

IN THE SUPREME COURT OF THE STATE OF NEVADA

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No. 75917

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MINERAL COUNTY; AND WALKER LAKE  
WORKING GROUP,

Appellants,

vs.

LYON COUNTY; CENTENNIAL LIVESTOCK;  
BRIDGEPORT RANCHERS; SCHROEDER GROUP;  
WALKER RIVER IRRIGATION DISTRICT;  
STATE OF NEVADA DEPARTMENT OF WILDLIFE; AND  
COUNTY OF MONO, CALIFORNIA

Respondents.

---

ON CERTIFICATION FROM THE UNITED STATES  
COURT OF APPEALS FROM THE NINTH CIRCUIT

Case No. 15-16342

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BRIEF *AMICUS CURIAE* OF PERI & SONS FARMS, INC.,  
DESERT PEARL FARMS, LLC, PERI FAMILY RANCH, LLC,  
JASON CORPORATION, AND FRADE RANCHES, INC.  
IN SUPPORT OF RESPONDENTS

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RULE 26.1 DISCLOSURE OF *AMICUS CURIAE* PERI & SONS FARMS, INC.,  
DESERT PEARL FARMS, LLC, PERI FAMILY RANCH, LLC,  
JASON CORPORATION, AND FRADE RANCHES, INC.

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel for *amici curiae* Peri & Sons Farms, Inc., Desert  
Pearl Farms, LLC, Peri Family Ranch, LLC, Jason Corporation, and Frade Ranches,

Inc. hereby certifies that none of the foregoing *amici* parties are owned by a parent corporation or company and no publicly-held company owns ten percent (10%) or more of any of their stock or membership interests. Brad M. Johnston of Simons Hall Johnston PC is the only attorney and law firm expected to appear in this Court on behalf of the *amici curiae*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted this 19th day of April, 2019.

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## **I. Identity and Interest of *Amici Curiae*.**

*Amici curiae* Peri & Sons Farms, Inc. (“Peri & Sons”), Desert Pearl Farms, LLC (“Desert Pearl”), Peri Family Ranch, LLC (“PFR”), Jason Corporation (“Jason”), and Frade Ranches, Inc. (“Frade Ranches”) are affiliated Nevada companies located in Lyon County in and near the City of Yerington. Desert Pearl, PFR, Jason, and Frade Ranches are the land-holding companies among the *amici curiae* that own water-righted farmland within the Walker River Basin, which they lease to Peri & Sons. Collectively, they own approximately 7,000 acres of irrigated farmland and have decreed water rights under the Walker River Decree totaling 99.86 cfs.<sup>1</sup>

Peri & Sons is the operating entity among the *amici curiae*. It farms approximately 12,500 acres throughout Mason Valley, which sits exclusively within the Walker River Basin.<sup>2</sup> Peri & Sons’ crops include fresh-market onions, organic leafy greens, such as baby spinach, spring mix, broccoli, and cauliflower, and forage crops, like alfalfa and triticale, used to feed dairy cows and other livestock. To the best of its knowledge, Peri & Sons is the largest private water right user on the entire Walker River system.

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<sup>1</sup> Decreed water rights are based on “cfs” which stands for cubic feet per second.

<sup>2</sup> Peri & Sons also leases irrigated farmland from non-affiliated, third parties in addition to the farmland Desert Pearl, PFR, Jason, and Frade Ranches own. That is why Peri & Sons farms more acres than the acres owned by its affiliated companies.

Peri & Sons traces its roots back to humble beginnings in 1979, when David Peri moved from his childhood home and family farm in Lockwood, Nevada to Yerington to pursue his passion for farming. An initial crop of 100 acres of onions on leased land in 1980 lead to the incorporation of Peri & Sons in 1981 and the company's expansion over the past thirty-nine years. The company now not only farms over 12,000 acres in Mason Valley, it employs approximately 250 full-time, year-round employees and nearly 1,800 seasonal workers.

In 2018, the company's sales approached \$150 million, resulting from 3,500 acres of fresh-market onions (approximately 306,250,000 pounds of onions) and another 3,500 acres of organic leafy greens (approximately 90,000,000 pounds of organic greens), not to mention the company's forage crops. The costs associated with this food production, such as labor, fuel, fertilizer, assessments, taxes, and professional services, exceeded \$146 million being pumped into the local and regional economies. Yet, none of these social and economic benefits would be possible without irrigation water, including the decreed water rights that exist under the Walker River Decree dating back to the 1800's. Accordingly, this Court's response to the Ninth Circuit's certified questions will have far-ranging and potentially devastating consequences to the social and economic fabric of rural, agricultural communities (and all other communities in Nevada) that have relied and continue to rely on the finality of legally-protected adjudicated water rights.

Peri & Sons and its affiliated *amici* companies have an interest in filing this amicus brief on the two questions the Ninth Circuit Court of Appeals certified to this Court, *see Mineral County v. Walker River Irrigation District*, 900 F.3d 1027 (9th Cir. 2018), because they have historically relied on and continue to rely on the finality and certainty of decreed water rights to acquire farmland, make capital investments, improve ranch properties, expand farming operations, and grow the food people need in order to eat. Any utilization of the public trust doctrine to take decreed water rights from Peri & Sons and its affiliated companies (and/or any other farms) in favor of another locale would not only jeopardize Peri & Sons' economic survival but also inhibit future crop diversification, economic growth, and capital investment. Irrigation water is the cornerstone of any farming operation in the Walker River Basin (and everywhere else in Nevada), and imposition of the public trust doctrine to reallocate decreed and appropriated water rights to other uses, as Mineral County advocates, would create social and economic chaos.

Indeed, this case does not begin and end with the Walker River decree as Mineral County seems to suggest. And, Mineral County's apparent suggestion that decreed water rights can simply be reallocated to Walker Lake without further consequence is false. This is because the Walker River system is far more complex than Mineral County and its supporters have acknowledged.



The Walker River system includes not only the natural flow, decreed water rights the United States District Court for the District of Nevada administers pursuant to the Walker River Decree, but also storage water rights supplemental to decree rights, newlands stand-alone storage rights, underground water rights supplemental to decree rights, and stand-alone, primary underground water rights.<sup>3</sup> While newlands and primary underground rights are not tied directly to the Walker River Decree, supplemental water rights are. Thus, application of the public trust doctrine to reallocate decreed water rights already adjudicated under the Walker River Decree would likely have a cascading effect on the security and validity of other water rights established and in good-standing under Nevada law, further impacting farming operations in the Walker River Basin like those of *amici*.

Peri & Sons, by virtue of its lease agreements with its affiliated *amici* and other third-parties, has the right to use over 19,000 acre feet of supplemental groundwater rights in the Mason Valley hydrographic basin.<sup>4</sup> These supplemental groundwater rights are used when surface water is not sufficiently available during

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<sup>3</sup> Storage water came into existence on the Walker River system with the creation of a reservoir on the East Fork of the Walker River in Bridgeport, California and a reservoir on the West Fork of the Walker River in Topaz, California/Nevada.

<sup>4</sup> While Desert Pearl, PFR, Jason, and Frade Ranches together own approximately 19,000 acre feet of supplemental groundwater rights in Mason Valley, the State has issued approximately 119,000 acre feet of supplemental groundwater rights for irrigation in Mason Valley. *See Nevada State Engineer Order Number 1268* at pp. 5-6, ¶ 15.

the irrigation season because, for example, a lack of snowfall in the Sierra Nevada limits Walker River flows. In fact, supplemental groundwater rights were applied for and granted on the basis that they would only be used “when necessary to make up, but not wholly replace, the surface-water source [i.e, the Walker River] when surface water was deficient [i.e., in years of low natural flow].” *Nevada State Engineer Order Number 1268* at p. 2, ¶ 6. Because supplemental groundwater rights can only be used for this limited purpose, their use fluctuates from year to year depending on river flows. And, special restrictions apply to supplemental groundwater rights. These special restrictions include not allowing supplemental groundwater rights to be used for beneficial uses other than irrigation, not allowing them to be used as stand-alone water rights, and limiting the transfer of such rights based on the priority date of the Walker River Decree right they supplement. *See id.* at p. 5, ¶ 13.5 Thus, any reallocation of decreed water rights under the public trust doctrine would necessarily call into question the status of supplemental groundwater

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<sup>5</sup> In this regard, supplemental groundwater rights can only be transferred “to locations that also have a surface water right of the same or senior priority as the surface water right at the place of use for which the groundwater right was originally granted.” *Nevada State Engineer Order Number 1268* at p. 5, ¶ 13. Thus, for example, if a supplemental groundwater right was granted to supplement a decree right with a 1895 priority date, it can be transferred to supplement a different 1895 decree right (equal priority), and an 1890 decree right (senior priority), but not a 1900 decree right (junior priority). The rationale for this restriction is that the supplemental groundwater right would be used more extensively if transferred to supplement a more junior decree right.

rights in the Walker River system – 119,000 af of groundwater in Mason Valley alone – that are critical to sustaining farming operations. For this additional reason, *amici curiae* have an interest in filing this brief because adoption of the public trust doctrine, as advanced by Mineral County, would, in all likelihood, impact other water rights that support agriculture and have served as a basis for ranch acquisitions, capital improvements, expanded farming operations, and crop diversification.

The answers this Court provides in response to the two questions the Ninth Circuit Court of Appeals has certified to it will have far-ranging implications and affect the certainty and security of all Nevada water rights generally and those within the Walker River Basin particularly. With irrigation water serving as the basis for any agricultural activity within the Walker River Basin (and consequently the economic base of that region), *amici curiae* have a unique interest in being heard on the certified questions.

## **II. Summary of Argument.**

Mineral County wants to take water from existing users on the Walker River System to increase the flow of water into Walker Lake. It claims this can be done by “reallocating” decreed water rights on the Walker River – rights adjudicated nearly eighty years ago – and that the public trust doctrine mandates such reallocation without regard to other considerations or compensation to existing water right owners. The public trust doctrine does not, however, stand as a remedy Mineral

County (or any other third party) can invoke to take water rights from existing beneficial uses like agriculture in favor of what it identifies as a superior use – Walker Lake. Furthermore, to the extent water is taken from existing water right users under the public trust doctrine to allocate water to Walker Lake, such taking/reallocation would violate the Nevada Constitution if just compensation was not paid.

### **III. Legal Argument.**

#### **a. The Public Trust Doctrine.**

The Ninth Circuit certified to this Court the following question: Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation? This Court should answer this question in the negative because: (i) the public trust doctrine is a limitation on the State’s power to transfer certain land, and (ii) recognition of the right to use water for beneficial uses under the doctrine of prior appropriation, such as those rights recognized and legally protected by the Walker River Decree, are necessarily consistent with any limitations embodied in the public trust doctrine. This Court should further reject Mineral County’s assertion that the public trust doctrine imposes a legal duty on the State to preserve – at any and all cost – Walker Lake without regard to other considerations. Indeed, Mineral County seeks to turn a narrow limitation on the State’s power to transfer certain property into a third-party remedy that takes water from existing

beneficial uses in favor of another locale. This remedy does not exist under Nevada law, and this Court should not create it.

The seminal case in the United States concerning the public trust doctrine is the United States Supreme Court's decision in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). In that case, a dispute arose over the ownership of certain submerged lands at Lake Michigan in the City of Chicago. *See Illinois Central*, 146 U.S. at 433-34. The Illinois legislature enacted legislation transferring title to submerged lands at Lake Michigan to the Illinois Central Railroad and then rescinded the transfer years later. *See id.* at 449-42. The Court ultimately concluded that the Illinois legislature had the power to rescind the land transfer because the original transfer was inconsistent with the state's obligation to maintain lands under navigable waters for the public's benefit. Critical to the Court's decision was the fact that the original land transfer would not necessarily benefit the public. Thus, *Illinois Central* defines the public trust doctrine as a limitation on a state's power to transfer certain lands in derogation of certain public interests, not a limitation on the ability to recognize beneficial uses of water that serve the public's interest in promoting food production and an economically-viable agricultural industry.

This Court, in affirmatively recognizing the existence of the public trust doctrine in Nevada in *Lawrence v. Clark County*, 127 Nev. 390 (2011), similarly defined the doctrine as the United States Supreme Court did in *Illinois Central*.

Specifically, this Court, noting that the public trust doctrine is “distinct from other common law principles” that the legislature cannot easily abrogate, concluded that “any legislation that purports to convey *public trust lands* is subject to judicial review.” *Id.* at 400-01 (emphasis). In reaching this conclusion, this Court reasoned that the public trust doctrine was a limit on the state’s sovereign power to dispose of certain lands; thus, the legislature could not abolish the limits of its authority through legislation. *See id.* This Court then defined public trust land as land that was “submerged beneath navigable water when Nevada joined the United States on October 31, 1864.” *Id.* at 401. And finally, this Court noted that lands subject to the public trust doctrine could nevertheless be transferred after considering whether the land is being transferred for a public purpose, whether fair consideration is being received, and whether the transfer satisfies the state’s obligation to maintain the trust asset for present and future generations. *See id.* at 405. Accordingly, Nevada’s public trust doctrine, like that set forth in *Illinois Central*, is a limitation on the state’s power to transfer certain lands in derogation of certain public interests, not a limitation on the ability to recognize beneficial uses of water. And, this Court should not expand the public trust doctrine beyond what it is set forth in *Lawrence* or turn it into a remedy that can be used to re-write Nevada’s water law.

Indeed, there is no basis to apply the public trust doctrine to decreed water rights. The common law, constitutional, and statutory provisions concerning land

that this Court relied upon to adopt and define the public trust doctrine in *Lawrence* do not exist – historically or presently – in Nevada’s water law. The Nevada Constitution does not address the use of water, the common law permitted and controlled the use of water (including the waters of the Walker River system) until the first part of the last century, and Nevada statutes allow for the beneficial use of waters within the State. Thus, while the public trust doctrine, as stated in *Lawrence*, may serve as an “inseverable restraint” on the state’s power to transfer land submerged under navigable water due to common law, constitutional, and statutory restraints, it is not an inseverable restraint on the state’s ability to permit beneficial uses of water for the public good. This Court should accordingly hold that the public trust doctrine does not apply to rights already adjudicated and settled under the doctrine of prior appropriation.

Underscoring this conclusion is the fact that even if the public trust doctrine applies to adjudicated water rights, the legal right to use water in Nevada satisfies the three-part test this Court adopted in *Lawrence*. First, the right to use water exists for public purposes and benefits the public directly. In this regard, this Court need not look any farther than the social and economic benefits associated with Peri & Sons’ farming operations. Hundreds of Nevada citizens have direct full-time employment because Peri & Sons can irrigate its crops. Take away the right to use water, and these jobs are taken away too. Other business that support Peri & Sons’

farming operations, such as fuel suppliers, trucking companies, and sellers of farm equipment, benefit from over \$100 million being pumped into the economy each year as a result of Peri & Sons' crop production. Take away the right to use water, and this economic activity is taken away too. The population as a whole also has access to the affordable, secure food Peri & Sons grows because it can use water to irrigate its crops. Thus, there is no doubt that the recognition of water rights exists for public purposes and benefits the public as a whole.

The State also receives fair consideration in exchange for the right to use water because those possessing water rights must adhere to regulatory requirements the State imposes on them. This includes using water for a permitted, beneficial use at a designated place of use. In addition, the right to use water sustains viable farming operations that improve lands, pay taxes, and sustain rural, agricultural communities. And because water must be used for beneficial purposes and is regulated, present and future generations are protected. Accordingly, the dispensation of the right to use water in Nevada meets the requirements of *Lawrence*, further negating Mineral County's assertion that the public trust doctrine requires reallocation of existing water rights for the benefit of Walker Lake.

Finally, the negative consequences that would result from this Court's adoption of Mineral County's interpretation of the public trust doctrine cannot be overstated. While farming is always affected by certain uncontrollable variables



such as weather and volatile commodity markets, one constant is the certainty and finality associated with water rights that exist under Nevada law. This allows farming enterprises, like *amici*, to make informed decisions when it comes to ranch acquisitions, business plans, and capital improvements. If water rights, like those settled under the Walker River Decree, become uncertain and can be taken away by application of the public trust doctrine, the public trust doctrine will perversely inhibit rather than advance the public good because it will stifle land acquisitions, capital improvements, long-term business planning, and, consequently, the social and economic benefits derived from existing beneficial uses of water. It would also create uncertainty with respect to additional water rights, such as supplemental groundwater rights, that are tied to existing decree rights, exacerbating the negative side-effects. And, these types of negative consequences would permeate across Nevada and other water-reliant developments due to the cloud of uncertainty the public trust doctrine would forever create. This Court should accordingly decline Mineral County's invitation to expand the public trust doctrine, and answer, as a matter of Nevada law, that the public trust doctrine does not apply to water rights adjudicated and settled under the doctrine of prior appropriation.

**b. Reallocation of Adjudicated Water Rights Would Constitute a Taking.**

Mineral County wants at least 127,000 acre feet of water to flow into Walker Lake annually. This would require owners of existing, perfected water rights to be cut-off in some form from using their legally-recognized and protected water rights. Thus, Mineral County wants to appropriate water rights for Walker Lake that others, including *amici*, already own. This would constitute a taking requiring just compensation.

This Court has recognized that water rights are property rights that cannot be taken without just compensation. *See, e.g., Dermody v. City of Reno*, 113 Nev. 207, 212-13 (1997). In fact, this Court recently reiterated that water rights are “regarded and protected as real property” such that water right holders have a due process right to notice of a hearing that could result in the initiation of curtailment proceedings because, if initiated, the curtailment proceedings could deprive water right holders of their property rights. *See Eureka County v. Seventh Jud. Dist. Ct.*, 134 Nev. Ad. Rep. 37, 417 P.3d 1121 (2018). It is accordingly incongruous for Mineral County and its supporters to claim that adjudicated water rights can be taken from existing owners without just compensation to effectively establish a new, senior right to increase flows to Walker Lake.

On this point, it is important to emphasize, as this Court has stated, that “appurtenant water rights are a separate stick in the bundle of rights attendant to real property.” *Dermody*, 113 Nev. at 212. And, appurtenant water rights transfer with land as a matter of law if they are not expressly reserved in the land conveyance. *See id.* Thus, when water-righted properties are bought and sold, such as ranches in the Walker River Basin, the purchase price is largely determined by whether water rights are being reserved (drastically reducing the per-acre price) or, if they are not being reserved, the nature and quality of the water rights that will transfer with the land (potentially maximizing the per acre price). In other words, people pay for water rights. Yet, Mineral County wants to take water rights people have paid for without compensation. This is not permitted.

Furthermore, Mineral County wants to reallocate water rights under the Walker River Decree without giving due consideration to how that reallocation would impact supplemental storage and groundwater rights that currently exist in the Walker River Basin. As discuss *supra* at p. 5, supplemental groundwater rights have been granted based on their link to natural flow, decree rights. If Walker River Decree rights are reallocated, what happens to the legally-protected groundwater rights that are tied to them? Proportional reduction of supplemental groundwater rights would take additional water rights from existing users, compounding the social and economic problems of reallocation. And, no reduction in supplemental

groundwater rights could have unintended consequences in the hydrographic basin due to increased groundwater use. The public trust doctrine should not, therefore, be expanded to allow reallocation of surface rights resulting in further complications and/or takings in connection with other legally-recognized and protected water rights like supplemental groundwater rights.

Finally, water right owners, like *amici*, have made substantial investments based on the fact that their water rights have been adjudicated. These investments include ranch improvements, such as the replacement of open-air ditches with pipelines for more efficient delivery of irrigation water, the construction of supplemental groundwater wells, the purchase of more efficient irrigation equipment, and the purchase of farming equipment that will sit idle in the absence of water. Thus, the amount expended based on the existence and certainty of adjudicated water rights cannot be isolated or limited to the actual cost to acquire water rights. And, disruption of adjudicated water rights through an expansion of the public trust doctrine would negatively impact these types of investments to the detriment of the public good. Mineral County according seeks to promote its economic welfare without regard to the economic welfare of its neighboring county and existing businesses and industries. The public trust doctrine does not support such a trade-off.

#### IV. Conclusion.

Agriculture is the economic driver in the Walker River Basin. It has been historically. And, it is today. *Amici curiae* are a large part of the agricultural activity that exists in the Walker River Basin, creating jobs and producing other social and economic benefits. But, these social and economic benefits cannot exist without the use of water. So, the fundamental question in this case is whether a doctrine premised on protecting the public good now and in the future can be turned on its head to disrupt the social and economic benefits that result from the use of adjudicated water rights in accordance with Nevada's water law. The answer to this question is no. This Court should, therefore, reject Mineral County's invitation to expand the public trust doctrine beyond all rational limits and hold that the doctrine does not apply to rights already adjudicated and settled under the doctrine of prior appropriation.

DATED this 19<sup>th</sup> day of April, 2019.

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in Times New Roman, font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) and NRAP 29(e) because, excluding the parts of the brief exempted by RNAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,826 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of April, 2019.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Simons Hall Johnston PC and that on the 19<sup>th</sup> day of April, 2019, I electronically filed the foregoing with the Clerk of the Court using the Supreme Court Electronic Filing System, which will send notification of such filing to the following attorneys of record:

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