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	)	**ORDER DENYING REQUEST TO DISQUALIFY DIRECTOR AS PRESIDING OFFICER AT HEARING**

Background

On June 3, 2005, the Director of the Department of Water Resources ("Director" or "Department") issued an order in this matter entitled *Order on Petitions for Reconsideration, Clarification, Stay, Request for Hearing, and Request for Independent Hearing Officer* ("June 3 Order"). The order responded to the request of the Surface Water Coalition[1] (or "Coalition") and the Idaho Power Company ("Idaho Power"), made pursuant to Idaho Code § 42-1701A(2), that the Director appoint an independent hearing officer in this matter. The June 3 Order denied the requests for appointment of an independent hearing officer. The order also provided for a status conference to be held in this matter on June 15, 2005.

On June 14, 2005, the Surface Water Coalition filed *Surface Water Coalition's Petition for Review of Director's June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer*, and *Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right*. Also on June 14, 2005, Idaho Power filed *Idaho Power Company's Disqualification of the Director as the Hearing Officer as a Matter of Right*.[2] At the status conference on June 15, 2005, parties agreed to brief the issue of whether the Director should be disqualified from serving as the hearing officer in this case, or more precisely hearing the case as a presiding officer.[3] In the *Order Regarding Status and Scheduling Conference of June 15,*

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[1] The Surface Water Coalition is comprised 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.

[2] Idaho Power's filing is not addressed in the present order due to its non-party status. Idaho Power's lack of party status in this proceeding is addressed in a separate order of the Director issued July 22, 2005.

[3] The Department's Rules of Procedure distinguish between a "hearing officer" and a "presiding officer." *See* IDAPA 37.01.01.410 ("A hearing officer is a person other than the 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. The term 'hearing officer' as used in these rules refers only to officers subordinate to the agency head."). Thus, when the Director hears a contested case he is serving as a presiding officer.

2005, the Director provided that all briefing on the issue regarding his disqualification to hear the case was to be filed within fourteen (14) days of the status and scheduling conference.

On June 29, 2005, the Idaho Ground Water Appropriators, Inc. ("IGWA")[4] filed *Idaho Ground Water Appropriators' Brief on the Question of Disqualification of the Director as Hearing Officer in this Case*; the State Agency Ground Water Users ("SAGWU")[5] filed *State Agency Ground Water Users' Opposition to Disqualifying Director as Presiding Officer at Hearing*; the City of Pocatello filed *City of Pocatello's Brief in Response to: 1) Surface Water Coalition's Petition for Review of Director's June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer and 2) the Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right* and *City of Pocatello's Response to Idaho Power Company's Disqualification of the Director as the Hearing Officer as a Matter of Right*; and the U. S. Bureau of Reclamation filed *Reclamation's Statement of Disqualification of the Director as Hearing Officer.*

Review of the June 3 Order

The Surface Water Coalition petitions the Director in accordance with Department Rule of Procedure 711, IDAPA 37.01.01.711, to reverse the June 3 Order denying requests for appointment of an independent hearing officer made pursuant to Idaho Code § 42-1701A(2). Rule 711 provides that any party or person affected by an interlocutory order may at any time petition for review of the order. The Surface Water Coalition reiterates its previous arguments that the Director should appoint an independent hearing officer to preside over the hearing in this matter because of (1) the Director's participation and involvement with the recalibration of the Eastern Snake Plain Aquifer ("ESPA") ground water model; (2) the Director's involvement in gathering facts related to "injury" suffered by the Coalition members as determined in the Director's Order of May 2, 2005, in this matter; and (3) the Director's prior involvement in direct negotiations between the parties.

The Surface Water Coalition's petition is supported by the *Affidavit of Charles E. Brockway, Ph.D., P.E.* The Surface Water Coalition relies in part upon Dr. Brockway's affidavit to support its argument that the level of the Director's participation in the recalibration of the ESPA ground water model warrants the appointment of an independent hearing officer in this proceeding.

The Director has reviewed and considered the information and arguments presented in the Surface Water Coalition's *Petition for Review of Director's June 3, 2005 Order*, the Director declines to reverse his June 3 Order denying requests for appointment of an independent hearing officer in this matter. The arguments raised by the Surface Water Coalition in its petition for

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[4] IGWA members include Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, Southwest Irrigation District, and North Snake Ground Water District.

[5] SAGWU includes the Idaho Department of Fish & Game, the Idaho Department of Health & Welfare, the Idaho Department of Juvenile Corrections, and the Idaho Transportation Department.

review are substantially the same arguments that the Coalition presented in its initial request for appointment of an independent hearing officer.

The considerations supporting the Director serving as the presiding officer, identified in the June 3 Order, outweigh the concerns that have been expressed. Concerns regarding the Director's participation in the recalibration of the ESPA ground water model, the Director's participation in gathering factual information relating to this matter, and the Director's participation in prior negotiation sessions between the parties prior to the commencement of the contested case do not require the appointment of an independent hearing officer.

Disqualification as a Matter of Right

On June 14, 2005, the Surface Water Coalition filed *Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right* and Idaho Power filed *Idaho Power Company's Disqualification of the Director as the Hearing Officer as a Matter of Right.* In contrast to their initial requests that the Director exercise his discretion to appoint an independent hearing officer pursuant to Idaho Code § 42-1701A(2), the disqualifications filed by the Surface Water Coalition and Idaho Power on June 14 assert a right, pursuant to Idaho Code § 67-5252(1), to disqualify the Director without cause from serving as the presiding officer at the hearing in this matter. The Surface Water Coalition and Idaho Power do not seek to disqualify the Director for cause pursuant to Idaho Code § 67-5252 in their filings of June 14, 2005.

For contested case hearings, Idaho Code § 67-5242(2) provides that, "The agency head, one (1) or more members of the agency head, or one (1) or more hearing officers may, in the discretion of the agency head, be the presiding officer at the hearing." Agency head is defined to mean "an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law." Idaho Code § 67-5201(4). In the case of the Department of Water Resources, the individual in whom the ultimate legal authority of the agency is vested is the Director. *See* Idaho Code §§ 42-1801, -1804, and -1805. Addressing the potential disqualification of a presiding officer, Idaho Code § 67-5252 provides, in pertinent part, as follows:

> (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 … .
>
> (2) Any party may petition for the disqualification of a person serving or designated to serve as presiding officer:
>
> (a) within fourteen (14) days after receipt of notice indicating that the person will preside at the contested case;
>
> . . . .
>
> (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.

Department Rule of Procedure 410 providing for the appointment of hearing officers states that, "A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency." IDAPA 37.01.01.410. Rule of Procedure 411, which contrasts hearing officers with the agency head, provides: "Agency heads are not hearing officers, even if they are presiding at contested cases. The term 'hearing officer' as used in these rules refers only to officers subordinate to the agency head." IDAPA 37.01.01.411. Department Rule of Procedure 412 addresses the disqualification of officers hearing contested cases:

> 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 the 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. ***Disqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4).***

IDAPA 37.01.01.412 (emphasis added).

A comprehensive analysis of the Idaho Administrative Procedure Act as adopted in 1992 and amended in 1993 by the Idaho Legislature was undertaken by Deputy Attorney General Michael S. Gilmore and University of Idaho Professor of Law Dale D. Goble in 1993 ("Gilmore and Goble"). Michael Gilmore & Dale Goble, *The Idaho Administrative Procedure Act: A Primer For The Practitioner*, 30 IDAHO L. REV. 273-432 (1993-94). Gilmore and Goble note that the purpose behind the provisions of I. C. § 67-5252 concerning disqualification of the presiding officer and I. C. § 67-5253 on *ex parte* communications is to ensure that the decision maker is unbiased and bases the order solely on the facts and arguments contained in the record created at the evidentiary hearing. *Id.* at 321. Gilmore and Goble provide the following analysis of the provisions of I. C. § 67-5252:

> To appreciate the operation of the provisions on disqualifications, it is necessary to begin by distinguishing three terms: "presiding officer," "hearing officer," and "agency head." The presiding officer is the person who presides over the evidentiary hearing in the contested case proceeding. There are two kinds of presiding officers: a "hearing officer," who is someone other than the agency head, and the "agency head" itself. Different disqualification rules potentially apply to these two categories of presiding officers.
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> Hearing officers may be disqualified from hearing a contested case without cause in two situations. First, each party has a right to one disqualification without the need to specify cause. The second and the most significant expansion of the right to disqualify potential hearing officers, however, is the provision allowing a party to assert a blanket disqualification of all agency employees. . . .
>
> The APA also expands the types of "cause" that are sufficient to disqualify a presiding officer. Hearing officers may be disqualified not only for bias, prejudice,

> interest, substantial prior involvement in the case other than as a presiding officer, or any other cause for which a judge may be disqualified, but also for lack of professional knowledge in the subject matter of the contested case. These rights of disqualification, particularly the right to disqualify all agency employees, are unusually broad and have no parallel in the federal or model state APAs.
>
> The broad rights of disqualification of hearing officers do not always extend to the agency head. While presiding officers who are agency heads are subject to disqualification under the same provisions as hearing officers, the APA includes a "rule of necessity": when the disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the person is not [to] be disqualified and may decide the case. Rather than disqualifying the decisionmaker and precluding a decision, the APA requires the actions of the agency head to be treated as a conflict of interest under the Ethics in Government Act.
>
> The APA also sets out the procedure to be used by a party in exercising its right to disqualify a presiding officer. The right to disqualify all agency employees may be exercised without awaiting the designation of a presiding officer; indeed, this right should be exercised as soon as a party is notified that a contested case has been initiated. Other petitions for disqualification are to be filed within fourteen days of notification of the identity of the presiding officer or "promptly upon discovering facts establishing grounds for disqualification." Petitions are to be filed with the officer whose disqualification is sought; the officer is required to decide the petition in writing and to include in that decision a statement of facts and reasons.

Id. at 321-323 (internal citations omitted).

An initial consideration is whether the Surface Water Coalition's disqualification as a matter of right was filed within the time limit established by statute. If not, the disqualification must be considered waived. Idaho Code § 67-5252(2)(a) provides that any party may petition for the disqualification of a person serving or designated to serve as a presiding officer within fourteen days after receipt of notice indicating that the person will preside at the contested case.

The Director first stated his intent to serve as the presiding officer at the hearing in this matter in an Order issued on January 25, 2005, in response to a January 20, 2005, letter from the Surface Water Coalition requesting that the Director and certain Department employees be removed from involvement in the matter. The Order of January 25, 2005, provided that all employees of the Department other than the Director would be disqualified from serving as the hearing officer in the matter. Subsequently, in an Order of February 14, 2005, the Director formally designated this matter as a contested case pursuant to Idaho Code § 67-5240 and gave notice that he would preside in the contested case. In the June 3 Order, addressing the Surface Water Coalition's request for appointment of an independent hearing officer pursuant to Idaho Code § 42-1701A(2), the Director addressed the lack of a timely petition for disqualification under Idaho Code § 67-5252 as follows:

> No party sought disqualification of the hearing officer under Idaho Code § 67-5252. Any request under Idaho Code § 67-5252 must be raised within fourteen days "after receipt of notice indicating that the person will preside at the contested case." Notice that the Director would preside over the contested case was served on February 14, 2005. Since more than fourteen days have expired since the notice was served that the Director would

> serve as the hearing officer, any request for disqualification without cause under Idaho Code § 67-5252 has been waived.

June 3 Order at 2, fn. 3.

The Surface Water Coalition attempts to avoid the waiver of a request for disqualification under Idaho Code § 67-5252 by asserting that the present contested case did not commence until issuance of the June 3 Order, which responded to the Coalition's May 17, 2005, request for a hearing on the Director's Order of May 2, 2005. Under this view of the case, the Coalition's Disqualification filed on June 14, 2005, would be timely because it comes within fourteen days of the June 3 Order. The Director rejects this view of the case because it contradicts the specific provisions of the Order of February 14, 2005, which designated the matter as a contested case pursuant to Idaho Code § 67-5240. *Feb. 14 Order* at 33.

The Coalition further argues that it did not receive "formal notice" of the Director's intention to serve as the presiding officer in this contested matter until issuance of the June 3 Order. *Surface Water Coalition's Disqualification* at 7. The argument is not convincing. In addition to designating the matter as a contested case, the February 14 Order provided clear notice that the Director was serving as the presiding officer in the case. The Director in the February 14 Order took several actions in the case and clearly signaled that he would continue in a presiding role:

> The Director will make a determination of the extent of likely injury after April 1, 2005, when the USBR and USACE release forecasts for inflow to the Upper Snake River Basin for the period April 1 through July 1, 2005.
>
> The Director will consider the water delivery call as a call for administration and curtailment of junior priority ground water rights in Water Districts No. 120 and No. 130 that are alleged to be causing injury to the senior surface water rights of the members of the Surface Water Coalition.

Order of February 14, 2005, at 33.

Thus, the Surface Water Coalition had notice that the Director was serving as the presiding officer for this contested case as of February 14, 2005. Pursuant to the provisions of Idaho Code § 67-5252(2)(a), the Coalition had fourteen days from February 14, 2005, to file a petition seeking to disqualify the Director from serving as the presiding officer in this case. Because the Coalition did not seek disqualification of the Director within this fourteen-day time period, any request for disqualification without cause under Idaho Code § 67-5252 has been waived.

ORDER

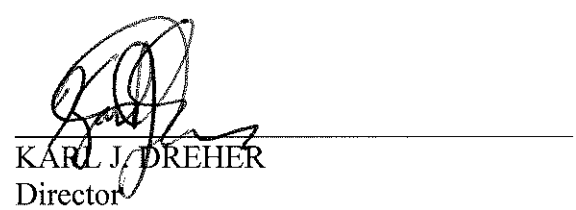
Based upon a review of the record and the briefs and pleadings of the parties relating to this issue and consistent with the forgoing discussion and analysis, IT IS HEREBY ORDERED as follows:

1. The Surface Water Coalition's petition for review of the Order of June 3, 2005, Denying Requests to Appoint an Independent Hearing Officer in this matter pursuant to Idaho Code § 42-1701A(2) is DENIED.

2. The Surface Water Coalition's disqualification of the Director to serve as the presiding officer in this case as a matter of right is DENIED because it was not timely filed within fourteen days after receipt of notice indicating that the Director would preside at the contested case, as required by Idaho Code § 67-5252(2)(a).

3. The Idaho Power Company's disqualification of the Director to serve as the presiding officer in this case as a matter of right is DENIED due to Idaho Power's lack of party status in the case.

DATED this 22nd day of July 2005.



KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2005, the above and foregoing, was served by the method indicated below, and addressed to the following:

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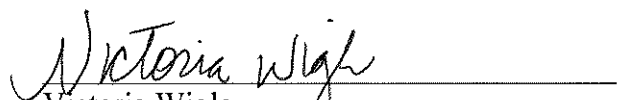

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