

# Public Trust – In Nevada? Possible Impacts to Water Rights: *Adoption of The Public Trust Doctrine in Nevada*

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The Nevada Supreme Court in *Lawrence v. Clark County*, 254 P.3d 606, 127 Nev. Adv. Op. 32 (Nev. 2011) for the first time expressly adopted the “Public Trust Doctrine.” Generally, under the public trust doctrine, a state holds the banks and beds of navigable waterways in trust for the public. *Id.* at 607.<sup>1</sup> The trust traditionally preserved public rights of navigation, commerce, and fishing. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892). However, it has found much broader application, including consideration of environmental and recreational resources. Although the *Lawrence* decision related to land underlying a “navigable waterway,” it could have long-lasting impacts on Nevada water law.

In *Lawrence* the Nevada State Land Registrar sought review of a judgment which involved a proposed transfer of land adjacent to the Colorado River to Clark County officials. The issue was whether state-owned land that was once submerged under a waterway can be freely transferred to Clark County, or whether the public trust doctrine prohibits such a transfer. After describing the origins of the public trust doctrine from Roman law, to the common law courts in England, to early opinions in the United States, the court described how Nevada informally embraced its tenets. The court then described the sources of public trust principles as being contained in the gift clause of Article 8, Section 9 of the Nevada Constitution, and effectively codified in NRS 321.0005 and NRS 533.025. Finally, citing *Illinois Central*, 146 U.S. 387, the court determined that the formal adoption of the public trust doctrine arises from the inherent limitations on the state’s sovereign power. “[B]ecause 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.” *Lawrence*, 254 P.3d at 613. The *Lawrence* case was remanded to the trial court for a determination of whether the disputed lands were in fact submerged beneath navigable waters at the time of Nevada achieved statehood and how the lands became dry.<sup>2</sup> If the public trust doctrine applies, whether the disputed land is transferable turns on whether the transfer serves the public’s interest in the land and comports with the state’s trustee obligations.

## Expansion of the Public Trust Doctrine and Its Implication on Water Rights

Although *Lawrence* dealt with land formally under navigable waters, now that Nevada has adopted the public trust doctrine it is likely that attempts will be made to expand its application. In *Lawrence* the court placed special emphasis on the concurring opinion of Justice Rose in *Mineral County v. State, Department of Conservation*, 117 Nev. 235, 20 P.3d 800 (2001), calling for the court to address the existence of the public trust doctrine in Nevada in a case involving rights to withdraw surface or groundwater from Walker River and Walker Lake. Further, to show the source of public trust principles in Nevada law the court turns to NRS 533.025, which provides 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.”

The California Supreme Court recognized in *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 425, 658 P.2d 709, (Cal. 1983) that the system of legal thought encompassing the public trust doctrine and protection of environmental and recreational values, is “on a collision course” with the appropriative water rights system. *National Audubon Society* is the leading decision applying the public trust to water resources, and heavily relied on in Justice Rose’s concurring opinion in *Mineral County*. The *Lawrence* court has already recognized the expansion of public trust to recreation resources. *Lawrence*, 254 P.3d at 616. Further, Justice Rose stated that “the trust has evolved to encompass additional public values -- including recreational and ecological uses.” *Mineral County*, 117 Nev. at 247.

In *National Audubon*, the City of Los Angeles had obtained permits to appropriate nearly the entire flow of the streams flowing into Mono Lake, California. After the resulting decline in the level of the lake, environmental organizations sought an injunction to permanently compel the city water department to reduce its water diversions from the lake, claiming that the lake was protected by the public trust. The lower court ruled that the public trust doctrine offered no independent basis for challenging the diversions. On writ of mandate, the California Supreme Court held that 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. *National Audubon*, 33 Cal. 3d at 446.

*National Audubon* and Justice Rose’s concurring opinion in *Mineral County* provide a possible basis and reasoning to expand public trust into the area of Nevada water law. First, the *National Audubon* court determined that the public trust doctrine protects navigable waters from harm caused by diversion of non-navigable tributaries. 33 Cal. 3d at 437.<sup>3</sup> This included the protection of fishing, environmental values, and recreation interests in non-navigable streams. *Id.*<sup>4</sup> The expansion of the trust to non-navigable tributaries is endorsed by Justice Rose, who stated:

although the original scope of the public trust reached only navigable water, the trust has evolved to encompass non-navigable tributaries that feed navigable bodies of water. This extension of the doctrine is natural and necessary where [ ] the navigable water’s existence is wholly dependent on tributaries that appear to be over-appropriated.

*Mineral County*, 117 Nev. at 246-247; citing *National Audubon*, 33 Cal. 3d at 434.

Second, seeking an “accommodation” between the public trust and appropriative rights, the *National Audubon* court found that the concept of the public trust applies to rights in flowing waters as well as to rights in tidelands and lakeshores, and

it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust. *Id.* at 445. This duty applies to the courts and the agencies that approve water diversions. Justice Rose would impose this trust responsibility upon the Nevada State Engineer in fulfilling his obligations under Nevada water law.

If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not substantially impair the public interest in the lands and waters remaining.

*Mineral County*, 117 Nev. at 247. Likewise, Justice Springer in his dissent in *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 762 (1996) opined that the state government was trustee of all public natural resources, and that the State Engineer's refusal to consider alternatives to a groundwater transfer project was not consistent with the exercise of his functions as the trustee of water resources in Nevada.

Finally, the *National Audubon* court determined that the trust imposes a duty of continuing supervision over the taking and use of the appropriated water, including supervision over existing vested rights.

In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

*Id.* at 447. This allows reconsideration in a previously adjudicated stream system that a use of water is harmful to current interests protected by the public trust, including reconsideration of rights previously granted in that system. *Id.* at 449. Any member of the general public has standing to raise a claim of harm to the public trust. *Id.* at 431, fn 11; see also *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1364 (Cal. App. 1st Dist. 2008).

### Conclusion and Implication

Now that Nevada has adopted the public trust doctrine it appears only a matter of time before its implications are felt in water right and water allocation proceedings before the State Engineer. How the doctrine is applied in Nevada will likely be an issue of contention. However, as discussed above, the California lead in *National Audubon* and Justice Rose's acceptance of that case and its application in his concurring opinion in *Mineral County* may provide a road map for future public trust applications in Nevada water proceedings.

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<sup>1</sup> To determine navigability, Nevada applies the uniform federal test of navigability, under which waters are navigable if they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce. *State v. Bunkowski*, 88 Nev. 623, 627-629; 503 P 2d 1231 (Nev. 1972).

<sup>2</sup> The court found that the applicability of the public trust doctrine related to land requires consideration of 1) whether the land was submerged beneath navigable waters on October 31, 1864, when Nevada joined the United States, and 2) whether the land became dry through avulsion (a sudden change in a stream).

<sup>3</sup> In Hawaii the public trust doctrine applies to groundwater (*In re Water Use Permit Applications*, 94 Haw. 97, 133 (Haw. 2000)), and the maintenance of waters in their natural state constitutes a distinct “use” under the trust (Id. at 136).

<sup>4</sup> California has expanded the public trust to protection of scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. *National Audubon*, 33 Cal. 3d at 435. Further, public trust can be expanded to protect non-water related resources. In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1354 (Cal. App. 1st Dist. 2008), the court determined that wildlife, including birds, is considered to be a public trust resource where it was alleged that wind turbine electric generators were killing and injuring raptors and other birds in violation of the public trust doctrine.

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