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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**SURFACE WATER COALITION'S DISQUALIFICATION OF THE DIRECTOR AS THE HEARING OFFICER AS A MATTER OF RIGHT**

COMES NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (hereinafter collectively referred to as the "Surface

Water Coalition" or "Coalition"), and hereby file this *Disqualification of the Director as the Hearing Officer as a Matter of Right* pursuant to the Idaho Administrative Procedure Act ("Idaho APA"), Idaho Code § 67-5252(1). The bases for this disqualification are as follows:

FACTS

The Surface Water Coalition hand delivered a letter to the Director on January 14, 2005, requesting administration of junior ground water rights within Water District No. 120 in 2005. *See January 14, 2005 Letter to Director*. On January 20, 2005, the Coalition sent the Director another letter concerning questions about statements Department personnel had made to the public about the Coalition's request for water right administration. *See January 20, 2005 Letter to Director*. The Coalition requested the Director to identify the Department personnel and their statements, and remove those individuals from participating in the Department's response to the request for water right administration. *See id.* at 3.

The Director immediately responded to the Coalition's January 20, 2005 letter and issued an *Order* on January 25, 2005 ("*Jan. Order*"). The Director deemed the Coalition's letter "to be a petition for disqualification pursuant to Idaho Code § 67-5252." *Jan. Order* at 1. Consequently, the Director denied "the request to recuse and remove the Director as the presiding officer in responding to the delivery calls made by the Surface Water Coalition." *Id.* at 6.

Shortly after the Director issued his first order, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a petition to intervene on February 3, 2005. On February 11, 2005, Idaho Power Company filed a letter in support (petition to intervene) of the Coalition's request for water right administration by priority. In response to the Coalition's request for water right administration the Director issued an initial order on February 14, 2005 ("*Feb. Order*"). The

order was designated as "interlocutory" except for two matters and purported to initiate a "contested case" pursuant to Idaho Code § 67-5240. *Feb. Order* at 33. The Director also granted IGWA's petition to intervene. *See id.* at 34. Following the Director's *Feb. Order* the Idaho Dairyman's Association ("IDA") filed a petition to intervene on February 18, 2005. Later, on March 7, 2005, the United States Bureau of Reclamation ("Reclamation") also filed a petition to intervene. The Director granted IDA's and Reclamation's petitions to intervene and denied Idaho Power's motion to intervene by order on April 6, 2005. Approximately two weeks later the Director issued a final order responding to the Coalition's water right delivery request on April 19, 2005, which was then superceded by an amended order on May 2, 2005 ("*May Order*"). On April 26, 2005, the City of Pocatello ("Pocatello") and several state agencies ("State Ground Water Users") filed petitions to intervene. The Director granted these petitions to intervene by order on May 11, 2005.

Petitions requesting a hearing on and/or reconsideration of the Director's *May Order* were filed by the Coalition, Reclamation, Idaho Power, IGWA, IDA, Pocatello, J.R. Simplot Company, and the State Ground Water Users following the *May Order*. The Coalition and Idaho Power further requested the Director to appoint an independent hearing officer to conduct the hearing on the Director's *May Order*. The Director responded to the various petitions and requests by his order of June 3, 2005 ("*June Order*"). The Director denied the requests for an independent hearing officer. *June Order* at 3.

ARGUMENT

I. THE IDAHO APA GRANTS A PARTY TO A CONTESTED CASE THE RIGHT TO DISQUALIFY A HEARING OFFICER AS A MATTER OF RIGHT.

Idaho Code § 67-5252(1) provides the following with respect to "presiding officers" in administrative "contested cases":

> (1) Except as provided in subsection (4) of this section, any party ***shall have the right to one (1) disqualification without cause of any person serving or designated to serve as presiding officer . . .***

I.C. § 67-5252(1)(emphasis added).

Subsection (4) states the following:

> (4) Where disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of section 59-704, Idaho Code.

I.C. § 67-5252(4).

The Coalition's January 20, 2005 letter raised concerns about Department personnel being involved in the process that would result in a response to the Coalition's request for water right administration. The Coalition requested the Director to identify Department personnel along with the statements that were made to the public that could be viewed as prejudicial to the Coalition's water right administration request. The Coalition also requested the Director to recuse those individuals from participating in the Department's response to the Coalition's request for water right administration. Contrary to the Director's findings in the *Jan. Order*, the Coalition did not seek to disqualify any "presiding" or "hearing" officers in any "contested cases" pursuant to the Idaho APA, I.C. § 67-5201 *et seq.*, or the Department's rules of procedure. Moreover, no "contested case" even existed at that time, as evidenced by the Director's February 14, 2005 order that designated a "contested case."[1] *Feb. Order* at 33.

Assuming for argument's sake the Director's designation of the "contested case" by his *Feb. Order* is correct, then the Coalition still retains the right to disqualify the "hearing officer" (i.e. the Director) as a matter of right pursuant to I.C. § 67-5252(1). Although the Director

[1] The Coalition does not agree that the Director has the authority to designate a "contested case" in the context of priority water right administration within water districts. *See Petitioners' Joint Response to IGWA's Motion for Order Authorizing Discovery* at 2-3.

analyzed I.C. § 67-5252(4) and I.C. § 59-704 in his *Jan. Order* and concluded that he did not have a "conflict of interest" pursuant to I.C. § 59-704, that analysis does not apply to the present matter involving a request for a hearing on the Director's *May Order*.

In requesting a hearing on the Director's *May Order*, the Coalition did not seek to disqualify the Director carte blanche from participating in any part of the Department's response to the request for water right administration, i.e. to serve as the "presiding officer" in the case, or the person who issues the "final order" for purposes of judicial review. To do so would be an attempt to void all prior orders issued to date. A disqualification of that magnitude is exactly the situation that I.C. § 67-5252(4) and I.C. § 59-704 address. Where such a disqualification of the "agency head" results in an agency's inability to decide the "contested case", the actions of the "agency head" are treated as a "conflict of interest" under I.C. § 59-704.[2] The Coalition's request for an independent hearing officer does not implicate the analysis called for in I.C. § 67-5252(4).

Instead, the Coalition requested the Director to appoint an independent "hearing officer" pursuant to his authority granted under I.C. § 42-1701A(2). That statute allows the Director "to direct that a hearing be conducted by a hearing officer appointed by the Director." I.C. § 42-1701A(2). The Department's own rules distinguish between a "hearing officer" and a "presiding officer" for purposes of contested cases. *See* IDAPA 37.01.01.410 ("A hearing officer is a

[2] Whether or not an "agency head" can be disqualified from serving as a "presiding officer" in a contested case is a two-step analysis. First, the agency head must determine whether or not his or her disqualification results in "the agency's inability to decide a contested case." If the answer is yes, the agency head must then determine whether or not he or she has a "conflict of interest" as defined under I.C. § 59-703. For purposes of that section, a "conflict of interest" essentially equals a private pecuniary interest in the case. Since the Idaho APA and the Department's rules of procedure allow the Director to designate someone other than himself as a "presiding officer" or "agency head" for purposes of reviewing recommended and preliminary orders and issuing a final order in a contested case, his disqualification does not result in the Department's inability to decide contested cases. *See* I.C. §§ 67-5243 through 5245; IDAPA 37.01.01.720, 730 (agency head designee's may review recommended and preliminary orders for purposes of issuing a final order). Accordingly, the disqualification analysis does not reach the second step where the Director is capable of designating someone to serve in his stead and issue a final order in a contested case.

person other than an agency head appointed to hear contested cases on behalf of the agency."); IDAPA 37.01.01.411 ("Agency heads are not hearing officers, even if they are presiding at contested cases."). In addition, the Department's rules specifically address disqualification of "hearing officers." Rule 412 provides the following:

> Pursuant to Section 67-5252, Idaho Code ***hearing officers*** are subject to disqualification for bias, prejudice, interest, substantial prior involvement in the case other than as a presiding officer, status as an employee of the agency, lack of professional knowledge in the subject matter of the contested case, or any other reason provided by law or for any cause for which a judge is or may be disqualified. Any party may promptly petition for disqualification of a hearing officer after receiving notice that the officer will preside at a contested case or upon discovering facts establishing grounds for disqualification, whichever is later. Any party may assert a blanket disqualification for cause of all employees of the agency hearing the contested case, ***other than the agency head***, without awaiting the designation by a presiding officer. A hearing officer whose disqualification is requested shall determine in writing whether to grant the petition for disqualification, stating facts and reasons for the hearing officer's determination. ***Disqualifications of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.***

IDAPA 37.01.01.412 (emphasis added).

Under the Department's rules of procedure, a hearing officer and the Director are treated differently for purposes of disqualification. According to the rules, the Director is not a "hearing officer" since he is the "agency head." Although the rule is similar to the Idaho APA, the statute uses the same disqualification language but it applies to "presiding officers", not just "hearing officers." Although the term "presiding officer" is not defined in the Idaho APA, it plainly includes the concepts of a "hearing officer" and an "agency head." Consequently, the statute provides a party to a contested case the right to disqualify a "hearing officer" as a matter of right. I.C. § 67-5252(1). Whereas the Department's rules do not provide for disqualification "without cause," the rules cannot abrogate a party's right provided by statute.

The Coalition perceived certain issues that are certain to arise in the course of this proceeding, including the Director's involvement in the recalibration of the ESPA groundwater model, past participation in direct negotiations between the parties, and factual issues raised by the *May Order*. These issues plainly warrant appointment of someone other than the Director to serve as the "hearing officer" in this matter. Although the Director will ultimately review the hearing officer's recommended order and issue a final order in this matter, that does not preclude the Coalition from exercising its right to disqualify the Director from presiding at the hearing in this matter without cause. Accordingly, the Coalition exercises its right granted pursuant to I.C. § 67-5252(1) and requests the Director to disqualify himself from serving as the "hearing officer" in the proceeding to review his *May Order*.

Contrary to the findings in the Director's *June Order* (p. 2 n. 3), the Coalition has not waived any right to disqualify the appointed hearing officer in this proceeding without cause. As set forth above, the Coalition's January 20, 2005 letter did not seek a "disqualification" of any "presiding" or "hearing" officers in a "contested case." Moreover, the "contested case" to review the Director's *May Order* was only initiated within the last month once parties filed petitions requesting a hearing. Only after the Director issued his *June Order*, denying the request to appoint an independent hearing officer, did the Coalition and other interested parties receive formal notice that the Director would serve as the "hearing officer" and preside over the hearing on the *May Order*.

As such, the Coalition's request is timely under the Idaho APA and the Department's rules. For these reasons the Coalition requests disqualification of the Director from presiding over the hearing in this matter. The Coalition further requests the Director to designate the responsive order to this request as a "final order." Resolution of this issue in a timely manner is

necessary to ensure that the Department and the parties make the best use of time and resources prior to proceeding with the hearing.

DATED this 14th day of June 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2005, I served a true and correct copy of the foregoing *Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right* on the following by the method indicated:

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