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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, AMERICAN BIRD CONSERVANCY, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and UTAH RIVERS COUNCIL,

Plaintiffs,

v.

UTAH DEPARTMENT OF NATURAL RESOURCES; UTAH DIVISION OF WATER RIGHTS; and UTAH DIVISION OF FORESTRY, FIRE, AND STATE LANDS,

Defendants,

and

CENTRAL UTAH WATER CONSERVANCY DISTRICT, WEBER BASIN WATER CONSERVANCY DISTRICT, JORDAN VALLEY WATER CONSERVANCY DISTRICT, *et al*.

Intervenors.

BRIEF OF *AMICUS CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Case No. 230906637

Judge Laura Scott

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Other Authorities

Identity and Interest of the Amici Curiae Law Professors

Amici curiae are the more than 30 law professors and scholars listed on the attached appendix. These individuals have dedicated their careers to teaching, researching and writing about natural resources, climate law, property law, and the public trust doctrine. These law professors and scholars are among the nation's leading experts on the complex legal history and evolution of the public trust doctrine. They have a strong interest in informing the Court about the role of the public trust doctrine in defining sovereign legal obligations to water resources, and are well-situated to do so based on their knowledge and experience.

Additional information about the Law Professors is included in their motion for leave to file this brief.

Statements Required by URAP 25(e)[1]

As outlined in the Law Professors' motion, parties were timely notified of amici's intent to file their brief on April 26, 2024. Plaintiffs consented to the filing of this brief, but Defendants and some Intervenors did not (specifically identified in the Law Professors' motion). As of the morning of May 3, 2024, some Intervenors have not provided their position on the Law Professors' brief.

No party or party's counsel authored this brief in whole or in part, and no person—including any party or party's counsel—contributed money intended to fund the preparation or submission of this brief.

[1]Amici Curiae Law Professors rely on the Utah Rules of Appellate Procedure for guidance in preparing this brief.

Introduction

The Great Salt Lake (GSL), the largest natural lake west of the Mississippi River, is a national treasure. John Muir said that the lake provided "one of the great views of the American Continent." *See* Utah.com, *Great Salt Lake Facts*. Its demise is not only a local but a national tragedy. The lake's ecological collapse is the result of longstanding neglect on the part of the state of Utah to restrain upper basin water diversions, largely for agriculture, with no consideration of the cost of the diversions to ecological integrity of the lake. The resulting precipitous drop in water levels, shrinking the footprint of the Great Salt Lake by one-half, unleashing toxic clouds of air pollutants on nearby communities and threatening species extinctions.

The ongoing tragedy is legally unjustified. The state's failure to apply Utah's public trust doctrine (PTD) to protect the GSL against substantial impairment is a violation of the public's right to a sustainable GSL. This court can correct the state's crabbed view of the PTD by requiring the state to consider the effect on the lake's ecological integrity of the upper basin diversions of the public's water. The state has thus far denied its trustee obligations by unjustifiably rejecting the state's PTD duties to protect its principal public trust resource. The state's position that the express recognition of the applicability of the PTD to *lands* in the state's constitution implies a rejection of the state's duty to protect the public waters flowing into the lake is contrary to both federal and state court interpretations of the PTD over the last century-and-a-half.

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Argument

The PTD is a longstanding doctrine of public rights and government obligations to ensure access to and protection of important trust resources like navigable waters and their submerged lands. The U.S. Supreme Court has repeatedly recognized these public rights and governmental duties are inherent in sovereignty. They may be recognized in constitutions and statutes, but they are not created by them, and they are inalienable.

I. The Public Trust Doctrine is Well-Established.

The PTD is an ancient doctrine, a right of the public, recognized throughout the world, and at times referred to as the "law's DNA." Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 283-84 (2014). *See generally* Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* 3-11 (Carolina Academic Press, 3d ed. 2021). The American version of the doctrine can be traced to Roman law; the Justinian Code explained that "the following things are by natural law common to all—the air, running water, the sea, and consequently the sea shore." Institutes of Justinian, 2.1.1.

The PTD was recognized in early American cases like *Carson v. Blazer,* 2 Binn. 475 (Pa. 1810); and *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1823) to protect the public's right to fish in navigable waters over the objections of shoreside landowners. The Supreme Court endorsed the public's right to fish as "a public common of piscary" (fishery), as has been recognized for 600 years in English law" to be a "high prerogative trust," or a "public trust," "incident to the powers of government" and "imposing a duty in the government" to protect public rights in *Martin v. Waddell's Lessee*, 41 U.S. 367, 412-13 (1842).

Three years later, in *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845), the court ruled that public rights in navigable waters in newly created states were conveyed to them implicitly through the equal footing doctrine, an interpretation of the Constitution's admissions clause. In *Barney v. City of Keokuk,* 94 U.S. 324, 338 (1876), the Court described the beds and shores of navigable waters owned by the states by virtue of "their inherent sovereignty." In *Packer v. Bird*, 137 U.S. 661, 672 (1891), the Court announced that navigable waters "properly belong[] to the states by their inherent sovereignty").

The signature public trust case was *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892), in which the Supreme Court invalidated a legislative grant of Chicago harbor to a private railroad company because the state legislature lacked authority to privatize trust lands and waters, as they were "held in trust for the people of the state" and therefore inalienable. *Id.* at 452-453. Otherwise, it would "place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated." *Id*. at 455. If a state legislature could "deprive the state of control over [the harbor's] bed and waters," the result "would be a grievance which never could be borne by a free people." *Id*. at 456.

The Court was clear not only that the trust included both submerged lands and overlying waters but that state's trustee obligations were inalienable, as they required "state management and control" of trust resources in order to ensure against "any substantial impairment of the public interest in the lands and waters...." *Id*. at 453. Justice Field's opinion analogized the PTD to the state's police powers, saying that "the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils . . . than it can abdicate its police powers." *Id*. at 453.

Over the years, *Illinois Central* has had a substantial legacy. The overwhelming number of state courts interpreting the case have considered the decision to be binding on them. *See* Crystal Chase, *The*

Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View, 16 Hastings W-Nw. Envtl. L. Rev. 113 (2010) (noting that 29 state courts have interpreted the decision as binding on them). No state court, so far as we are aware, has ever ruled that a state's PTD did not extend to navigable waters.

II. The Public Trust Doctrine is Inherent in Sovereignty.

Courts have regularly applied Illinois Central's determination that the PTD is a foundational doctrine--an incident of state sovereignty, *Illinois Central,* 146 U.S. at 455 (navigable waters and submerged lands are "held by the state, by virtue of its sovereignty, in trust for the public"). Two years later, in *Shively v. Bowlby*, U.S. 1, 43-44 (1894), the Court stated that the beds and shores of navigable waters "properly belong to the states by their inherent sovereignty"). The Court clarified in a related wildlife trust case that state control over wildlife was an "attribute of government," one recognized since the colonial era, in *Geer v. Connecticut,* 161 U.S. 519, 527-28 (1896).

A century later, the Supreme Court, in a series of cases extending into the 21st century, tied state ownership of the trust resources identified in Illinois Central closely to state sovereignty. For example, in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1997), the Court reiterated that "navigable waters uniquely implicate sovereign interests," also observing that lands under navigable waters have historically been considered "sovereign lands, owned by the state "as an essential attribute of sovereignty" (quoting *Utah Div. of State Lands v. U.S.,* 482 U.S. 193, 195 (1987)). The Court repeated that state ownership of submerged lands is "an essential attribute of sovereignty" in *U.S. v. Alaska,* 521 U.S. 1, 5 (1997).

More recently, the Court again announced, in *PPL Montana v. Montana,* 506 U.S. 576, 589, 604 (2012), that states "in their capacity as sovereigns hold title to the beds under navigable waters," and that "by virtue of the State's sovereignty" neither laches nor estoppel applied to a belated state lawsuit seeking rental payments. The Court has consistently recognized the sovereign ownership and accompanying trust responsibilities of states concerning navigable waters and submerged lands. Sovereign ownership was vested in the states at least by statehood, and probably before then in territorial governments.

In *PPL Montana*, the Court clarified that the equal footing conveyance to the states of navigable waters and their beds--along with the public trust obligations concerning prohibiting "substantial impairment" of trust resources and public enforcement--is a federal doctrine. States may, however, expand the scope of the public's rights under the PTD as they see fit. *Id*. at 604. A year later, the Court recognized that sovereign states possess an "absolute right to all their navigable waters and soils under them for their own common use" as "an essential attribute of sovereignty" in *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 631 (2013).

Many states have interpreted their state authorities and obligations to be inherent in sovereignty. One of the more notable recognitions was that of the Pennsylvania Supreme Court in *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013), in which a plurality of the court described the PTD as embodying the "inherent and infeasible" rights of citizens constitutionally reserved in Article I of the state constitution. Although the Pennsylvania Constitution contains a specific public trust provision in Article I, section 25, the *Robinson* plurality made clear that the state constitution created no new public rights, instead merely enumerated pre-existing rights of the people. *Id*. (citing Article I, section

1 of the constitution recognizing "Inherent Rights of Mankind" as inherent and indefeasible rights). The *Robinson* plurality decision was later endorsed by a majority of the Pennsylvania Supreme Court in *Pennsylvania Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017). The same court later described the PTD as "inherent in man's nature" which was "preserved rather than created" by the state's constitution. *Pennsylvania Envtl. Defense Found. v. Commonwealth,* 255 A.3d 289, 313 (Pa. 2021).

The Utah Constitution, in Article I, section 1, also recognizes inherent and inalienable public rights to defend their liberties, including their properties, presumably including their interests in public property. Utah Const. Art. I, § 1. Presumably, as in Pennsylvania, these public rights were preserved, not created by the Utah Constitution. The Pennsylvania courts are not outliers, as several other courts in other states have interpreted similar language.

The Nevada Supreme Court recently joined a chorus of state courts recognizing the inherent nature of that state's PTD, noting that the doctrine "derives from inherent limitations on a state's sovereign powers." *Mineral County v. Lyon County,* 473 P.3d 418, 425 (Nev. 2020). Among numerous other decisions is the South Dakota Supreme Court's declaration that the PTD is "an inherent attribute of sovereign authority" in *Parks v. Cooper,* 676 N.W. 823, 837 (S.D. 2004). The Hawai'i Supreme Court agreed, describing the PTD as "an inherent attribute of sovereign authority" in *In re Water Use Permits*, 9 P.3d 409, 443 (Haw. 2000) (also noting, at 447, that the PTD is "a dual concept of sovereign right and responsibility"). The Washington Supreme Court, in *Caminiti v. Boyle,* 732 P.2d 989, 993 (Wash. 1987), ruled that the state possessed the PTD *res* "by virtue of its sovereignty, and that the state constitution was merely a formal declaration of pre-existing right. The Washington PTD has "always

existed" in the state, according to *Orion Corp. v. State*, 747 P.2d 1064, 1072 (Wash. 1987). Over a century ago, the Florida Supreme Court recognized the PTD as "governmental in its nature" which "cannot be wholly alienated." *Brickell v. Trammel,* 82 So. 221, 223 (Fla. 1919). Presumably, the inherent and inalienable public rights embodied in the PTD cannot be renounced by a state.

These state courts are hardly the only ones to recognize the inherent sovereign nature of the PTD. Among the others is the Oregon Supreme Court in *Kramer v. City of Lake Oswego*, 446 P.3d 1, 9 (Or. 2019) (noting that "principles of sovereignty" give the state the "absolute rights to all their navigable waters and the soils under them," quoting *PPL Montana LLC v. Montana*, 565 U.S. 576, 590 (2012) (internal quotations omitted), *opinion adhered to as modified on reconsideration*, 455 P.3d 922 (Or. 2019), and *Chernaik v. Brown*, 475 P.3d 68, 76 (Or. 2020) (state acquired title to navigable waters at statehood "by virtue of its sovereignty"); *see also* the Michigan Supreme Court in *Glass v. Goeckel*, 703 N.W.2d 58, 64–65 (Mich. 2005) ("The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources."); and the Arizona Court of Appeals in *Defenders of Wildlife v. Hull*, 199 Ariz. 411 (Ct. App. 2001) (PTD trust resources are "sovereign resources" that the state has a "fiduciary obligation" to manage for the public), *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. App. 1991) (state's PTD duties are an "inabrogable attribute of statehood").

These sovereign public rights antedate statehood. They are inherent in the social contract. For example, in *Robinson Twp. v. Commonwealth, supra,* 83 A.3d at 913, interpreting Article I, Section 27 of the state constitution--guaranteeing public rights to clean air, pure water, and the preservation of the natural environment and establishing the Commonwealth as the "trustee of Pennsylvania's public

natural resources"--as an embodiment of the "social contract between government and the people." More recently, the federal District Court of Oregon recognized that "public trust rights both predated the Constitution and are secured by it," in *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260-61 (Oregon 2016) explaining that Thomas Jefferson and other Founding Fathers were "heavily influenced" by "the Social Contract theory" which "provides that people possess certain inalienable rights and that governments were established by consent of the governed for the purpose of securing those rights." Accordingly, the court found that "the Constitution did not *create* the rights to life, liberty, or the pursuit of happiness — the documents are, instead, vehicles for protecting and promoting those already-existing rights." The protection of these rights is the legal obligation of the sovereign. Upholding this obligation, the PTD "instructs our government" to preserve and protect "the essential natural resources that enable our society to function, evolve, and reproduce for future generations." Torres & Bellinger, *supra*, 4 Wake Forest J. L. & Pol'y, at 283-84.

III. Utah's Robust Public Trust Doctrine

The public trust doctrine in Utah dates at least to statehood in 1896, although probably before in the territorial era in which non-native sovereignty began. Since statehood, Utah has recognized, expanded, and enforced the PTD in its constitution, statutes, and case law. The constitution expressly recognized the PTD applicable to public lands, municipal water, beneficial use as the basis and measure of water rights and forest management. Utah Const., Arts. 20, § 1 (public lands), 11, § 6 (municipal water), 27, § 1 (beneficial use), 18, § 1 (forests).

Utah's legislature has amplified the nature of the state's PTD, declaring that all state waters are the property of the public, subject to existing rights. Utah Code Ann., § 73-1-1. Utah statutes restrict

state alienation trust lands only for uses that serve the public interest or the long-term protection of their conservation value. *Id.* § 65-A-1-2. Utah law also ensures public access rights on state lands for hunting, fishing, and trapping. *Id.* § 23-21-4.

Although the legislature has embraced the state's PTD, Utah courts have insisted that any alienation of the public's sovereign trust rights must serve the public interest and not impair the trust resources. *Coleman v. Utah State Land Bd.,* 795 P.2d 622, 635-36 (Utah 1990). The scope of the state's PTD includes the navigable Green, Grand, and Colorado Rivers, as they have been "highways of commerce in which trade and travel have been conducted in customary modes of trade and travel on water." *Utah v. U.S.* 403 U.S. 9, 10 (1971), even though those waterways were not expressly subjected to trust obligations in the state constitution. Since the 1920s, the state has employed the navigable-in-fact test for public rights under state law, rejecting the more limited English tidal test for navigable waters. *State v. Rolio,* 262 P. 987 (Utah 1927). The capability for use as a highway of commerce, a physical characteristic, was determinative of the existence of public rights, not a constitutional or statutory declaration.

There have been statutory pronouncements of the public nature of waterways, such as the Utah Water Code's declaration of public ownership of water. Utah Code Ann. §. 73-1-1. The Utah declaration, first articulated in 1903, includes public recreational use of both navigable and non-navigable waters. *See Conatser v. Johnson,* 194 P.3d 897 (Utah 2008) (reversing a criminal trespass conviction against a rafter who floated over and walked on privately owned lands). The Utah Supreme Court expressly recognized that the public's use right extends to waters overlying private lands, including "the right to float leisure craft, hunt, fish, and participate in any lawful activity." *Id.* at 899.

The court advised that the public's use rights included "the right to touch privately owned state waters in ways incidental to all recreational rights provided for in the easement." *Id.* at 901-02.

The Utah legislature responded to the *Conatser* decision by attempting to cut back on public rights to recreate in non-navigable waterways whose submerged lands are privately owned. Absent landowner permission, the Utah Public Waters Access Act of 2010 limited permissible public recreational use of private streambeds to "incidental touching or portaging" only in the course of "floating" and "fishing" unless the water had been historically used for recreational activities, restricting the incidental touching of private streambeds for "hunting," "wading," or "any other activity." Utah Code Ann. §§ 73-29-102(9)(a)(i)-(9)(b). The statute enacted an adverse possession-like, ten-year test (post-1982) to establish "historical use" through open, notorious, adverse, continuous public use without interruption. *Id.* § 73-29-203.

The Utah Stream Access Coalition challenged the statute as unconstitutional. A lower court agreed on the ground that the statute violated public trust principles present in Article XX, section 1 of the Utah Constitution. *See Utah Stream Access Coalition v. VR Acquisitions,* 439 P.3d 593, 596 (Utah 2019). This provision "deems "[a]ll lands of the state" that have been "acquired" by it as "public lands" and also mandates that those lands "be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be . . . acquired." *Id.* But the Utah Supreme Court reversed the lower court, interpreting its *Conatser* decision to be based on common law that was subject to modification or reversal by the legislature unless "the *Consatser* easement has a historical basis as a public easement as of the time of the framing of the Utah Constitution." *Id.* at 596-598. As section II of this brief explained, the public trust is *not* a common law doctrine; it is instead

embedded in Article I, section 1 of the state constitution as an inherent and inalienable public right, recognized as such in the numerous decisions by other state courts, as discussed above.

IV. Consistent with other States in the Mountain West, Utah's Public Trust Doctrine Applies to Water Bodies like the Great Salt Lake.

A. Western states, including Utah, recognize the applicability of the public trust doctrine to water.

Nearly all states in the Mountain West have acknowledged their trust obligations around navigable waters.[2] Some states, like Montana and Nevada, have extended their trust obligations and public access rights to non-navigable waters in the state. *See Galt v. Montana*, 731 P.2d 912, 915 (Mont. 1987) (recognizing public's right of recreational use in waters in the state up to the high-water mark); *Mineral County*, 473 P.3d at 425 ("[T]he public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters."). Utah has recognized the applicability of the public trust doctrine to navigable waters and to lands underlying navigable waters in the state. *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 601, 610 (Utah 2019); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 635-36 (Utah 1990). Utah has also recognized the applicability of the public trust doctrine to the Great Salt Lake, the bed of the Great Salt Lake, and the lands surrounding the Great Salt Lake. *See Morton Intern., Inc. v. Southern Pac. Transp. Co.,* 495 P.2d

[2] *San Carlos Apache Tribe v. Superior Ct. Ex rel. Cnty. Of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999); *In re Sanders Beach*, 147 P.3d 75, 78 (Idaho 2006); *Montana Coal. For Stream Access, Inc. v. Curran*, 682 P.2d 163, 168, 170 (Mont. 1984); *Mineral County v. Lyon County*, 473 P.3d 418, 424 (Nev. 2020); *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 51-53 (N.M. 2022); *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 600 (Utah 2019); *Day v. Armstrong*, 362 P.2d 137, 144, 147 (Wyo. 1961). A recent case in Colorado provided the state with the opportunity to recognize the existence of its trust obligations in the riverbed underlying a navigable waterbody. *State of Colo. v. Hill*, 530 P.3d 632 (2023). The Colorado Supreme Court rejected the case for lack of standing; in so doing, the court did not address the underlying questions concerning the existence or scope of the state's trust obligations. *Id.* at 636.

31, 34 (Utah 1972) ("The Great Salt Lake is the property of Utah subject only to regulation of navigation by Congress"); U*tah State Road Comm'n v. Hardy Salt Co*., 486 P.2d 391, 392-93 (Utah 1971).

B. Western states define and treat water as a public resource.

Most Western states recognize public ownership of their water resources in their statutes and regulations. Many Western states' water laws describe water as a public resource or publicly owned.[3] For example, Nevada statutes declare that "[w]ater belongs to [the] public. The 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." N.R.S. § 533.025. Under Article IX of the Montana constitution, "any use of water is a public use and . . . the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses [as defined by law]" M.C.A. § 85-2-101(1) (2023). Likewise, Arizona law stipulates that

> The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

Az. Rev. Stat. § 45-141.A (2022). Colorado, Idaho, New Mexico, and Wyoming statutes also define water as public in nature.[4] State-recognized public access rights for recreational activities confirm the

[3] Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 76 n.108 (2010) (identifying sections of state constitutions and statutes declaring state or public ownership of fresh waters); Mark Squillace, *Restoring the Public Interest in Western Water Law*, 2020 UTAH L. REV. 627, 652 n.126 (listing twelve western state constitutional or statutory provisions declaring waters of the state to be publicly owned).

[4] C.R.S. § 37-92-102; Id. Stat. § 42-101; N.M. Stat. § 72-1-1; Wy. Stat. § 41-3-101.

public nature of water resources. For example, Montana provides that "navigable" waters "between the lines of ordinary high water thereof of the state of Montana" and all "rivers, sloughs, and streams flowing through any public lands of the state" are public waters for the purpose of angling. M.C.A. § 87-2-305.

Although private water users may obtain rights in the waters of Western states, there are some key limitations. First, the nature of a water right is that it is usufructuary: water rights holders do not own the water itself; rather, they have the right to use a specified quantity in a specified location. Second, states require rights holders to put the water to beneficial use. *See, e.g.*, Id. Stat. § 42-101 (imposing an affirmative obligation on the state to "supervise [surface waters'] appropriation and allotment to those diverting the same therefrom for any beneficial purpose[]"); N.M. Stat. § 72-1-1 (confirming public ownership is limited to beneficial use); Az. Rev. Stat. § 45-141.A (2022) (same).

C. Utah's water code defines and treats water as a public resource, and places key limits on water rights.

Utah's water code is consistent with other western states in its description and treatment of water as a public resource subject to beneficial use. The state declares that "[a]ll waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof." Utah Code Ann. § 73-1-1(1). The code announces that "[t]he Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property." *Id*. at § 73-1-1(3). As in other Western states, "beneficial use" serves as the "basis, the measure, and the limit of all rights to use of the water in this state." *Id*. at § 73-1-3.

A beneficial use is not the right to divert a fixed quantity of water in perpetuity. The Utah Supreme Court has repeatedly recognized the need to ensure "the most continuous beneficial use of all available water with as little waste as possible." *Delta Canal Co. v. Frank Vincent Family Ranch, LC*,

420 P.3d 1052 (Utah 2013) (quoting *Green River Canal Co. v. Thayn*, 84 P.3d 1134 (Utah 2003). Water users are under a continuing obligation to ensure that their use of water satisfies both prongs of beneficial use: (1) beneficial purpose and (2) reasonable amount. *Id*. at 1059 (citing *Eskelsen v. Town of Perry*, 819 P.2d 770, 775-75 (Utah 1991). Where appropriate, courts should exercise their power to order improved methods of managing water "so as to assure the greatest possible use of the natural resource." *Id*. at 1059 (citing *In re Water Rights of Escalante Valley Drainage Area*, 348 P.2d 679, 682 (Utah 1960).

Accordingly, Utah courts play an important role in interpreting and applying the PTD to Utah's water bodies, including the Great Salt Lake. Recognition that the PTD is inherent in all state water rights, as it is in Nevada, *Mineral Cy. v. Lyon Cy,* 473 P.3d 418 (Nev. 2020), would mean that the Great Salt Lake could not be destroyed by the state's unwillingness to acknowledge the Lake as a trust resource. Allowing the Lake to be "wasted" by upper basin water diversions is neither in the public interest nor a beneficial use. State inaction to restrain diversions that are not used beneficially is a violation of the PTD. No vested rights are threatened. *See* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: the Inefficient Search for Efficiency in Western Water Use,* 28 Envtl. L. 919 (1998).

The public trust doctrine requires all feasible accommodations to protect trust resources. *Nat'l Audubon Socy v. Superior Ct,* 658 P.2d 709, 712 (Cal. 1983). Feasible accommodations within the state of Utah's authority could include 1) changing how surplus waters are managed in wet years and how flows outside of the irrigation season are managed, 2) requiring efficiency improvements with the saved water released to the Lake, and 3) implementing an enforceable state restoration plan. A restoration plan resulting from judicial recognition of the applicability of the PTD to Mono Lake has produced

considerable restoration of the Lake and its surface area. From a historic low in 1982 of 6,372 feet above sea level, Mono Lake has been rising toward its targeted management level of 6,392 feet above sea level; the May 1, 2024 reading was 6,383.7 feet above sea level, almost 60% of the state's goal, despite persistent drought years. "State of the Lake," Mono Lake Committee, available at https://www.monolake.org/learn/stateofthelake/ (last accessed May 3, 2024). The ongoing recovery of Mono Lake is a clear example of the tangible benefits that flow from a court's recognition and application of the PTD.

Water rights are further limited by the need to consider appropriations' potential harms to public welfare. The Utah State Engineer may approve an application to appropriate water only where, among other criteria, the State Engineer has reason to believe that "the proposed plan...would not prove detrimental to the public welfare[.]" Utah Code Ann. § 73-3-8(1)(a)(iii)(B). Although the statute does not define "public welfare" or instruct when an appropriation may prove "detrimental" to it, the Utah Supreme Court has used the public welfare standard to sustain the denial of a water right. In *Tanner v. Bacon*, the court concluded, "Where the approval of the application would...interfere with the more beneficial use for any of the purposes mentioned, or would prove detrimental to the public welfare, the State Engineer is directed to reject the same." *Tanner v. Bacon*, 136 P.2d 957, 962 (Utah 1943).[5]

[5] For a more detailed discussion of the "public welfare" standard in Utah, *see* Squillace, 2020 Utah L. Rev. at 670-71.

D. The Public Trust Doctrine Protects Affiliated Non-Navigable Waters that Feed the Great Salt Lake.

The public trust doctrine protects more than navigable lakes and streams. It also shields non-navigable tributaries to protected waters when diverting them would damage the downstream resources. *See People v. Gold Run D.M. Co.,* 4 P. 1152 (1884); *People v. Russ,* 64 P. 111 (1901) (finding a public nuisance created by dams on non-navigable sloughs adjoining and adversely affecting a navigable river). The adverse effects of diversions from upstream non-navigable waters on a protected downstream body can violate the public trust doctrine if the diversion damages the vitality of a public trust resource such as the Great Salt Lake.

The importance of accounting for the aggregate, cumulative effects of non-navigable influent streams has played a key role in modern cases implementing the public trust doctrine. For example, in its seminal *Mono Lake* decision, the California Supreme Court found that diversions of virtually the entire flow of four freshwater streams away from Mono Lake to the City of Los Angeles constituted a violation of the state's public trust doctrine. *National Audubon Society v. Superior Court of Alpine County,* 658 P.2d 709 (Cal. 1983). These diversions, pursuant to prior appropriation rights, diminished the surface area of Mono Lake by one-third, imperiling its scenic and ecological value. 658 P.2d at 711. The court declared that California's core obligations under the public trust doctrine extended to "waters tributary to Mono Lake and bar[red Los Angeles] or any other party from claiming a vested right to divert waters once it [became] clear that such diversions harm the interests protected by the public trust." *Id.* at 712-713. The court acknowledged that these upstream diversions were non-navigable

waters, but were nonetheless subject to public trust limits where necessary to protect navigable waters from harm. *Id.* at 720-721; *see* discussion *supra* at 15-16.

The extension of public trust protections due to aggregated, cumulative effects extends to groundwater as well. For example, when environmentalists objected to the extraction of groundwater at a scale that damaged the Scott River, the California Court of Appeals focused on the nature of the aggregated harm - not the navigability of the source - in recognizing that the state's public trust doctrine to upstream groundwater pumping adversely affecting a navigable water:

> The County's squabble over the distinction between diversion and extraction is, therefore, irrelevant. The analysis begins and ends with whether the challenged activity harms a navigable waterway and thereby violates the public trust. The fact that in this case it is groundwater that is extracted, in *National Audubon* it was nonnavigable tributaries that were diverted, and in *Gold Run* it was sand and gravel that was dumped, is not determinative. Each and every one of these activities negatively impacted a navigable waterway. As a consequence, the dispositive issue is not the source of the activity, or whether the water that is diverted or extracted is itself subject to the public trust, but whether the challenged activity allegedly harms a navigable waterway.

Envtl. Law Found. v. State Water Res. Control Bd., 26 Cal.App.5th 844, 859-60 (Cal. Ct. App. 2018). If the Great Salt Lake were located in California, the public trust doctrine would require the state to review and restrict upstream diversions of non-navigable streams and groundwater extractions harming the Lake—even if the public trust doctrine does not apply directly to those upstream bodies themselves.

As noted above, the Utah Supreme Court has recently ruled that the state's public trust doctrine is based on common law that the Utah Legislature can modify or reverse via statute (unless the access right arises from a historical public easement in place when the Utah Constitution was framed). The Utah Public Waters Access Act of 2010, however, limits recreational use of private streambeds only

under certain circumstances. This statutory framing does not alter Utah's obligations as a public trustee to prevent harm to the Great Salt Lake caused by over-appropriation and diversion of non-navigable tributaries and streams necessary to the Lake's health, or to allow the mining of groundwater that leads to depletion of the Lake itself.

V. Utah has Violated its Affirmative Obligation to Preserve and Protect the Great Salt Lake.

The state's ownership of the trust resources imposes duties on the state as trustee. *See Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911, 931–32 (Pa. 2017) ("[The natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries."). Indeed, a growing number of states have recognized that states as trustees have affirmative obligations to protect and preserve public trust assets.

In California, for example, the Supreme Court has been unequivocal: "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." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983). That obligation means that if the state grants an appropriation right for a water diversion "the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water." *Id.* That duty is judicially reviewable. The state Court of Appeal ruled that groundwater pumping was subject to the PTD, the court observing in 2018 that "[t]he analysis begins and ends with whether the challenged activity harms a navigable waterway and thereby violates the public trust." *Envtl. Law Found. v. State Water Res. Control Bd.*, 26 Cal. App. 5th 844, 859–60 (Cal. App. 2018). Because the groundwater pumping harmed navigable waterways, and because the state had failed to take those harms into account in approving the extractions, the state had violated its

"affirmative duty . . . to act on behalf of the people to protect their interest in navigable water." *Id.* at 857.

So, too, in Hawai'i. The Hawai'ian Supreme Court has described the public trust as "a dual concept of sovereign right and responsibility." *In re Water Use Permit Application*, 9 P.3d 409, 447 (Haw. 2000). That responsibility amounts to a "duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e. g., recreation." *State by Kobayashi v. Zimring*, 566 P.2d 725, 735 (Haw. 1977). In a 2014 decision, the Hawai'ian Supreme Court upheld a local planning commission's denial of permits for a water bottling company, observing that the commission properly "took seriously its public trust duty[.]" *Kauai Springs, Inc. v. Planning Comm'n of Cnty. of Kauai*, 324 P.3d 951, 985 (Haw. 2014). In fact, the commission's "duties under the public trust *required* it to ensure that [the company's] proposed use was in compliance with [state] requirements." *Id.* at 989 (emphasis added).

Alaskan courts have held similarly. The Alaska Supreme Court has been clear that the state owes a fiduciary duty as trustee of public trust assets. *Kanuk v. State Dept. of Natural Res.*, 335 P.3d 1088, 1099–1100 (Aka. 2014). That court has held the state to that obligation, finding a breach of fiduciary duty when the state commingled public trust lands with other general grant lands. *State v. Weiss*, 706 P.2d 681, 684 (Aka. 1985). The court has correspondingly permitted the state to sue private parties interfering with public trust resources, holding that the state's status as trustee "restrain[s] governmental use of public resources, [and] also enables the State to recover damages from third parties for harm to trust resources." *Williams Alaska Petroleum, Inc. v. State*, 529 P.3d 1160, 1187 (Ala. 2023).

Pennsylvania has followed suit, as "'the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct…[a]s a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.'" *Pa. Envtl. Defense Found.*, 161 A.3d at 932 (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956–57 (Pa. 2013)). In practice, that means the state has "a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties." *Id.* at 933. While decisions about what course of action to take may be discretionary, "[t]he trustee may use the assets of the trust only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries." *Id.* (quotations omitted).

Just a few years ago, Nevada agreed. In a 2020, the Nevada Supreme Court chided the state for attempting to "evade its fiduciary duties regarding public trust property" when it "freely allocate[d] nonnavigable waters to the detriment of navigable waters[.]" *Mineral Cnty. v. Lyon Cnty.*, *supra,* 473 P.3d 418, 426 (Nev. 2020). As the Court made clear, "[t]his, the state cannot do." *Id.*

The weight of authority is thus compelling: state trustees have affirmative obligations under the public trust doctrine. These duties, fiduciary in nature, obligate the state to act to preserve public trust resources. Consistent with this growing judicial chorus, Utah's public trust duties are to protect and preserve the Great Salt Lake.

Utah has not come close to meeting those responsibilities. As set forth in the Plaintiffs' Complaint, the state is not only neglecting to act to save the Great Salt Lake, but *actively authorizing*

water appropriations that divert upstream water. *See* Compl. at ¶¶ 11, 70. Through those state-approved diversions, 2.1 million acre-feet of water never make it into the Great Salt Lake. *See id.* at ¶ 72. Rather than address that problem, the state has instead focused on "trying to persuade individual water users to undertake voluntary measures to reduce their consumption[.]" *See id.* Seeking voluntary measures from water users is insufficient to meet the state's duty to ensure against the "substantial impairment" of the Great Salt Lake while the lake continues to shrink and its ecosystem is undergoing collapse.

Just as courts in California, Hawai'i, Alaska, Pennsylvania, and Nevada have done, this court can address and remedy the state's violation of its public trust duties. We urge it to do so.

Conclusion

The Great Salt Lake's precarious future is not beyond legal remedy. The public trust doctrine supplies a path toward a resolution. That path begins with this Court correcting the state's shortsighted view of its trust obligations, which apparently excuses its inaction in avoiding the destruction of the Lake, a trust resource under state law. In recent years, Western states like California, Hawaii, and Nevada have recognized the trust doctrine's applicability to water rights. Its application invites the modernization of water law, a law that at times seems frozen in the 19th century. No vested rights need be threatened, but vested rights in prior appropriation law are not rights to divert a fixed quantity of water in perpetuity.

The state clearly has the authority to undertake water conservation measures necessary to restore the Lake, like changing surplus water management in wet years, managing flows outside the irrigation season for conservation, and requiring efficiency improvements with the conserved water released to the

Lake. Directing the state to fulfill its public trust obligation by developing and enforcing a plan with such measures to restore the Lake is certainly within the authority of this Court. Moreover, all water rights in the state are subject to the public interest and must be used for beneficial purposes without waste. It is within the power of this Court to inform the state that the waste of the Great Salt Lake is neither in the public interest, nor is it a beneficial use.

Respectfully submitted this 3rd day of May, 2024,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Utah Rules of Appellate Procedure governing briefs of *amicus curiae*, I certify that this brief is 6,995 words, as tabulated by Microsoft Word and excluding the tables of contents and authorities, appendices, and signature and certificates of counsel.

Dated: May 3, 2024

/s/ Julie J. Nelson

CERTIFICATE OF SERVICE

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