BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF REQUEST FOR WATER RIGHT ADMINISTRATION IN WATER DISTRICT NO. 120 AND PETITION FOR WATER RIGHT ADMINISTRATION AND DESIGNATION OF THE EASTERN SNAKE PLAIN AQUIFER AS A GROUND WATER MANAGEMENT AREA	)	**ORDER**

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "Department"), as the result of the following: (1) a hand-delivered letter filed with the Director on January 14, 2005, requesting water right administration in Water District No. 120 and distribution of water to senior surface water rights; (2) a petition filed with the Director electronically on January 14, 2005, seeking water right administration of ground water rights not in an organized water district and seeking designation of the Eastern Snake Plain Aquifer as a Ground Water Management Area; and (3) a letter filed by facsimile and email with the Director on January 21, 2005, alleging that "representations or published statements" made by Department staff "call into question whether the Department or its employees have compromised their ability to fairly judge the ... request for water right administration." The letter filed on January 21 also seeks to have any Department employee that has commented publicly on ESPA conjunctive management issues or participated in meetings involving the Expanded Natural Resources Interim Legislative Committee recused and removed from any further involvement in the Department's response to the filings described in (1) and (2) above. The letter filed on January 21, 2005, is deemed to be a petition for disqualification pursuant to Idaho Code § 67-5252. In response, the Director enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On January 11, 2005, the Twin Falls Canal Company held a press conference and issued a press statement announcing its intention to file a delivery call with the Department seeking the administration of groundwater rights from the Eastern Snake Plain Aquifer ("ESPA") junior in priority to the Canal Company's surface water rights.

2. On January 14, 2005, the A & B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, Twin Falls Canal Company, American Falls Reservoir District No. 2, Milner Irrigation District, and North Side Canal Company (collectively referred to as the "Surface Water Coalition") hand delivered a letter to the Director requesting water right administration in Water District No. 120 and requesting distribution of water to senior priority

surface water rights, pursuant to Rule 40 of Rules for Conjunctive Management of Surface and Ground Water Resources ("Conjunctive Management Rules") (IDAPA 37.03.11).

3. Also on January 14, 2005, the Surface Water Coalition filed a petition by email for water right administration of ground water rights junior in priority to surface water rights of the Surface Water Coalition that are not in an organized water district pursuant to Rules 30 and 41 of the Conjunctive Management Rules. The petition also sought designation of the entire ESPA as a Ground Water Management Area pursuant to Idaho Code § 42-233b. The filings described here and in Finding No. 2 are collectively referred to as the "delivery calls."

4. On January 21, 2005, the Twin Falls Canal Company filed a letter (dated January 20, 2005) with the Department alleging that because of public comments on ESPA conjunctive management issues and participation in meetings involving the Expanded Natural Resources Interim Legislative Committee, "the Department or its employees have compromised their ability to fairly judge the Surface Water Coalition's request for water right administration." The letter also requests the inventory and disclosure of each and every public comment made by any Department employee regarding ESPA conjunctive management issues and the validity of the delivery calls made by the Surface Water Coalition. The letter further requests that any employee identified as having made public comments, including statements made during meetings involving the Expanded Natural Resource Interim Legislative Committee, be recused and removed from any further involvement in the Department's response to the delivery calls made by the Surface Water Coalition.

5. On January 10, 2005, Ron Carlson, the regional manager for the Department's Eastern Regional Office in Idaho Falls, Idaho and watermaster for Water District No. 1, made a presentation at the winter conference of the Far West Agribusiness Association in Jackpot, Nevada. A true and correct copy of Mr. Carlson's presentation is attached to the letter described in Finding No. 4.

6. On January 11, 2005, Rocky Barker of the *Idaho Statesman*, contacted Michael Keckler, the Department's public information officer, seeking a statement in response to the press statement issued by the Twin Falls Canal Company described in Finding No. 1. Mr. Keckler consulted with the Director and sent the following statement attributed to the Director by email to Mr. Barker:

> About a million acres of land are irrigated on the ESPA with ground water junior in priority to the natural flow rights held by the Twin Falls Canal Company. Until we are able to see what their allegation of injury is and to evaluate it, it is premature to say what portion, if any, of that million acres may or may not be subject to curtailment.

This statement was published on January 16, 2005, by the *Idaho Statesman* in a special report titled "Troubled Water."

7. In the special report published by the *Idaho Statesman* on January 16, 2005, it was reported that the Director said that "he needs the companies and districts to show him how much the reduction of spring flows has hurt the people they serve." The Director did not make such statement publicly or otherwise.

8. On January 19, 2005, the Director was informed by his public information officer that KIFI – TV, a television station in Idaho Falls, intended to record and subsequently televise a panel discussion regarding the delivery calls filed by the Surface Water Coalition described in Findings Nos. 2 and 3, and that Ron Carlson had been invited to participate as a member of that panel. In response, the Director sent a letter by facsimile to KIFI – TV containing the following:

> ... it is inappropriate for any employee of the Department of Water Resources under my supervision, except as noted below, or any watermaster under my supervision to publicly comment on or participate in any public forum addressing non-procedural issues of legal filings that have been made with the Department, when such filings may result [in] a contested case that is formally before me or my designee. The exception is the Public Information Officer for the Department whom I have designated to serve as the Department's spokesperson and who is removed from the line of decision-making involving all contested cases.
>
> Therefore, no employee of the Department of Water Resources, other than the Public Information Officer, nor any watermaster under my supervision is authorized to participate on the panel addressing the delivery call that your station reportedly is intending to convene.

9. On January 24, 2005, the Director sent an email to all employees of the Department, including the watermasters for Water Districts Nos. 1, 120, and 130, and Deputy Attorneys General working for the Department, with the letter described in Finding No. 8 attached asking that every employee read that letter. The email sent by the Director also contained the following instruction: "The limitations described in the attached letter apply not only to the delivery calls that were filed last week, but generally to other matters that are pending before the Department as well.

10. The Director has investigated claims made by the Twin Falls Canal Company that Department employees from both the Department's Eastern Regional Office and State Office made statements to Kathleen O'Neil from the *Idaho Falls Post Register* suggesting that delivery calls described in Findings Nos. 2 and 3 were without a basis because the Twin Falls Canal Company had all the water they needed. Both Lewis Rounds and Roger Warner from the Department's Eastern Regional Office have confirmed they had communications with Ms. O'Neil, but none of the communications addressed the delivery calls or the water supply needed by the Twin Falls Canal Company. In the State Office, Tim Luke, Shelly Keen, and Michael Keckler have also confirmed that they had communications with Ms. O'Neil. Only the communications with Michael Keckler involved the delivery calls described in Findings Nos. 2 and 3, but neither the validity of the delivery calls nor any other substantive issues were discussed.

11. The Director and various members of his staff have participated in numerous meetings involving the Expanded Natural Resources Interim Legislative Committee.

12. The filing of delivery calls by the Surface Water Coalition is expected to result in one or more contested cases before the Department.

13. The Director has sought legal advice from Phil Rassier and Clive Strong, Deputy Attorneys General for the State of Idaho, concerning whether a conflict of interest exists pursuant to Idaho Code § 59-704.

CONCLUSIONS OF LAW

1. Idaho Code § 67-5252 provides in part:

> **Presiding officer – Disqualification. –** (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, and any party shall have a right to move to disqualify for bias, prejudice, interest, substantial prior involvement in the matter other than as a presiding officer, status as an employee of the agency hearing the contested case, lack of professional knowledge in the subject matter of the contested case, or any other cause provided in this chapter or any cause for which a judge is or may be disqualified.
>
> (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; or
>
> (b) promptly 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 designation of a presiding officer.
>
> (3) A person whose disqualification for cause is requested shall determine in writing whether to grant the petition, stating facts and reasons for the determination.
>
> (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.

2. Idaho Code § 59-704 provides in part:

> **Required action in conflicts. –** A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section. Disclosure of a conflict does not affect an elected public official's authority to be counted for purposes of determining a quorum and to debate and to vote on the matter, unless the public official requests to be excused from debate and voting at his or her discretion. In order to determine whether a conflict of interest exists relative to any matter within the scope of the official functions of a public official, a public official may seek legal advice from the attorney representing that governmental entity or from the attorney general or from independent counsel. If the legal advice is that

> no real or potential conflict of interest exists, the public official may proceed and shall not be subject to the prohibitions of this chapter.

3. Idaho Code § 67-5253 provides in part:

> **Ex parte communications.** – Unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication.

4. Statements made by Ron Carlson, the regional manager for the Department's Eastern Regional Office in Idaho Falls, Idaho and watermaster for Water District No. 1, during the presentation described in Finding No. 5 were made before the delivery calls were filed by the Twin Falls Canal Company. The statements by Mr. Carlson were his own personal opinions, were not authorized by the Department, and will have no weight in the administrative determinations that will be made in response to the delivery calls filed by the Surface Water Coalition.

5. The Director's statement described in Finding No. 6 reflects that what constitutes injury and what effect such a determination will have is dependent on the outcome of administrative determinations that have not yet been made. The Director's statement does not prejudge legal issues, such as burden of proof, which are set forth in Idaho law including Idaho Code and the Conjunctive Management Rules.

6. The Director's participation with the Expanded Natural Resources Interim Legislative Committee was part of his statutory duties as the Director. The Director's participation did not involve the determination of any legal issues raised by the delivery calls filed by the Surface Water Coalition.

7. The Director has not had any inappropriate or ex parte communications with any entity or individual involving any substantive issue raised by the delivery calls filed by the Surface Water Coalition.

8. The legal advice provided by Phil Rassier and Clive Strong, Deputy Attorneys General for the State of Idaho, pursuant to Idaho Code § 59-704 is that the Director has no real or potential conflict of interest.

9. Based on the results of the Director's investigation to date of public comments made by Department employees and the actions of the Director described in Findings Nos. 8, 9, and 10, the inventory and disclosure of public comments regarding ESPA conjunctive management issues and the validity of the delivery calls, sought by the Twin Falls Canal Company in its letter of petition described in Finding No. 4, is not necessary or warranted.

10. There is no reason to conclude that the Director cannot provide the Surface Water Coalition with fair and unbiased determinations in response to the delivery calls that the Coalition has filed.

11. The Director should grant in part and deny in part the relief sought by the Twin Falls Canal Company in its letter of petition described in Finding No. 4.

12. The Director should require that any communications with the Department regarding any substantive issue raised by the delivery calls filed by the Surface Water Coalition must be in writing with a copy placed in the Department's file for the matter and served upon or otherwise made available to any other parties to the action.

ORDER

IT IS THEREFORE, HEREBY ORDERED that the request for a comprehensive inventory and disclosure of all public comments made by any Department employee pertaining to ESPA conjunctive administration issues and the validity of the delivery calls made by the Surface Water Coalition, either prior to or after the filing of delivery calls by the Surface Water Coalition, is **DENIED**.

IT IS FURTHER ORDERED that the request to recuse and remove all Department employees who have made public comments pertaining to ESPA conjunctive administration issues and the validity of the delivery calls by the Surface Water Coalition is **DENIED** in part and **GRANTED** in part. All employees of the Department are hereby disqualified as the presiding officer in responding to the delivery calls made by the Surface Water Coalition and the Director will serve as the presiding officer both for the determinations made in direct response to the delivery calls and for any contested cases that may result.

IT IS FURTHER ORDERED that the request to recuse and remove the Director as the presiding officer in responding to the delivery calls made by the Surface Water Coalition is **DENIED**.

IT IS FURTHER ORDERED that any communications with the Department regarding any substantive issue raised by the delivery calls filed by the Surface Water Coalition must be in writing with a copy placed in the Department's file for the matter and served upon or otherwise made available to any other parties to the action.

IT IS FURTHER ORDERED that this is an interlocutory order, which may be reviewed by the Director at any time pursuant to the provisions of IDAPA 37.01.01.711.

DATED this 25th day of January, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2005, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JOHN K. SIMPSON
BARKER ROSHOLT
205 N 10TH STE 520
PO BOX 2139
BOISE ID 83701-2139

VINCE ALBERDI
TWIN FALLS CANAL COMPANY
357 6TH AVE WEST
PO BOX 326
TWIN FALLS ID 83303

ROGER LING
LING ROBINSON
615 H ST
PO BOX 396
RUPERT ID 83350

TOM ARKOOSH
ARKOOSH LAW OFFICES
PO BOX 32
GOODING ID 83330

KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318

IDWR - EASTERN REGION
900 N SKYLINE DR STE A
IDAHO FALLS ID 83402-1718

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources