

courts have still recognized that the public trust doctrine exists “independently of any statutory [water source] protections supplied by the legislature.” See *Water Use Permit Applications*, 9 P.3d at 444 (collecting cases); see also *Kootenai*, 671 P.2d at 1094; *Hassell*, 837 P.2d at 168; *Cooper*, 676 N.W.2d at 838 (collecting cases).

This court has repeatedly reaffirmed that Nevada looks to the water law of its western sister states to interpret and understand its own. See *Happy Creek*, 135 Nev. at 304, 448 P.3d at 1109. And indeed, this court reviewed and previously approved of the reasoning in some of those cases cited above. *Mineral Cty.*, 117 Nev. at 247 & nn.4-5, 20 P.3d at 808 & nn.4-5 (Rose, J., concurring) (discussing and favorably citing *Audubon*); *Lawrence*, 127 Nev. at 405-06, 254 P.3d at 616 (favorably citing the reasoning in *Hassell*). This court should not easily set aside such analysis, *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (stating that, generally, this court “will not overturn [precedent] absent compelling reasons for so doing”), or the well-reasoned decisions underlying the same. But the majority makes no attempt to explain how the principles enunciated in *Audubon*, *Hassell*, and *Kootenai* have become inapplicable in the years since we first highlighted them, citing *Audubon* and *Hassell* only in passing and omitting any mention of *Kootenai*.

C.

Setting aside these considerations of sovereign responsibilities, separation of powers, and stare decisis, the majority points to the importance of “finality” in water-rights determinations. In fact, the majority implicitly holds that this principle outweighs every other already mentioned, to require the merger of the public trust doctrine and NRS Chapter 533. The majority relies on a United States Supreme Court

decision involving California and Arizona for its proposition that the necessity of finality of water rights supersedes the effective application of an inseverable constitutional restraint on state power. Majority op. at 23 (quoting *Arizona v. California*, 460 U.S. 605, 620 (1983)). But the precedent of both those states, cited and discussed above, establishes that the public trust doctrine exists independently of their respective state water statutes, and even despite the importance of finality. *Hassell*, 837 P.2d at 169 (noting that “[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary” (quoting *Kootenai*, 671 P.2d at 1092)); *Audubon*, 658 P.2d at 723 (recognizing the “continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust”).

The posited dichotomy is thus a false one. Crediting Mineral County’s position with respect to the public trust doctrine does not require that the decree court revoke senior adjudicated Walker Basin water rights. It bears repeating: Mineral County names several approaches that would better protect the value of Walker Lake *without disturbing vested rights or impinging on principles of finality*. It is not now this court’s responsibility—or the Ninth Circuit’s—to determine whether Mineral County can prevail across the board on its claims and obtain all the relief it seeks. *See Skilstaf*, 669 F.3d at 1014 (holding that, in reviewing an appeal from an order granting a motion to dismiss, the reviewing court accepts as true the nonmoving party’s allegations). But, if Mineral County can demonstrate that conservation of Walker Lake would be enhanced by using these measures, and that the administration of the Basin contrary to those

objectives contravenes the public trust doctrine, it is entitled to proceed. In any case, and as established, the Walker River Decree Court cannot simply ignore its obligations under the doctrine because in application the facts are complicated. *See Ill. Cent. R.*, 146 U.S. at 453 (“The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

Bearing all this in mind, I do not deem trivial the concerns of Basin rights holders regarding finality, or deny that their reliance on prior allocations of Basin waters may be substantial. To the contrary, such concerns should enter into any reexamination of authorized diversions in the Basin undertaken by the Walker River Decree Court according to the public trust doctrine. *See Audubon*, 658 P.2d at 729. But, under our system of water rights, a prior appropriation is never permanent—even vested rights are granted only to the extent their holders do not over-appropriate or waste water. *See Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). Accordingly, the existence of such appropriations cannot be said to entirely preclude the Walker River Decree Court from addressing public trust concerns. *See id.* (“It is clear that some responsible body ought to reconsider the allocation of the waters of the . . . Basin. No vested rights bar such consideration.”) (footnote omitted).

III.

Based on the discussion offered above, I would answer the Ninth Circuit’s first question as follows: The public trust doctrine is one part of Nevada’s integrated system of water laws, and assuming the truth of the facts presented, the doctrine protects Walker Lake from harm caused by diversions of Basin waters, whatever the cause, and that this interest must

be cast into the balance in managing the Walker River Basin, even though doing so may impinge on historical practices in utilizing vested water rights. I recognize that my response to the Ninth Circuit's first question begs an answer to its second question, which the majority declined to answer—namely, “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?”

In *Audubon*, the California Supreme Court offered the definitive discussion of the delicate balance an independently supervised public trust doctrine helps strike in an integrated system of water law. See *Audubon*, 658 P.2d at 727. With regard to the powers of the legislature and authorized executive agency, the California court noted that they necessarily have “the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream.” *Audubon*, 658 P.2d at 727. Indeed, the court admitted that “[t]he population and economy of [a] state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values.” *Id.* But weighing against these economic considerations is the truth, demonstrable even by the precipitous decline of Walker Lake, that “an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests.” *Id.* at 728. Thus, the public trust doctrine requires that the state affirmatively reassess the availability of water resources, as necessary to protect the public interest,

“in light of current knowledge or . . . current needs,” *id.*, and demand feasible accommodations as necessary.

In this case, Mineral County represents that the objectives of the public trust reassessment may be achieved in any one of several different ways. But importantly, whatever solution the Walker River Decree Court ultimately adopts, it would not demand the creation of a new and superior water right that would upset the prior “allocation of rights” and require a complete restructuring of Nevada water law, as framed by the majority. As discussed above, the limited factual record before this court indicates that the Basin waters are publicly held navigable or nonnavigable surface water tributaries, such that any holders of usufructuary rights in the waters acquired them subject to the public trust in the first instance. *See Mineral Cty.*, 117 Nev. at 247, 20 P.3d at 808 (Rose, J., concurring); *cf. Desert Irrigation*, 113 Nev. at 1059, 944 P.2d at 842 (“Indeed, even those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use.”). Even the vested water rights at issue are only worth the maximum amount of water available for allocation in the Basin, which water source, according to the record before this court, is held in public trust. Thus, while enforcement of the doctrine could potentially alter the amount of Basin water available for private use—as Mineral County points out, just as “any other natural constraint on the already variable availability of water to supply private appropriations”—it does not effect a reallocation of vested water rights. *Audubon*, 658 P.2d at 723 (stating that “while [a rights holder] may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes”).



Accordingly, even to the extent the Walker River Decree Court would act to protect Walker Lake pursuant to the doctrine by limiting the availability of Basin waters, it would not divest anyone of any legal title they previously held. *Id.* (“Except for those rare instances in which a grantee may acquire a right to use former trust property free of restrictions, the grantee holds subject to the trust”); see also Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 *Pace Env'tl. L. Rev.* 649, 650-51 (2010) (stating that “[c]ourts applying [this] doctrine demand all feasible accommodations to preserve and protect trust assets, but they do not attempt to eliminate private property. In fact, virtually all applications of the public trust doctrine leave possession of private property unchanged” and collecting cases (internal footnote omitted)).

The answer to the Ninth Circuit’s second question then, is that enforcement of the public trust doctrine here does not result in a “reallocation of water rights,” much less implicate the constitutional takings doctrine.

In sum, “[t]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state” *Kootenai*, 671 P.2d at 1094 (quoting *Audubon*, 658 P.2d at 723-24). And, as the majority recognizes, the duty in question arises from constitutional sources and inherent sovereign authority to protect the interests of “present generations [and] those to come.” *Hassell*, 837 P.2d at 169. Moreover, “[t]he check and balance of judicial review” are essential components of the state’s fiduciary duties, particularly where water resources are concerned, “provid[ing] a level of protection against

