

## *The Network Note* November 2020

### *Focus on Nevada*

#### ***Race, Federal Indian Policy, and Access to Water Webinar Starts Series on Race & Water***

*Dividing the Waters* convened its first webinar on racial justice and water on November 20, focusing on federal Indian policy. Speakers included Bethany Berger (U. of Conn.) and Monte Mills (U. of Montana). They described how changing federal Indian policy has affected tribal water rights. [Click here](#) to watch a recording.

In response to a question about how water judges can address past injustices inflicted on tribes, Professor Mills offered SCOTUS' recent opening sentence in *McGirt v. Oklahoma* as a good example: "On the far end of the Trail of Tears was a promise." He explained that each tribe's water rights arise out of a unique history and conditions. Adjudication of those water rights requires close examination of that history.

**Next Up:** Closer examination of tribal history and water rights on the Klamath River.

**NV: Public Trust Does Not Allow Reallocation of Water**  
Responding to questions from the 9<sup>th</sup> Circuit regarding the Public Trust Doctrine on the Walker River, the NV Supreme Court reaffirmed the Doctrine but held that it "does not permit the reallocation of water rights already adjudicated and settled under the doctrine of prior appropriation."

The Walker River originates in CA's Sierra Nevada, flows into NV and through farms in the Carson Valley, and ends at Walker Lake, on the reservation of the Walker River Paiute Tribe. In 1994, Mineral County intervened in the 1936 federal water rights decree case to ensure minimum flows into Walker Lake, to protect its fishery. In 2018, the 9<sup>th</sup> Circuit ruled that Mineral County had standing to assert the Public Trust and asked the NV Supreme Court whether the state's Doctrine allowed reallocation of already-adjudicated water rights.

The NV Supreme Court concluded in *Mineral County v. Lyon County* that, while public trust applied to all NV rivers, the state's statutory structure did not allow reallocation of adjudicated water rights. The Court offered a full analysis of the Doctrine's history, including its 2011 *Lawrence v. Clark County* decision, and the limits the Doctrine imposes on the state's allocation of water. Its analysis of NV statutes, however, led to the conclusion that state law protects the public trust, even in the granting of water rights. The dissent urges more active judicial enforcement of the Doctrine.

#### **NV Water Policy:**

Because much of Nevada's water originates in other states and the Federal Government owns 81% of Nevada lands, federal agencies and courts play leading roles. The Newlands Project, in the Truckee-Carson watershed, was among the first federal water projects after the 1902 passage of the Reclamation Act. Starting in 1915, the US filed water right adjudications in federal courts on the Truckee, Carson, and Walker rivers.

#### **Leading Federal Role**

#### **NV Water Agencies**

The NV Department of Conservation and Natural Resources includes agencies that address water rights and quality. The **Division of Water Resources**, led by the **State Engineer**, has the duty to "conserve, protect, manage and enhance the State's water resources for Nevada's citizens through appropriation and reallocation of the public waters." The **Division of Environmental Protection** implements measures to "ensure clean lakes, streams, rivers and drinking water is available to the citizens of Nevada."

Both agencies provide administrative adjudications of their water right and quality decisions. The State Engineer has hearing officers on water rights. The State **Environmental Commission** hears appeals of water quality decisions.

#### **Enduring NV Water Conflicts**

NV has mostly desert lands, so water is in short supply and often comes downstream from mountains in other states. Conflicts therefore have endured for decades, including:

- *Truckee River* terminates on the Pyramid Lake Paiute Tribe Reservation. In the 1970's, federal courts enforced limits on farmers' rights to divert Truckee River water and recognized the Tribe's rights to flows into its lake. In 1990, Congress passed Tribes Water Rights Settlement Act, leading to negotiation of a new Truckee River Operating Agreement, completed in 2008.
- *Las Vegas* planned to import groundwater from rural NV counties. After 31 years of litigation, Las Vegas gave up on the project earlier this year.
- *Walker River*. As described opposite, the Tribe and Mineral County seek water to protect fish in Walker Lake.
- *Humboldt River*. Surface water rights date to the 1800's, while groundwater developed, separately, in the 1950's.
- *Sagebrush Rebellion*. Cattlemen who lost federal grazing permits claimed rights to control federal grazing lands based on their water rights located on those federal lands.

**Recent court decision? Focus edition ideas? Contact the Network Note Editor at [ALFIII@sbcglobal.net](mailto:ALFIII@sbcglobal.net)**