

## Opinion No. 92-41

### BEFORE THE NEVADA COMMISSION ON ETHICS

#### In The Matter of the Opinion Request Regarding THE BOARD OF DIRECTORS OF THE CARSON-TRUCKEE WATER CONSERVANCY DISTRICT

This Opinion is in response to a request by the Board of Directors (Board) of the Carson-Truckee Water Conservancy District (District). The Board was represented by Leo P. Bergin of McDonald, Carano, Wilson, McCune, Bergin, Frankovich & Hicks. Statutory confidentiality of the proceedings was waived and the proceeding was therefore open to the public. Chairman Thomas R.C. Wilson recused himself from participating in this Opinion request because Mr. Bergin is one of his law partners.

The subject matter of this Opinion Request is generally, whether the Board Directors who use or hold water rights within the District's region can vote or otherwise participate in District matters which may impact their private interests or commitments to others without violating the Code of Ethical Standards in light of the provisions of NRS 541.100(1).

The Commission met to hear evidence and deliberate on this request in Las Vegas, Nevada on September 25, 1992.

The Commission has jurisdiction over this matter pursuant to NRS 281.511(1). Based on the forgoing, the Commission makes the following Findings and renders the following Opinion.

#### FINDINGS

1. The Carson Truckee Water Conservancy District (District) is formed pursuant to statutory authority at NRS 541.010 *et seq.* The District is one of several other regional water districts organized throughout Nevada for the statutory purpose of providing "for the conservation and development of the water and land resources of the State of Nevada and for the greatest beneficial use of water within this state." NRS 541.030(1). The policy of the State of Nevada for organizing water districts is:

- (a) To control, make use of and apply to beneficial use unappropriated waters in this state to a direct and supplemental use of such waters for domestic, manufacturing, irrigation, power and other beneficial uses.
- (b) To cooperate with the United States and agencies thereof under the federal reclamation laws or other federal laws now and hereafter enacted and to construct and finance works within or without the State of Nevada. ...

NRS 541.030(2).

2. Pursuant to statute, the district court in which the greatest part of the lands of the proposed water district is located is vested with authority to establish such water conservancy districts upon the proper filing of a petition with the clerk of the court. NRS 541.040; NRS 541.050. The board of directors for each water conservancy district is appointed by the Governor. NRS 541.100(1). NRS 541.100 provides in pertinent part the following with respect to appointment of board directors:

No person may be disqualified to act as a director because he is an officer, employee or stockholder of, or owner of land within, any irrigation or other district constituting a division,

or part of a division, or subcontracting agency of the district, nor may any director for that reason be disqualified to vote or act upon any matter involving such irrigation or other district or subcontracting agency.

NRS 541.100(1).

3. The Board's statutory powers on behalf of the District include the following: to hold, sell and acquire water rights within and without the State of Nevada; to take any property in the State necessary to exercise its power; to use State land for the construction of the conveyance of water; to contract with any governmental entity to deliver water needed to its constituents; to allot water for irrigable land within the District's region and to levy assessments for such allotments; to fix rates at which water will be sold, leased or otherwise disposed of within the District; to employ personnel and establish offices as required by the Board's business transaction requirements; to adopt plans and specifications for the District's work; to appropriate or otherwise acquire water to store and transport such water for municipal and domestic purposes within the District; to generate and contract for generation, distribution and sale of electric energy; to invest surplus District money; to borrow money in the name of the District; to construct bylaws; and to construct work for the drainage of land and levy assessments against such lands drained. (NRS 541.140).

4. At the time of the administrative hearing in this matter, the Carson-Truckee Water Conservancy District Board of Directors was composed of the following individuals: Andre Aldax, Minden, Nevada, representing Carson Water Subconservancy District; Ted J. DeBraga, Fallon, Nevada, representing Truckee-Carson Irrigation District; Janet R. Carson, Reno, Nevada, representing Sierra Pacific Power Company; Donald Casazza, Reno, Nevada, representing Washoe County Water Conservation District; Todd Westergard, Carson City, Nevada, representing Carson City, Nevada; Edward L. Pine, Reno, Nevada, representing Washoe County; George Pomeroy, Jr., Fallon, Nevada, representing Churchill County; Richard Bacus, Virginia City, representing Storey County; and John D. Winters, Dayton, Nevada, representing Lyon County. The Board composition reflects representation from each of its six divisions those being all of Washoe County, Carson City, Churchill County and part of Storey County, Douglas County and Lyon County. The Board also had Director representation for each of its District's principal subcontracting agencies, those being Truckee-Carson Irrigation District, Washoe County Water Conservation District, Carson Subconservancy District and Sierra Pacific Power Company.

5. The majority of the Board of Directors for the District are farmers or water users who have water rights on either the Carson or Truckee Rivers in counties within the jurisdiction of the District. For example, Conservancy Board Director Ted DeBraga is a farmer in his private business capacity, receives water in that capacity through the Truckee-Carson Conservancy District and owns land within the geographical region served by the District. Conservancy Board Directors address and vote on issues concerning or affecting water users and permit holders within the District's region and statewide on a regular basis. As a result, numerous items upon which the Board acts could affect individual directors such as Mr. DeBraga. Six other members of the Conservancy Board are similarly situated to Mr. DeBraga in their private capacities as water users or water rights holders or land owners within the Board's juridical authority. The District maintains that unless directors can vote on issues that concern water right holders or users, the District will not have sufficient votes on many matters.

6. Prior to filing its opinion request, the Truckee-Carson Water Conservancy District had been requested by the Department of Conservation and Natural Resources to retain outside counsel to join in appealing a May 26, 1992, ruling from the United States Court of Appeals for the Ninth Circuit in *United States v. Alpine Land and Reservoir Co.*, 965 F.2d 731 (9th Cir. 1992), *amended*, 983 F.2d 1487 (9th Cir. 1992). The ruling raised questions about the validity of 5, 000 or more previously approved water rights transfers and potentially impacted water users served by the District, including Conservancy Board Directors individually holding or using Nevada water rights, by changing the interpretation and application of Nevada water law as applied since 1907. The Truckee-Carson Water District did not join in appealing the Ninth Circuit Court ruling which was amended on January 21, 1993, 983 F.2d 1487 (9th Cir. 1993). The water law issue was resolved during the 1993 Nevada Legislative session by passage by Assembly Bill

337. (Act of May 27, 1993, ch. 181, § 2, 1993 Nev. Stat. 321) (AB 337).

## OPINION

Based on the above-stated Findings, the Commission concludes that Directors of the Carson- Truckee Water Conservancy District are public officers by virtue of their appointment to the District's Board of Directors and exercise of public power, trust and duty in administering the statutory responsibilities of the District. NRS 281.4365; NRS 541.140.

The questions presented by the Board of Directors as the Requestor in this matter are specifically, (i) whether the Code of Ethical Standards prohibited Conservancy Board Directors from voting on whether to retain counsel to appeal a court ruling which impacted constituents of the District, including seven of the ten individual Board members for the District; and (ii) whether the Code of Ethical Standards prohibits Board Directors from voting on water issues if they are individually impacted as holders or users of water in their private capacities as employees, officers or stockholders, or owners of land within any irrigation or other district or division or subcontracting agency of the District.

### I.

#### Retaining Counsel To Overturn Ninth Circuit Case

The Commission notes that this question is moot as the decision of the Ninth Circuit was reconsidered and amended on January 21, 1993, in 983 F.2d 1487 (9th Cir. 1992). The point of law in that case over which the Truckee-Carson Water Conservancy District was concerned, that being the transferability of water rights not yet put to beneficial use, was resolved in the 1993 Legislature through enactment of AB 337 which became law on May 27, 1993.

### II.

#### Ongoing Conflict of Interest for Directors

The Conservancy Directors also requested this Commission to provide guidance on whether those Directors who use or hold water rights in their private capacities as landowners, or employees, or stockholders of irrigation districts or divisions or District subcontracting agencies within the region served by the District can vote on issues that concern water right holders without violating the Code of Ethical Standards. The Code of Ethical Standards provides in pertinent part:

**NRS 281.501 Additional standards: Voting by members of legislative branch and other public officers or employees; effect of abstention from voting on quorum; required disclosures.**

....

2. In addition to the requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of a matter with respect to which the independence of judgement of a reasonable person in his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgement of a reasonable person would not be materially affected by his pecuniary interest where that resulting benefit or detriment accruing to him is not greater than that accruing to any other member of the general

business, profession, occupation or group.

3. A public officer or employee shall not approve, disapprove, vote, abstain from voting, or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest, without disclosing the full nature and extent of the gift, loan, commitment or interest. Such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected.

NRS 281.501(2) and (3) provide the standards legislators and voting public officers must follow in discussing, advocating, voting, or otherwise acting on a matter with respect to which the independence of judgment of a reasonable person in his or her situation would be materially affected by the acceptance of a gift or loan, a pecuniary interest, or a commitment in a private capacity to the interest of others.

The Board has identified that the majority of Directors have in their private capacities interests or commitments to others relating to numerous water issues voted on by the District. The Directors are therefore both constituents of the District and Board members for the District.

The question for the Commission is to what extent does the Code of Ethical Standards apply to the District's Board of Directors in view of specific statutory language applicable to water district boards which is restated in pertinent part as follows:

No person may be disqualified to act as a director because he is an officer, employee or stockholder of, or owner of land within, any irrigation or other district constituting a division, or part of a division, or subcontracting agency of the district, nor may any director for that reason be disqualified to vote or act upon any matter involving such irrigation or other district or subcontracting agency.

NRS 541.100(1). This statutory section, allowing voting and action on District matters which may also affect Directors in their related private capacities, must be reconciled with the Code of Ethical Standards which prohibits a public officer from voting on matters in which the judgment of a reasonable person would be materially affected by his private interests. NRS 281.501(2). In reconciling the two statutory provisions, the Commission is guided by rules of statutory construction established in Nevada case law. It has become axiomatic in Nevada law that whenever possible, if reasonable construction allows, statutes relating to the same subject must be harmonized to effectuate the intent of each. *Weston v. County of Lincoln*, 98 Nev. 183, 185, 643 P.2d 1227 (1982); *State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830 (1977); *First Am. Title Co. of Nev. v. State*, 91 Nev. 804, 806, 543 P.2d 1344 (1975). In this case, NRS 541.100(1) does not conflict with NRS 281.501(3) which requires prior timely disclosure of the full nature and extent of a gift, loan or pecuniary interest a Director may have in matters which come before the Board. Since NRS 541.100(1) only addresses Directors voting or acting on District matters and NRS 281.501(3) only addresses legislators' and public officers' disclosure of interest prior to voting or taking action on issues by a public body, the two statutes can be harmoniously construed. In applying both statutes, the Commission concludes that District Directors are required to disclose any loan, gift, pecuniary interest or commitment to others prior to acting or voting on matters that come before the District which relate to those interests. Such disclosure must be made in public, to the chairman and other members of the body at the time the matter is considered. NRS 281.501(3)(c).

The Code of Ethical Standards at NRS 281.501(2) prohibits a public officer from voting or acting on a matter in which the independence of a reasonable person would be affected. This section of the Code is contrasted with NRS 541.100(1) allowing "an officer, employee or stockholder of, or owner of land within, any irrigation or other district constituting a division or part of a division or subcontracting agency of the district...to vote or act upon any matter involving such irrigation, or other district or subcontracting agency."

Where as here, statutory provisions conflict, it has been a long-standing tenet of Nevada case law to give the more specific statute precedence over the more general statute. *State Indus. Ins. Sys. v. Furman*, 103 Nev. 366, 368, 741 P.2d 1357 (1987); *Laird v. Nevada Pub. Employees Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171 (1982). Since NRS 541.100(1) specifically identifies and essentially exempts from conflict of interest, Directors who vote or act on matters involving an irrigation or other district of a division or a subcontracting agency with the District, in which they hold positions as officers, employees, stockholders or are owners of land, this statute takes precedence over the general voting provisions of NRS 281.501(2). NRS 541.100(1) contemplates that the Directors' expertise associated with their private water interests or commitment to others in that area, is a primary reason why such individuals' participation on the Board is desired and outweighs the influence such private interests may have on a Director's vote or action on District matters. It is precisely because the Directors' have interests as land owners and water users or the officers, shareholders or employees of irrigation districts or divisions within the District's region that they are valuable representatives of such interests in District matters. (See, NRS 541.050(f) for Board representation and composition.)

For example, in the factual circumstance presented by Mr. DeBraga regarding the appropriateness of his voting on a matter which affects both the water rights of the Truckee-Carson Irrigation District which he represents and his own water rights as a farmer owning land within that District, under NRS 541.100(1), Mr. DeBraga may vote on that matter, despite his personal interests in the matter. He must however, pursuant to NRS 281.501(3), appropriately disclose that interest prior to voting on the matter.

However, this is a narrow exception to the Code of Ethical Standards and does not extend beyond the specific language of NRS 541.100(1). That is, unless the matter before the Directors involves the irrigation district of a division or subdivision with which the Director has a private connection in the form of being an officer, employee, stockholder, land owner or District subcontractor, the matter is not exempt from the Code of Ethical Standards and the voting restrictions in NRS 281.501(2) apply. As a result, Directors are still obligated to both disclose and refrain from voting or acting on matters in which the judgment of a reasonable person would be materially affected by acceptance of a gift or loan, a pecuniary interest or a personal commitment to others when such matters do not involve a district, division, subdivision or subcontracting agency with which the Director is associated as an officer, employee, landowner or shareholder. If, for such reasons, a Director abstains from voting on a matter pending before the Board, the necessary quorum and number of votes necessary to act upon the matter is reduced as though the member were not a member of the Board of Directors. NRS 281.501(4).

## CONCLUSION

Directors of the Carson- Truckee Water Conservancy District must comply with the Code of Ethical Standards in every respect except where they are exempted from doing so by the provisions of NRS 541.100(1). Under that statutory provision, the Directors of the District may vote or act on matters involving a subcontracting agency of the District, irrigation district or other district constituting a division, or part of a division or with whom a director is an officer, employee or stockholder or within which the Director is a landowner without violating the Code of Ethical Standards. Disclosure by Directors of such private interests or commitments and of the full nature and extent of any gift, loan, commitment or interest associated with any matter on which they act or vote is required by NRS 281.501(3) which is consistent with and does not conflict with the exemptions provided for in NRS 541.100(1).

## COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances, and may not apply to other circumstances. The provisions of NRS 281.501 quoted and discussed above must be applied on a case-by-case basis, with results which will vary depending on the specific facts and circumstances involved.

DATED: February 11, 1994.

NEVADA COMMISSION ON ETHICS

By: /s/ WILLIAM R. MORSE, Vice Chairman