

navigation, fishing, and commerce freed from the obstruction of private parties. *Id.* at 452.

Nevada has historically embraced public trust principles. In *State Engineer v. Cowles Brothers, Inc.*, we recognized that “[w]hen a territory is endowed with statehood one of the many items its sovereignty includes is the grant from the federal government of all navigable bodies of water within the particular territory, whether they be rivers, lakes or streams.” 86 Nev. 872, 874, 478 P.2d 159, 160 (1970). In *State v. Bunkowski*, we reaffirmed the principles of state ownership of navigable waters and the beds underneath in determining that the Carson River was “navigable” and therefore belonged to the State in trust for public use. 88 Nev. 623, 633-34, 503 P.2d 1231, 1237 (1972). In a concurrence in *Mineral County v. State, Department of Conservation*, Justice Rose eloquently explained the role of the public trust doctrine in Nevada water law:

This court has itself recognized that this public ownership of water is the “most fundamental tenet of Nevada water law.” Additionally, we have noted that those holding vested water rights do not own or acquire title to water, but merely enjoy a right to the beneficial use of the water. This right, however, is forever subject to the public trust, which at all times “forms the outer boundaries of permissible government action with respect to public trust resources.” In this manner, then, the public trust doctrine operates simultaneously with the system of prior appropriation.

117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring) (internal footnotes omitted) (internal citations omitted).

Ten years later, in *Lawrence v. Clark County*, we expressly adopted the public trust doctrine in Nevada. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). In doing so, we explained that sources of Nevada’s public

trust doctrine derived not only from common law, but from Nevada's Constitution, its statutes, and the inherent limitations on the state's sovereignty. *Id.* at 398, 254 P.3d at 612.

Particularly, Article 8, Section 9 of the Nevada Constitution, the gift clause, provides that “[t]he State shall not donate or loan money, or its credit, subscribe to or be, interested in the Stock of any company, association, or corporation, except corporations formed for educational or charitable purposes.” We noted that this clause limits the Legislature’s ability to dispose of the public’s resources, “at the core of which lays the principle that the state acts only as a fiduciary for the public when disposing of the public’s valuable property.” *Lawrence*, 127 Nev. at 399, 254 P.3d at 612. “[T]he public trust doctrine, like the gift clause, requires the state to serve as trustee for public resources.” *Id.*

Moreover, we noted that the Legislature effectively codified the principles behind the public trust doctrine through NRS 321.0005 and NRS 533.025. Specifically, the Legislature has declared that state lands “must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes.” NRS 321.0005(1). Regarding water, the Legislature has declared that “[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.” NRS 533.025. Thus, “[b]oth provisions recognize that the public land and water of this state do not belong to the state to use for any purpose, but only for those purposes that comport with the public’s interest in the particular property, exemplifying the fiduciary principles at the heart of the public trust doctrine.” *Lawrence*, 127 Nev. at 400, 254 P.3d at 613.

Finally, we noted that the public trust doctrine also derives from inherent limitations on a state's sovereign powers, as recognized by the United States Supreme Court in *Illinois Central Railroad* in establishing that:

The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

146 U.S. at 453. Thus, in *Lawrence*, we explained that "because the state holds such property in trust for the public's use, the state is simply without power to dispose of public trust property when it is not in the public's interest." 127 Nev. at 400, 254 P.3d at 613.

While we note that the parties here do not dispute whether the public trust doctrine applies in Nevada, they dispute (1) whether such doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, and (2) whether such doctrine applies to nonnavigable waters, navigable waters only, or no water at all.

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

Appellants ask this court to explicitly recognize that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right. We explicitly recognize so.

Since our state's admission to the Union, the state's constitution and inherent limitations on state sovereignty have restricted the state's ability to dispose of public trust resources such as navigable

waters and the lands thereunder. *See Nev. Const. art. 8, § 9; Ill. Cent. R.R.*, 146 U.S. at 453. Thus, when the state declared that all water within the state belonged to the public, all waters, whether navigable or nonnavigable, within the state were subject to this limitation on the state's discretion to dispose of public trust resources. *Cf. NRS 533.025*. These inherent limitations applied prior to our court's express adoption of the doctrine in *Lawrence*. The public trust doctrine therefore applies to water rights allocated before and subsequent to our opinion in *Lawrence*.

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

Appellants and their amici ask this court to recognize that the public trust doctrine encompasses nonnavigable waters, while respondents and their amici argue, alternatively, that the doctrine either applies only to navigable waters or no water at all. Given the confusion over the *res* of the public trust doctrine, we clarify that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters.⁴ *See id.* To limit the public trust doctrine to only navigable waterways and the lands below would ignore the fact that flowing water that feeds into the navigable waters is allocated along the way. As stated by Justice Rose,

[A]lthough the original scope of the public trust reached only navigable water, the trust has evolved

⁴The dissent errs in contending that this clarification unnecessarily expands the scope of the public trust doctrine. The Legislature recognized that “[t]he water of all sources” is subject to the public trust doctrine. *See NRS 533.025*. The waters of the Basin include nonnavigable tributaries that feed into the navigable Walker Lake, and, as the dissent recognizes, nonnavigable tributaries feeding navigable waters must fall within the scope of the doctrine to prevent the harm of their diversion. Moreover, the parties dispute the scope of the doctrine, warranting this clarification.

to encompass non-navigable tributaries that feed navigable bodies of water. This extension of the doctrine is natural and necessary where, as here, the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated.

Mineral Cty., 117 Nev. at 247, 20 P.3d at 807-08 (Rose, J., concurring) (internal footnote omitted). To permit the state, as owner of all water within its borders, to freely allocate nonnavigable waters to the detriment of navigable waters held for the public trust would permit the state to evade its fiduciary duties regarding public trust property. This, the state cannot do.

We therefore reaffirm that the public trust doctrine applies in Nevada. We also clarify that it applies to rights previously settled under prior appropriation and clarify that the doctrine applies to all waters in the state and the lands submerged beneath navigable waters.

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

Although we recognize that the public trust doctrine applies to prior appropriated rights and that the doctrine has always inhered in Nevada's water law, we hold that Nevada's comprehensive water statutes are already consistent with the public trust doctrine because they (1) constrain water allocations based on the public interest and (2) satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*. See 127 Nev. at 405, 254 P.3d at 616.

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

The Legislature has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights in Nevada. Much of Nevada's water laws were rewritten and codified in 1913, bringing all of the state's surface waters and artesian groundwater

under state ownership and regulation by the State Engineer.⁵ 1913 Nev. Stat., ch. 140, §§ 1, 18, 20, at 192, 195, 196. In bringing all of the state's water under comprehensive regulation, the Legislature declared that "[t]he water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." NRS 533.025.

Nevada's water statutes embrace prior appropriation as a fundamental principle. Water rights are given "subject to existing rights," NRS 533.430(1), given dates of priority, NRS 533.265(2)(b), and determined based on relative rights, NRS 533.090(1)-(2).

The other fundamental principle that the water statutes embrace is beneficial use. Specifically, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NRS 533.035; *see also* NRS 533.030(1) (providing that "all water may be appropriated for beneficial use" subject to existing rights and other limitations provided in the water statutory scheme). Beneficial use is declared "a public use," NRS 533.050, and by statute includes uses such as irrigation, power, municipal supply, domestic use, mining, livestock watering, and storage, NRS 533.340. In 1969, "any recreational purpose," which includes fishing and wildlife habitations, was additionally deemed a beneficial use. NRS 533.030(2); *see* 1969 Nev. Stat., ch. 111, § 1, at 141 (amending NRS 533.030); *State v. Morros*, 104 Nev. 709, 716-17, 766 P.2d 263, 268 (1988) (citing Hearing on A.B. 278 Before the Senate Federal, State & Local Governments Comm., 55th Leg. Sess. (Nev., March 7, 1969)). NRS 533.023 was added in

⁵The State Engineer was then granted jurisdiction over all underground waters in the state in 1939. 1939 Nev. Stat., ch. 178, § 1, at 274.

1989 to define “[w]ildlife purposes” to include “the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats.” See 1989 Nev. Stat., ch. 741, § 1, at 1733. Accordingly, beneficial use underpins Nevada’s water statutes, and the Legislature has continued to delineate and expand on which uses are considered public uses in Nevada.

To ensure that water is being used beneficially and for public use, Nevada’s water law charges the State Engineer with approving and rejecting applications. See NRS 533.325 (requiring that anyone who wishes to appropriate water or change its diversion apply to the State Engineer for a permit). The State Engineer has identified 13 guidelines, including beneficial use, in determining what constitutes the public interest. See *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 746-47, 918 P.2d 697, 698-99 (1996). In considering whether to approve or reject applications, the State Engineer must consider whether the proposed action is “environmentally sound” and “an appropriate long-term use which will not unduly limit the future growth and development in the basin” for groundwater applications, NRS 533.370(3)(c)-(d), and must reject any permit applications detrimental to the public interest, NRS 533.370(2). In these ways, Nevada’s water statutes constrain water allocations to those that are public uses and require the State Engineer to reject permits if they are unnecessary or detrimental to the public interest. These considerations are consistent with the public trust doctrine.

Appellants argue, however, that the statutory scheme does not ensure that the state is fulfilling its continuous public trust duties. They maintain that the statutory scheme does not place an affirmative fiduciary

duty on the state to assure that public trust resources are available for future generations. We disagree.

First, the statutes constrain water usage to uses that are necessary and terminate water rights when water is not used beneficially, thereby ensuring against waste. *See* NRS 533.045 (“When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of this State except at such times as the water is required for a beneficial purpose.”); NRS 533.060(1) (“Rights to the use of water must be limited and restricted to as much as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes The balance of the water not so appropriated must be allowed to flow in the natural stream . . . and must not be considered as having been appropriated thereby.”); NRS 534.090 (recognizing forfeiture for nonuse of groundwater for five consecutive years). Second, the statute recognizes that water rights may be abandoned. *See* NRS 533.060 (regarding surface water rights); NRS 534.090 (regarding groundwater rights). Finally, the State Engineer is permitted to declare preferred uses and regulate groundwater in the interest of public welfare, which includes curtailing groundwater rights during water supply shortages. NRS 534.120. In these ways, Nevada’s water statutes protect against wasteful use and incorporate mechanisms for limiting water rights when water resources are depleted. The statutory scheme therefore sufficiently places an affirmative duty on the State Engineer to maintain public trust resources.⁶

⁶Insofar as the dissent contends that our opinion provides no remedy should the State Engineer abuse its office or misallocate public resources, it

Nevada's water statutes satisfy Lawrence

In *Lawrence*, we adopted a three-part test to determine whether the dispensation of public trust property is valid. 127 Nev. at 405, 254 P.3d at 616. Specifically, we stated that courts must consider “(1) whether the dispensation was made for a public purpose, (2) whether the state received fair consideration in exchange for the dispensation, and (3) whether the dispensation satisfies ‘the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.’” *Id.* (quoting *Ariz. Ctr. for Law v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991)). In considering the third prong, courts must evaluate the following factors:

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

Id. at 406, 254 P.3d at 616 (alteration in original) (internal quotation marks omitted). Furthermore, “when the Legislature has found that a given

is mistaken. The certified questions do not ask the court to settle the matter of judicial review of the State Engineer’s actions, and we reject any contention that such actions are per se exempt from judicial review. *See, e.g.*, NRS 533.450 (providing for judicial review of State Engineer orders and decisions); *Pyramid Lake Paiute Tribe of Indians*, 112 Nev. at 762, 918 P.2d at 709 (Springer, J., dissenting) (reasoning that the State Engineer erred in failing to adequately consider the public trust in the allocated resource).

dispensation is in the public's interest, it will be afforded deference." *Id.* at 406, 254 P.3d at 617. Hence, public interest and benefit remain paramount.

Respondents argue that Nevada's statutory water scheme satisfies the requirements to transfer public trust property under *Lawrence*, and we agree. First, the statutes permit the State Engineer only to grant permits that are based on beneficial use, which the Legislature has declared a public use. *See* NRS 533.035; NRS 533.050. Water allocations under the statutes are thus dispensed only for a public purpose. *See Lawrence*, 127 Nev. at 405, 254 P.3d at 616.

Second, the state receives fair consideration in allocating water for beneficial use, satisfying *Lawrence's* second requirement. *See id.* When water is allocated for purposes such as irrigation, power, municipal supply, mining, storage, or recreation, residents in the state are able to grow or purchase food and receive drinking water, electricity, and other resources. Farmers and miners are able to grow their industries, which in turn boosts the state's economy. *See, e.g., Nev. Dep't of Agric., Economic Analysis of the Food and Agriculture Sector in Nevada 2019*, at 3 (2018) (noting that "Nevada's food [and] agriculture sector contributed \$1.3 billion to the state's economy in 2017"); *Nev. Dep't of Taxation, Div. of Local Gov't Servs., 2018-2019 Net Proceeds of Minerals Bulletin 9* (2019) (indicating that Nevada's mining industry contributed approximately \$55.8 million in state taxes in 2018). Nevada's prosperity and progress was dependent on the early mining and agricultural industries, which was contingent on the allocation of water based on beneficial use. *See, e.g., In re Manse Spring & Its Tributaries*, 60 Nev. 280, 290, 108 P.2d 311, 316 (1940) ("Courts appreciate the necessity of requiring that water be beneficially used, because of its importance to the agricultural industry of the state."); *Reno Smelting, Milling & Reduction*