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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATE OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	3:73-cv-00127-ECR-RAM In Equity No. C-125-ECR Subfile No. C-125-B **AFFIDAVIT OF GORDON H. DePAOLI IN SUPPORT OF RESPONSE OF WALKER RIVER IRRIGATION DISTRICT IN OPPOSITION TO MOTION TO DISQUALIFY GORDON DePAOLI**

I, GORDON H. DePAOLI, being first duly sworn, depose and say:

1. I have been licensed as an attorney in the State of Nevada since September 25, 1972.

2. I make this Affidavit in Support of Response of Walker River Irrigation District in Opposition to Motion to Disqualify Gordon DePaoli (the "District Opposition").

3. Since about 1979, a major part of my law practice has involved matters related to water law, including, but not limited to, federal claims to water based upon the implied reservation of water doctrine, also referred to as the "Winters Doctrine."

4. At about that time, I assisted Richard W. Blakey as counsel to Sierra Pacific Power Company in connection with litigation on the Truckee River involving claims of the United States and the Pyramid Lake Paiute Tribe for additional water for the Pyramid Lake Indian Reservation.

5. I have been counsel to the Walker River Irrigation District (the "District") since the fall of 1987.

6. As a result of my representation of the District, I am familiar with its organizational history and with the water rights it holds within the Walker River Basin. The factual statements in the District Opposition concerning that organizational history and concerning water rights held by the District are based upon what I have learned about the District and its water rights since 1987.

7. As a result of my representation of the District, I am also familiar with the types of water rights held by water right holders within the boundaries of the District. The factual statements in the District Opposition about those types or categories of water rights held by such water right holders are based upon what I have learned in my representation of the District since 1987.

8. I have represented the District in this matter since its inception in 1992, and have participated on behalf of the District in all proceedings leading up to and following the April 18, 2000 Case Management Order ("CMO").

9. After the entry of the CMO, I participated on behalf of the District in proceedings before the Magistrate Judge which resulted in the approval for use in service of process of the Notice of Lawsuit and Request for Waiver of Service of Notice in Lieu of Summons; Waiver of Service of Notice in Lieu of Summons; Notice of Appearance and Intent

to Participate; Order and Form -- Disclaimer of Interest; and Order and Form Regarding Changes in Ownership of Water Rights.

10. When the United States and the Walker River Tribe commenced to request waivers of personal service in the summer of 2004, the District requested that I and my law firm, Woodburn and Wedge, conduct workshops in Yerington and Smith Valley to inform District water right holders about the package of information included with the Notice of Lawsuit and Request for Waiver of Service of Notice in Lieu of Summons which the water right holders were receiving from the Tribe and United States.

11. Workshops were held in Yerington and Smith Valley on July 22, 2004. Those workshops involved an explanation of the waiver of service process, and also provided background information on the claims being made and how the claims might affect recognized water rights within the District. Those workshops included an explanation of how this matter would be managed as provided in the CMO. Those workshops also covered an explanation of and the reasons for the Notice of Appearance and Intent to Participate, the Order and Form -- Disclaimer of Interest, and the Order and Form Regarding Notice of Change of Ownership.

12. Through those workshops and the District Office, the District and its counsel offered to assist water right holders within the District with the completion of and the filing of all of those forms. That assistance continues to this time.

13. While assisting District water right holders with the preparation and filing of the various forms, including the Notice of Appearance and Intent to Participate form, I, Dale Ferguson and Woodburn and Wedge agreed, when asked, to be identified as attorneys for many holders of water rights within the District. In some cases, District water right holders have identified us as their attorneys without even contacting us ahead of time.

14. Our agreement to be so identified was not made in a vacuum, but rather in the context of our knowledge about the issues which this case will involve, the issues which this case will not involve, and the manner in which it will be managed under the CMO.

15. One of the reasons that we agreed to be so identified at this stage of this litigation was we knew that there would be no active litigation in this matter until service of process is complete, service of process would not be complete for at least two years, and after service of process was complete, it would be necessary to inform defendants of additional proceedings in this matter, as provided in the CMO. We knew that the burden of providing that information for the Court and the other parties would be reduced when an attorney had appeared for a party.

16. Our decision to be identified as counsel for water right holders within the District was made with an awareness of the provisions of Nevada Supreme Court Rule 157 and how it might be applied in the context of this case as it proceeded under the provisions of the CMO. We understand that Supreme Court Rule 157 not only must be considered with respect to concurrent representation of the District on the one hand, and individual water right holders within the District on the other, but also with respect to concurrent representation of numerous individual water right holders within the District.

17. Based upon my knowledge of the law applicable to the Tribal Claims, as defined in the CMO, and the Federal Claims, as defined in the CMO, and of the water rights held by the District and its electors, it is my opinion that it is highly unlikely that this case will ever involve direct adversity between the District and individual water right holders within the District, or among individual water right holders within the District. In my opinion, some direct adversity might occur if the Court were to decide to adjudicate the underground water rights in the Walker River Basin, or if the Court decided to adjudicate surface and underground water in the

Walker River Basin as a single source of supply. However, the Court's position on those questions will not be known until the Threshold Issues, as referenced in the CMO, are decided, and even if the Court's decision is in the affirmative on one or both of those issues, it is by no means certain that the claim of every party will necessarily impair the water right claim of every other party.

18. It is my opinion that our representation of the District in the threshold issue phase of the Tribal Claims, as defined in the CMO, will not materially limit our representation of the individual water right holders, and vice-versa. It is my opinion that the District and individual water right holders will assert defenses intended to bar the Tribal Claims in their entirety, and will urge the Court against a broad exercise of jurisdiction over underground water rights and use. However, I intend to examine the requirements of Rule 157, particularly subsection (2), when the identification of threshold issues becomes final under the CMO. That will be the first point in time when a full explanation of the implications of common representation on those issues, and of the advantages and risks involved, can be provided and informed written consent sought.

19. After a final decision is obtained on threshold issues, as defined in the CMO, and to the extent that some or all of the Tribal Claims proceed on their merits, it is my opinion that the District and individual water right holders will seek a result on those Tribal Claims which is as small in quantity of water and as junior priority date as possible. However, after there is a final decision on the threshold issues, and the scope of the merits of the Tribal Claims can be discerned, I will again examine the requirements of Supreme Court Rule 157. That will be the first point in time when a full explanation of the implications of common representation on the merits of the Tribal Claims and of the advantages and risks involved can be provided, and informed written consent sought.

20. It is also my opinion that after their is a final decision on threshold issues related to the Tribal Claims, as defined in the CMO, more will be known about the potential scope of the merits of the Federal Claims, as defined in the CMO. At that point in time, an initial look at the requirements of Supreme Court Rule 157 in the context of the Federal Claims also can take place.

21. It is my intention to visit the application of Supreme Court Rule 157 to our representation of clients in this case as often as necessary as this litigation proceeds. It is my opinion that the best course for this litigation is to examine the application of Supreme Court Rule 157 when there is actual knowledge of the issues and claims to be litigated, rather than to speculate today on what they might be. In my judgment, it would be particularly inappropriate for me to speculate now, and to tell District electors now, that the interests of the District and their interests in defending this litigation conflict.

22. At this point in time, we have not obtained any confidential information from any of the clients who have listed us as their attorneys in a Notice of Appearance and Intent to Participate.

23. I, Dale Ferguson and my firm participate in the ongoing Mediation as attorneys for the District. The District participates in the Mediation to seek a result which leaves the water rights of its electors whole. It is not participating in the Mediation to simply protect the water rights to which it holds legal title, or to simply protect the water rights of those electors who happen to constitute its present Board of Directors.

24. The fact that I, Dale Ferguson and my firm have been identified in a Notice of Appearance and Intent to Participate as attorney for individual water right holders in this litigation has not ipso facto made such persons or entities Mediating Parties, and it has not

expanded our role in the Mediation, where we represent only the District and the District acts in the interest of all of its electors.

25. Consistent with the *Mediation Process Agreement* and the *Order Governing Mediation Process*, the District has communicated to its constituents (electors) with respect to the progress of and the solutions being considered in that process. We have not communicated to anyone about those matters, including persons who have identified us as their attorneys in Notices of Appearance and Intent to Participate, except through that process and as allowed under paragraph 8.3.4 of the Mediation Process Agreement.

26. In my opinion, the litigation use of information obtained in the Mediation Process is governed by the same rules, whether a party and their attorney has or has not participated in the Mediation Process. Based upon what I know about the law applicable to the Tribal Claims and the Federal Claims, information I am aware of because of my representation of the District in the Mediation gives me no advantage in defending against those claims, and certainly will not allow me to protect water rights of the individual clients I represent and the District without also protecting the interests of all others similarly situated.

27. To the extent that Nevada Supreme Court Rule 157 is presently implicated because of our representation of the District in the Mediation and our identification as attorneys for individual water right holders in Notices of Appearance and Intent to Participate in this litigation, the first point in time when the provisions of that Rule can be examined with respect to any settlement proposal emanating from the Mediation will be, if and when, the details of such a settlement proposal are known. There is no such settlement proposal at the present time. To the extent that I and Woodburn and Wedge were to represent anyone other than the District in connection with obtaining necessary approvals of such a settlement proposal, we would

review the requirements of Rule 157 at that time, and take the steps required as a result of that review.

28. At page 7 of the Motion to Disqualify, the following statement is made:

> "There is evidence to suggest that WRID has repeatedly increased its storage of water during the period of major use, when no additional storage is supposed to be permitted. Some individual stakeholders were, at the same time, being told that their allotment - a high priority water right - had run out."

No factual support for the statement is included with the Motion. However, if there were to be some proceeding initiated with respect to it, that proceeding would obviously involve questions regarding administration of the existing Walker River Decree and, as counsel to the District, I would not also represent the complaining "individual stakeholders," and if it turned out that they included some of the persons who have identified me or my firm in Notices of Appearance and Intent to Participate, I would review the application of Rule 157 to that specific situation, and act accordingly. Clearly, that unsupported statement has nothing whatsoever to do with respect to defending against the Tribal Claims and the Federal Claims in this litigation.

29. I and my law firm do not presently represent Joseph and Beverly Landolt in this matter, and I and my law firm have never represented Joseph and Beverly Landolt in any matter.

30. Attached hereto as Exhibit A is a copy of Colorado Ethics Opinion #58 (revised 10/14/95).

31. Based upon what I know about this litigation and its present status, there is absolutely no basis to disqualify me or my law firm from continued representation of the

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District and the individual water right holders who have identified us as their attorneys in Notices of Appearance and Intent to Participate.

DATED this 30th day of January, 2006.

Gordon H. DePaoli

Subscribed and sworn to before
me this 30th day of January, 2006.

Notary Public

TOMMIE KAY ATKINSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 00-62686-2 - Expires May 26, 2008

CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on the 30th day of January, 2006, I electronically filed the foregoing *Affidavit of Gordon H. DePaoli in Support of Response of Walker River Irrigation District in Opposition to Motion to Disqualify Gordon DePaoli* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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and I further certify that I served a copy of the foregoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 30th day of January, 2006:

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EXHIBIT A

EXHIBIT A

Colorado Bar Association

Ethics Opinion 58: Water Rights, Representation of Multiple Clients, 03/21/81; Revised 10/14/95

The following Formal Opinion was written by the Ethics Committee of the Colorado Bar Association

[*Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.*]

58 WATER RIGHTS, REPRESENTATION OF MULTIPLE CLIENTS

Adopted March 21, 1981.
Revision adopted October 14, 1995.

Syllabus

The fact that an attorney or firm may accept employment for two or more persons involved in litigation concerning water rights from the same river system does not, in and of itself, constitute an ethical impropriety. As used in this Opinion, the term "river system" means "water of the natural streams" as that term is used in Colorado law, including surface flows and alluvial and tributary ground water, which are tributary to the same river. An ethical impropriety arises when, in the course of such litigation, the water right or the water supply of one client is in fact impaired, or there is a likelihood of such impairment occurring, as a result of the representation of the other party.

Opinion

This Opinion addresses the issue of whether an attorney's or firm's representation of a client owning or claiming water rights in a river system in and of itself bars that attorney or firm from accepting additional employment involving other water rights within that river system.[(2)] This Opinion considers the application of the relevant provisions of the Colorado Rules of Professional Conduct to the issues of conflict of interest (as addressed in Rule 1.7 and related provisions). Initially, it should be noted that the Rules apply equally to all attorneys and that there is no different standard applicable to water lawyers. However, due to the unique nature of water law practice, this Opinion is issued to guide water lawyers in situations where they represent more than one client in a river system.

Rule 1.7 specifically states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless
>
> 1. the lawyer reasonably believes the representation will not adversely affect

EXHIBIT A

the relationship with the other client; and

2. each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

1. the lawyer reasonably believes the representation will not be adversely affected; and

2. the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.

(c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

Further, the provisions of Rules 1.6, 1.8(b) and 1.9 apply insofar as previous client contacts may give rise to the presence of information protected as confidential. Rule 1.10 extends the restriction of Rules 1.7 and 1.9 to the lawyer's entire firm. Rule 1.11 imposes additional duties on lawyers representing government entities and agencies. Moreover, the water attorney should be aware that disclosure and consent would not allow him or her to represent one client in negotiations or appearances before a public body he or she also represents. *See* Opinions 57, 45, 48, and 97 and Rule 1.11. Rule 2.2 governs a lawyer's conduct when acting as "intermediary" between or among multiple clients.

Water rights adjudications in Colorado and most other litigations involving water rights are *in rem* proceedings binding all persons within a particular river system and water division. Because of the *in rem* nature of such actions and the vast geographical extent of the area potentially affected by any water proceeding, it might appear that all water rights owners are in competition with one another for the same limited resource, whether they be owners of previously adjudicated rights, rights for junior priorities in the process of adjudication, or rights for which a change of water right or plan for augmentation is in the process of adjudication. An examination of the water right decrees issued in such proceedings, however, reveals that the degree of actual competition involved between water rights owners varies substantially from case to case, and in many cases, there is not a real competition at all.

A decree adjudicating a water right in Colorado confirms the existence of an appropriative right in water and defines certain of its parameters. The decree confirms the fact that an appropriation has been made, establishes an appropriation date for the water right, specifies the quantity or rate of flow allowable for such appropriation, specifies the source and location from which the appropriation is exercised, and specifies certain uses which are allowable. A decree confirming an appropriation in Colorado does not assure that water will always be available to satisfy the appropriation being confirmed. Each water right owner is at his or her own peril as to whether the water right actually will yield any water under the physical supply and priority restrictions that will prevail from time to time.

Thus, a water right decree will define and set out the parameters and conditions upon which an appropriator may divert water from a scarce and variable supply of water under the priority system. The decree will establish the relative priority of one user *vis-à-vis*

others. The variable conditions of physical supply and users' fluctuating demands will determine who gets water under each of the relative priorities set out by the decrees. The decree proceeding, however, will not in and of itself determine whether water will actually be delivered under priority administration to one party or another on the river system.

Furthermore, each decree becomes a final judicial act upon its completion and entry, though many water decrees are subject to the court's retained jurisdiction for a period of time. The validity of the parameters assigned to appropriations previously decreed generally is not at issue in a subsequent proceeding to adjudicate another water right.This is manifested in the longstanding water law rule (subject to few exceptions) that no priority given in a subsequent adjudication can be senior to the latest priority given in a prior adjudication proceeding. Similarly, under the current statute, water rights decreed upon applications filed in any calendar year generally are junior to rights decreed on applications filed in previous years. C.R.S. Sections 37-92-306. Allowable diversion rates, volumes and uses of water are likewise insulated by the principles of *res judicata* from attack in a later adjudication proceeding for different water rights. Thus, it is evident that the outcome of an adjudication proceeding to determine a water right for a present client does not automatically pose a threat to parties who have previously obtained adjudicated rights. However, a new appropriator may have a basis to challenge certain existing decreed rights based on abandonment, lack of diligence (for conditional water rights) or similar grounds. Moreover, some types of newly decreed appropriations (such as federal reserved water rights and existing exchanges) may take priority over some previously decreed rights.

These stream adjudications often occur in the context of an extensive river system where there may be many previously adjudicated water rights. The Colorado River system has, for example, at least 10,000 individual water rights. Clearly, the adjudication of a junior priority has no impact under the law on most of the previously adjudicated 10,000 rights and, absent other ethical considerations, no conflict would exist from representation of an owner of one or more of the 10,000 water rights and the simultaneous representation of a junior appropriator.

A lawyer undertaking representation of a client should consider the potential for real harm to another client, based on a realistic assessment of actual and likely future administration and factual conditions on the river. While the tests to be satisfied as to initial applicability of Rule 1.7 are whether the clients' interests are "directly adverse" and whether the lawyer's representation "may be materially limited," in most water law situations the operative question will be whether the water supply available under a decreed priority to one client will be impaired as a result of the endeavor of another client. Because of the usual complexity of the factual situations involved, the question should be further expanded to include the "likelihood of impairment."

There may be situations in which two presently proceeding appropriators may be in actual conflict with one another, where the appropriations are near each other or are large in comparison to the remaining water supply in a particular area. First of all, if both were asserting an appropriation on the same stream within the basin, and both were filing within the same calendar year, there might then be an actual competition for a certain portion of the scarce resource. Present adjudication statutes provide that for any water decrees upon applications filed in the same calendar year, the relative priority is determined by the actual date of appropriation proven by each. In some of these concurrently proceeding cases where there is an actual competition for the same physical supply, the court's determination of parameters such as flow rate and appropriation date may decide the ultimate administrative question of which of the appropriators gets a full water supply under foreseeable low flow conditions. It would be improper to represent both appropriators in such circumstances. In addition, as noted above, there are some circumstances in which decreed priorities may be vulnerable in subsequent proceedings.

In other adjudication cases involving changes of previously decreed rights or plans for augmentation, where the standard is whether or not there will be any injurious effect on water rights entitled to take water, factual issues will arise as to whether the granting of the application will alter the historic regimen of the stream so as to injure the decreed water rights of others. In such circumstances, the question of whether a Rule 1.7 conflict exists will depend on whether there is an impairment in fact, or in likelihood, of the supply available for other water rights owners. This question in turn depends on certain factual characteristics of the case and of the part of the river system involved. It is not always true that each change of water right case necessarily puts in jeopardy all previously decreed water rights or even the supply of water available to such water rights. It may well be possible that change cases on certain segments of the river system can be implemental without potential impact on others in other portions of the river system. It is generally true, for example, that a change case involving a certain priority will not adversely affect the supply of water available for upstream parties having priorities senior thereto, though it may affect the amount of return flow available to downstream parties, and the extent to which upstream junior rights are curtailed.

Each of these cases involves factual variations and must be examined for actual or potential impairment of a client's water supply. Representation of one client will be less likely to affect another client adversely if the water rights involved are located in separate water districts, on separate tributaries within a river system, or at distances far removed, although the circumstances of each case will control.

In determining whether there is an actual or potential impairment, the lawyer must be mindful of confidentiality obligations to each client. Rule 1.7(b) restricts representation which "may be limited by a lawyer's responsibilities to another client. . . ." These responsibilities include the lawyer's confidentiality obligation under Rule 1.6, which extends to all "information relating to representation" of each client. Similarly Rule 1.8(b) prohibits use of such information to the client's disadvantage, unless the client consents, and Rule 1.9(c) requires consent for any adverse use or disclosure of information relating to representation of former clients. In determining whether actual or potential impairment of another client's water rights exists, the lawyer must be careful to protect the confidential information of each client, and to obtain each client's informed consent to any disclosures that may be needed to satisfy Rule 1.7.

In circumstances where a potential impairment exists, the lawyer must consider the likelihood of such impairment. If such impairment is likely, we think "a disinterested lawyer would conclude that the client should not agree to the representation," so the lawyer must decline representation under Rule 1.7(c). If the likelihood of impairment is remote, each client must consent to the representation after "consultation which involves full disclosure of the possible effect of such dual representation on the exercise of the lawyer's independent professional judgment on behalf of each client." Comment to Rule 1.7. A prerequisite to such full disclosure is, of course, obtaining each client's consent under Rule 1.6 to any disclosure of "information relating to representation of" that client.

In conclusion, the fact that each of multiple clients seeks to take water from the same river system does not in and of itself create an actual conflict which would bar multiple employment by a water rights practitioner. The practitioner must look to the likelihood that an actual impairment of water supply available to a client's water rights might result from such multiple employment, and must abide by the requirements of Rules 1.6 and 1.7 regarding confidentiality and client consent.

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2. This Opinion does not address potential conflicts of interest which may arise in representing multiple clients claiming rights in designated ground water, Denver Basin ground water, nontributary ground water, or other water resources which are not part of a

"river system" as defined in the Syllabus. While the Opinion does not discuss the factual and legal issues involved in such circumstances, the Colorado Rules of Professional Conduct do, of course, govern lawyers' and firms' conduct and should be applied in the pertinent text.

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