

RECEIVED

JUN 05 2007

DEPARTMENT OF WATER RESOURCES

Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

C. Tom Arkoosh, ISB #2258
ARKOOSH LAW OFFICE
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Filed via
email on
6-4-07
VW

Attorneys for A & B Irrigation District and
Burley Irrigation District

Attorneys for American Falls
Reservoir District #2

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

**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)
)
)
HEARING ON MAY 2, 2005 ORDER)
)
)

**SURFACE WATER
COALITION'S REQUEST FOR
INDEPENDENT HEARING
OFFICER**

**DISQUALIFICATION OF
THE DIRECTOR AS THE
HEARING OFFICER AS A
MATTER OF RIGHT**

COME 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 *Request for an Independent Hearing Officer* to preside at the hearing on the Director’s May 2, 2005 Order pursuant to I.C. § 42-1701A(2) and the Department’s Rules of Procedures (IDAPA 37.01.01 *et seq.*). Alternatively, the Coalition hereby files its *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 request and disqualification are as follows:

On May 23, 2007 Director David R. Tuthill, Jr. (recently appointed as Director of the Idaho Department of Water Resources by Governor C.L. “Butch” Otter in April 2007) issued a *Notice* setting a status conference in this matter to be held on June 5, 2007. The *Notice* does not identify whether or not the Director will serve as the hearing officer in this matter. However, given the uncertainty as to whether the Director intends to appoint himself as the hearing officer (and the effect of the *Notice*), the Coalition is filing this request within fourteen (14) days of the Director’s May 23, 2007 *Notice* to comply with Idaho’s APA.

REQUEST FOR INDEPENDENT HEARING OFFICER

Section 42-1701A(2) allows the Director to “direct that a hearing be conducted by a hearing officer appointed by the Director”. Since Karl J. Dreher (former Director) is no longer the hearing officer in this matter, the Coalition requests the Director to appoint an independent hearing officer to preside at the hearing in this matter pursuant to I.C. § 42-1701A(2).

Appointing an independent hearing officer is appropriate, as explained in greater detail below, and particularly given the Director’s involvement in this case as a fact witness (deposition taken September 28, 2005). Accordingly, the Coalition respectfully requests the Director appoint an independent hearing officer to preside at the hearing in this matter.

DISQUALIFICATION OF DIRECTOR AS HEARING OFFICER

Alternatively, and in the event the Director appoints himself as the hearing officer in this matter, the Coalition hereby disqualifies the Director as a matter of right pursuant to I.C. § 67-5252(1).

I. Introduction

The Coalition's concern about the Department's response to the request for water right administration dates back to January 20, 2005, six days after the request for administration was first made. In a letter to the Director, the Coalition raised concerns about public statements made by Department employees and requested the Director to remove those individuals from participating in the Department's response to the request for water right administration. *See January 20, 2005 Letter to Director.* The Director, sua sponte, deemed the letter to constitute a petition for disqualification pursuant to I.C. § 67-5252 and denied any request to remove the Director as the presiding officer in responding to the Coalition's delivery call. *See January 25, 2005 Order.*

In seeking review of the Director's May 2, 2005 Order, the Coalition again requested the Director to appoint an independent hearing officer in this matter. *See SWC May 17, 2005 Request for Hearing.* The Director denied the request in his *June 5, 2005 Order.* The Coalition later filed a disqualification of the Director as a matter of right on June 14, 2005. The Director denied the Coalition's disqualification as a matter of right in a *July 22, 2005 Order.* In his *July Order*, the Director denied the disqualification on the basis that the Coalition did not file the disqualification within fourteen (14) days after receipt of notice that the Director would preside at the contested case, I.C. § 67-5252(2)(a). *July Order* at 7. As noted above, the recently appointed Director Tuthill has yet to appoint a hearing officer in this matter. Although the

Director issued a *Notice* on May 23, 2007 setting a status conference in the matter, the notice does not expressly state that that Director will preside at the hearing in this matter. Regardless, if the *Notice* is deemed to identify the Director as the hearing officer, the Coalition's disqualification as a matter of right is timely under Idaho's APA since it is filed within 14 days of that *Notice*.

Given: (1) the Coalition's concerns about the Department's employees prejudicial public statements in early 2005; (2) the prior Director's refusal to appoint an independent hearing officer; (3) the present Director's status as a fact witness in this matter; and (4) questions over the Department's process in "conditionally approving" IGWA's 2007 Amended Replacement Plan (*see SWC Motion to Dismiss* filed May 21, 2007, and *SWC Petition for Reconsideration and Review of Director's May 23, 2007 Order* filed June 5, 2007), an independent hearing officer (not a current or former employee of the Department) is necessary for an objective and fair review of the Director's May 2, 2005 Order. Accordingly, the Coalition submits the following with respect to Idaho's APA "disqualification as a matter of right" pursuant to I.C. § 67-5252(1).

II. 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).

Assuming for argument's sake that the Director's May 23, 2007 *Notice* designates the Director as the hearing officer in this case, then the Coalition retains the right to disqualify the "hearing officer" (i.e. the Director) as a matter of right pursuant to I.C. § 67-5252(1). This disqualification is timely as it is being filed within 14 days of the Director's May 23, 2007 *Notice*.

In filing this disqualification, the Coalition does not seek to disqualify the Director from continuing his statutory duties or 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. 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. § 59-704.¹ The Coalition's request for an independent hearing officer does not implicate the analysis called for in I.C. § 67-5252(4).

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

¹ 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.

Since the Director is a fact witness in this matter (deposition taken September 28, 2005), the Director cannot serve as the hearing officer to judge his own testimony and involvement in this matter. Moreover, the questions identified above with respect to Department employees' prejudicial public statements in early 2005, the prior Director's refusal to appoint an independent hearing officer, and the process surrounding the recent "conditional approval" of IGWA's *Amended Joint Replacement Water Plan For 2007* are circumstances that 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. The issues addressed above call for an independent and objective review of the Director's May 2, 2005 Order. 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*.

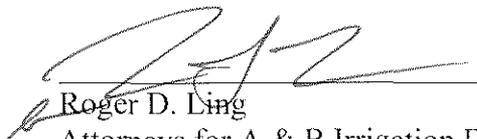
The Coalition's request is timely under the Idaho APA and the Department's rules. For these reasons the Coalition requests disqualification of the Director from presiding over the hearing in this matter.

REQUESTS FOR RELIEF

1. The Coalition requests the Director to appoint an independent hearing officer to preside at the hearing in this matter pursuant to I.C. § 42-1701A(2).
2. Alternatively, and in the event the Director appoints himself as the hearing officer, the Coalition disqualifies the Director as the hearing officer as a matter of right pursuant to I.C. § 67-5252(1).

DATED this 4th day of June 2007.

LING ROBINSON & WALKER



Roger D. Ling
Attorneys for A & B Irrigation District
and Burley Irrigation District

FLETCHER LAW OFFICES



W. Kent Fletcher
Attorneys for Minidoka Irrigation District

ARKOOSH LAW OFFICES CHTD.



Tom Arkoosh
Attorneys for American Falls
Reservoir District #2

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2007, I served a true and correct copy of the foregoing *Surface Water Coalition's Request for Independent Hearing Officer / Disqualification of the Director as the Hearing Officer as a Matter of Right* on the following by the method indicated:

Via Email and U.S. Mail

Director David R. Tuthill, Jr.
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098
victoria.wigle@idwr.idaho.gov

IDWR – Eastern Region
900 N. Skyline Dr., Suite A
Idaho Falls, Idaho 83402-1718

IDWR – Southern Region
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380

Randy Budge
Candice McHugh
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391
rcb@racinelaw.net
cmm@racinelaw.net

Kathleen Marion Carr
U.S. Department of Interior
960 Broadway
Boise, Idaho 83706
kmarioncarr@yahoo.com

James C. Tucker
Idaho Power Company
1221 West Idaho St.
Boise, Idaho 83702
jamestucker@idahopower.com

Jo Beeman
Beeman & Assoc.
409 W. Jefferson St.
Boise, Idaho 83702
jo.beeman@beemanlaw.com

James S. Lochhead
Adam T. DeVoe
Brownstein, Hyatt & Farber P.C.
410 17th St., 22nd Floor
Denver, Colorado 80202
jlochhead@bhf-law.com
adevoe@bhf-law.com

Michael Gilmore
Attorney General's Office
P.O. Box 83720
Boise, Idaho 83720-0010
mike.gilmore@ag.idaho.gov

Terry T. Uhling
J.R. Simplot Company
999 Main St.
Boise, Idaho 83702
tuhling@simplot.com

Scott L. Campbell
Moffatt Thomas Chtd.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, Idaho 83701
slc@moffatt.com

Mike Creamer
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701-2720
mcc@givenspursley.com

Matt Howard
USBR
1150 N. Curtis Rd.
Boise, Idaho 83706-1234
mhoward@pn.usbr.gov

Sarah Klahn
Amy Beatie
William Hillhouse II
White Jankowski
511 16th St., Suite 500
Denver, Colorado 80202
sarahk@white-jankowski.com



Travis L. Thompson