LAWRENCE G. WASDEN
ATTORNEY GENERAL

DAVID G. HIGH, ISB No. 1820
Chief of Civil Litigation

MICHAEL S. GILMORE, ISB No. 1625
Deputy Attorney General
Statehouse, Room 210
Boise, ID 83720
Telephone: (208) 334-4130
Telefax: (208) 334-2830
Attorneys for State Agency Ground Water Users
q:\water resources\swc call\p5179mgc.doc

RECEIVED
JUN 29 2005
DEPARTMENT OF WATER RESOURCES

ORIGINAL

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR ADMINISTRATION 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 FALL CANAL COMPANY	**STATE AGENCY GROUND WATER USERS' OPPOSITION TO DISQUALIFYING DIRECTOR AS PRESIDING OFFICER AT HEARING**

The Idaho Department of Fish & Game, the Idaho Department of Health & Welfare, the Idaho Department of Juvenile Corrections, and the Idaho Transportation Department, who have intervened as the State Agency Ground Water Users (SAGWU), by and through their counsel of record, Michael S. Gilmore, Deputy Attorney General, file this Opposition to Disqualifying Director as Presiding Officer at Hearing.

The Surface Water Coalition (SWC) filed a Disqualification of the Director as a Matter of Right and a Petition for Review of Director's June 3, 2005, Order Denying Requests to Appoint an Independent Hearing Officer.[1] Both documents have the same goal—using a presiding officer other than the Director at the hearing on this matter—and both will be addressed here.

1. Disqualification Without Cause. SWC does not have a right under Idaho Code

[1] Non-party Idaho Power has filed similar papers. Under Idaho Code § 67-5252, only parties may move for disqualification of presiding officers, and Idaho Power's papers may be disregarded for that reason. If, however, Idaho Power were to become a party, this analysis would also apply to its papers.

§ 67-5252(1) to disqualify the Director without cause from being a presiding officer at hearing. Disqualification without cause has two conditions—it must come within 14 days "after receipt of notice indicating that the person will preside at the contested hearing," § 67-5252(2)(a), and, when an agency head is the object to the attempted disqualification as of right, it must not "result in an inability to decide a contested case," § 66-5252(4).

The Director gave notice that he would preside in this contested case on February 14, 2005, in his Order of that date, and SWC did not request disqualification within 14 days. The attempted disqualification without cause is not timely.

Next, if even SWC had filed a timely disqualification without cause, under § 67-5252(1) the Director as an agency head is subject to a different standard than a hearing officer—he cannot be disqualified if that would "result in an inability to decide a contested case." Idaho Code § 66-5252(4).

SWC argues that it need not reach the issue of "inability to decide a contested case" because the Director may decide the case on a record created before a hearing officer who would issue a preliminary or recommended order. Although the Director could appoint a hearing officer to issue a preliminary or recommended order, neither the Idaho Administrative Procedure Act nor the statutes governing IDWR require him to do so. The decision whether to hear this case himself or to appoint a hearing officer is at the heart of the Director's discretion on how to administer this important case of first impression.

Further, if a hearing officer were used and issued a preliminary or recommended order, the Director always has authority to "hold additional hearings." Idaho Code § 67-5244(2)(c), § 67-5245(6)(c). The Director, as the ultimate finder of fact, has the discretion to determine whether his fact-finding would be better served by hearing the case himself or delegating hearing authority to another. There is no reason for the Director to appoint a hearing officer when he believes that it would be appropriate to hold hearings himself. *Cf. Baginksi v. Alcoholic Beverage Com'n*, 62 R.I. 176, 4 A.2d 265, 268 (1939) ("the commission did not err in hearing testimony and receiving additional evidence").

If the Director does not ultimately decide this case, there is no one else who can. Under § 67-5252(4), that leaves the issue of the Director has a conflict of interest within the meaning of Idaho Code § 59-704. The Director has no conflicts of interest as defined in § 59-703(4) that would require him to take steps to declare his conflicts of interest under § 590-704. The Director may be the presiding officer at hearing.

2. Disqualification for Cause. SWC also argues that the Director should be disqualified from presiding at hearing because he participated in recalibration of the ESPA groundwater model, because he participated in gathering information that was officially noticed in the earlier Orders, and because he participated in negotiations among the parties. SWC cites no statutes or case law in support of these arguments. SWC in essence is arguing that the Director should be disqualified for having the knowledge base to do his job. *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 97 Cal. Rptr. 2d 467 (2000), explains why none of these three activities impugns his ability to hear the case and make unbiased factfinding that will be based upon the record before him:

> BreakZone also contends that the fact that one council member filed the appeal and participated in and voted on that appeal is a violation of the common law of conflict of interest and requires issuance of a writ of mandate. In support of this contention, BreakZone relies on *Withrow v. Larkin* (1975) 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (*Withrow*) and *Cohan, supra,* 30 Cal.App.4th 547, 35 Cal.Rptr.2d 782.
>
> In *Withrow*, the Wisconsin medical examiner conducted a preliminary investigation, hearing testimony concerning a Dr. Larkin. The medical examiner then sent the doctor a notice of a hearing at which it would be determined whether his license to practice medicine should be suspended. Larkin sought relief from the federal district court, contending the board's action deprived him of a fair hearing. The district court found that the board was disqualified to decide his case. The United States Supreme Court reversed, finding that the board was not disqualified from conducting the hearing or making the decision on his license. While "a biased decisionmaker [is] constitutionally unacceptable," the crucial issue for the court was as follows: "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication ... must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses

such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." (*Withrow, supra,* 421 U.S. at p. 47, 95 S.Ct. 1456.)

After analyzing the combination of investigative, charging and adjudicatory functions carried out by the board, the court held: "The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing." (*Withrow, supra,* 421 U.S. at p. 55, 95 S.Ct. 1456.)

Withrow stands for the proposition that advance knowledge of adjudicative facts that are in dispute, as well as participation in the charging function, do not disqualify the members of an adjudicatory body from adjudicating a dispute; nor does the combination of such functions disqualify them from (1) determining that further investigation is warranted, (2) issuing the order to appear, and (3) making the ultimate decision after hearing on the merits. The teaching of *Withrow* is that there must be more, a commitment to a result (albeit, perhaps, even a tentative commitment), before the process will be found violative of due process.

Withrow focuses us on applicable legal inquiry: whether (or the probability that) a participant in the adjudicatory process has an actual bias toward a party.

To prevail on a claim of bias violating fair hearing requirements, BreakZone must establish "an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims." (See *U.S. v. State of Oregon* (9th Cir.1994) 44 F.3d 758, 772.) A mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty. (*Brooks v. New Hampshire Supreme Court* (1st Cir.1996) 80 F.3d 633, 640; *Stivers v. Pierce* (9th Cir.1995) 71 F.3d 732, 741.)

The rule under California law is similar. In *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, 37 Cal.Rptr. 194, 389 P.2d 722, our Supreme Court held that combining investigative and adjudicative functions in an administrative proceeding does not, by itself, constitute a denial of due process. (*Id.* at p. 98, 37 Cal.Rptr. 194, 389 P.2d 722.)

Further, in *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 257 Cal.Rptr. 427, Division Five of this Court held that certain provisions of the charter of the City of Los Angeles did not violate federal or state due process requirements. "The [Supreme] Court has found that allowing a single decision maker to undertake both the investigative and the adjudicative functions in an administrative proceeding does not, by itself, constitute a denial of due process. (*Griggs v. Board of Trustees*[, *supra,*] 61 Cal.2d [at p.] 98, 37 Cal.Rptr. 194, 389 P.2d 722.)" (*Id.* at pp. 581-582.)

Rather, as in the federal courts, our Supreme Court requires a party seeking to show bias or prejudice on the part of an administrative decision maker to

prove the same with concrete facts: " 'Bias and prejudice are never implied and must be established by clear averments." [Citation.] Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792, 171 Cal.Rptr. 590, 623 P.2d 151; accord *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 910-911, 245 Cal.Rptr. 304; *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 472-473, 230 Cal.Rptr. 769.) The court added, "[O]ur courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of bias. We cannot now exchange this established principle for one as vague, unmanageable and laden with potential mischief as an 'appearance of bias' standard, despite our deep concern for the objective and impartial discharge of all judicial duties in this state. [¶] The foregoing considerations, of course, are equally applicable to the disqualification of a judicial officer in the administrative system. Indeed, the appearance of bias standard may be particularly untenable in certain administrative settings." (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at pp. 793-794, 171 Cal.Rptr. 590, 623 P.2d 151, fn. omitted.) In a footnote, the court observed that there were some situations in which a decision maker should be disqualified because of the "probability" of bias, such as when the decision maker has a personal or financial interest in the outcome, or is either familially or professionally related to the litigant. (*Id.* at p. 793, fn. 5, 171 Cal.Rptr. 590, 623 P.2d 151.)

Thus, it appears that the highest court of this state construes the state Constitution's due process guaranty of a fair and impartial administrative decision maker in the same manner as the federal courts have interpreted parallel provisions in the federal Constitution. In other words, mere involvement in ongoing disciplinary proceedings does not, per se, violate due process principles. Conversely, those principles are violated if the official or officials who take part in the proceedings are demonstrably biased or if, in the least, circumstances such as personal or financial interest strongly suggest a lack of impartiality. Our Supreme Court has emphatically rejected the notion that a subjective "appearance of bias" is enough to taint an entire legislatively created system of handling disciplinary matters." (*Burrell v. City of Los Angeles, supra,* 209 Cal.App.3d at pp. 581-582, 257 Cal.Rptr. 427.)

Our decision in *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 20 Cal.Rptr.2d 903 (*Binkley*) provides further support for this view. In *Binkley*, we reversed the trial court's issuance of a writ of mandate, finding that the procedure by which a police chief had been discharged and his appeal heard were not fundamentally unfair. The basis for that holding was that the chief of police held his position at the pleasure of the city manager who was free to discharge him without just cause so long as the chief was given the opportunity to convince the employing authority to reverse its decision. We reached our conclusion despite the fact that the city manager had both initiated the process and

> retained final decisionmaking authority in the matter. In so holding, we relied in part on the following reasoning of the court in *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621, 273 Cal.Rptr. 730: "Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice." (*Gray, supra,* at p. 632, 273 Cal.Rptr. 730; *Binkley, supra,* at p. 1810, 20 Cal.Rptr.2d 903.)

81 Cal App. 4th at 1235-8, 97 Cal. Rptr. at 491-3 (footnote omitted).

The same analysis should apply in Idaho. The Director's familiarity with and participation in recalibration of the model is not grounds to disqualify himself. Neither is his investigative work (or his directing the investigative work of staff) regarding official noticed materials grounds to disqualify himself. Neither is his familiarity with negotiations among the parties. The Director can preside at the hearing in this case.

DATED this 29th day of June, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
MICHAEL S. GILMORE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2005, I caused to be served a true and correct copy of the foregoing by regular U.S. Mail, postage prepaid, to:

Roger D. Ling
LING ROBINSON & WALKER
PO Box 396
Rupert, Idaho 83330

C. Tom Arkoosh
ARKOOSH LAW OFFICES, CHTD.
PO Box 32
Gooding, Idaho 83330

John A. Rosholt
Travis L. Thompson
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167

W. Kent Fletcher
FLETCHER LAW OFFICE
PO Box 248
Burley, Idaho 83318

John Simpson
BARKER ROSHOLT & SIMPSON LLP
PO Box 2139
Boise, Idaho 83301-6167

Scott L. Campbell
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD
101 S. Capitol Blvd., 10th Floor
PO Box 829
Boise, Idaho 83701

Jeffrey C. Feredey
Michael C. Creamer
GIVENS PURSLEY LLP
601 Bannock Street, Suite 200
PO Box 2720
Boise, Idaho 83701-2729

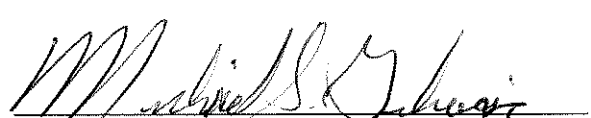
Josephine P. Beeman
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, Idaho 83702

Kathleen Marion Carr
OFFICE OF THE FIELD SOLICITOR
550 W. Front Street, MSC 020
Boise, Idaho 83724

Sarah A. Klahn
WHITE & JANKOWSKI, LLP
511 16th St. Suite 500
Denver, Colorado 80202

James S. Lochhead
Adam T. DeVoe
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202

James Tucker
Senior Attorney
Idaho Power Company, Legal Department
1221 West Idaho Street
Boise, Idaho 83702



Michael S. Gilmore
Deputy Attorney General