

**IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATION )  
NO. 80700 FILED BY THE NATIONAL )  
FISH AND WILDLIFE FOUNDATION )  
ON MAY 10, 2011, TO CHANGE THE )  
PLACE OF USE OF WATERS OF )  
WALKER RIVER )

State'S EXHIBITS 7
DATE: _____

STATE ENGINEERS OFFICE

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**STATEMENT OF ISSUES**

As ordered by the Office of the Nevada State Engineer at the pre-hearing conference for this proceeding, held August 31, 2011, the United States Bureau of Indian Affairs (BIA) submits this statement of issues.

A. In its July 15, 2011, protest, BIA noted the following issues:

1 - The Application does not comply with NRS 533.345, which requires every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated to contain such information as may be necessary to a full understanding of the proposed change. The Application does not include any technical information regarding the administration of the proposed change of use, nor how the administration of the water rights at the existing point of diversion and place of use would be different than the administration of the water rights at the proposed point of diversion and place of use.

2 - The Application does not comply with NRS 533.345, which requires every application for a permit to change the place and diversion, manner of use or place of use of water already appropriated to contain such information as may be necessary for a full understanding of the proposed change. The Application lacks any precise identification or location of the groundwater wells referenced in the Application; therefore, it is not possible to verify whether or how the groundwater rights associated with the wells will be withdrawn.

3 - The proposed use of water under the Application may conflict with the [Walker Indian] Reservation Water Rights. The Application bundles in one package seven different irrigation water rights (with thirteen different priority years), all of which are junior to the Reservation Water Rights. The Applicant proposes to convey the bundled water through the Reservation to Walker Lake potentially in conflict with the Reservation

Water Rights. The Application refers to a conveyance agreement with the Tribe and BIA; no such agreement currently exists although the BIA anticipates working cooperatively with the Applicant on such an agreement.

4 - The United States reserves the right to identify additional bases for its protest and objections to this Application based on the State Engineer's review of this Application and any additional information and issues that may arise during pre-hearing investigations or otherwise, and to incorporate the objections filed by any other party filing a protest to this Application.

B. In addition, BIA has identified as another issue the appropriate role of the United States Board of Water Commissioners, the Water Master, and their legal counsel in this proceeding, taking into consideration the Walker Decree Court's Administrative Rules dated June 3, 1996 (attached), and the Order of the Walker Decree Court dated February 13, 1990 (attached).

The factual and legal issues described above suffice to represent BIA's statement of issues at this time. BIA notes, however, that the Desert Research Institute model, on which the applicant intends to rely, is not yet complete. Therefore, BIA reserves the right to raise additional issues after BIA has had an opportunity to examine the completed model and its use in this proceeding. BIA is prepared to brief any and all issues raised in this proceeding as the Nevada State Engineer deems necessary.

Dated this 18th day of October 2011.

Respectfully submitted,



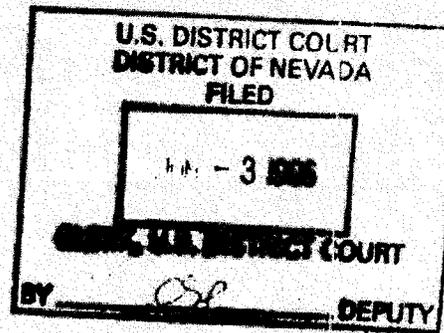
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ATTACHEMNT 1

C-1251

**UNITED STATES BOARD OF WATER COMMISSIONERS**



**ADMINISTRATIVE RULES AND REGULATIONS REGARDING  
CHANGE OF POINT OF DIVERSION, MANNER OF USE OR PLACE  
OF USE OF WATER OF THE WALKER RIVER AND ITS  
TRIBUTARIES AND REGARDING COMPLIANCE WITH  
CALIFORNIA FISH AND GAME CODE SECTION 5937  
AND OTHER PROVISIONS OF CALIFORNIA LAW**

**As Amended through June 3, 1996**

112

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**ADMINISTRATIVE RULES AND REGULATIONS REGARDING  
CHANGE OF POINT OF DIVERSION, MANNER OF USE OR PLACE  
OF USE OF WATER OF THE WALKER RIVER AND ITS TRIBUTARIES  
AND REGARDING COMPLIANCE WITH CALIFORNIA FISH AND GAME  
CODE SECTION 5937 AND OTHER PROVISIONS OF CALIFORNIA LAW**

**PREFACE**

In applicable part paragraph X of the final decree (the "Walker River Decree") in United States of America, Plaintiff v. Walker River Irrigation District et. al., Defendants, in the United States District Court for the District of Nevada, Case In Equity, C-125 (the "Walker River Action") provides that "parties shall be entitled to change the manner, means, place or purpose of use or the point of diversion of [waters of the Walker River] or any thereof in the manner provided by law, so far as they may do so without injury to the rights of other parties hereto, as the same are fixed hereby."

In applicable part paragraph XIV of the Walker River Decree provides that the Court retains jurisdiction for regulatory purposes regarding the point of diversion, manner of use and place of use of waters of the Walker River and its tributaries and that the Court may make such regulations as to notice and form or substance of any application for change, or modification of this Decree, or for change of place or manner of use as it may deem necessary.

In applicable part paragraph XV of the Walker River Decree provides that the Water Master, with approval of the Court, may make such rules as may be necessary and proper for the enforcement of the Decree and for carrying out of its purposes and objectives.

On July 15, 1987, the United States Board of Water Commissioners and the Chief Deputy Water Commissioner filed a petition in the Walker River Action for an order establishing the procedure, rules and regulations to be followed with respect to changing the point of diversion, manner of use or place of use of the waters of the Walker River.

The United States and the Walker River Paiute Tribe filed objections to the proposed rules and regulations.

On May 17, 1988, the Court in the Walker River Action entered an order provisionally adopting the proposed rules and directing that they be modified in accordance with the Court's order and also clarified. After additional briefing and argument the Court in the Walker River Action entered additional orders concerning the proposed rules and regulations on July 7, 1989 and on September 11, 1989.

On April 5, 1994, the United States Board of Water Commissioners filed a petition in the Walker River Action to amend the rules and regulations to correct certain addresses contained therein. On May 31, 1994, the Court entered an order approving that petition and amending the rules and regulations accordingly.

On December 22, 1995, the Walker River Irrigation District, the United States of America, the California State Water Resources Control Board, the State of Nevada, the Walker River Paiute Tribe and California Trout, Inc. filed a Stipulation for Entry of Order in Subfile No. C-125-A in the Walker River Action. The Stipulation for Entry of Order settled a Petition filed by the Walker River Irrigation District on January 9, 1991, related to certain orders issued by the California State Water Resources Control Board in 1990 pursuant to California Fish and Game Code section 5937. The Stipulation for Entry of Order provided for additional amendments to

the rules and regulations with respect to California Fish and Game Code section 5937 or any other applicable provision of California law with respect to the waters of the Walker River adjudicated in the Walker River Decree involving water rights established only under the law of the State of California. On June 3, 1996, the Court entered a Final Order Pursuant to Stipulation amended the rules and regulations as provided in the Stipulation.

The rules and regulations set forth herein are in compliance with the Court's orders of May 17, 1988, July 7, 1989, September 11, 1989, May 31, 1994 and June 3, 1996.

## ARTICLE I

### DEFINITIONS

**Section 1.1** Unless the context otherwise requires, as used in these Rules and Regulations, the following words and phrases shall have the following meanings:

(a) "Agency" or "agencies" shall mean and refer to either or both of the State Engineer of the State of Nevada or the California State Water Resources Control Board as appropriate, which has the responsibility for adjudicating a specific change application or the responsibility for determining compliance with California Fish and Game Code §5937 or any other applicable provision of California law;

(b) "Applicant" shall mean and refer to any person making a change application or seeking to modify, amend, change or establish specific terms and conditions for compliance with California Fish and Game Code §5937 or any other applicable provision of California law;

(c) "Change Application" shall mean and refer to any application filed in accordance with these Rules and Regulations to change the point of diversion, manner of use and/or place of use of the waters of the Walker River adjudicated in the Walker River Decree.

(d) "Compliance Application" shall mean and refer to any administrative proceeding initiated by the Water Resources Control Board or any application filed in accordance with these Rules and Regulations to modify, amend, change or establish specific terms and conditions for compliance with California Fish and Game Code §5937 or any other applicable provision of California law with respect to the waters of the Walker River adjudicated in the Walker River Decree involving water rights established only under the law of the State of California.

(e) "Contested Application" shall mean and refer to a change application which is protested pursuant to the provisions of N.R.S. §533.365 or California Water Code §1704, or to a compliance application which is opposed as the case may be.

(f) "Intervenor" shall mean and refer to any person who, pursuant to Article IX of these Rules and Regulations, is allowed to appear in an agency proceeding by timely intervention, or after the time allowed for appearance of right has expired, or who, having not so appeared in the agency proceeding, is allowed by the court in the Walker River Action, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to appear in a proceeding for approval or judicial review of an agency decision or report.

(g) "Order(s)" shall mean and refer to the decision of the Water Resources Control Board issued in connection with a Compliance Application.

(h) "Party" shall mean and refer to any person who appears or is allowed to appear in an agency proceeding or in a proceeding for approval or judicial review of an agency decision or report.

(i) "Person" shall mean and refer to a corporation, company, partnership, firm, association, society, governmental agency, Indian tribe, or any other entity, as well as a natural person.

(j) "Protestant" shall mean and refer to any person who protests a change application pursuant to the provisions of N.R.S. §533.365 or California Water Code §1704, or who opposes a compliance application as the case may be.

(k) "State Engineer" shall mean and refer to the state engineer of the State of Nevada.

(l) "United States Board of Water Commissioners" shall mean and refer to that certain six person board appointed pursuant to the orders of the court in the Walker River Action dated May 12, 1937, January 28, 1938, and June 27, 1940, to act as a water master or board of commissioners to apportion and distribute the waters of the Walker River, its forks and tributaries in the State of Nevada and in the State of California.

(m) "Walker River Action" shall mean and refer to that certain action entitled "United States of America, Plaintiff v. Walker River Irrigation District, et al., Defendants," in the United States District Court for the District of Nevada, In Equity No. C-125-ECR.

(n) "Walker River Decree" shall mean and refer to that certain final decree entered in the Walker River Action on April 14, 1936, as amended on April 24, 1940.

(o) "Water Resources Control Board" shall mean and refer to the California State Water Resources Control Board.

**ARTICLE II**  
**APPLICABILITY**

**Section 2.1** The Rules and Regulations shall apply to all change applications involving water rights adjudicated in the Walker River Decree, including the rights of the United States of America held in trust for the benefit of the Walker River Indian Reservation, with certain exceptions. These exceptions are set forth in Sections 2.2, 2.3 and 2.4. These Rules and Regulations shall also apply to all compliance applications.

**Section 2.2** These Rules and Regulations do not apply to any change in point or points of diversion sought to be made for the Walker River Indian Reservation to a point or points above the boundaries of the Walker River Indian Reservation. Such changes shall be made in accordance with the provisions of Paragraph I of the April 24, 1940 Order for Entry of Amended Final Decree to Conform to Writ of Mandate, etc.

**Section 2.3** These Rules and Regulations do not apply to any change in the point of diversion and/or place of use of water adjudicated to the United States of America for the benefit of the Walker River Indian Reservation, which change is entirely within the boundaries of the Walker River Indian Reservation.

**Section 2.4** Any change in the point of diversion and/or place of use of storage waters adjudicated to the Walker River Irrigation District, which change is entirely within the boundaries of the Walker River Irrigation District, shall be made pursuant to adopted rules and regulations of the governing body for said District. This exception shall not apply to any transfer outside the present boundaries of the Walker River Irrigation District, nor shall this exception apply

should there be a change in the authority given the Walker River Irrigation District under Nevada law.

### ARTICLE III

#### FILING CHANGE APPLICATIONS AND COMPLIANCE APPLICATIONS

Section 3.1 Applicants within the State of Nevada shall file a change application with the State Engineer on such forms and in such manner as required by that office.

Section 3.2 Applicants within the State of California shall file a change application with the Water Resources Control Board on such forms and in such manner as required by that office.

Section 3.3 Persons initiating compliance applications shall file such pleadings as required by the Water Resources Control Board.

Section 3.4 Applicants shall pay such direct costs associated with the processing of the change application or compliance application, including, notice and attendant publication costs. In addition applicants for changes or parties initiating compliance applications in California shall pay such costs as are allowed by the order entered in the Walker River Action appointing the Water Resources Control Board as Special Master.

### ARTICLE IV

#### NOTICE OF CHANGE APPLICATIONS AND COMPLIANCE APPLICATIONS

Section 4.1 Notice of all change applications, whether filed in the State of Nevada or State of California, and of compliance applications shall be given by the responsible agency as follows:

(a) Within ninety (90) days after the filing of a completed change application or compliance application in proper form, the agency shall cause notice thereof to be

published five times during a period of four consecutive weeks in a newspaper of general circulation and printed and published in the county where the change is to occur or where compliance will be required.

(b) In addition to publication as required in (a) above, the agency shall cause a notice of the change application or compliance application to be published five times during a period of four consecutive weeks in newspapers of general circulation and printed and published in Mono County, California, Douglas County, Nevada, and Lyon County, Nevada. Provided, however, that publication pursuant to (a) above shall satisfy the publication requirement for one of the counties listed in this subsection (b).

(c) In addition to publication as required in (a) and (b) above, notice of the change application or compliance application shall be given in such manner as may be required by the law of the state where the change or compliance is to occur.

(d) Upon the filing of a change application or compliance application, the agency shall immediately forward a copy thereof to the United States Board of Water Commissioners, P. O. Box 853, Yerington, Nevada 89447, to the agency of the other state, to the United States Attorney for the District of Nevada, 100 West Liberty Street, Suite 600, Reno, Nevada, 89501, to the Walker River Paiute Tribe, Attention: Tribal Chairperson, P.O. Box 220, Schurz, Nevada, 89427, and to the Nevada Department of Wildlife, 1100 Valley Road, Reno, Nevada, 89512.

**Section 4.2** Any person holding a water right adjudicated under the Walker River Decree may file with the agencies a written request stating that said person desires special notice of all change applications or compliance applications filed pursuant to these Rules and Regulations. The request shall state the post office address of the person and thereafter upon the

filing of a change application or compliance application the agency shall immediately forward a copy thereof to said person at that address by United States mail certified, return receipt requested.

**Section 4.3** The responsible agency shall ensure that each notice of change application or compliance application shall set forth:

- (a) That the application has been filed;
- (b) The date of filing;
- (c) The name and address of the applicant;
- (d) The name of the water source that will be affected by the application;
- (e) In the case of a change application the location of the existing point of diversion or place of use and the present manner of use and in the case of a compliance application the location and name of the dam or other facility affected;
- (f) In the case of a change application the location of the new point of diversion or place of use and the new manner of use;
- (g) The quantity of water involved in the change application or compliance application;
- (h) The purpose for which the application has been filed; and
- (i) Such other information as may be necessary to permit complete understanding of the proposed change application or compliance application.

The agency shall ensure that each notice of publication of a change application or compliance application includes the date of first publication and the date of the last publication.

**Section 4.4** Proof that notice of a change application or compliance application has

been given in accordance with the requirements of this Article shall be filed with the agency of each state and with the United States Board of Water Commissioners within 30 days after the final date of publication of the last published notice.

## ARTICLE V

### PROCEEDINGS BEFORE THE AGENCY

**Section 5.1** Except as otherwise expressly provided by these Rules and Regulations all proceedings before an agency with respect to change applications and compliance applications shall be in accordance with the practice and procedure of that agency. Protests to change applications may be filed in accordance with the provisions of Nevada Revised Statutes Section 533.365 or California Water Code Section 1704 and opposition to compliance applications may be filed in accordance with the practice and procedure of the Water Resources Control Board.

**Section 5.2** An agency shall prepare a full and complete administrative record of all proceedings had concerning a change application or compliance application. To the extent applicable, the administrative record shall include:

- (a) A copy of the change application or compliance application;
- (b) All pleadings, motions and intermediate rulings;
- (c) Evidence received and considered;
- (d) Statement of matter officially noted;
- (e) Questions and offers of proof, and objections and rulings thereon;
- (f) Proposed findings and exceptions;
- (g) Decisions, opinions or report of the agency;
- (h) Transcript of oral proceedings.

**Section 5.3** A copy of an agency record shall be filed with the agency of the other state and with the United States Board of Water Commissioners.

**Section 5.4** The United States Board of Water Commissioners may participate as a party in all proceedings concerning a change application or compliance application before an agency. Within the time provided by an agency, which time shall in no event be less than sixty (60) days after the United States Board of Water Commissioners receives a copy of a change application or compliance application, the United States Board of Water Commissioners shall provide the agency with comments and recommendations concerning the change application or compliance application.

## ARTICLE VI

### AGENCY DECISION

**Section 6.1** The responsible agency shall approve or reject a change application or act upon a compliance application within one (1) year after the date of initial filing, except that the decision may be postponed for an additional time period not to exceed two (2) additional years upon written authorization by the applicant, or in the case of a contested application, where the applicant, protestant, as well as any intervenor(s) jointly agree to an extension. In the case of a compliance application, the time for agency action may be extended by the responsible agency for up to two (2) years, if the agency determines that additional time is required to obtain information needed to act upon the application. Where an action has been filed in any court which may affect the allocation and distribution of waters of the Walker River, the agency may withhold for good cause shown any pending decision on a change application or compliance application until such court action is concluded.

**Section 6.2** The decision of the State Engineer and the compliance order of the Water Resources Control Board shall be served by the agency on all parties to the agency administrative proceeding, on the United States Board of Water Commissioners and on the agency of the other state.

**Section 6.3** The report of the Water Resources Control Board shall be prepared, announced and filed in the Walker River Action in accordance with the orders entered in the Walker River Action appointing said Board as Special Master, with these Rules and Regulations and with Rule 53 of the Federal Rules of Civil Procedure, in that order of precedence. In review of any report and recommendation as to a change application or compliance application rendered by the California State Water Resources Control Board in its capacity as Special Master, the Court shall not be limited by the "clearly erroneous" standard prescribed by Fed.R.Civ.P. 53(e)(2). The report shall be served by the agency on all parties to the agency administrative proceeding, on the United States Board of Water Commissioners and on the agency of the other state.

**Section 6.4** Decisions of the State Engineer and orders and reports of the Water Resources Control Board shall be subject to the provisions of Article VII and Article VIII.

## **ARTICLE VII**

### **JUDICIAL REVIEW**

**Section 7.1** All agency decisions, orders or reports shall be submitted to the Court in the Walker River Action. Any party to an agency administrative proceeding shall be entitled to petition for judicial review thereof in the Walker River Action. Any other entity or individual not a party to the agency proceedings may seek judicial review of the agency decision upon a

showing of good cause as to why such entity or individual was not a party to the agency proceedings. With respect to persons who participated in the agency proceedings, the Court shall not consider new or different objections or arguments, without a showing of good cause for failure of that person to present such objections or arguments in the agency proceeding.

**Section 7.2** Proceedings for approval of modifications of the Walker River Decree in accordance with the decision or report of the agency regarding change applications, or for judicial review of any such agency decision or report, may be instituted by the filing of a petition in the Walker River Action by any party to the agency proceedings or upon petition by the agency. A petition must be filed within 45 days after service of the agency decision or report or, if a rehearing is held, within 45 days after the decision or report thereon. Copies of the petition shall be served on the responsible agency, all parties to the agency administrative proceeding, on the United States Board of Water Commissioners and on the agency of the other state, the United States Attorney for the District of Nevada, the Walker River Paiute Tribe and the Nevada Department of Wildlife.

**Section 7.3** The Water Resources Control Board shall file a petition in the Walker River Action for approval of a compliance order within 35 days of its adoption or, if reconsideration is granted, within 35 days after an order is issued thereon. Copies of the petition shall be served on all parties to the proceeding which resulted in the compliance order, the United States Board of Water Commissioners, the State Engineer, the United States Attorney for the District of Nevada, the Walker River Paiute Tribe and the Nevada Department of Wildlife. Objections to the petition for approval shall be filed and served within 45 days of service thereof.

Objections shall be served on all parties who were served with the petition for approval of the compliance order.

**Section 7.4** The petition for approval or judicial review shall have the agency decision, order or report appended to it and generally shall state the grounds for the petition.

**Section 7.5** The decision or report of the agency regarding a change application shall not take effect unless and until the court having jurisdiction over the Walker River Action finally approves it and enters an order modifying the Walker River Decree accordingly. An order of the Water Resources Control Board regarding a compliance application shall take effect upon adoption unless stayed, except that such an order is automatically stayed without application for a stay if the Water Resources Control Board fails to file a petition for its approval within the time provided in section 7.3. The automatic stay provided for herein shall be deemed lifted upon the filing of a petition for approval of the order by the Water Resources Control Board and the actual receipt thereof by the party or parties affected by the order.

**Section 7.6** Within 30 days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. The court may require or permit subsequent corrections or additions to the record.

**Section 7.7** If before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that additional evidence is material and that there was good cause for failure to present it in the proceeding

before the agency, the court may receive additional evidence. The court shall receive such additional evidence in such manner and form as it deems appropriate.

**Section 7.8** The review shall be conducted by the court without a jury. In its review, the court shall consider the administrative record, any additional evidence received by the court, written briefs, and, where deemed appropriate by the court, oral argument. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in court.

**Section 7.9** The Court shall conduct a de novo review of all agency decisions regarding change applications which recommend modification of the Walker River Decree, irrespective of whether any party files a formal request for judicial review. Except as set forth in Article VIII, the court may affirm the decision or approve the report of the agency or remand the case for further proceedings. The court may reverse or modify the decision if said decision would impair existing rights under the Walker River Decree, adversely impact some public interest or prejudice substantial rights of the petitioner. Substantial rights of the petitioner may be prejudiced where the administrative findings, inferences, and/or conclusions are:

- (a) Made upon unlawful procedure;
- (b) Affected by other error of law;
- (c) Erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (d) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

**Section 7.10** In reviewing any report of the Water Resources Control Board, the court in the Walker River Action shall not be limited by the "clearly erroneous" standard prescribed by Fed.R.Civ.P. 53(e)(2). In the event that no objections are filed to a petition for approval and judicial review of an agency decision or report, the court in the Walker River Action may, in its discretion, accept the agency decision or report regarding a change application without further proceedings.

**Section 7.11** Except as provided in section 8.2, the scope and standard of review governing a petition for approval of a compliance order shall be determined by the Court on a case-by-case basis.

## ARTICLE VIII

### TRIAL DE NOVO IN CERTAIN CASES

**Section 8.1** In all review proceedings involving a change application or protest of a change application of the United States of America on behalf of the Walker River Paiute Tribe or of the Walker River Paiute Tribe on its own behalf, the court shall conduct a trial de novo. The trial shall be to the court without a jury. The evidence before the court shall include the administrative record prepared and filed in accordance with these Rules and Regulations and any other relevant evidence offered to and admitted by the court.

**Section 8.2** In a petition for approval of a compliance order involving an objection to a compliance application of the United States of America on behalf of the Walker River Paiute Tribe or of the Walker River Paiute Tribe on its own behalf, the Court shall conduct a trial de novo on the objection of the Tribe or the United States. The trial shall be to the Court without a jury. The evidence before the Court shall include the administrative record prepared and filed

in accordance with these Rules and Regulations and any other relevant evidence offered to and admitted by the Court. The scope and standard of review on all matters other than the objection of the Tribe or the United States shall be determined by the Court on a case-by-case basis.

## ARTICLE IX

### INTERVENTION

**Section 9.1** In all proceedings before the federal court, whether for judicial review of an agency recommendation or for modification of the Amended Final Decree, Federal Rule of Civil Procedure 24 shall apply to all potential intervenors. In exercising its discretion to permit permissive intervention on behalf of one not a party to the agency proceedings, the Court shall consider whether the potential intervenor has shown good cause for failure to participate in the agency proceedings.

**Section 9.2** Upon timely application anyone shall be permitted to intervene in an agency proceeding: (1) when a statute of California, Nevada or the United States confers an unconditional right to intervene; (2) when the proposed intervenor claims an interest relating to the subject of the proceeding and is so situated that the disposition of the proceeding may as a practical matter impair or impede the proposed intervenor's ability to protect that interest, unless the proposed intervenor's interest is adequately represented by existing parties.

**Section 9.3** Upon timely application anyone shall be permitted to intervene in an agency proceeding: (1) when a statute of California, Nevada, or the United States confers a conditional right to intervene; (2) when the proposed intervenor's interest and the proceeding have a question of law or fact in common. In exercising its discretion the agency shall consider

whether the intervention will unduly delay or prejudice the determination of the rights of the original parties.

**Section 9.4** A person desiring to intervene shall serve a motion to intervene upon all parties to the agency proceeding. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the position of the proposed intervenor for which intervention is sought.

ATTACHEMNT 2

ENTERED

FEB 13 1990

U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
FILED

FEB 13 1990

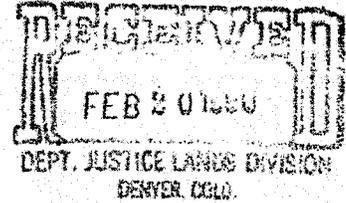
CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
BY *Debbie Roberts* DEPUTY

CAROL G. FITZGERALD, CLERK  
BY *Debbie Roberts* DEPUTY

U. S. ATTORNEY, Reno, Nev.

RECEIVED

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

ORDER

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.

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1           The United States 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

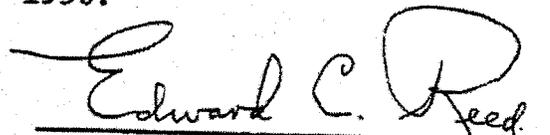
1 District and the Board of Water Commissioners. The Court also is  
2 aware of the need to balance convenience and efficiency on the one  
3 hand, with competing interests in impartiality and avoiding the  
4 appearance of impropriety. Having conducted a careful review of  
5 the history of this action, 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  
23  
24  
25  
26

**IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATION )  
NO. 80700 FILED BY THE NATIONAL )  
FISH AND WILDLIFE FOUNDATION )  
ON MAY 10, 2011, TO CHANGE THE )  
PLACE OF USE OF WATERS OF )  
WALKER RIVER )

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Statement of Issues* was served via U.S. Mail on all individuals identified in the Nevada State Engineer's August 9, 2011, Notice of Pre-hearing Conference.

Dated at Washington, DC, this 19th day of October 2011.

Signature: 

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