]

National Audubon, on the other hand, held that the public trust doctrine not only applies to existing water rights, but also requires the state to exercise continuing supervisory authority over the rights, with authority to modify and reallocate the rights to provide water for public trust uses.[162] *National Audubon* flatly held that the public trust doctrine authorizes "reallocation of the allocation of waters."[163]

Thus, *Mineral County* held that the public interest is served by finality of adjudicated water rights because finality ensures that water will be available for the public's present and future needs, and *National Audubon* held, conversely, that the public interest is served by reallocability of water rights because reallocability ensures that public trust uses will be preserved for present and future generations. The decisions thus fundamentally diverge on the nature of the public interest served by the public trust doctrine, in terms of whether the public interest is served by finality of water rights or by preservation of public trust uses.

Arguably, *Mineral County* and *National Audubon* might be distinguished and reconciled on grounds that neither decision directly addressed the reallocation issue decided by the other. Although *Mineral County* held that adjudicated water rights cannot be reallocated, *Mineral County* did not specifically address whether other types of water rights—such as water rights based on permits issued by the State Engineer under the state's appropriative water rights system—are also precluded from reallocation. Conversely, although *National Audubon* held that the State Water Board, which administers California's statutory water rights system, has continuing supervisory authority over its permits and may reallocate the rights to protect public trust uses, *National Audubon* did not specifically address whether water rights adjudicated by the courts—a different branch of government—are also subject to reallocation, either by the State Water Board or other authorities. Since *Mineral County* and *National Audubon* addressed the reallocation issue in different

161. *Mineral County*, 473 P.3d at 425–30.

162. *Nat'l Audubon Soc'y*, 658 P.2d at 727–29.

163. *Id.* at 737.

contexts—*Mineral County* in the context of court-adjudicated rights and *National Audubon* in the context of state-issued permits—the decisions might, arguably, be viewed as reconcilable and not in conflict.

More likely, however, the decisions embrace two different views of the public interest served by the public trust doctrine and cannot be distinguished. *Mineral County* apparently viewed water rights recognized under state law as final and conclusive and not subject to reallocation, regardless of whether the rights are based on judicial decrees or state-issued permits. *Mineral County* stated that the Legislature has determined that finality of water rights is in Nevada's public interest by ensuring availability of water for Nevada's vital present and future needs, such as for irrigation, domestic use, hydropower, and other such uses.[164] "[T]o permit reallocation," the court held, "would create uncertainties for future development in Nevada and undermine the public interest in finality and thus also the management of these resources consistent with the public trust doctrine."[165] The court favorably cited the U.S. Supreme Court's decision stating that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States."[166] *Mineral County* expressly declined to follow *National Audubon*, which it viewed as "diminish[ing] the stability of prior appropriations."[167] Thus, *Mineral County* appeared to regard finality of water rights as having a very high public value regardless of the source of the rights, such as whether they are based on judicial decrees or state-issued permits.

By contrast, *National Audubon* held that protection of instream public trust uses, such as Mono Lake's ecological values, is a very high public value and appeared to regard the preservation of these instream public trust uses as having a higher value than other uses of water. *National Audubon* held that public trust uses must be preserved if "feasible"; that the state has an "affirmative duty" to consider public trust uses in planning and allocation of water resources, and a "duty of continuing supervision" over water rights in order to protect public trust uses; and that the state is not bound by past water allocation decisions but instead may reconsider them to protect public trust uses.[168] Although the Nevada Supreme Court had held in another case that a state-based water right, whether based on a state permit or actual appropriation of water, is a "vested right" protected by constitutional guaranties,[169] *National Audubon* held that no one has a "vested right" to use water in a manner harmful to public trust uses.[170]

Thus, *Mineral County* regarded finality of water rights as having a very high public value even though this may adversely affect public trust uses, and *National*

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164. *Mineral County*, 473 P.3d at 429.

165. *Id.*

166. *Id*. (citing *Arizona*, 460 U.S. at 620).

167. *Mineral County*, 473 P.3d at 430 n.10.

168. *Nat'l Audubon Soc'y*, 658 P.2d at 727–28.

169. Application of Filippini, 202 P.2d 539, 537 (Nev. 1949).

170. *Nat'l Audubon Soc'y*, 658 P.2d at 732.

Audubon conversely regarded public trust uses as having a very high public value even though this may limit the finality of water rights. Because the decisions diverge on the relative importance of these public values, their divergence apparently does not depend on the source of the water rights in question.

B. Relationship Between Public Trust Doctrine and Statutory Water Rights Laws

Mineral County and *National Audubon* also diverge more broadly on the nature and scope of the public trust doctrine itself, in terms of the relationship between the common law doctrine and the statutory water rights laws. The question is whether the public trust doctrine is a separate body of common law that exists independently of the statutory water rights laws and must be integrated by the courts into the statutory laws, or instead whether the doctrine, although not by name, is already incorporated and integrated in the statutory laws. The question, then, is whether the courts should fashion common law principles that apply to and bind the legislative judgment in regulating water rights, or should instead defer to the legislative judgment in regulating the rights.

i. Whether Public Trust Doctrine Is Separate from, or Instead Incorporated in, Statutory Laws; Deference to Legislative Judgment

In *Mineral County*, the Nevada Supreme Court viewed the public trust doctrine and the statutory water rights laws as part of a unified and comprehensive system for regulation of water rights, in that the statutory laws codify and incorporate public trust principles.[171] The Court held that the public trust doctrine requires that the state regulate water rights in the public interest, and that the Legislature fulfilled its public trust responsibilities by enacting a statutory system in the public interest; as the Court noted, the statutory laws provide that the state's waters are owned by the public, that water may only be used for a beneficial use, which is a public use, and that the State Engineer must consider the public interest in issuing permits to appropriate water.[172] Based on this predicate, the Court deferred to the Legislature's judgment that finality of adjudicated water rights is in the public interest, because finality ensures that water will be available for the public's present and future needs, and the Court concluded that the public trust doctrine does not mandate a contrary result by authorizing reallocation of adjudicated rights.[173] Thus, *Mineral County*, rather than establishing common law principles that potentially override the legislative judgment, deferred to the legislative judgment that finality of the rights is in the public interest.

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171. *Mineral County*, 473 P.3d at 424 ("codified"), 431 ("incorporates").

172. *Id.* at 426–31.

173. *Id.*

Mineral County did not entirely defer to the legislative judgment, however. *Mineral County*, citing its earlier decision in *Lawrence v. Clark County,*[174] held that the state may dispose of a public trust resource only under limited circumstances—if the disposition is for a public purpose, the state receives fair consideration, and the state maintains the resource for present and future generations.[175] *Mineral County* then held that the Legislature's judgment that adjudicated water rights are final and non-reallocable is consistent with this three-part test.[176] Thus, while *Mineral County* generally deferred to the legislative judgment that finality of water rights is in the public interest, *Mineral County* also held that the legislative judgment is consistent with the Court's previously-established public trust principles.

National Audubon, on the other hand, stated that the statutory water rights laws and the public trust doctrine "exist[] independently of each other" and are on a "collision course," and must be "integrate[d]" in a way that gives meaning to both.[177] Thus, *National Audubon* viewed the public trust doctrine as a body of common law that is separate and distinct from, and in potential conflict with, the statutory laws, and that must be integrated by the Court into the statutory laws. Based on this predicate, *National Audubon* fashioned public trust principles that apply to and bind the legislative judgment in regulating water rights.[178]

In fashioning these principles, *National Audubon* acknowledged that California's statutory laws provide that "domestic use" is "the highest use of water in the State,"[179] which was the basis for the State Water Board's 1940 decision that issued an appropriative permit to Los Angeles Department of Water and Power. *National Audubon* stated that the statutory priority for domestic use must be read in conjunction with "judicial decisions explaining the policy embodied in the public

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174. *Mineral County*, 473 P.3d at 427–29 (citing Lawrence v. Clark County, 254 P.3d 606, 616 (Nev. 2011)).

175. *Mineral County*, 473 P.3d at 427–29. In *Illinois Central*, the Supreme Court held that the state can dispose of public trust resources in lands underlying navigable waters if such disposition "promote[s]" the public interest. *Ill. Cent. R.R. Co.*, 146 U.S. at 453. On the other hand, the California Supreme Court ruled, in a case decided shortly before *National Audubon*, that the state can dispose of trust property in lands underlying navigable waters, such as tidelands, only if the lands are "substantially valueless" for trust purposes. *City of Berkeley v. Superior Court*, 606 P.2d 362, 374 (Cal. 1980). Thus, while *Mineral County* and *Illinois Central* held that the state can dispose of trust resources under some circumstances if the disposition is in the public interest, the California Supreme Court in *City of Berkeley* held that the state can dispose of trust resources only if the lands are no longer capable of serving trust uses.

176. *Mineral County*, 473 P.3d at 427–29.

177. *Nat'l Audubon Soc'y*, 658 P.2d at 712, 732.

178. *Id.* at 727–28.

179. *Id*. at 713 (citing CAL. WATER CODE § 1254 (West 2021) ("In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water."). *See also* CAL. WATER CODE § 106 (West 2021) ("It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.").

trust doctrine," which limit the Legislature's statutory priority.[180] *National Audubon* then stated, without citation of authority, that the state is required to preserve public trust uses if "feasible."[181] Thus, while the Legislature provided that domestic use is the highest priority of water use in California, *National Audubon* instead held that public trust uses, if "feasible," are the highest priority, because the legislative priority must be read in conjunction with the court's own decisions establishing priorities of use. *National Audubon* also stated that the public trust doctrine precludes "the possibility that statutory protections [of public trust uses] can be repealed,"[182] thus indicating that the Legislature is powerless to repeal its own statutes that may protect public trust uses. *National Audubon* thus established public trust principles that apply to and bind, and even override, the legislative judgment in regulating water rights.

Additionally, *National Audubon* held that the public trust doctrine requires that the state exercise continuing authority over water rights, with authority to impose additional conditions in the rights and even revoke them, to protect public trust uses.[183] California's statutory laws, on the other hand, authorize the State Water Board to exercise continuing authority over its water right permits only under defined and limited circumstances, none of which relate to public trust uses.[184] Thus, while the statutory laws authorize the State Water Board to exercise continuing authority over water rights under defined and limited circumstances, *National Audubon* held that the public trust doctrine authorizes the Board to exercise continuing authority over water rights to protect public trust uses if "feasible." Although the issue of whether the state has continuing authority over water rights to protect public trust uses involves an important issue of the state's public policy in regulating water rights, *National Audubon* decided this significant policy issue itself rather than allowing the Legislature to decide it.

Thus, while *Mineral County* viewed the public trust doctrine and the statutory laws as part of a unified and comprehensive system of regulation, and

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180. *Nat'l Audubon Soc'y*, 658 P.2d at 729 n.30.

181. *Id*. at 728.

182. *Id*. at 728 n.27.

183. *Id*. at 727–28.

184. The State Water Board is authorized to reserve jurisdiction over a permit if sufficient information is not available to establish final terms and conditions of the permit, or if the permit application relates to only part of a coordinated project. CAL. WATER CODE § 1394 (West 2021); *see United States v. State Water Res. Cont. Bd.*, 182 Cal. App. 3d 82, 102, 150 (Cal. 1986) (holding that State Water Board has reserved jurisdiction to impose additional conditions in appropriative water right permits issued to federal Central Valley Project and State Water Project). The State Water Board may revoke a permit if the permittee has not proceeded with due diligence to put water to beneficial use, CAL. WATER CODE § 1410, or if the permitted works are not in conformity with the statutory or regulatory laws, or with the terms of the permit. *Id.* § 1611. The State Water Board cannot reserve jurisdiction over a license, however. *Id.* § 1394.

deferred to the legislative judgment that finality of adjudicated rights is in the public interest, *National Audubon* viewed the public trust doctrine and the statutory laws as different bodies of law that are on a "collision course" and must be integrated by the courts into a unified system of regulation. While *National Audubon* integrated public trust principles into the statutory laws, *Mineral County* held that public trust principles are already integrated into the statutory laws.

Although *National Audubon* defined public trust principles separately from the statutory laws, certain passages in *National Audubon* indicate that the Legislature is ultimately responsible for regulating water rights and determining the appropriate balance between public trust uses and other uses of water. *National Audubon* stated that as a matter of "current and historical necessity" the state may approve water diversions even though the diversions may "unavoidably impair" trust uses in source streams.[185] *National Audubon* stated that the state, in regulating water rights, is required only to consider—but not necessarily preserve—public trust uses, at least if the trust uses are not "feasible."[186] *National Audubon* stated that public trust uses must yield when in conflict with public interest standards established under the constitutional and statutory laws; the Court stated that "all uses of water, *including public trust uses*, must conform to the standard of reasonable use" established under the California Constitution,[187] and that the state must preserve public trust uses only to the extent "consistent with the public interest" as established under the statutory laws.[188] These passages suggest, contrary to other passages in *National Audubon*, that the courts should defer to the legislative judgment rather than adopt common law rules that override it.

In pre-*National Audubon* cases involving tidelands and other lands underlying navigable waters, the California Supreme Court held that the legislature is responsible for administering the public trust and that its judgment is "conclusive."[189] The court in some such cases upheld the legislature's authorization of activities in navigable waters and underlying lands that promoted commerce—a recognized public trust use—even though the activities impaired other trust uses, such as navigation and fisheries.[190] These decisions suggest that the courts should

185. *Nat'l Audubon Soc'y*, 658 P.2d at 727.

186. *Id*. at 728.

187. *Id*. at 725 (citing CAL. CONST. art. X, § 2) (emphasis added).

188. *Id*. at 728.

189. City of Long Beach v. Mansell, 476 P.2d 423, 437 n. 17 (Cal. 1970); Mallon v. City of Long Beach, 282 P.2d 481, 486 (Cal. 1955); *see* Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971) ("It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished.").

190. Colberg, Inc. v. California, 432 P.2d 3, 10 (Cal. 1967); Boone v. Kingsbury, 273 P. 797, 812 (Cal. 1928). In *Colberg, Inc. v. California*, the California Supreme Court upheld a legislative enactment authorizing construction of a bridge over a navigable waterway, even though the bridge impaired navigation by preventing ships from having access to shipyard facilities. *Colberg, Inc.*, 432 P.2d at 10. The

defer to the legislature's "conclusive" judgment in regulating water rights, rather than adopt common law principles that limit or override the legislative judgment. *National Audubon* appears consistent with these earlier decisions in stating that as a matter of "current and historical necessity" the state may authorize water diversions that impair public trust uses in source streams,[191] but not in stating, for example, that "feasible" public trust uses have higher priority than domestic uses that the legislature regarded as having the highest priority.[192]

Subsequently to *National Audubon*, the California Supreme Court appeared to rule in another case that if a statute defines a state agency's regulatory duties, then the agency's regulatory duties are defined by the statute rather than the common law public trust doctrine. In *Environmental Protection & Information Center v. California Department of Forestry and Fire Protection* (*EPIC*),[193] an environmental plaintiff brought an action against the California Department of Fish and Game (DFG), alleging that DFG's issuance of an incidental take permit under the California Endangered Species Act (CESA) violated both CESA and the public trust doctrine. The California Supreme Court held that DFG's permit violated CESA but not the public trust doctrine.[194] The court stated that there are "two distinct public trust doctrines," one the "common law" doctrine described by *National Audubon* and the other based on the "statute," i.e., CESA, that defined the agency's duties, and that it would look to the statute and not the common law doctrine to determine whether the agency had violated its regulatory duties.[195] *EPIC* appears consistent with the California Supreme Court's pre-*National Audubon* decisions holding that the Legislature exercises "conclusive" judgment in administering the public trust, and appears at least to be in tension with passages in *National Audubon* stating that the public trust doctrine may limit and override the legislative

Court stated that the bridge was necessary for the state's commercial development, and that "the state, as trustee for benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise." *Id*. at 10. Similarly, in *Boone v. Kingsbury*, the California Supreme Court held that the state was authorized to issue permits for exploration of gas and oil in tidal or submerged lands, because the explorations were vital to California's and the nation's commerce, in that gasoline "is a mover of commerce and fills the office of 'a public benefit.'" *Boone*, 273 P. at 812. The state's judgment, the Court stated, is "conclusive" in such matters. *Id.* at 813.

191. *Nat'l Audubon Soc'y*, 658 P.2d at 727.

192. *Id.* at 728.

193. 187 P.3d 888 (Cal. 2008).

194. *Id*. at 925–26.

195. *Id*.

judgment, such as the legislative judgment that domestic use of water is the highest priority of use.[196]

ii. Protection of Public Trust Uses Under California's Constitutional and Statutory Laws

National Audubon—in stating that the statutory water rights laws and the public trust doctrine are a "collision course" and must be "integrate[d]"—appeared not to fully consider the extent to which the water rights laws of California and other western states provide significant protection of the public interest in regulation of water and thus incorporate the principles on which the public trust doctrine is based.

As noted earlier, California's constitutional and statutory water rights laws, like the laws of many other western states, provide that water may only be used for uses that are generally regarded as beneficial to the public.[197] More specifically, the California Constitution provides that all water rights in California are subject to the rule of reasonable and beneficial use, generally referred to as the rule of reasonable use.[198] As *National Audubon* recognized, the rule of reasonable use "establishes state water policy" and applies to public trust uses.[199] The rule of reasonable use applies to all water rights in California, including both appropriative and riparian rights in surface waters,[200] as well as rights in groundwater.[201] Thus, a recognized water right must not only be beneficial to the public, but must also be reasonable in light of competing uses dependent on the same water resource. The California Supreme Court has held that the rule of reasonable use requires the state, in regulating water rights, to consider "statewide issues of transcendent

196. In *Env't L. Found. v. State Water Res. Cont. Bd.* (*ELF*), 26 Cal.App.5th 844 (2018), the California Court of Appeal stated that *EPIC* is distinguishable from *National Audubon* because *EPIC* "is not a water rights case" and instead involved "the public trust in wildlife"; the regulation of wildlife, the court stated, is "primarily statutory" and thus distinguishable from the public trust in water, "which is based on the common law." In fact, the public trust doctrine is a common law doctrine as applied to both wildlife and water, because the doctrine is not provided for in the statutes applicable to either, and indeed water is regulated by the statutes as much as, and in fact more than, wildlife is regulated by the statutes. *See, e.g.*, CAL. WATER CODE §§ 1200 (West 2021) (establishing comprehensive statutory requirements applicable to State Water Board's regulation of water rights). Thus, there appears little basis for *ELF*'s distinction between wildlife and water in terms of the relationship between the common law public trust doctrine and the Legislature's statutes.

197. *See supra* text accompanying notes 50–63.

198. CAL. CONST. art. X, § 3; CAL. WATER CODE § 100 (West 2021).

199. *Nat'l Audubon Soc'y*, 658 P.2d at 725.

200. Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 892–96 (Cal. 1967); Peabody v. City of Vallejo, 40 P.2d 486, 491, 498–99 (Cal. 1935); People *ex rel.* State Water Res. Cont. Bd. v. Forni, 54 Cal.App.3d 743, 750–51 (Cal. Ct. App. 1976); Light v. State Water Res. Cont. Bd., 226 Cal. App. 4th 1463, 1479–80 (Cal. Ct. App. 2014).

201. City of Barstow v. Mojave Water Agency, 5 P.3d 853, 862–63 (Cal. 2000).

importance," such as "the ever increasing need for conservation of water in this state."[202] Additionally, California's statutory laws, like those of other western states, require that water rights must be consistent with the "public interest."[203] California's State Water Board may issue an appropriative permit only if the proposed use is in the "public interest" and may impose conditions in the permit to protect the "public interest."[204] California's statutory laws also provide that "[a]ll water within the State is the property of the people of the State,"[205] thus incorporating the public trust principle that navigable waters belong to the public rather than the water user.

Thus, although California's water rights laws do not explicitly incorporate the public trust doctrine as such,[206] they provide significant protection of the public interest that is the objective of the doctrine as described in *Illinois Central* and its progeny. The public trust doctrine and the constitutional and statutory laws may not be on the "collision course" depicted by *National Audubon*, because the constitutional and statutory laws provide significant accommodation and inclusion of the foundational principles of the doctrine.

This suggests that *National Audubon* might have reached the same result in protecting public trust resources in Mono Lake by holding that the State Water Board was authorized under the constitutional and statutory laws to reconsider LADWP's water right permit and impose conditions to protect the trust resources, rather than by invoking common law public trust principles that had never been applied to regulation of water. In fact, the California courts have held that under the rule of reasonable use, as codified in the California Constitution and the statutes, the State Water Board is authorized to take action to prevent water uses that are not reasonable and beneficial.[207] In *National Audubon*, the State of California argued that under the rule of reasonable use and accompanying statutes, the State Water Board was authorized to reconsider LADWP's appropriative permit and impose additional conditions to protect public trust uses in Mono Lake.[208] *National Audubon* disregarded the argument, stating that it "need not resolve that

202. *Joslin,* 429 P.2d at 894–95.

203. *See supra* text accompanying notes 50–63.

204. CAL. WATER CODE §§ 1253, 1255, 1257 (West 2021); *see supra* text accompanying note 62.

205. CAL. WATER CODE § 102 (West 1943).

206. CAL. WATER CODE §§ 1120, 85023 (West 2021). Subsequently to *National Audubon*, the California Legislature amended the Water Code to generally provide that its provisions apply to State Board decisions based on the public trust doctrine, but without otherwise specifying how the doctrine may apply to regulation of water rights. CAL. WATER CODE §§ 1120, 85023 (West 2021).

207. *Forni*, 54 Cal. App. 3d at 750–51 (holding that under rule of reasonable use the State Board is authorized to take action and adopt regulation limiting water diversions for frost protection); *Light*, 226 Cal. App. 4th at 1479–80 (same); *see* CAL. WATER CODE § 275 (West 2021) (authorizing State Board to take judicial action to prevent "unreasonable use" of water).

208. *Nat'l Audubon Soc'y*, 658 P.2d at 728 n.28.

controversy" because it relied on the public trust doctrine to reach its result.[209] Perhaps *National Audubon* might have rested on a sounder jurisprudential footing if the decision were based on recognized constitutional and statutory principles rather than not previously applied common law principles, particularly if it could have reached the same result under the former approach.

In fact, *National Audubon*'s integration of common law and statutory principles appears to have resulted in certain incongruities. *National Audubon* held, on the one hand, that public trust uses must be protected if "feasible"[210] but, on the other, that public trust uses must be protected only if consistent with the "public interest,"[211] which is the statutory standard that the State Water Board applies in regulating water rights.[212] If, as *National Audubon* held, public trust uses must be protected if "feasible" but not if inconsistent with the "public interest" standard that otherwise applies to water rights, this means that "feasible" public trust uses would have no meaningful protection at all, because they must always yield when in conflict with the "public interest" standard that applies to water rights. Thus, there appears to be a conflict between *National Audubon*'s common law "feasible" standard and its statutorily based "public interest" standard. At least one California court has noted the apparent contradiction and resolved it in favor of the "public interest" standard; the court rejected a plaintiff's argument that a public trust use must be preserved because it was "feasible," stating that *National Audubon* held that public trust uses must be preserved only if "consistent with the public interest" as determined by the State Water Board.[213]

Perhaps because *National Audubon* rested on a common law ground rather than on constitutional or statutory grounds, *National Audubon* appears not to have had a major effect on water rights in California, at least to the extent that the rights are judicially reviewable. Although *National Audubon* was originally hailed by some as establishing a foundational principle of water law that would have a major impact on regulation of water rights, California's constitutional and statutory water rights laws weave such a comprehensive and extensive web of regulation of water rights that little room is left for application of judicially fashioned common law principles.[214] The California courts, in determining whether the State Water Board has properly exercised its duties in regulating water rights, have generally relied on the statutes defining the Board's regulatory duties, and either have not mentioned the public trust doctrine or mentioned it only in

209. *Id.*

210. *Id.* at 727.

211. *Id.* at 728.

212. CAL. WATER CODE §§ 1253, 1255, 1257 (West 2021).

213. State Water Res. Cont. Bd. Cases, 136 Cal. App. 4th 674, 778 (Cal. 2006).

214. *See supra* notes 33–42 and accompanying text.

passing.[215] No California court decision to date appears to have overturned or limited a State Water Board decision, regulation, or other action on grounds that the Board has improperly exercised its public trust duties as defined in *National Audubon*.[216] This appears to be the consequence of California's comprehensive statutory system for regulation of water rights.

iii. Separation-of-Powers Principles

The question of whether the courts should defer to the legislative judgment or instead adopt common law public trust principles that potentially override the legislative judgment, as addressed in *Mineral County* and *National Audubon*, is suffused with constitutional issues concerning the separation of the legislative and judicial powers. Under separation-of-powers principles, which are codified in the constitutions of California and Nevada,[217] the legislative branch

215. In the leading case of *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82 (Cal. 1986), the California Court of Appeal held that the State Water Board is required under the statutory laws, including the statutes establishing the rule of reasonable use and the water quality statutes, to adopt water quality standards in appropriative water rights permits issued to the federal Central Valley Project and the State Water Project, *id.* at 115–30, and the court mentioned the public trust doctrine in passing, *id.* at 106, but did not rely on the doctrine in reaching its decision. *Id.* The court held, however, that the State Water Board has continuing jurisdiction to impose additional conditions for water rights permits under the California Constitution and statutes, under the permit terms and conditions themselves, and under the principle established in *National Audubon*. *Id.* at 149–50. In *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006), the California Court of Appeal held that the State Water Board is required to adopt flow standards for protection of salmon under the statutory laws, and near the end of the decision, rejected the plaintiff's argument that the Board's flow standards violated the public trust doctrine, stating that the Board is required under the statutory laws to determine whether the flow standards are in the "public interest." *Id*. at 777–78. In *Light v. State Water Resources Control Board*, 226 Cal. App. 4th 1463 (Cal. 2014), the California Court of Appeal held that the State Water Board has statutory authority to adopt regulations limiting water diversions for frost protection of crops, *id.* at 1481–83, and mentioned the public trust doctrine in passing, *id.* at 1480, but did not rely on the doctrine in reaching its decision. *Id.* In *El Dorado Irrigation District v. State Water Resources Control Board*, 142 Cal. App. 4th 937 (Cal. 2006), the California Court of Appeal held that the State Water Board abused its discretion in amending a permit affecting priority of rights without amending other permits for the same purpose, *id.* at 961–66, and mentioned the public trust doctrine in passing, *id.* at 966, but did not rely on the doctrine in reaching its decision. *Id.*

216. In *Environmental Law Foundation v. State Water Resources Control Board*, 26 Cal. App. 5th 844 (Cal. 2018), the California Court of Appeal, citing *National Audubon*, held that the public trust doctrine applies to counties because they are subdivisions of the state, and requires the counties, in issuing permits for new wells, to determine whether groundwater pumping from the new wells affects public trust uses in nearby navigable waters. *See id.* at 867–68.

217. CAL. CONST. art. III, § 3; NEV. CONST. art. III, § 1.

exercises the core function of enacting the laws, and the judicial branch exercises the core function of interpreting the legislative enactments and determining their constitutionality.[218] While these core functions may overlap, in that the actions of one branch may incidentally and even significantly affect those of the other,[219] neither branch may materially impair the inherent functions of the other branch, or arrogate to itself the other branch's core functions.[220] As a general rule, the legislative branch is responsible for establishing the state's public policy, and the judicial branch cannot independently evaluate the wisdom of the legislature's policy judgments.[221]

The courts, in exercising their core function of interpreting the laws, would seem the appropriate institution to determine the broad contours of the public trust doctrine, in terms of the nature and scope of the state's duties under the doctrine. Just as the United States Supreme Court in *Illinois Central* exercised the judicial function in determining that states have sovereignty over navigable waters under the equal footing doctrine and are required to regulate the waters in the public interest,[222] the state courts appear to properly exercise the judicial function of determining whether the state is in fact regulating the waters in the public interest rather than the private interest. If, for example, a state legislature adopted a water rights program under which water rights are sold to the highest bidder in the marketplace without regard to the public interest, the courts might properly overturn the legislative program because the legislature has failed to regulate water rights in the public interest. Both *Mineral County* and *National Audubon* agreed that the common law public trust doctrine requires that the state regulate waters in the public interest.[223]

In terms of *how* the state regulates water rights in the public interest, however, this appears to primarily involve policy judgments that are within the legislative rather than judicial sphere. In allocating water among competing uses, the state necessarily determines which competing use or uses of water best serve and protect the public interest, and the appropriate balance between the uses, and the legislature and not the courts is the appropriate institution for making these policy judgments.[224] Since the legislature is directly elected by and accountable to the public, its judgment, almost by definition, reflects the public interest. In *Illinois*

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218. N. Lake Tahoe Fire Prot. Dist. v. Washoe County Bd. of County Comm'rs, 310 P.3d 583, 586 (Nev. 2013); Superior Court. v. County of Mendocino, 913 P.2d 1046, 1051 (Cal. 1996); Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 539 (Cal. 2001); *In re* Rosenkrantz, 59 P.3d 174, 208 (Cal. 2002); Younger v. Superior Ct., 577 P.2d 1014, 1024 (Cal. 1978); Bixby v. Pierno, 481 P.2d 242, 250 (Cal. 1971); Davis v. Mun. Court., 757 P.2d 11, 17 (Cal. 1988).

219. *Younger*, 577 P.2d at 1024; *Rosenkrantz*, 59 P.3d at 208.

220. *Rosenkrantz*, 59 P.3d at 208; *Younger*, 577 P.2d at 1022–24.

221. *Mendocino*, 913 P.2d at 1051.

222. *See supra* text accompanying notes 70–81.

223. Mineral County, 473 P.3d at 427–28; *Nat'l Audubon Soc'y*, 658 P.2d at 728.

224. *See* text accompanying notes 50–65, *supra*.

Central, for example, it was the Illinois legislature—not the Illinois courts—that made the policy judgment of rescinding the grant of a fee interest in lands underlying Lake Michigan in order to utilize the lands for other public purposes, and the Supreme Court upheld the Illinois legislature's right to make this policy judgment.[225] Thus, the legislative branch is the institution responsible for allocating water among competing uses and for determining the appropriate balance between public trust uses and other uses, such as, for example, the balance between environmental uses, on the one hand, and economic and consumptive uses like agricultural and domestic uses, on the other.

There is, of course, no bright line that separates these core judicial and legislative functions, and that distinguishes between the judicial function, which is to ensure that the state regulates water in the public interest, and the legislative function, which is to actually regulate water in the public interest. Each branch is responsible for exercising its own core function and for avoiding intrusion into the core function of the other branch. *Mineral County* was very heedful of separation-of-powers principles in deferring to the legislative judgment that finality of water rights is in the public interest; the Court directly stated that "we [cannot] substitute our own policy judgments for the Legislature's."[226] *National Audubon* was also heedful of separation-of-powers principles in concluding that the state, through the Legislature or the State Water Board, may as a matter of "current and historical necessity" authorize water uses that impair public trust uses. But the court appeared less heedful of these principles in concluding, for example, that public trust uses have a higher priority than domestic uses that the Legislature determined have the highest priority.[227]

C. Nature and Location of Public Trust Uses

Mineral County and *National Audubon* also appear to diverge concerning the nature and location of the water uses that are within the ambit of the public trust doctrine. *Mineral County* viewed the doctrine as protecting all uses of water that the legislature has deemed beneficial to the public—including both economic and environmental uses—and *National Audubon*, while recognizing that the doctrine may protect economic uses as well as environmental uses, focused so extensively on environmental uses that the Court appeared to view the doctrine as primarily protecting environmental uses rather than other public uses. Also, *Mineral County* viewed the doctrine as protecting public trust uses whether within the source stream or elsewhere, and *National Audubon* viewed the doctrine as protecting only public trust uses within the source stream.

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225. *Ill. Cent. R.R. Co.*, 146 U.S. at 452–55.

226. *Mineral County*, 473 P.3d at 430.

227 *See Nat'l Audubon Soc'y*, 658 P.2d at 728, 732.

More specifically, *Mineral County* held that the public trust doctrine does not authorize reallocation of the defendants' appropriative water rights to provide more water for downstream public trust uses in Walker Lake.[228] The defendants' appropriative rights in *Mineral County* included the right to divert water for various consumptive uses, such as "irrigation, power, municipal supply, mining, [and] storage."[229] The use of water for such purposes, the Court stated, enabled the state's residents to "grow or purchase food and receive drinking water, electricity, and other resources," and enabled "[f]armers and miners . . . to grow their industries, which in turn boosts the state's economy."[230] *Mineral County* also made clear that the public trust doctrine protects not only these consumptive uses but also environmental uses, such as recreation, wildlife protection, wetlands, and fisheries.[231] Thus, *Mineral County* held that the public trust doctrine protects both consumptive economic water uses and non-consumptive environmental uses.[232] In terms of location of the uses, the defendants' appropriative water rights upheld in *Mineral County* in many cases authorized diversions of water from the Walker River to other locations, such as for municipal use and power generation, and thus the uses were out-of-stream rather than solely instream.[233] Thus, *Mineral County* held that the public trust doctrine broadly protects all water uses that are in the public interest as defined by the legislature, including both economic and environmental uses, and regardless of whether the uses are within the source stream or elsewhere.[234]

In contrast, *National Audubon*, although acknowledging in passing that the public trust doctrine protects both commerce and environmental uses of water,[235] focused so exclusively on environmental uses in source streams that the court appeared to view the doctrine as primarily protecting instream environmental uses rather than other uses of water. *National Audubon* stated that public trust uses do not include "all public uses" of water but only "uses and activities in the vicinity of" source streams,[236] thus making clear that doctrine protects only instream uses and

228. *Mineral County*, 473 P.3d at 430.

229. *Id.* at 428.

230. *Id*.

231. *Id.* at 426–27.

232. *Id.* at 426–28.

233. *Mineral County*, 473 P.3d at 422, 428.

234. *Id.* at 428.

235. *National Audubon* stated early in its decision that "the triad of [public trust] uses—navigation, commerce and fishing—did not limit the public interest in the trust res," *Nat'l Audubon Soc'y*, 658 P.2d at 719, and later acknowledged in a footnote that public trust uses include commerce as well as environmental uses, and that the Legislature has the right to prefer one such trust use over another. *Id*. at 722 n.21. But these passages were not the main focus of the decision. *National Audubon* appeared to differentiate between instream environmental uses and commerce uses, stating that the state cannot grant tidelands free of the public trust simply because the grant may serve "some public purposes" such as a "commercial" purpose. *Id*. at 724.

236. *Id.* at 724.

not out-of-stream uses. In describing the instream uses protected by the doctrine, *National Audubon* mentioned only environmental uses, such as recreation, aesthetics, fishing, hunting, bathing, swimming, and preservation of tidelands in their "natural state."[237] The state has an "affirmative duty," the Court stated, to "protect the people's common heritage of streams, lakes, marshlands and tidelands."[238] In the case at hand, *National Audubon* applied the public trust doctrine to protect specific instream environmental uses, such as aesthetics, recreation and air quality, in Mono Lake, which the Court described as "a scenic and ecological treasure of national significance."[239] *National Audubon* favorably cited law review articles that argued that the public trust doctrine should be interpreted to protect instream environmental values and uses.[240] Other court decisions have also cited *National Audubon* as protective of instream environmental uses.[241] As one court stated, "although the [public trust] doctrine originally protected navigable waterways for the purposes of navigation, commerce, and fishing, *Audubon Society* . . . expanded the purpose of the doctrine to the preservation of water's function as natural habitat."[242]

Thus, while *Mineral County* viewed the public trust doctrine as protecting public uses of water regardless of the nature of the public use and regardless of whether the use is instream or out-of-stream, *National Audubon* viewed the doctrine as primarily protecting environmental uses within the source stream. To be sure, *National Audubon* acknowledged that as a matter of "current and historical necessity" the state may approve water diversions for out-of-stream uses even though this may "unavoidably impair" trust uses in the source stream.[243] But *National Audubon* did not regard these out-of-stream uses as public trust uses, because in its view public trust uses consist only of "uses and activities in the vicinity of" the source stream.[244] Thus, *National Audubon* viewed the state's authority to allocate water for out-of-stream uses as an exception to the public trust doctrine, which was justified by "current and historical necessity," while *Mineral County*

237. *Id.* at 719.

238. *Id.* at 724.

239. *Nat'l Audubon Soc'y*, 658 P.2d at 712.

240. The law review articles favorably cited by *National Audubon* bore such titles as "Some Reflections on Environmental Considerations in Water Rights Administration," "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right," and "Public Trust Protection for Stream Flows and Lake Levels." *Id.* at 709 n.15, 720–21, 728.

241. *See, e.g.*, Light v. State Water Resources Control Board, 173 Cal. Rptr. 3d 200, 212 (Cal. Ct. App. 2014); Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 596–97 (Cal. Ct. App. 2008).

242. *Light*, 173 Cal. Rptr. 3d at 211; *see also FPL Group*, 83 Cal. Rptr. 3d at 596–97 ("[A]n important purpose of the public trust over bodies of water is to protect the habitat for wildlife . . . .").

243. *Nat'l Audubon Soc'y*, 658 P.2d at 727.

244. *Id.* at 723.

viewed the state's authority to allocate water for such out-of-stream uses as a feature of the public trust doctrine itself.

This does not suggest, of course, that *National Audubon* held or implied that the public trust doctrine protects only instream environmental uses and not other uses, but rather that *National Audubon*'s virtually exclusive focus on instream environmental uses indicates that *National Audubon* viewed the doctrine as *primarily* protecting such uses rather than other uses. The difference between *Mineral County* and *National Audubon* in this respect is one of degree and not kind, in that *Mineral County* viewed the doctrine as protecting all public uses of water whether instream or out-of-stream, and *National Audubon* viewed the doctrine as primarily protecting instream environmental uses rather than other uses. Thus, *Mineral County* appeared to view the public trust doctrine as a doctrine of state sovereignty, in that it protects the state's sovereign right to regulate water in the public interest regardless of the nature of the public interest, and *National Audubon* appeared to view the doctrine primarily as an environmental law doctrine, in that it primarily protects instream environmental uses. Since *National Audubon* was decided in the wake of Congress' passage of various environmental laws—such as the National Environmental Policy Act (1969),[245] the Clean Air Act (1970),[246] the Clean Water Act (1972),[247] and the Endangered Species Act (1973),[248] as well as California's passage of the Porter-Cologne Act (1969),[249] which provides for regulation of water quality--*National Audubon* might be viewed as establishing a corollary common law principle of environmental law in the context of regulation of water.

Mineral County's view that the public trust doctrine protects myriad public uses of water appears to more closely align than *National Audubon* with the traditional view of the public trust doctrine, as the doctrine was developed in the English common law and applied by the Supreme Court in its seminal decision in *Illinois Central*. In *Illinois Central*, the Supreme Court held that the public trust doctrine protects non-environmental public uses of water, such as "navigation" and "commerce," as well as environmental uses, such as "fisheries."[250] Indeed, *Illinois Central* applied the doctrine to uphold Illinois' right to revoke its grant of a fee interest in lands underlying Lake Michigan to develop the lands for commercial purposes, specifically to create a harbor for "shipping and commerce."[251] Earlier, in *Martin v. Waddell*,[252] which laid the foundation for the public trust doctrine, the Supreme Court stated that the state holds navigable waters for the "common use"

245. 42 U.S.C. §§ 4321–47.

246. 42 U.S.C. §§ 7401–671.

247. 33 U.S.C. §§ 1251–388.

248. 16 U.S.C. §§ 1531–44.

249. CAL. WATER CODE § § 13000–16104.

250. *Illinois Cent. R.R. Co.*, 146 U.S. at 452.

251. *Id*. at 437–38.

252. 410 U.S. 367 (1842).

of the public,[253] and identified "common use" as including *inter alia* "navigation, fishery, [and] the mooring of vessels."[254] Earlier still, under the English common law, the English Crown's sovereignty over navigable waters was subject to "common rights" of the public, including the public's right of navigation and free passage.[255] Thus, the public trust doctrine, as it has evolved from the English common law to modern American law, has been recognized as protecting a broad array of public uses of water and not just environmental uses. The doctrine traditionally has been agnostic regarding the nature of protected public trust uses. In this respect, *Mineral County*'s view of the doctrine more closely follows the traditional view of the doctrine established in *Illinois Central* and its progenitor decisions than *National Audubon*.

This does not, of course, suggest that either *Mineral County* or *National Audubon* provided a more "correct" interpretation of the public trust doctrine, as if there were such a more correct interpretation. As the United States Supreme Court has held, each state is responsible for developing its own public trust doctrine and determining its own public trust duties.[256] The public trust doctrine is a flexible doctrine that allows each state to determine its own public interest in regulation of water, as informed by its own public needs, putting aside the institutional issue of whether this policy judgment should be made by the legislative or judicial branches. It is nonetheless instructive that while *National Audubon* interpreted the public trust doctrine broadly as applied to environmental uses, *Mineral County* interpreted the doctrine more broadly than *National Audubon* as applied to the conglomeration of public uses protected under the doctrine.

D. Potential Limitation of Public Trust Doctrine: Taking of Property

The question of whether the public trust doctrine authorizes reallocation of water rights, as raised in *Mineral County* and *National Audubon*, raises the constitutional issue of whether such reallocation would result in a taking of property under the Takings Clause of the United States Constitution, thus entitling the holders of the rights to compensation. The Takings Clause, found in the Constitution's Fifth Amendment and made applicable to the states in the Fourteenth Amendment, provides that property may not be taken for public use without payment of compensation.[257]

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253. *Id*. at 410–11.

254. *Id*. at 383, 385.

255. PPL Mont., LLC v. Montana, 565 U.S. 576, 589–90 (2012).

256. *See supra* notes 86–87**,** and accompanying text.

257. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Webb's Fabulous Pharm. v. Beckwith, 449 U.S. 155, 160 (1980) (explaining Takings Clause applies to states under Fourteenth Amendment).

Although the takings issue was not raised in *National Audubon*, *National Audubon* nonetheless addressed the takings issue, stating that the public trust doctrine, as applied to water rights, does not result in a taking of property because the water users have not been divested of "title" to their property; instead, they hold the property subject to the public trust.[258] The court stated that no one has a "vested right" to use water in a manner harmful to public trust uses,[259] thus indicating that a takings claim does not arise when the water is reallocated to protect a public trust use.[260] After the Court's decision, LADWP raised the taking issue in a certiorari petition to the United States Supreme Court, claiming that the court's decision resulted in a taking of LADWP's water rights, but the Supreme Court denied the petition,[261] likely because it was premature; *National Audubon* held only that the State Water Board could reconsider LADWP's water right permit, but no action had been taken that deprived LADWP of any right to water.[262]

In *Mineral County*, the Ninth Circuit certified to the Nevada Supreme Court the issue of whether reallocation of adjudicated water rights would result in a taking of property under the Takings Clause of the Nevada Constitution, which is modeled after the Takings Clause of the U.S. Constitution.[263] The Nevada Court did not reach the takings issue because it concluded that the public trust doctrine does not authorize reallocation of adjudicated water rights.[264] In earlier decisions, however, the Nevada Supreme Court indicated that reallocation of water rights can result in a taking of property under the Constitution because, the Court stated, water rights are "vested" for purposes of "constitutional guaranties" if they have "become fixed either by actual diversion and application to beneficial use or by appropriation."[265] Thus, while *National Audubon* stated that there are no "vested rights" to water that give rise to taking claims in public trust cases, the Nevada Supreme Court indicated in earlier decisions that there are "vested rights" to water that, if reallocated, may give rise to taking claims.

Although taking claims typically arise when the government, either federal or state, exercises its power of eminent domain to physically seize property for a

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258. *Nat'l Audubon Soc'y*, 658 P.2d at 721–23, 735 n. 22.

259. *Id.* at 445.

260. Earlier, the California Supreme Court had rejected a taking claim raised by grantees of tidelands who claimed that the state had taken their rights in the tidelands, because, the Court stated, the grantees did not lose title to the tidelands but instead retained it subject to the public trust. People *ex inf.* Webb v. Cal. Fish Co., 138 P. 79, 88–89 (Cal. 1913). Subsequently to *National Audubon*, however, a California appellate court stated in another case, in which public trust issues were raised, that water rights are "vested property rights" and cannot be "taken" without "due process and just compensation." United States v. State Water Res. Cont. Bd., 227 Cal. Rptr. 161, 168 (Cal. Ct. App. 1986).

261. City of L.A. Dep't of Water & Power v. Nat'l Audubon Soc'y, 104 S.Ct. 413 (1983).

262. *Id.*

263. NEV. CONST. art. 1, § 8; McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126–27 (Nev. 2006).

264. *Mineral County*, 473 P.3d at 418, 430.

265. Nevada v. Morros, 766 P.2d 263, 266 (Nev. 1998) (quoting Application of *Filippini*, 202 P.2d 539, 537 (Nev. 1949)).

public purpose,[266] the United States Supreme Court has adopted the regulatory takings doctrine, which holds that governmental regulation of property can also result in a taking of property if the regulation goes "too far."[267] In *Penn Central Transportation Co. v. New York*, the Supreme Court adopted a balancing test in determining whether a regulation goes "too far."[268] The balancing test considers the "economic impact" of the regulation on the property owner, the extent to which the regulation has interfered with the property owner's "distinct investment-backed expectation," and the "character of the government action."[269] A regulation that results in a "physical invasion" of the property, however, is a *per se* taking and is not subject to the *Penn Central* balancing test.[270] On the other hand, no taking occurs if the regulation is supported by "background principles" of state nuisance or property law.[271]

The Supreme Court and other courts have held that a water right is a form of "property" within the meaning of the Takings Clause, which suggests that a state regulation of a water right can result in a taking of property if the other elements of a takings claim are present.[272] Although a water right is a usufructuary right—in that the holder of the right has the right to use water but does not own it[273]—the right to use water is, itself, considered a form of property.[274] The Supreme Court, at least in the modern era, has never decided whether state regulation of an appropriative water right, whether under the public trust doctrine or another principle of law, may result in a taking of the property and entitle the holder of the right to compensation.[275] No takings issue arose in *Illinois Central*, which was decided in 1892, long before the Supreme Court's later adoption of the regulatory takings doctrine.[276]

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266. *See* Kelo v. City of New London, 545 U.S. 469, 477–80 (2005).

267. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

268. 438 U.S. 104 (1978).

269. *Id.* at 124.

270. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).

271. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

272. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 124 (1983); Kaiser Aetna v. United States, 444 U.S. 164, 179–180 (1979); Ickes v. Fox, 300 U.S. 82, 95–96 (1937); *Gerlach Live Stock Co.*, 339 U.S. at 737, 752–754; United States v. State Water Res. Cont. Bd., 277 Cal.Rptr. 161, 168 (Cal. Ct. App. 1986); *Filippini*, 202 P.2d at 537).

273. *E.g.,* Eddy v. Simpson*,* 3 Cal. 249, 252 (1853).

274. *E.g*., *Gerlach Live Stock Co.*, 339 U.S. at 753; *State Water Res. Cont. Bd.*, 277 Cal. Rptr. at 168.

275. *Cf.* Int'l Paper Co. v. United States, 282 U.S. 399, 405–07 (1931). The Supreme Court held that the federal government, in requisitioning a public power company's production of electrical power for national defense purposes, had taken the power company's water rights and was required to pay compensation to the power company under the Takings Clause. *Id.*

276. The Supreme Court adopted the regulatory takings doctrine in 1922, in *Mahon,* 260 U.S. at 415.

The question of whether reallocation of a water right under the public trust doctrine may result in a taking of property within the meaning of the Takings Clause raises broad issues of constitutional significance. One issue is whether a taking of property can occur only as a result of regulatory actions taken by the legislative or executive branches, or can also occur as a result of the judicial branch's interpretation of a property right that restricts or cancels the right. The issue, framed differently, is whether the Takings Clause applies to all three branches of government or only the legislative and executive branches. The Supreme Court recently addressed this question in *Stop the Beach Renourishment v. Fla. Dep't of Env'l Quality*,[277] but while a four-justice plurality decision argued that the Takings Clause applies to all three branches of government and thus applies to judicial interpretations of property, the Court failed to reach a majority decision.[278]

Another significant constitutional issue is whether the state's authority to reallocate a water right under the public trust doctrine is a "background principle" of state nuisance or property law—in which case the reallocation would not be a taking—or instead whether the state's authority to reallocate the right is a departure from such background principles, in which case the reallocation would be a taking. Some argue that the public trust doctrine is a long-recognized and well-established—and therefore "background"—principle of state water law and thus that reallocation of water rights under the doctrine does not result in a taking of property.[279] Others argue that the public trust doctrine has never been applied to regulation of water, much less as a basis for restricting a water right, and thus that reallocation of water rights under the doctrine can give rise to takings claims.[280] Perhaps the takings issue may turn on whether, as Justice Potter Stewart opined in a concurring decision, the courts interpret property in way that "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents."[281]

Regardless of the answer to this constitutional question, *National Audubon*'s view that the constitutional taking issue does not arise because the water user has not lost "title" to its property is inconsistent with the United States Supreme Court's modern taking jurisprudence and is unlikely to be sustained.

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277. Stop the Beach Renourishment v. Fla. Dep't of Env'l Quality, 560 U.S. 702 (2010).

278. *Id.* at 713–14. In *Stop the Beach Renourishment*, a four-justice plurality opinion written by Justice Scalia argued that the Takings Clause applies to all branches of government, and thus that a court's interpretation of property can result in a "judicial taking" of property. *Id.* at 719–29. A two-justice concurring opinion written by Justice Kennedy argued that a judicial interpretation of property can result in a violation of the Due Process Clause but not the Takings Clause, and thus a "judicial taking" cannot occur. *Id.* at 742–45 (Kennedy, J., concurring). The Kennedy concurring opinion argued, however, that under the Due Process Clause the courts "may not have the power to eliminate established property rights by judicial decision," absent "direction from the executive or legislature." *Id*. at 736. The other justices argued that the Court should not address the taking issue. *Id.* at 742 (Breyer, J. concurring).

279. *See, e.g.*, Appellants' Opening Brief at 36-43, Mineral County v. Lyon County, 473 P.3d 418 (Nev. 2020) (No. 75917).

280. *See, e.g.*, Respondents' Answering Brief at 43-44, *Mineral County*, 473 P.3d 418 (No. 75917).

281. Hughes v. Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

Under the Supreme Court's modern jurisprudence, as described above, the issue of whether a taking occurs does not depend on whether the property owner has lost "title" to the property, but instead depends on other factors—the balance of the property owner's and the states' interests under *Penn Central*, whether the state has effectively "physically seized" the property, and whether the state action is supported by "background principles" of state law. The takings issue depends on these factors and not on whether the water user has lost "title." This significant constitutional issue—whether a state reallocation of water rights under the public trust doctrine results in a taking of the rights under the factors established by the Supreme Court—has not been decided and awaits resolution by the courts, perhaps by the Supreme Court, in an appropriate future case.

VI. CONCLUSION

The Nevada and California Supreme Courts' respective decisions in *Mineral County* and *National Audubon* interpret the public trust doctrine similarly in many respects but diverge concerning fundamental elements—whether the doctrine authorizes reallocation of water rights; whether the courts should defer to the legislative judgment in regulation of water rights or instead establish common law principles that apply to and bind the legislative judgment; and the nature and location of public trust uses protected by the doctrine. The Nevada and California Supreme Courts' differing interpretations of the public trust doctrine will likely provide guidance to the courts of other states, as they develop their own public trust doctrines and establish their own public trust duties.