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6 IN THE OFFICE OF THE STATE ENGINEER  
7 OF THE STATE OF NEVADA

9 IN THE MATTER OF CHANGE )  
10 APPLICATION NO. 80700 FILED BY ) **WALKER RIVER PAIUTE TRIBE'S**  
11 THE NATIONAL FISH AND WILDLIFE ) **RESPONSE TO THE BRIEF OF THE**  
12 FOUNDATION ) **UNITED STATES BOARD OF WATER**  
 ) **COMMISSIONERS**

13 The Walker River Paiute Tribe ("Tribe"), by and through its attorney Wes Williams Jr. of the  
14 Law Offices of Wes Williams Jr., P.C., hereby submits this response to the brief filed in this matter  
15 by the United States Board of Water Commissioners ("Board") on February 3, 2012. The Tribe  
16 objects to the Board advocating an issue that would result in the denial of the National Fish and  
17 Wildlife Foundation's ("NFWF's") change application. By filing its brief, the Board has violated  
18 the Code of Judicial Conduct by overstepping its obligation to conduct itself in an impartial,  
19 unbiased manner. Furthermore, the issues raised by the Board are mischaracterizations of decades  
20 old statements by attorneys arguing issues not presently before the State Engineer.

21 **THE BOARD'S BRIEF VIOLATES THE CODE OF JUDICIAL CONDUCT**

22 In the late 1980's, the United States and the Tribe filed pleadings in the Walker River action  
23 contesting whether one attorney could represent both the Board and a water right owner in the  
24 Walker River Basin. At that time, attorney Gordon DePaoli was representing the Board and the  
25 Walker River Irrigation District ("WRID"). On February 13, 1990, Judge Reed entered an order that  
26 states one attorney could not represent both the Board and WRID. C-125 Doc. 162 (copy attached  
27 hereto). The order states that the Board functions in a ministerial, as well as a quasi-judicial,  
28 capacity. "The Court-appointed Board of Water Commissioners acts as a special master in the  
Walker River action. Clearly, then the Board of Water Commissioners is bound by the Code of

State 'S EXHIBITS 16  
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1 Judicial Conduct, and is obligated to conduct itself in an impartial, unbiased manner.” Order at 4.  
2  
3 The Order also states: “Not only does our system of justice seek to prevent actual bias, but also ‘to  
4 prevent even the probability of unfairness.’ . . . The Code of Judicial Conduct reflects this interest  
5 in avoiding the appearance of impropriety or partiality, and specifically guards against it by  
6 requiring a judicial officer to step down where such an appearance is given.” Order at 4 -5 (citations  
7 deleted). This order governs all actions taken by the Board, the Water Master and their attorney.

8 Despite this clear directive by the federal court and the clear requirements of the Code of  
9 Judicial Conduct, the Board has filed a brief in this matter advocating against the NFWF’s change  
10 application. The Board specifically argues that part of NFWF’s proposed place of use is not “within  
11 the Walker River Basin,” which it argues violates the terms of the Walker River Decree. By arguing  
12 this position, the Board is advocating that the application be denied. The Board thereby is  
13 advocating against the change application, so is not conducting itself in an impartial, unbiased  
14 manner.

15 The Board may argue that it is simply acting as an advisor to the State Engineer in these  
16 proceedings. At the pre-hearing conference held on January 24, 2012, the Board’s attorney  
17 acknowledged that the Board’s role was simply to point out issues the State Engineer should  
18 consider. She acknowledged that the Board was subject to the Code of Judicial Conduct. Despite  
19 this knowledge, the Board filed a brief advocating against the position of an applicant, which at a  
20 minimum constitutes an appearance of impropriety or partiality. The simple appearance of partiality  
21 constitutes a violation of the Code of Judicial Conduct.

22 Based on this violation, the State Engineer should disregard the arguments of the Board.

### 23 **WALKER LAKE IS A PART OF THE WALKER RIVER BASIN**

24 The Board’s brief argues that Walker Lake is not a part of the Walker River Basin. Based on  
25 this argument, the Board concludes that granting NFWF’s application would violate the Walker  
26 River Decree that states “no water shall be sold or delivered outside the basin of the Walker River.”

27 The Board further appears to argue that the decree is ambiguous on the meaning of “the basin  
28 of the Walker River.” The Board then jumps to the illogical conclusion that Walker Lake is not a  
part of the Walker River Basin because no party sought to specifically include a finding in the decree  
that Walker Lake was a part of the Walker River Basin.

The Board’s position defies logic. A simple definition of “basin” is a region drained by a

1 river system. Since the Walker River ends in a terminal lake (there is no outlet from Walker Lake),  
2 the Lake must be a part of the Basin. The Nevada Supreme Court followed this logical definition  
3 when addressing and describing the Walker River Basin.  
4

### 5 **The Walker River Basin**

6 The Walker River Basin covers an area that consists of approximately 4,050  
7 square miles. The entire basin stretches in a northeasterly direction from its origins in  
8 the southwestern elevations of the Sierra Nevada Mountains to the basin's terminus,  
9 Walker Lake. Between the headwaters of the Walker River in Mono County,  
10 California, and its terminus at Walker Lake in Mineral County, Nevada, the Walker  
11 River Basin includes portions of Nevada's Douglas, Lyon, and Churchill Counties.  
12 Approximately twenty-five percent of the Walker River Basin lies within California,  
13 and this portion of the basin accounts for the majority of the precipitation. This  
14 section of the basin is also the primary source of the basin's surface water flows. On  
15 the other hand, the vast majority of consumptive water use within the basin, including  
16 evapotranspiration and evaporation from surface waters, takes place in Nevada. The  
17 basin's principal agricultural water use occurs in Bridgeport and Antelope Valleys in  
18 Mono County, California, and Smith and Mason Valleys in Lyon County, Nevada.

14 The Walker River system consists of two forks, the West Walker River and  
15 the East Walker River. The West Walker River has its origins below the divide that  
16 separates the Walker River Basin from Yosemite National Park. From its origin, the  
17 West Walker River flows north through Leavitt Meadow and into Antelope Valley.  
18 Before reaching Nevada, water from the West Walker River is partially diverted into  
19 Topaz Reservoir for water storage

18 The second fork, the East Walker River, is fed by waters in the high Sierras north  
19 of Mono Lake. Water draining from Virginia Lakes flows north and joins with water  
20 from Green, Robinson, Summers, and Buckeye Creeks. These flows contribute to  
21 Bridgeport Reservoir.

21 The confluence of these two forks is located approximately seven miles  
22 upstream from the city of Yerington, Nevada, at the south end of Mason Valley. The  
23 merged forks of the West and East Walker Rivers flow northerly and then turn south  
24 as they enter the Walker River Paiute Indian Reservation ("Reservation"). Here, the  
25 Walker River flows through Campbell Valley and enters Weber Reservoir. From  
26 Weber Reservoir, the Walker River continues south for approximately twenty-one  
27 miles before entering Walker Lake.

26 *Mineral County v. State of Nevada*, 20 P.3d 800, 801-02, 117 Nev. 235, 237-38 (2001).

27 Instead of following a simple definition for "Walker River Basin," the Board attempts to  
28 construe numerous statements from attorneys who had no reason to specifically and legally describe  
the Walker River Basin. The context of these statements is unclear, but they reflect a time prior to

1 modern views on the use of water. The statements by the attorneys quoted by the Board often refer  
2 to wasting water by letting it flow to Walker Lake. This no longer accepted belief that water was  
3 wasted if it remained instream has been drastically altered over the past 80 years. Now it is nearly  
4 universally accepted that instream flows and maintaining natural river and lake systems is a  
5 beneficial use of water. Instead of recognizing today's reality, the Board would have the State  
6 Engineer ignore the fact that instream flows are beneficial uses of water.

7 The Board provides quotations from attorneys who had no interest in Walker Lake and no  
8 reason to address whether it was part of the Walker River Basin. In the 1930s, no party to the  
9 litigation made a claim for Walker Lake, so there was no need to address whether Walker Lake was  
10 a part of the Walker River Basin. That issue was never before the court or the parties. Yet the  
11 Board now asks the State Engineer to construe numerous out of context statements as defining the  
12 boundaries of the Walker River Basin.

13 The Board cherry picks attorney statements made in hearings nearly 80 years ago about an  
14 issue they were not addressing at that time, and likely never contemplated would be addressed in the  
15 future. The quoted statements refer to the "basin" but there is no indication that the discussion  
16 centered on the Board's argument that Walker Lake is not part of the Walker River Basin. Even if  
17 that issue was addressed, the attorney's statements would only be considered arguments – they  
18 would not constitute a finding by the court that Walker Lake is not a part of the Walker River Basin.

19 Based on the foregoing, the State Engineer must not give any weight to the arguments of the  
20 Board. They are not binding, and constitute an abuse of the Board's powers.

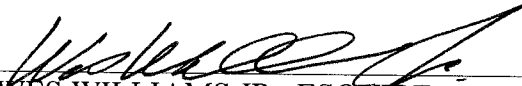
#### 21 OWNERSHIP OF LAND

22 The Board raises the issue that a water right holder cannot transfer its water to land not  
23 owned by the water right holder. The Board fails to recognize that this regularly occurs within the  
24 system where water is used on land leased by a farmer. The Board apparently has no objection to  
25 this practice.

26 The Board's real problem appears to be that the fees collected by the Board may be reduced  
27 by a water right being transferred to an instream flow. However discussions with NFWF  
28 representatives have revealed that NFWF plans to continue to pay the fees previously assessed  
against the water rights. If this occurs, the Board's concern is alleviated.

1 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of February 2012.

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that I am an employee of the Law Offices of Wes Williams Jr., a Professional  
12 Corporation, and on February 15, 2012 I deposited for delivery the foregoing document titled  
13 "Walker River Paiute Tribe's Response to Brief of the United States Board of Water  
14 Commissioners" by placing an original or true copy thereof in a sealed envelope placed for  
15 collection and mailed on said date, following ordinary business practice,  
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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT,  
a corporation, et al.,

Defendants.

IN EQUITY NO. C-125

O R D E R

The United States has filed a memorandum opposing the legal representation of the United States Board of Water Commissioners (hereinafter the "Board of Water Commissioners") by the same attorney who represents the Walker River Irrigation District (hereinafter the "District") (document #118). The United States requests that Mr. Gordon DePaoli be disqualified from representing the Board of Water Commissioners, since the Board of Water Commissioners is a court-appointed body. The Board of Water Commissioners and the District thereafter filed a joint memorandum concerning their legal representation, wherein they oppose disqualification.

*162*

1           The United Stated Board of Water Commissioners was  
2 created by court order in 1937, to "act as a board to constitute  
3 a water master or board of commissioners to apportion and  
4 distribute the waters of the Walker River, its forks and  
5 tributaries . . . . " United States v. Walker River Irrigation  
6 District, Order entered by Judge Norcross, filed May 12, 1937. The  
7 Board of Water Commissioners was created and is obliged to  
8 administer the waters of the Walker River in accordance with water  
9 rights set forth in the Walker River Decree. The Board functions  
10 in a ministerial, as well as a quasi-judicial, capacity.

11           According to the Decree, both the Walker River Irrigation  
12 District and the Tribe own a significant number of water rights on  
13 the Walker River. In addition to owning water rights in its own  
14 right, the District is responsible for distributing the waters of  
15 the Walker River to those lands located within the boundaries of  
16 the District, in accordance with their respective rights. The  
17 District encompasses a large geographical area, and is governed by  
18 a Board of Directors selected from representatives of that area.

19           Historically, there has been significant overlap between  
20 the District and the Board of Water Commissioners. Through the  
21 years, several members of the Board of Water Commissioners also  
22 have been members of the District's Board of Directors, and the two  
23 organizations share the same office facilities. In addition, since  
24 1937, several attorneys have acted in a representative capacity to  
25 both organizations. The Court is aware of the convenience and  
26 efficiency such an arrangement has fostered. However, such



1 historical practices do not persuade this Court to overlook the  
2 potential for conflict that exists as a result of this dual  
3 representation.

4 The Board of Water Commissioners occupies a special  
5 position relative to the District on the one hand, and the United  
6 States and the Tribe, on the other. The Board of Water  
7 Commissioners is obligated by its order of appointment to oversee  
8 the distribution of the waters of the Walker River to all who hold  
9 water rights under the Decree, including both the District and the  
10 Tribe. It is understandable that the Tribe, and the United States  
11 acting on its behalf, objects to the Board's continued  
12 representation by the same attorney who represents its major  
13 competitor for water under the Decree.

14 In United States v. Lewis, 308 F.2d 453, 457 (9th Cir.  
15 1962), in reviewing a ruling on a motion to disqualify two court-  
16 appointed commissioners in an eminent domain case, the Ninth  
17 Circuit stated that the district court must balance all  
18 considerations and probabilities when ruling on such a motion. We  
19 adopt this balancing approach in ruling on this motion to  
20 disqualify. The central issue in this case is whether the dual  
21 representation of the District and the Board of Water Commissioners  
22 creates a conflict of interest. At the heart of all conflict of  
23 interest cases is whether there is a "struggle to serve two  
24 masters." See Cuyler v. Sullivan, 446 U.S. 335, 349 (1980).

25 In analyzing whether such a struggle to serve two masters  
26 exists, we are guided by two considerations. First is the duty of

1 the Board of Water Commissioners, in its capacity as a special  
2 master, to adhere to the Code of Judicial Conduct for United States  
3 Judges. Second is an attorney's obligation to abide by the  
4 applicable rules of professional responsibility.

5 Code of Judicial Conduct

6 The Code of Judicial Conduct for United States Judges  
7 requires that a judge "disqualify himself or herself in a  
8 proceeding in which the judge's impartiality might reasonably be  
9 questioned." Code of Judicial Conduct for United States Judges,  
10 Canon 3.C(1); see also, 28 U.S.C. § 455(a) (same standard  
11 applicable to "any justice, judge, or magistrate of the United  
12 States"). The Code further provides that "[a]nyone, whether or not  
13 a lawyer, who is an officer of a judicial system performing  
14 judicial functions, including an officer such as a . . . special  
15 master, . . . is a judge for the purpose of this Code. All judges  
16 should comply with this Code except as provided below." Code of  
17 Judicial Conduct, at I-58. The court-appointed Board of Water  
18 Commissioners acts as a special master in the Walker River Action.  
19 Clearly, then, the Board of Water Commissioners is bound by the  
20 Code of Judicial Conduct, and is obligated to conduct itself in an  
21 impartial, unbiased manner.

22 Not only does our system of justice seek to prevent  
23 actual bias, but also "to prevent even the probability of  
24 unfairness." In re Murchison, 349 U.S. 133, 136 (1955). See also  
25 Taylor v. Hayes, 418 U.S. 488, 501 (1974) ("[T]he inquiry must be  
26 not only whether there was actual bias on [the judge's] part, but

1 also whether there was 'such a likelihood of bias or an appearance  
2 of bias that the judge was unable to hold the balance between  
3 vindicating the interests of the court and the interests of the  
4 accused.'" (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964)).  
5 The Code of Judicial Conduct reflects this interest in avoiding the  
6 appearance of impropriety or partiality, and specifically guards  
7 against it by requiring a judicial officer to step down where such  
8 an appearance is given.

9 The agency relationship between attorney and client  
10 demands that the Board's attorney be viewed as an extension of the  
11 Board itself, and therefore subject to the same standards. Mr.  
12 DePaoli's dual representation creates an impression that the Board  
13 would favor the District over other water rights holders. In  
14 addition, that an actual conflict might arise under the  
15 representation of an attorney less principled than Mr. DePaoli is  
16 not so far-fetched. The Court's interest in the administration of  
17 justice, and in preserving public confidence in the integrity of  
18 the judicial system, requires that the Court scrupulously guard its  
19 appointments of both special masters and those ultimately appointed  
20 to act as counsel for court-appointed bodies. Therefore, under the  
21 strictures of the Code of Judicial Conduct, Mr. DePaoli is required  
22 to cease his simultaneous representation of both the Walker River  
23 Irrigation District and the Board of Water Commissioners.

24 Professional Responsibility

25 Another aspect of this case is the duty imposed on Mr.  
26 DePaoli under the rules of professional responsibility.

1           Local Rule 120-8 for the District of Nevada provides that  
2 the standards of conduct of the members of the bar of the District  
3 of Nevada "shall be those prescribed by the Code of Professional  
4 Responsibility and the Model Rules of Professional Conduct as such  
5 may be adopted from time to time by the Supreme Court of Nevada  
6 except as such may be modified by this court." Nevada Supreme  
7 Court Rule 150 adopts the ABA Model Rules of Professional Conduct  
8 as the Nevada Rules of Professional Conduct, which govern  
9 professional conduct for lawyers practicing in Nevada. Under the  
10 Nevada Rules of Professional Conduct, an attorney is prohibited  
11 from representing a client if representation of that client would  
12 be adverse to another client, or if representation of that client  
13 would be materially limited by the attorney's responsibility to  
14 another client, to a third person, or by lawyer's own interests.  
15 However, if the lawyer reasonably believes that the representation  
16 would not be adversely affected, and each client consents after  
17 consultation, such representation is permitted. Rule 157, Nevada  
18 Rules of Professional Conduct (1989). See also Rules 156, 158,  
19 159, 166, and 167, Nevada Rules of Professional Conduct (1989).

20           Most cases addressing attorney disqualification relate  
21 to rules of professional responsibility governing conflict of  
22 interests, such as Rule 157, cited above. For example, numerous  
23 cases address issues of multiple representation, where one attorney  
24 represents two clients whose interests are potentially adverse.  
25 See, e.g., In re Coordinated Pretrial Proceedings in Petroleum  
26 Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), cert.

1 denied, 455 U.S. 990 (1982). As the Board of Water Commissioners  
2 and the District point out in their joint brief, however, this is  
3 not a pure multiple representation case. Mr. DePaoli represents  
4 only one party to this action, that being the District. The Board  
5 of Water Commissioners is not a party herein. Therefore, the  
6 Nevada Rules of Professional Conduct do not speak directly to the  
7 issue at hand.

8 In the event that the Nevada Rules of Professional  
9 Conduct are deemed to control this dispute, Mr. DePaoli has guarded  
10 against future conflicts by full disclosure to each client of the  
11 potential for those future conflicts to arise, and both the  
12 District and the Board of Water Commissioners have chosen to retain  
13 Mr. DePaoli as their counsel. They do not perceive that their dual  
14 representation creates any conflict of interest, nor do they feel  
15 that their interests are potentially adverse. The Board of Water  
16 Commissioners and the District also have been made aware of their  
17 attorney's obligation to cease representation of one or both of  
18 them in the event that an actual conflict arises in the future.  
19 Having taken these steps to inform his clients about his  
20 relationship with both the Board of Water Commissioners and the  
21 District, Mr. DePaoli has acted properly and within the  
22 requirements of the Nevada Rules of Professional Conduct.

23 However, Mr. DePaoli's compliance with the professional  
24 responsibility rules governing potential conflict of interest  
25 between two clients does not end the inquiry. Because this is not  
26 a pure multiple representation case, the Nevada Rules of

1 Professional Conduct do not completely dispose of this action. The  
2 conflict of interest rules are designed to safeguard the sanctity  
3 of the attorney/client relationship, and to prevent an attorney  
4 from engaging in any activity which might undermine that attorney's  
5 loyalty to the client. A conflict of interest may arise not only  
6 in multiple representation cases, but also in a case such as this,  
7 where there is only one party being represented. See, e.g., United  
8 States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980) (potential  
9 conflict in counsel's book contract concerning Patty Hearst trial),  
10 cert. denied, 451 U.S. 938 (1981).

11 This is not a situation where a disgruntled client is  
12 claiming inadequate representation due to a conflict of interest.  
13 On the contrary, both clients represented by Mr. DePaoli are  
14 anxious to retain him as their attorney. The objections to the  
15 dual representation come from a third party, with whom Mr. DePaoli  
16 has no formal relationship, and to whom Mr. DePaoli owes no duty  
17 of loyalty. In the typical case, a third party would have no  
18 standing to object to an opposing party's choice of counsel.

19 However, this is not a typical conflict of interest  
20 case. The potential for conflict is present here because Mr.  
21 DePaoli's representation of the Board of Water Commissioners  
22 obligates him to ensure that his client (the Board of Water  
23 Commissioners) carries out its mandate under the Decree, i.e., to  
24 administer and distribute the waters of the Walker River to the  
25 various and potentially adverse holders of those water rights.  
26 Indeed, Mr. DePaoli himself was appointed by the Court for this

1 very purpose. Therefore, the Board of Water Commissioners and Mr.  
2 DePaoli owe an equal duty to all those who are adjudged to be  
3 owners of water rights under the Decree. The Board of Water  
4 Commissioners is obligated to function in an impartial manner in  
5 administering its duties under the Decree, and Mr. DePaoli likewise  
6 is obligated to see that the Decree is enforced impartially. Mr.  
7 DePaoli's simultaneous representation of the District, one of the  
8 largest owners of water rights under the Decree, creates an  
9 appearance of favoritism. Such an appearance cannot be sanctioned  
10 by this Court, which also has a duty to ensure that the precepts  
11 of the Decree are enforced even-handedly.

12 The situation presented in this case is unique. The  
13 parties have not cited any case where the attorney for a court-  
14 appointed special master also represented a major defendant in  
15 related proceedings, nor has the Court unearthed any such case.  
16 Although the Nevada Rules of Professional Conduct do not, strictly  
17 speaking, prohibit the dual representation, those governing rules  
18 of professional conduct cannot be applied to this case in a vacuum.  
19 In any event, the spirit of those rules must be does not permit the  
20 dual representation. Furthermore, in addition to its obligation  
21 to apply the applicable rules of professional conduct, the Court  
22 also must ensure that the status of the court-appointed Board of  
23 Water Commissioners be untainted by any appearance of impropriety.

24 All parties have presented thorough briefs regarding this  
25 dual representation issue. The Court is cognizant of the many  
26 advantages attendant to having the same attorney represent both the

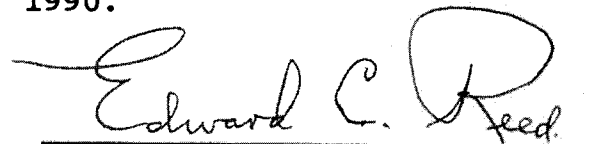
1 District and the Board of Water Commissioners. The Court also is  
2 aware of the need to balance convenience and efficiency on the one  
3 hand, with competing interests in impartiality and avoiding the  
4 appearance of impropriety. Having conducted a careful review of  
5 the history of this action, and having evaluated the benefits and  
6 disadvantages associated with dual representation,

7 IT IS, THEREFORE, HEREBY ORDERED that it would be  
8 inappropriate for the same attorney to continue to represent both  
9 the Walker River Irrigation District and the Board of Water  
10 Commissioners.

11 IT IS FURTHER ORDERED that Mr. DePaoli shall have ninety  
12 (90) days within which to make an election regarding his future  
13 representation of either the Board of Water Commissioners or the  
14 Walker River Irrigation District. Mr. DePaoli shall advise the  
15 Court and shall serve all parties with his election within that  
16 time.

17 IT IS FURTHER ORDERED THAT Mr. DePaoli shall file with  
18 the Clerk appropriate documents effectuating his election.

19 DATED: February 13, 1990.

20   
21 Edward C. Reed  
22 UNITED STATES DISTRICT JUDGE  
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