PICKERING, C.J., with whom SILVER, J., agrees, concurring in part and dissenting in part:

I.

The certified question from the Ninth Circuit is: "Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Because this court's answer to such a question is only appropriate where it "may be determinative of the cause then pending in the certifying court," NRAP 5, we must accept and address the question in the limited context in which it arises. *See Peone v. Regulus Stud Mills, Inc.*, 744 P.2d 102, 103 (Idaho 1987) (cautioning against deciding extraneous matters that "would result in an advisory opinion on a question not certified"). Here, the question arises from an appeal from a district court order granting a motion to dismiss, on the basis that the public trust doctrine gives Mineral County no claim upon which relief might be granted in respect to its prayer that the Walker River Basin decree court adopt measures to protect Walker Lake water levels. Given this procedural context, the majority opinion should have been limited to addressing whether the public trust doctrine applies to, and to what extent it may be determinative of, Mineral County's request for consideration of the health of Walker Lake in the administration of the waters in the Basin.

Instead, the majority rephrases the Ninth Circuit's question to ask: "Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Majority op. at 5. Thus rephrased, the question effectively asks whether the public trust doctrine allows the Walker River Decree Court to revoke senior adjudicated upstream rights. But, as Mineral

County argues, it does not seek creation of a super-senior water right to override those already adjudicated and settled in the underlying case. Rather, consistent with the relevant procedural posture, Mineral County seeks a range of relief aimed at facilitating the Walker River Decree Court's fulfillment of this state's public trust duty with respect to the precious natural resource that is Walker Lake. As Mineral County explains, an order granting it the relief sought in its complaint-in-intervention could take a number of different forms.

> Such an order might involve, without limitation: (1) a change in how surplus waters are managed in wet years and how flows outside of the irrigation season are managed; (2) mandating efficiency improvements with a requirement that water saved thereby be released to [Walker Lake]; (3) curtailment of the most speculative junior rights on the system; (4) a mandate that the State provide both a plan for fulfilling its public trust duty to Walker Lake and the funding necessary to effectuate that plan; and/or (5) an order requiring water rights holders to come up with a plan to reduce consumptive water use in the Basin as was done by the [State Engineer] in Diamond Valley.

Mineral County further represents that the Walker Basin Restoration Program (WBRP) has acquired by purchase half of the water rights needed to fulfill Walker Lake's demand, but that WBRP is facing obstruction by the federal water master and exorbitant charges, such that not one drop of the purchased water has reached Walker Lake. If proven, these allegations—which we should assume are true for purposes of answering the Ninth Circuit's certified question, *see Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012) (in reviewing an order granting a motion to dismiss, the Ninth Circuit accepts "all factual allegations in the complaint as true")—support directives by the Walker

River Decree Court to the water master to facilitate delivery to Walker Lake of the water purchased for it without further delay and expense.

Notably, none of these remedial measures would require a "reallocation of rights," as framed by the majority. And thus, as a threshold matter, I cannot agree that NRAP 5 authorizes the court to rephrase and then answer a question the underlying case does not present—the revocation of vested water rights is not at issue, and this court need not answer whether the public trust doctrine can effect the same.

II.

But there is another, more substantive problem with the revised question the majority asks itself: As revised, the question suggests an all-or-nothing approach that is fundamentally inconsistent with the public trust doctrine. Nevada's appropriative water rights system and the public trust doctrine developed independently of each other. The goal is to balance them and their competing values, not set them on a collision course.

> [B]oth the public trust doctrine and the [prior appropriation] system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.

Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 723-24 (Cal. 1983). Just as the system of prior appropriation "may be necessary for efficient use of water despite unavoidable harm to public trust values, . . . an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust

interests." *Id.* at 728. The rephrased question misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine.

A.

I begin with the points on which the majority and I agree—this court has previously made plain that the public trust doctrine inheres in Nevada law. *Lawrence v. Clark Cty.*, 127 Nev. 390, 398, 254 P.3d 606, 612 (2011); *see Mineral Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 247, 20 P.3d 800, 808 (2001) (Rose, J., concurring). The doctrine stems from "the most fundamental tenet of Nevada water law," *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997)—that is, public ownership of this state's water sources—because, necessarily correspondent to this public ownership is the state's fiduciary obligation "to protect the people's common heritage of streams, lakes, marshlands and tidelands," *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094 (Idaho 1983) (quoting *Audubon*, 658 P.2d at 723-24); *see also Farm Inv. Co. v. Carpenter*, 61 P. 258, 265 (Wyo. 1900) ("There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the state."). I likewise concur with the majority that these doctrinal principles are founded in Nevada's Constitution and "inherent from inseverable restraints on the state's sovereign power." *Lawrence*, 127 Nev. at 398, 254 P.3d at 612; majority op. at 26.

But from there the majority and I part company. Citing Justice Rose's limited statement that the public trust encompasses both navigable water and "non-navigable tributaries that feed navigable bodies of water," *Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 807-08 (Rose, J., concurring) (citing

Audubon, 658 P.2d at 721) (concluding that "the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries"), the majority proceeds to "*clarify* that the public trust doctrine applies to *all waters of the state, whether navigable or nonnavigable*, and to the lands underneath navigable waters." Majority op. at 14 & n.4 (emphases added). This "clarification" marks a significant expansion of the public trust doctrine—one that increases the conflict the majority posits between the public trust doctrine and Nevada's prior appropriation system. While the principle is consistent with doctrine emerging in a few jurisdictions, *see In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (holding that the "public trust doctrine applies to all water resources without exception or distinction"); *Parks v. Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) (holding that "all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public"), it is not universally adopted, *see, e.g.*, *Audubon*, 658 P.2d at 721 n.19; *Parks*, 676 N.W.2d at 839-41 (collecting cases). *See also* Joseph Regalia, *A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts*, 108 Ky. L.J. 1, 14 (2020) (discussing variability among western states with regard to waters covered by the public trust doctrine). But here, the question of expanding the public trust doctrine to reach all water without regard to navigability is not presented: No one disputes, for purposes of deciding the certified questions in this case, that Walker River and Walker Lake encompass navigable waters, fed by nonnavigable surface tributaries. We could meaningfully answer the ultimate question—even as framed by the majority—by simply assuming the navigability of waters in the Basin for purposes of traditional public trust doctrine analysis. *Figueroa-Beltran v. United States*, 136 Nev., Adv.

Op. 45, 467 P.3d 615 (2020) (noting that when deciding certified questions, the court "accept[s] the facts as stated in the certification order and its attachments") (quoting *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014)); *see Audubon*, 658 P.2d at 721 n.19 (declining to "consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to nonnavigable streams" where the facts did not require it to do so).

B.

Having recast the certified question, and then expanded the reach of the public trust doctrine beyond the call of that question to reach all waters, even groundwaters not connected to navigable waterways, the majority then subsumes the public trust doctrine in a handful of sections in NRS Chapter 533. Majority op. at 21 & n.7. According to the majority, and based on those sections, the Legislature has reposed in the State Engineer the entirety of this state's fiduciary duties to protect and conserve all of Nevada's water sources under the public trust doctrine. *Id.* at 17-18. And under such an approach, so long as the State Engineer executes his discretionary statutory obligations under NRS Chapter 533, *see Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 308, 448 P.3d 1106, 1112 (2019) (noting generally that the State Engineer's discretionary decisions are reviewed deferentially), there is no remedy or action to be taken to protect from the irreversible depletion of this state's most precious natural resource. But this view fundamentally misapprehends the public trust doctrine and its constitutional and sovereign dimensions. *See* Regalia, 108 Ky. L.J. at 20 (noting that the doctrine "is emblematic of fundamental constitutional principles embedded in American democracy").

To begin, the Nevada Constitution expressly limits the Legislature's ability to freely dispose of public resources. *See* Nev. Const. art. 8, § 9 (prohibiting the gift or loan of public property). And this court has made plain that any legislative action that purports to convey property held in trust for the public is therefore subject to judicial review. *Lawrence*, 127 Nev. at 399-401, 254 P.3d at 612-13 (citing *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999)); *see also Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 166-68 (Ariz. Ct. App. 1991). Thus, even assuming that NRS Chapter 533 comports with the public trust doctrine, the doctrine's judicial check would be necessary; the mere existence of water source regulations does not ensure the Legislature's and the State Engineer's compliance with the same. *See Lawrence*, 127 Nev. at 399-401, 254 P.3d at 612-13. Put differently, "[j]ust as private trustees are judicially accountable to their beneficiaries for dispositions of the res, . . . so the legislative and executive branches are judicially accountable for their dispositions of the public trust." *Hassell*, 837 P.2d at 169 (internal citations omitted).

Moreover, it is a well-established principle of separation of powers that a legislature cannot "grant to an officer under its control what it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Accordingly, it cannot be that with the enactment of NRS Chapter 533, the Legislature effectively delegated to an administrative officer its own public trust obligations and the judiciary's responsibility to police constitutional and sovereign limits on the Legislature's own authority. *San Carlos Apache Tribe*, 972 P.2d at 199 (stating that a legislature cannot "by legislation destroy the constitutional limits on its authority" or "order the courts to make the [public trust] doctrine inapplicable to . . . any proceedings"

governing water rights); *Hassell*, 837 P.2d at 166-68 (basing its decision on the separation-of-powers doctrine and a constitutional gift clause nearly identical to Nevada's). As this court stated in *Lawrence*, "[t]he public trust doctrine is . . . not simply common law easily abrogated by legislation." 127 Nev. at 401, 254 P.3d at 613. Rather, it is an "inabrogable attribute of statehood itself." *Hassell*, 837 P.2d at 168; *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (noting that a state cannot abdicate its duties under the public trust doctrine).

The majority does not tackle these principles head-on, instead attempting a sleight of hand. NRS Chapter 533, the majority argues, has functionally replaced the public trust doctrine because its provisions are "consistent with" the public trust doctrine and "satisfy all of the elements of the dispensation of public trust property that we established in *Lawrence*." Majority op. at 15. The majority further attempts to misdirect that the values the public trust doctrine protects are totally commensurate with the "public interest" as considered in NRS Chapter 533. *See id.* at 21 n.7. In so doing, the majority equates the concepts in error—an appropriation could conceivably be in the public interest while still resulting in unavoidable and unjustified harm to public trust values. *See Audubon*, 658 P.2d at 728. For example, while it could theoretically be in the public interest to allocate water rights to facilitate cattle grazing, increase herd size, and ultimately reduce the price of beef for dinner, if done without regard to the deleterious impacts of unsustainable watering and grazing on Nevada's natural resources, such action could also be entirely inconsistent with public trust principles.

In any case, while it is true that the cited water statutes and public trust doctrine may share and even promote the same core principles, this shared purpose alone "do[es] not override the public trust doctrine or render it superfluous." *Water Use Permit Applications*, 9 P.3d at 445. To the contrary, the public trust doctrine, enforced by a separate and independent judiciary, is one intentionally endowed with flexibility—to consider a multitude of needs and impacts, to encompass more and different protections over this state's water sources, to check the actions by legislative and executive actors for absolute compliance with their fiduciary obligations—that those limited statutory sections cited lack. *See Kootenai*, 671 P.2d at 1095 (noting that "mere compliance by [the State Engineer] with [its] legislative authority is not sufficient to determine if [its] actions comport with the requirements of the public trust doctrine"); *see also* Rebecca LaGrandeur Harms, *Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes*, 39 Environs: Envtl. L. & Pol'y J., 97, 113 (2015) (recognizing the "unique utility of the public trust doctrine in its original common law form"—"common law doctrine has been able to expand to cover more natural resources and public uses").

Perhaps even more concerning is that the rigid statutory protections the majority would endow with sovereign state functions can be repealed, *see Audubon*, 658 P.2d at 728 n.27 (noting same concern); what of this storied doctrine then? I cannot fathom relocating this long-standing limitation on sovereign authority, *see* Regalia, 108 Ky. L.J. at 28 (discussing purpose of doctrine), to such shaky ground. No doubt the public trust doctrine may "inform [the] interpretation [of NRS Chapter 533], define its permissible 'outer limits,' and justify its existence." *Water Use Permit*

Applications, 9 P.3d at 445. But it cannot be that this state's affirmative fiduciary obligations over certain water sources—obligations supervised by the judiciary and founded on a century of common law, inherent sovereign authority, and the state constitution—are entirely subsumed by a handful of statutes governing the specific duties of an administrative agent.

Indeed, that the public trust doctrine exists as one part of an integrated system of water law that also includes NRS Chapter 533 is the only logical outcome—as Mineral County stated so aptly in its reply brief, the "[i]nclusion of a provision in statutory law does not ensure execution of that provision in satisfaction of the State's public trust duties." And that principle is well-illustrated here. The public trust doctrine demands that some responsible state entity take action to preserve the public value of Walker Lake, yet all parties recognize its continuing decline despite the State Engineer's statutory obligations. The doctrine does not permit the Walker River Decree Court to simply stand by and watch the ruination of public resources, but what enforcement avenue has the majority left here? Simply put, if the doctrine does not empower the Walker River Decree Court's independent supervision of the State Engineer's management of rights in Basin waters, it is illusory; the majority's recognition of its history and scope, mere lip service.

Unsurprisingly then, and as many cases cited above suggest, courts in other states have held that the public trust doctrine is one part of an integrated system of water laws, which system also includes, in part, a statutory system of appropriative water rights. *See, e.g.*, *Audubon*, 658 P.2d at 732; *Parks v. Cooper*, 676 N.W.2d 823, 838 (S.D. 2004) (aligning South Dakota's jurisprudence with other jurisdictions'). And despite the interconnectedness of the doctrine and appropriative systems, these foreign