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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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	**IDAHO GROUND WATER APPROPRIATORS' BRIEF ON THE QUESTION OF DISQUALIFICATION OF THE DIRECTOR AS HEARING OFFICER IN THIS CASE**

Idaho Ground Water Appropriators, Inc. ("IGWA"), through its counsel Givens Pursley LLP and on behalf of its ground water district members, Aberdeen-American Falls Ground Water District, Magic Valley Ground Water District, Bingham Ground Water District, North Snake Ground Water District, Bonneville-Jefferson Ground Water District, Southwest Irrigation District, and Madison Ground Water District (the "Ground Water Districts" or "IGWA"), submits its brief in response to the June 16, 2005 *Order Regarding Status and Scheduling Conference of June 15, 2005* issued by the Director, Idaho Department of Water Resources

("Director" and "Department"). The issue on which the Director has requested briefing is whether he should be disqualified as the Hearing Officer in this matter. For the reasons set forth below, IGWA submits that the Director may not be disqualified from presiding over this contested case.

BACKGROUND

The petitioning Surface Water Coalition ("SWC") and non-party Idaho Power Company ("Idaho Power")[1] have sought to disqualify the Director as the presiding officer in this contested case and seek appointment of an "independent hearing officer." The grounds for disqualification recited in their respective briefs are that the Director has: 1) participated in development of the ESPA model; 2) participated in conjunctive management and administration negotiations among surface and ground water users; and 3) in response to the instant SWC delivery call, directed Department employees to collect information concerning the extent, if any, of reduced beneficial use of water by SWC members due to water shortages.

In an Order issued June 3, 2005 ("June 3 Order") the Director denied the requests. The reasons given in the June 3 Order were that: 1) no party sought disqualification of the Director under Idaho Code 67-5252 within the statutory deadline and the right to do so under that statute, therefore, has been waived; 2) under Idaho Code 42-1701A(2), the appointment of an independent hearing officer is within the Director's discretion; 3) neither the Director's involvement with the development of administrative tools such as the ESPA model, nor his involvement in discussions among surface and ground water users aimed at reaching a long-term conjunctive management agreement are valid grounds for disqualification; and 4) information

[1] As a non-party, Idaho Power has no right, statutory or otherwise, to request appointment of an independent hearing officer here. Briefing recently has been submitted by parties and by Idaho Power on whether Idaho Power should be allowed to participate as a party in the hearing on the SWC delivery call. A decision on that issue is pending. The reasons why the Director's disqualification is inappropriate apply equally to Idaho Power's request if it ultimately is granted party status.

collection by a Department employee represents appropriate fact gathering necessary to respond to a delivery call.

DISCUSSION

1. Any rights to disqualify the Director under Idaho Code § 67-5252 have been waived.

The June 3 Order correctly recognizes that the SWC has waived its right to disqualify the Director with or without cause under Idaho Code § 67-5252. Under that statute a presiding officer may be disqualified without cause, or for certain enumerated causes, where a party has timely petitioned for disqualification. The petition must be submitted within fourteen days of issuance of notice of who the presiding officer will be or promptly upon discovering grounds for disqualification, whichever is later. The June 3 Order found that no such petition was timely filed and concluded that the right of any party to disqualify the Director as the presiding officer under this statute had been waived. SWC improperly attempts to bootstrap itself into Idaho Code § 67-5252 now and avoid the waiver bar by arguing that *this* contested case is not about their delivery call at all, but rather is some separate contested case that was initiated when they requested a hearing on the Director's May 2, 2005 Order. This delivery call contested case cannot be piecemealed to circumvent the statutory deadlines.

2. The Director is a mandatory decision maker in this contested case.

The June 3 Order also correctly recognizes that under Idaho Code § 42-1701A(2), the question of whether to appoint a hearing officer in a contested case is within the Director's discretion. To the extent that this statute governs who may preside over this contested case, the Director's decision to be the presiding officer may be challenged under the Idaho Administrative Procedure Act ("APA") only if that decision is an abuse of discretion. This issue is discussed further in Section 3 below.

IGWA contends, however, that the statutes governing who may preside over this contested case are Idaho Code §§ 42-237b-d, which are the procedural provisions of the Ground Water Act. These sections provide that upon receipt of a sufficient statement from a senior surface water user alleging that the use of such senior's water right is being adversely affected by the use of a junior ground water right, the Director "*shall* issue notice setting the matter for hearing before a local ground water board, constituted and formed as in this act provided." I.C. § 42-237b(4)(emphasis added). Idaho Code § 42-237d provides that such local ground water board

> *shall* consist of the director . . . and a person who is a qualified engineer or geologist, appointed by the district judge of the judicial district which includes the county in which the well of respondent. . . is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of the respondent. . . is located. (Emphasis added).

Under section 42-237d, which applies specifically to a request for administration of a junior ground water right by a senior surface water right, the Legislature has mandated that the Director be a decision maker. In other words, the Director's participation in a hearing on this matter is not discretionary—it is mandatory. The requests to disqualify the Director as the presiding officer cannot be granted.

3. To the extent the Director has discretion to decide who will be the presiding officer, there is no basis to conclude that discretion has been abused.

Assuming *arguendo* that the Director may commence a hearing here without constituting a local ground water board, and that his selection of a hearing officer is discretionary (as provided in Idaho Code § 42-1701A(2)), the issue is whether the Director has abused that discretion. Under traditional administrative law, the abuse of discretion standard, like the "arbitrary and capricious" standard, provides the agency decision maker significant latitude. The requests seeking the Director's disqualification do not approach the substantial showing

necessary to rebut a strong presumption of the agency decision maker's honesty, integrity and objectivity. Neither the SWC nor Idaho Power have alleged that the Director is biased, prejudiced or has a personal or pecuniary interest in this matter. Nor do they suggest that he lacks the professional knowledge to consider the complex issues presented.

The Director's involvement in prior discussions between certain of the SWC members and IGWA members related to conjunctive management issues was in the context of contested cases other than the instant proceeding.[2] Even if this involvement had been in this same case, such involvement in the attempts at informal resolution of disputed matters before the Department is contemplated *and encouraged* by the Idaho APA and the Department's rules. *See* Idaho Code § 67-5241; IDAPA 37.01.01.101. (It is also a traditional role of the judiciary.) To facilitate agreement and settlement, agency staff may contact parties, provide them information, advice and assistance, and propose informal resolution of formal disputes. IDAPA 37.01.01.101. If an informal resolution is not achievable, the Director may convert the proceeding to a formal one. IDAPA 37.01.01.10I. A formal proceeding can be converted to an informal proceeding and back again, as circumstances warrant, provided the Director does not abdicate his responsibility over the disposition of the contested case and the parties are not prejudiced. Idaho Code § 67-5241.

There is no basis whatsoever to disqualify the Director for contributing his expertise on technical issues and Department policies toward informal resolution of disputed issues between some of the instant parties in different contested cases. Doing so would have a chilling effect on what heretofore has been a traditional and important role of the Department's director and staff.

[2] Those different contested cases involved the Director's August 2001 orders designating the Thousand Springs and American Falls Ground Water Management Areas, subsequent related orders proposing curtailment of ESPA ground water rights under the GWMA designations, IGWA's Petition for judicial review of those curtailment orders, the Rangen Delivery Call and North Snake and Magic Valley Ground Water Districts' October 2003 Preliminary Mitigation Plan.

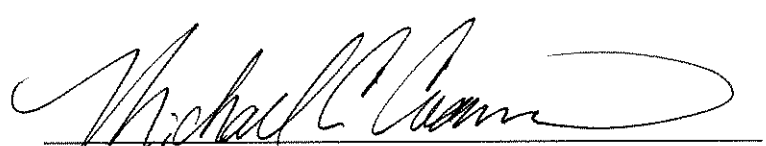
It is difficult to reconcile the SWC's concern about the Director having independently sought information concerning the effects of alleged water shortages on the SWC members' beneficial use. The Director repeatedly instructed the SWC members to produce that information in support of their delivery call, and they repeatedly refused. The Director presumably would have been justified in disallowing their delivery call altogether. One might argue that in helping the SWC make out an element of their case where they declined to do so themselves, the Director was showing *them* favoritism.

In any event, IGWA expects, and Idaho law permits,[3] the watermasters and the Director to inquire about the available water supply, the actual beneficial uses being made of that supply and any likely impacts of shortages on a senior's beneficial use before imposing an administrative curtailment of a junior right for the senior's benefit.[4] That inquiry is a component of due process, not a basis for disqualification.

For the foregoing reasons, SWC's and Idaho Power's requests that the Director appoint an independent hearing officer should be denied.

RESPECTFULLY SUBMITTED this 29th day of June 2005.

GIVENS PURSLEY LLP



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[3] *See e.g.*,,I.C. 42-602 (Director shall have direction and control of the distribution of water); *Arkoosh v. Big Wood Canal Co.,* 48 Idaho 383, 283 P. 522 (1929)(Director, not water user, is to be the judge of when water could be used).

[4] IGWA has its own concerns about the Department's inquiries, but they related primarily to the foundation for, and the merits of, the apparently anecdotal information itself, not whether the Director should be disqualified.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2005, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

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