

Clay R. Smith  
Chief Editor, AILD  
CWAG & AG Alliance  
1807 W. Bannock St. I Boise ID 83702  
208.350.6426 (Direct Dial) I 208.724.9780 (Cell)  
[Clay.Smith@cwagweb.org](mailto:Clay.Smith@cwagweb.org)

## **United States v. Walker River Irrigation District**—Ninth Circuit remands county’s public trust doctrine claim for resolution to the extent that it does not seek reallocation of previously adjudicated water rights

The Nevada federal district court entered the Walker River Decree in 1936 adjudicating numerous water rights under the prior appropriation doctrine and maintaining jurisdiction over its administration. Subsequent litigation established procedures for changes in allocation under which the Nevada State Engineer reviews such applications, subject to further review by the district court. Nevada prior appropriation common law, as modified by state statute, controls the State Engineer’s and the court’s decision-making. Mineral County is a relative latecomer to the case, first moving to intervene in 1994 and ultimately granted intervention in 2013. Its complaint requested the court “‘pursuant to its continuing jurisdiction under ... the ... Decree, [to] reopen and modify the final Decree to recognize the rights of Mineral County ... and the public to have minimum levels [of water] to maintain the viability of Walker Lake.’” To achieve this objective, it sought “‘a minimum of 127,000 acre/feet [of water] per year to Walker Lake ... under the doctrine of maintenance of the public trust.’” The district court then dismissed the complaint, as amended, on standing grounds and, alternatively, because “‘the Decree prohibits allocating any water specifically to the lake.’”

On appeal, the Ninth Circuit held that the County possessed standing but then certified two questions to the Nevada Supreme Court:

“[1] Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?

“[2] 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?”

*Mineral County v. Walker River Irr. Dist.*, 900 F.3d 1027 (9th Cir. 2018). The state court answered that “‘Nevada’s ‘public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation,’ but that ‘the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation.’” *Mineral County v. Lyon County*, 473 P.3d 418, 425 (Nev. 2020) (en banc).

Back before the Ninth Circuit, *United States v. Walker River Irrigation District*, No. 15-16342, 2021 WL 287912 (9th Cir. Jan. 28, 2021), the County recognized that the Nevada Supreme Court decision barred part of the relief that it had requested but “‘identifie[d] two legal theories that it says would not require a reallocation of adjudicated water rights.” The first theory—that the Decree itself violates the public trust doctrine whose elements under state law were first articulated by the state court in 2011—found no purchase with the Ninth Circuit panel. It explained that “[w]hatever merit there may be to this novel contention, we are not persuaded that the claim is timely. In *Mineral County*, the Nevada Supreme Court noted that challenges to a judicial decree

adjudicating water rights must be brought within three years” under Nev. Rev. Stat. § 533.210(1). The County’s second theory argued that “this case ‘must be remanded to the district court to determine: (1) ... whether the continuing duty of the Decree Court to maintain Walker Lake’s public trust uses and values has been violated since the entry of the Decree; (2) if so, what level of average annual minimum flows must reach the Lake; and finally (3) what the proper remedy ought to be.’” This theory proved more persuasive with the panel:

[W]e agree with the County that the Nevada Supreme Court’s decision in *Mineral County* does not foreclose the County from seeking remedies under the public trust doctrine that do not require a reallocation of adjudicated water rights. ... The court ... did not consider whether other remedies were viable. The court, moreover, squarely held that “[t]he public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation.” ... Although the court noted that the public trust doctrine “generally acts as a restraint on the state in alienating public trust resources,” ... the court did not hold, as the [Walker] Irrigation District suggests, that the doctrine acts only “as a restraint on alienation of a public resource.”

The panel further rejected, given the case’s procedural status at the time of appeal, the Irrigation District’s argument that “the County’s argument is a new one” and reflected a dilatory change in position. Other arguments advanced by District concerning the County’s proposed remedies “have not been developed, passed on by the district court, or briefed on appeal. We therefore leave them for the district court to address, in the first instance, on remand.”

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/01/28/15-16342.pdf>