



## STATE OF NEVADA

### BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for  
Advisory Opinion Concerning the Conduct of  
**PUBLIC OFFICER**, Member, City Council,  
State of Nevada,

Request for Opinion No. 11-98A  
**CONFIDENTIAL**

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PUBLIC OFFICER. /

#### ABSTRACT OF OPINION

##### **I. STATEMENT OF THE CASE**

Public Officer ("PUBLIC OFFICER") requested a confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his anticipated future conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum<sup>1</sup> of the Commission heard this matter on December 15, 2011. PUBLIC OFFICER appeared at the hearing and provided sworn testimony.

PUBLIC OFFICER serves as a member of a city council ("CITY COUNCIL") and questions whether he may participate in a public meeting concerning a matter that may affect his privately owned water rights.

After fully considering PUBLIC OFFICER's request and analyzing the facts, circumstances and testimony presented by PUBLIC OFFICER, the Commission deliberated and orally advised PUBLIC OFFICER of its decision that PUBLIC OFFICER's water rights would not be affected by the City's contractual issues with a private business entity and PUBLIC OFFICER may participate in the meeting with proper disclosures.<sup>2</sup>

PUBLIC OFFICER elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full Opinion.

##### **II. QUESTION PRESENTED**

PUBLIC OFFICER is a member of CITY COUNCIL. He asks the Commission whether he may participate in a public meeting regarding a contractual issue between the City and a private business entity where the business entity alleges that PUBLIC OFFICER's privately

<sup>1</sup> The following Commissioners participated in this opinion: Vice-Chair and Presiding Officer Paul Lamboley and Commissioners Timothy Cory, Gregory Gale, Magdalena Groover and Keith Weaver. Chairman Beyer disqualified himself from participating and voting in accordance with NAC 281A.505(3).

<sup>2</sup> Commissioner Cory voted against this determination.

owned water rights may be affected by the contract negotiations.

### **III. NEVADA LAW GENERALLY- WATER RIGHTS – NRS CHAPTERS 533 AND 534/STATE ENGINEER**

1. In Nevada, all sources of water within the State, above and below ground, belong to the public. A water right is a property right to the use of water which belongs to the public. A water right does not constitute ownership of the water itself. Water rights are administered by the State Engineer.
2. In Nevada, water rights are acquired by being the first to put publicly owned water to a beneficial use. Water rights can be conveyed, mortgaged and encumbered (leased). Water rights which are derived from the same source of water are given priorities based on the earliest timing of beneficial use. Failure to use the water results in forfeited or abandoned water rights.
3. Nevada water law follows the doctrine of “prior appropriation,” or “first-in-time, first-in-right” (the first person to draw on a water source and put it to beneficial use receives a permanent right to use the water – unless forfeited or abandoned – in priority over subsequent beneficial water users from the same water source). This process protects senior uses of water and provides for the allocation of new water uses.
4. Under Nevada law, water rights are generally established in one of two ways: 1) Pre-statutory vested rights

established through judicial decree (“decreed rights”); or 2) Statutorily permitted/certificated rights established through the State Engineer (“permitted/certificated rights”).

5. Decreed rights are those permanent water rights which were established before Nevada enacted its statutory law governing the appropriation of water. Decreed rights are original water rights which were established by judicial decree for those who first physically appropriated water from a water source and put it to continued, beneficial use. Those who established water rights from the same water source were given a priority schedule for the use of water pursuant to the terms of the decree. Decreed rights constitute vested water rights and they are recorded with the appropriate county recorders and also maintained by the State Engineer for the overall administration of water rights in the State.
6. Permitted/certificated rights are water rights which are established pursuant to Nevada’s statutory appropriation law. A person may acquire a water right in Nevada by applying to the State Engineer for a permit to appropriate certain water. If the State Engineer determines that there is unappropriated water available from the requested source, he may issue a permit to appropriate the water. The permit will include a timeline by which the applicant must divert the water from the source and prove continued beneficial use. If the applicant fails to prove the beneficial use within the timeline, the

permit may be revoked. If the applicant demonstrates appropriate diversion and beneficial use, the State Engineer will issue a certificate establishing the water right. A certificated water right is a vested water right, subject to other vested water rights with senior priority from the same water source.

7. In Nevada, most surface water was claimed prior to the enactment of Nevada's statutory water law and most water not otherwise claimed has since been appropriated pursuant to the current appropriation law.
8. The State Engineer does not assign title or ownership of a water right. Rather, the State Engineer maintains decrees, permits and certificates of water rights and confirms any other conveyances of water rights and files them in his office. Title disputes are addressed by the Courts.
9. Certain water rights in Nevada are collectively held and maintained by private mutual water companies such as irrigation companies and ditch companies. Water companies build and/or maintain the infrastructure (ditches, pipes, etc) that diverts water from the water source and delivers/distributes it to the owner/user of the water rights. The water companies hold the water rights of various owners and provide shares of stock in the company. The number of shares of stock in the company represents the shareholder's proportionate ownership interest in the water rights held by the company. Accordingly, each share is equal in the quantity

and quality of the water, making them readily deliverable to and transferable among or by all shareholders.

10. The shares of stock in the water company are commonly referred to as "water shares." Water shares are not the equivalent of water rights. Water shares constitute the measure by which water rights owners receive their proportionate amount of water held by the water company.<sup>3</sup> Owners of water rights/shareholders pay fees to the water companies for the maintenance and administration of the infrastructure and water delivery. Typically, the shareholders either use the water or lease it to other private and governmental entities.
11. Water companies do not control the legal rights of water rights owners to sell or lease their water rights.
12. Not all water rights result in the actual access to and use of water at all times, depending upon the availability of the water at any given time from a water source and subject to any priority rights. Without actual access to the water, the value of the water right may decrease. Priority rights are generally more valuable.

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<sup>3</sup> The lease of water rights through a water company (measured by water shares) is similar to the lease of real property through a management company; i.e., a landowner hires a management company to serve as his agent to manage and maintain the leased property.

#### **IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES**

##### **A. ISSUES**

PUBLIC OFFICER serves as a member of CITY COUNCIL. In his private capacity, PUBLIC OFFICER owns and controls significant water rights in Nevada which he holds in a local Irrigation Company (“Irrigation Company”)<sup>4</sup> and leases to various private and governmental entities in Nevada. PUBLIC OFFICER’s water rights are owned through various companies that he owns either individually or in conjunction with certain family members. PUBLIC OFFICER and his family members also lease certain privately-owned land and water rights to the owners of a local business entity (“Business Entity”) pursuant to a long-term lease agreement negotiated prior to PUBLIC OFFICER’s election to CITY COUNCIL.

The City manufactures and sells effluent water through its water treatment facility and presently has a contractual agreement with another local business entity (“Private Company”) regarding the purchase of its effluent. The contractual agreement is presently pending consideration by CITY COUNCIL.

The City has established a priority schedule for the delivery of its available effluent pursuant to various contractual agreements. The amount of effluent available for Private Company under its contractual agreement with the City is limited by the priority schedule with other entities and will be primarily

available only during winter months when there is less demand from the other entities with priority. Private Company also has more demand for water in the warmer/summer months. The cost to purchase effluent is significantly higher than the cost to lease private water rights.

To accommodate its irrigation needs, with or without the City’s effluent, Private Company has entered into a separate long-term lease agreement with the local water district to lease a portion of its water rights held by Irrigation Company. The water rights owned by the water district are held by Irrigation Company, but they are separate and distinct water rights from those owned and controlled by PUBLIC OFFICER through Irrigation Company.

Private Company presumably leases less water from the water district if more effluent is available and required to be purchased under the City’s contract. Less demand in the private market could potentially affect the value of PUBLIC OFFICER’S private water rights. However, all of PUBLIC OFFICER’s available water rights are presently committed under long-term lease agreements and therefore the value of his shares is locked-in for a time certain.

On the contrary, if less effluent is available, Private Company will require more private water, which Private Company could potentially seek from PUBLIC OFFICER. However, the record reflects that Private Company presently has a long-term contract with the water district for all the shares that it could require with or without effluent and therefore would not be seeking PUBLIC

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<sup>4</sup> PUBLIC OFFICER also owns other water rights in Nevada held in other Irrigation Companies.

OFFICER's shares. In the unlikely event Private Company required more shares, PUBLIC OFFICER assures the Commission that his available shares are otherwise committed and in any event he would not offer or enter into any agreements to provide his shares to Private Company while it is engaged in contract negotiations with the City for effluent.

Another potential conflict with the City's contractual negotiations could be the requirement for Private Company to purchase more effluent from the City, which costs more than leasing private water. Private Company presumably has an interest in leasing available water at a lower cost and therefore not increasing the amount of effluent it could be required to purchase from the City. Again, PUBLIC OFFICER'S water rights would not be affected in this scenario. Private Company is currently engaged in a long-term lease agreement with the water district and PUBLIC OFFICER's water rights are separate from those owned by the water district and are otherwise committed.

Finally, Business Entity is presently engaged in a long-term lease agreement with PUBLIC OFFICER and therefore will not be in the market for effluent or other available water under any circumstances. Therefore, no conflict exists between the City's effluent agreement with Private Company and PUBLIC OFFICER's private water rights.

The management of Private Company believes that PUBLIC OFFICER's private water rights and interests in Business Entity, namely his lease of land and water rights to Business Entity

create competition affecting the value of other available water, including the City's available effluent, and constitute conflicts of interest concerning PUBLIC OFFICER's ability to participate in any contract negotiations on behalf of the City regarding the sale of the City's effluent to Private Company.

Based on the testimony and documentary evidence provided, the Commission finds that PUBLIC OFFICER's water rights are not and would not be affected by the City's interests in providing its effluent to Private Company. The water rights leased from the local water district are separate and distinct from any available City effluent and any water rights owned and leased by PUBLIC OFFICER. Furthermore, PUBLIC OFFICER's interests in Business Entity would not be affected by the City's agreement to provide effluent to Private Company. Therefore, PUBLIC OFFICER has no conflict of interest that would prevent him from participating in the City's negotiations with Private Company concerning the City's water.

However, given the complicated nature of PUBLIC OFFICER's private water rights and interests in Business Entity and the public perceptions of conflicts of interests due to competition with the City and other water rights owners, PUBLIC OFFICER is advised to disclose his interests in any water rights and how those water rights are separate and distinct from the City's effluent, as well as his interests in any competing local business entities. PUBLIC OFFICER's disclosure should explain why his private interests and commitments are not affected, positively or negatively, by the success or failure of the City's

contractual negotiations with Private Company concerning the City's effluent.

PUBLIC OFFICER's anticipated future conduct will implicate the provisions of NRS 281A.400 and 281A.420 governing the public trust and the duties of disclosure and abstention.

## **B. RELEVANT STATUTES**

### **1) Public Policy**

**NRS 281A.020(1), provides:**

1. It is hereby declared to be the public policy of this State that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

The Ethics Law promotes the appropriate separation between public duties and private interests. As a member of the City Council, PUBLIC OFFICER has specific public responsibilities governing the interests of the City in pursuing contracts for the purchase and use of its effluent that must be kept separate from PUBLIC OFFICER's private interests, including his private water rights and interests in a local business entity.

By actively participating in contract negotiations through his official position, PUBLIC OFFICER may be violating the public trust if those negotiations and any resulting City contract have the potential to affect his pecuniary interests or commitments in a private capacity.

However, as reflected by the record in this case, the success or failure of negotiations concerning the City's sale of effluent to a local private business entity does not affect any of PUBLIC OFFICER's privately owned water rights or pecuniary interests in a competing business entity.

### **2) Use of Government Position to Secure Unwarranted Preferences.**

**NRS 281A.400(2), provides:**

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment" in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

PUBLIC OFFICER has significant pecuniary interests and commitments in a private capacity to the interests of his family members concerning privately owned water rights and interests in Business Entity to which he leases private land and certain water rights. See NRS 281A.420(8)(a)(2) and (4).

Given his pecuniary interests and commitments in local water rights and Business Entity, PUBLIC OFFICER must not use his position as a City Council member to secure unwarranted benefits for his private property rights (water and real property) or those of his family members.

An entity in need of water which does not own water rights must purchase or lease water from other sources, including effluent from the City or water from owners of private water rights (usually through various irrigation companies). The City has a certain amount of effluent each year to sell to private entities. Because the amount of effluent available for any given entity is limited pursuant to the City's priority schedule and the amount of available effluent, all local entities must acquire water from other available resources for proper irrigation. The cost to purchase effluent from the City is higher than the cost to lease private water.

PUBLIC OFFICER, through his various companies and in conjunction with family members, owns significant water rights in the City that he currently leases to various local entities. The remainder is used to irrigate family-owned farm land. Therefore, all of PUBLIC OFFICER's water rights holdings are committed to long-term use and not available to lease. Further, PUBLIC OFFICER has testified that he has no intentions of marketing any of his water rights to other local business entities that may otherwise become available. In the unlikely event that a need arose, PUBLIC OFFICER would decline to provide water rights to Private Company while it is engaged with the City in a contractual matter.

Although Private Company expressed concern regarding PUBLIC OFFICER's potential conflict, it has not articulated a basis for PUBLIC OFFICER's alleged conflict with his participation in the City's contract negotiations with Private Company to purchase the City's effluent. The Commission has therefore considered PUBLIC OFFICER's private interests and the matter before the City and identified the possible conflicts PUBLIC OFFICER could have in this matter. However, these possible conflicts are speculative and given the record evidence, the Commission finds that no actual conflicts exist; PUBLIC OFFICER's private interests and commitments will not be affected regardless of the outcome concerning the City's contract with the private business entity. The evidence does not support any conflicts based on PUBLIC OFFICER's assurances that his water is separate and distinct from water owned by the water district and is already committed or will not be made available to local entities if circumstances otherwise permit.

Based on the lack of pecuniary interests or benefits to his family members in matters relating to the City's distribution of effluent to Private Company, PUBLIC OFFICER would not violate NRS 281A.400(2) by participating in negotiations on behalf of the City concerning the City's lease of water to that entity. PUBLIC OFFICER could receive no personal privilege, preference, exemption or advantage to his personal and pecuniary interests in his water rights or those of his lessee, Business Entity, through the City's agreement with Private Entity over the purchase of effluent.

### 3) Disclosure

**NRS 281A.420(1), in relevant part, provides:**

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,  
- without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure to the chair and other members of the body...

Given the complicated nature of PUBLIC OFFICER's private water rights and interests in a competing private business entity, and potential perceptions of conflicts of interests, PUBLIC OFFICER is advised to disclose his interests in any water rights derived from the local water supply as well as his interests in any local business entities, including the interests of his family members. PUBLIC

OFFICER's disclosure should explain the nature and extent of his private interests and commitments and whether and/or how they are affected by the City's contractual negotiations with the private business entity concerning the City's water, as described herein. While many of the possible outcomes are speculative, PUBLIC OFFICER is advised to properly disclose how his interests may be affected, if at all, by the proposed contract.

### 4) Abstention

**NRS 281A.420(3) and (4) provides:**

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan:

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of other's.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a



commitment in a private capacity to the interests of others, accruing to the other person, is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

(b) The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

As described herein and without evidence that PUBLIC OFFICER's pecuniary interests or commitments to others will be affected at all, let alone materially affected, by the contractual

negotiations between Private Company and the City, PUBLIC OFFICER is not required to abstain from participating in the negotiations before CITY COUNCIL. Nevertheless, before PUBLIC OFFICER participates and/or acts on the matter, he is advised to undertake the disclosures identified herein.

## **V. CONCLUSIONS OF LAW**

1. At all times relevant to the hearing of this matter, PUBLIC OFFICER was a "public officer," as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. PUBLIC OFFICER would not violate NRS 281A.400(2) by participating in contractual negotiations on behalf of the City concerning the City's sale of effluent to Private Company. Neither PUBLIC OFFICER nor his family members could receive a privilege, preference, exemption or advantage to their personal and pecuniary interests in private water rights or their lessee, Business Entity, through the City's contract with Private Company concerning the purchase of effluent.
4. Pursuant to NRS 281A.420(1), PUBLIC OFFICER is advised to disclose his interests in any water rights derived from the local water supply as well as his interests in any competing local business entities. PUBLIC OFFICER's disclosure should explain the nature and extent of such interests and commitments, and whether and/or how they are

affected by the City's contractual negotiations with Private Company concerning the purchase of effluent.

5. Based on the lack of evidence of an actual conflict, PUBLIC OFFICER is not required to abstain from participating or voting in the City's contract negotiations with Private Company pursuant to NRS 281A.420(3).

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

Dated this 14<sup>th</sup> day of January, 2013.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul Lamboley  
Paul Lamboley  
Vice-Chairman