Mineral County v. Lyon County

Justia Opinion Summary

The Supreme Court answered in the negative a question certified to it by the Ninth Circuit Court of Appeals, holding that the public trust doctrine does not permit the reallocation of rights already adjudicated and settled under the doctrine of prior appropriation.

This litigation stemmed from Mineral County's intervention in longstanding litigation over water rights in the Walker River Basin to protect and restore Walker Lake. Here, the Supreme Court was asked for the first time to consider whether the public trust doctrine permits reallocating water rights previously settled under Nevada's prior appropriation doctrine. The Supreme Court held that the doctrine, as implemented through the state's water statutes, does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.

Read more

136 Nev. Advance Opinion 58

136 Nev., Advance Opinion 50

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINERAL COUNTY; AND WALKER LAKE WORKING GROUP,
Appellants,
vs.
LYON COUNTY; CENTENNIAL LIVESTOCK; BRIDGEPORT RANCHERS; SCHROEDER GROUP; WALKER RIVER IRRIGATION DISTRICT; STATE OF NEVADA DEPARTMENT OF WILDLIFE; AND COUNTY OF MONO, CALIFORNIA,
Respondents.

No. 75917

FILED

SEP 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Certified questions under NRAP 5 concerning Nevada's public trust doctrine. United States Court of Appeals for the Ninth Circuit; A. Wallace Tashima, Raymond C. Fisher, and Jay S. Bybee, Circuit Judges.

Question answered.

Simeon M. Herskovits, El Prado, New Mexico; Sean A. Rowe, District Attorney, Mineral County,
for Appellants Mineral County and Walker Lake Working Group.

Aaron D. Ford, Attorney General, Heidi Parry Stern, Solicitor General, Bryan L. Stockton, Senior Deputy Attorney General, and Tori N. Sundheim, Deputy Attorney General, Carson City,
for Respondent State of Nevada Department of Wildlife.

Best, Best & Krieger LLP and Roderick E. Walston, Walnut Creek, California; Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno; Stephen B. Rye, District Attorney, Lyon County,
for Respondent Lyon County.

SUPREME COURT
OF
NEVADA

(O) 1947A

20-34246

Best, Best & Krieger LLP and Roderick E. Walston, Walnut Creek, California; Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno,
for Respondent Centennial Livestock.

Woodburn & Wedge and Gordon H. DePaoli, Dale E. Ferguson, and Domenico R. DePaoli, Reno,
for Respondent Walker River Irrigation District.

Schroeder Law Offices, P.C., and Laura A. Schroeder and Therese A. Ure, Reno,
for Respondent Schroeder Group.

Law Office of Jerry M. Snyder and Jerry M. Snyder, Reno; Stacey Simon, County Counsel, and Jason Thomas Canger, Deputy County Counsel, Mono County, California,
for Respondent County of Mono, California.

Aaron D. Ford, Attorney General, Heidi Parry Stern, Solicitor General, and James N. Bolotin, Senior Deputy Attorney General, Carson City,
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Jason D. Woodbury, District Attorney, Carson City; Taggart & Taggart, Ltd., and Paul G. Taggart and Timothy D. O'Connor, Carson City,
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Hanson Bridgett LLP and Michael J. Van Zandt, San Francisco, California,
for Amici Curiae Churchill County, City of Fallon, and Truckee-Carson Irrigation District.

136 Nev., Advance Opinion 58

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Hanson Bridgett LLP and Michael J. Van Zandt, San Francisco, California, for Amici Curiae Churchill County, City of Fallon, and Truckee-Carson Irrigation District.

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King & Russo, Ltd., and Patrick O. King, Carson City,
for Amicus Curiae Carson Water Subconservancy District.

Schroeder Law Offices, P.C., and Therese A. Ure and Laura A. Schroeder, Reno,
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McDonald Carano LLP and Michael A.T. Pagni, Reno,
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Brett C. Birdsong, Las Vegas,
for Amicus Curiae Law Professors.

Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno; John D. Echeverria, South Royalton, Vermont; Robert Johnston, Carson City,
for Amici Curiae Natural Resources Defense Council, Sierra Club, Western Resource Advocates, National Wildlife Federation, and Nevada Wildlife Federation.

Taggart & Taggart, Ltd., and Paul G. Taggart and David H. Rigdon, Carson City,
for Amici Curiae Nevada Farm Bureau Federation, Nevada Cattlemen's Association, Lyon County Farm Bureau, and Elko County Farm Bureau.

Parsons Behle & Latimer and Gregory H. Morrison, Reno,
for Amicus Curiae Nevada Mining Association.

Blanchard, Krasner & French and Steven M. Silva, Reno,
for Amicus Curiae Pacific Legal Foundation.

Simons Hall Johnston PC and Brad M. Johnston, Yerington,
for Amici Curiae Peri & Sons Farms, Inc., Desert Pearl Farms, LLC, Peri Family Ranch, LLC, Jason Corporation, and Frade Ranches, Inc.

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, STIGLICH, J.:

In *Lawrence v. Clark County*, we adopted the public trust doctrine, which generally establishes that a state holds its navigable waterways in trust for the public. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). We are asked for the first time to consider whether the doctrine

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[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

permits reallocating water rights previously settled under Nevada's prior appropriation doctrine.

The Ninth Circuit Court of Appeals certified two questions to this court. The first question, as we rephrased it, asks: "Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" The second question asks: "If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a 'taking' under the Nevada Constitution requiring payment of just compensation?"

We conclude that the public trust doctrine as implemented through our state's comprehensive water statutes does not permit the reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation. In doing so, we reaffirm that the public trust doctrine applies in Nevada and clarify that the doctrine applies to all waters within the state, including those previously allocated under prior appropriation. We further hold that the state's statutory water scheme is consistent with the public trust doctrine by requiring the State Engineer to consider the public interest when allocating and administering water rights. But in recognizing the significance of finality in water rights, our Legislature has expressly prohibited reallocating adjudicated water rights that have not been otherwise abandoned or forfeited in accordance with the state's water statutes. Accordingly, we answer the first question as reworded in the negative, and we need not consider the second.

FACTS AND PROCEDURAL HISTORY[2]

The current litigation arises from appellant Mineral County's intervention in long-running litigation over the water rights in the Walker River Basin to protect and restore Walker Lake.

Walker River Basin and Walker Lake's decline

The Walker River Basin covers about 4,000 square miles, stretching northeast from its origins in the Sierra Nevada mountain range in California to its terminus, Walker Lake in Nevada. Approximately one quarter of the Basin lies in California, and California accounts for a majority of the precipitation and surface water flow into the Basin. The vast majority of the water is consumed and lost through evaporation across the border in Nevada.

Walker Lake is approximately 13 miles long, 5 miles wide, and 90 feet deep. However, its size and volume have shrunk significantly since they were first measured in 1882. By 1996, Walker Lake retained just 50 percent of its 1882 surface area and 28 percent of its 1882 volume. Today, Walker Lake suffers from high concentrations of total dissolved solids, such that it has high salt content, low oxygen content, and high temperatures. While the cause of the decline is attributable to multiple factors, including declining precipitation levels and natural lake recession over time, it is clear that upstream appropriations play at least some role. The decline of Walker Lake, according to appellants, has threatened the shelter of migratory birds

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[2]The following facts are from the Ninth Circuit's certification order, given that this court's review is limited to those facts. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012).

and proven inhospitable to fish species such that much of the lake's fishing industry has been eliminated.

Litigation over water rights in Walker River Basin

Litigation over the Walker River Basin began in 1902 when a cattle and land company sued another to enjoin it from interfering with the company's use of the Walker River in Nevada. *See Rickey Land & Cattle Co. v. Miller & Lux*, 218 U.S. 258 (1910). That litigation ended in 1919 with a final decree from the United States District Court for the District of Nevada. *See Mineral Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 240, 20 P.3d 800, 803 (2001).

In 1924, the United States brought a case in the United States District Court for the District of Nevada to establish water rights for the Walker Lake Paiute Tribe (the Tribe). The case resulted in the Walker River Decree (the Decree) in 1936, which adjudicated the water rights of various claimants under the doctrine of prior appropriation. *See United States v. Walker River Irrigation Dist.*, 14 F. Supp. 10, 11 (D. Nev. 1936). The Decree also created the Walker River Commission and the United States Board of Water Commissioners. *See Mineral Cty.*, 117 Nev. at 240, 20 P.3d at 804. The United States District Court for the District of Nevada has maintained jurisdiction over the Decree since.

In 1987, the Tribe intervened in this litigation to establish procedures to change allocations of water rights subject to the Decree. That motion was granted, and since then, the Nevada State Engineer reviews all change applications under the Decree in Nevada in accordance with the state's water statutes, subject to the federal district court's review. In 1991, the Tribe sought recognition of additional water rights under the implied federal reserved water right.

Mineral County's intervention

In 1994, Mineral County moved to intervene to modify the Decree to ensure minimum flows into Walker Lake. It noted the decline of Walker Lake and its impact on Mineral County's economy. The amended complaint sought an allocation of minimum flows of 127,000 acre/feet per year to Walker Lake under the "doctrine of maintenance of the public trust." The United States District Court for the District of Nevada granted Mineral County's intervention in 2013.[3] Appellant Walker Lake Working Group also supports Mineral County's position but was a defendant in the lower court case as a rights holder under the Decree.

In 2015, the United States District Court for the District of Nevada dismissed Mineral County's amended complaint in intervention, concluding that (1) Mineral County lacked standing to assert a *parens patriae* theory; (2) the public trust doctrine could only prospectively prevent granting appropriative rights, and any retroactive application of the public trust doctrine would constitute a taking requiring just compensation; (3) under the political question doctrine, the court lacked authority to effectuate a taking; and (4) Walker Lake is not part of the Walker River Basin.

Mineral County and the Walker Lake Working Group appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit determined that

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[3]During the pendency of the motion for intervention, appellants filed a writ petition with this court seeking to enjoin the State and the Department of Conservation and Natural Resources from granting additional water rights from Walker River and challenging their previous allocations as violations of the public trust. We dismissed the writ petition because the United States District Court for the District of Nevada was the proper forum as the decree court monitoring Walker River. *See Mineral Cty.*, 117 Nev. at 245-46, 20 P.3d at 807.

Mineral County had standing to assert its public trust claim. In a concurrent case, it determined that Walker Lake is within the Walker River Basin. *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 605-06 (9th Cir. 2018). However, whether Mineral County could seek minimum flows depended on whether the public trust doctrine permits reallocating rights previously settled under prior appropriation. The Ninth Circuit certified two questions to our court, and we accepted both questions.

DISCUSSION

In determining whether the public trust doctrine permits reallocating rights adjudicated and settled under the doctrine of prior appropriation, we first discuss the tenets of each doctrine. We then discuss Nevada's statutory water scheme, which we conclude already embraces both of these doctrines.

Prior appropriation doctrine in Nevada

Like most western states, Nevada is a prior appropriation state. The prior appropriation doctrine grants "[a]n appropriative right [that] 'may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations.'" *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) (quoting Frank J. Trelease & George A. Gould, *Water Law Cases and Materials* 13 (4th ed. 1986)). In *Lobdell v. Simpson*, 2 Nev. 274, 279 (1866), we formally recognized the prior appropriation doctrine in Nevada. Decades later, we affirmed that the doctrine of prior appropriation was the prevailing doctrine in Nevada. *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P. 317, 322 (1889); *see also Jones v. Adams*, 19 Nev. 78, 84-86, 6 P. 442, 445-46 (1885)

(noting that the common-law doctrine of riparian rights was not suitable for the conditions in Nevada).

The public trust doctrine in Nevada

The public trust doctrine establishes that the state holds its navigable waterways and lands thereunder in trust for the public. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The doctrine generally acts as a restraint on the state in alienating public trust resources. *Id.* at 453. It is an ancient principle originating from Roman law, which provided 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." *The Institutes of Justinian*, Lib. II, Tit. I, § 1, at 158 (Thomas Collett Sandars trans., Callaghan & Co., 1st Am. ed. 1876). From this origin, it was adopted by the common-law courts of England. *See Shively v. Bowlby*, 152 U.S. 1, 11 (1894) ("By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King.").

The public trust doctrine was first recognized in the United States in *Martin v. Waddell*, 41 U.S. 367 (1842). In *Martin*, the United States Supreme Court noted that "when the [r]evolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use . . . ." *Id.* at 410. Then in the seminal case of *Illinois Central Railroad*, the United States Supreme Court explained that when states were admitted into the United States on an "equal footing" with the original states, they were granted title to the navigable waters and the lands covered by those waters. 146 U.S. at 434-35. The states thus held title to these areas "in trust for the people of the State" to be enjoyed for