

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF ACCOUNTING	)	
FOR DISTRIBUTION OF WATER	)	<b>ORDER DENYING MOTION</b>
TO THE FEDERAL ON-STREAM	)	<b>TO DISQUALIFY; DENYING</b>
RESERVOIRS IN WATER	)	<b>REQUEST FOR INDEPENDENT</b>
DISTRICT 63	)	<b>HEARING OFFICER</b>
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On December 27, 2013, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) signed an order staying the above referenced matter pending a decision by the Idaho Supreme Court in the case involving Basin-Wide Issue No. 17. The Idaho Supreme Court issued its decision in that case on August 4, 2014. *In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to ‘Refill’, Under Priority, Space Vacated for Flood Control)*, Nos. 40974 and 40975, 2014 WL 3810591 (Idaho Aug. 4, 2014).

On September 10, 2014, the Director issued an *Order Lifting Stay and Notice of Status Conference* which lifted the December 27, 2013, stay and set the matter for a status conference on October 7, 2014.

On October 2, 2014, a *Motion to Disqualify* (“Motion”) and *Affidavit of Counsel* (“Affidavit”) were submitted to the Department by counsel for Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (hereinafter collectively referred to as “Ditch Companies”). The Ditch Companies seek disqualification of the Director or any member/employee of the Department from presiding over the above-captioned matter pursuant to Idaho Code § 67-5252 and IDAPA 37.01.01.412. *Motion* at 1.

## **Disqualification of the Director Without Cause**

The Ditch Companies assert Idaho Code § 67-5252(1) allows disqualification of the Director from presiding over this matter without cause. *Motion* at 2-3. No argument is presented in support of the position.

Idaho Code § 67-5252(1) states in full:

*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.*

Emphasis added.

Idaho Code § 67-5252(4) provides:

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.

Emphasis added. “Agency head” is defined as “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, the individual in whom the ultimate legal authority of the agency is vested is the Director. *See* Idaho Code §§ 42-1801, -1804, and -1805.

While Idaho Code § 67-5252(4) contemplates the disqualification of an “agency head,” it, unlike Idaho Code § 67-5252(1), does not explicitly state the grounds upon which the “agency head” may be disqualified; therefore, the circumstances under which an agency head may be disqualified are not explicitly defined in Idaho Code 67-5252. Presuming that the legislature intended to provide a means for a party to disqualify an agency head, it is appropriate to examine the legislative intent of not only Idaho Code § 67-5252, but also the entire Idaho Administrative Procedure Act, to determine the bases upon which an agency head may be disqualified. “[W]hen a statute merely comprises a section of an act, the court must look to the intent and purpose of the entire act.” *Odenwalt v. Zaring*, 102 Idaho 1, 10, 624 P.2d 383, 392 (1980).

On July 1, 1993, the current version of the Idaho Administrative Procedure Act became effective. In conjunction with its promulgation, former Idaho Attorney General, Larry EchoHawk, published the IDAHO ADMINISTRATIVE PROCEDURE ACT WITH COMMENTS AND IDAHO ATTORNEY GENERAL’S MODEL RULES OF PRACTICE AND PROCEDURE, *EFFECTIVE JULY 1, 1993* (hereinafter “IDAPA WITH COMMENTS AND MODEL RULES”). According to the IDAPA WITH COMMENTS AND MODEL RULES, the current Idaho Administrative Procedure Act, which had not been updated since 1965, was drafted through a collective effort between the Attorney General’s

Office and an interim legislative committee. As indicated by its title, descriptive comments follow most sections of the publication. While the “comments were not officially adopted by the Idaho Legislature in connection with the passage of the A.P.A. . . . the comments were prepared for and available to the legislative interim committee that studied the draft of the A.P.A. prepared by the Attorney General’s task force and were used by both that task force and the interim committee in their work.” *Id.*

According to the Idaho Session Laws, IDAPA, § 67-5252 was a “NEW SECTION.” Act *Relating to the Amendment of the Administrative Procedure Act*, ch. 263, 1992 Idaho Sess. Laws 809.

As stated in the *Comments* to § 67-5252:

*Subsection (1) provides grounds for disqualifying a presiding officer **other than an agency head**. A party is entitled to disqualify one hearing officer without cause. Since presiding officers are held to the same impartiality as judges, a presiding officer may be disqualified for any cause sufficient to disqualify a judge. In addition, the subsection provides two further grounds for disqualifying a hearing officer: status as an employee of the agency holding the contested case, or lack of professional knowledge of the subject matter are defined as sufficient cause to disqualify a hearing officer.*

. . . .

*Subsection (4) is concerned with the situation in which an **agency head** is subject to a petition for disqualification. The agency head is required to comply with Section 2 of the Ethics in Government Act, Idaho Code § 59-704. This problem can arise in two distinct situations: when the agency head is a single person or when the agency head is a multimember body and the disqualification would either disqualify all members or would potentially result in a tie vote.*

The Ethics in Government Act requires a decisionmaker to disclose fully any potential conflict of interest relevant to the matter to be acted upon. The disclosure is to be provided to the person appointing the decisionmaker. The Administrative Procedure Act is not intended to displace the Ethics in Government Act.

IDAPA WITH COMMENTS AND MODEL RULES at p. 36 (emphasis added).

Rule 412 of the Idaho Attorney General’s Model Rules of Practice and Procedure (“Model Rule 412”), which is substantially similar to Rule 412 of the Department’s Rules of Procedure, IDAPA 37.01.01.412, and is contained within the IDAPA WITH COMMENTS AND MODEL RULES, states in full:

Pursuant to section 67-5252, Idaho Code, *any party shall have a right to one (1) disqualification without cause of any **person** serving or designated to serve as a presiding officer and any party shall have a right to move to disqualify a hearing officer for bias, prejudice, interest, substantial prior involvement in the case 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 reason provided by law or for any cause for which a judge is or may be disqualified. Any party may, within fourteen (14) days, petition for the disqualification of a hearing officer after receiving notice that the officer will preside at a contested case or 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 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 the agency heads, if allowed, will be pursuant to sections 59-704 and 67-5252(4), Idaho Code.*

Emphasis added.

A reading of the *Comments* to § 67-5252(1), Model Rule 412, IDAPA 37.01.01.412, Idaho Code § 67-5252(1), and Idaho Code § 67-5252(4) supports the conclusion that the legislature intended that the “agency head” cannot be disqualified without cause under subsection (1).

The legislature's intent that the Director should not be disqualified without cause is further evidenced by Idaho Code §§ 67-5243, -5244, and -5245. Idaho Code § 67-5243 provides that even if an agency head decides not to act as the presiding officer in a contested case, the appointed hearing officer can only issue a recommended order, Idaho Code § 67-5244, or a preliminary order, Idaho Code § 67-5245, both of which are ultimately reviewable by the agency head. When a preliminary or recommended order is reviewed by the agency head, the agency head is entitled to agree with the order, remand the matter for additional hearings, or hold additional hearings. *See* Idaho Code §§ 67-5244(2)(a)-(c) and -5245(6)(a)-(c). In each instance, “[t]he agency head on review of the [recommended decision or preliminary order] **shall exercise all the decision-making power that he would have had if the agency head had presided over the hearing.**” *See* Idaho Code §§ 67-5244(3) and -5245(7) (emphasis added).

The Ditch Companies' contention that the Director is subject to automatic disqualification under Idaho Code § 67-5252(1) leads to the conclusion that, while the agency director could not serve as the presiding officer he nonetheless could make the final decision and in doing so “exercise all the decision-making power that he would have had if [he] had presided over the hearing.” *See* Idaho Code §§ 67-5244(3) and -5245(7) (emphasis added). Such a result would not advance the legislative purpose of streamlining the administrative hearing process. Rather, the Ditch Companies' argument could essentially result in two hearings: one before a presiding officer and another repeat hearing before the Director. Therefore, the Ditch Companies' petition to disqualify the Director without cause will be denied.

## **Disqualification of the Director for Cause**

The Ditch Companies assert Idaho Code § 67-5252(1) allows disqualification of the Director from presiding over this matter for bias, prejudice, and substantial prior involvement in the matter other than as presiding officer. *Motion* at 3. The Ditch Companies also cite to IDAPA 37.01.01.412.

While the Ditch Companies cite to IDAPA 37.01.01.412, the majority of that rule is inapplicable here. The rule primarily deals with disqualification of hearing officers. The Director is not a hearing officer, but is the agency head. IDAPA 37.01.01.411 (“The term ‘hearing officer’ as used in these rules refers only to officers subordinate to the agency head.”) Only the last sentence of IDAPA 37.01.01.412 is applicable. It provides: “Disqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.” This is the exclusive means for disqualification of the agency head.

Idaho Code § 67-5252(4) refers back to Idaho Code § 59-704. Section 59-704 of the Ethics in Government Act contains the standard for evaluating disqualification of an agency head. Idaho Code § 59-704 outlines the criteria for identifying conflicts of interest and provides in relevant part:

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.

The term conflict of interest is defined at Idaho Code § 59-703:

(4) "Conflict of interest" means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the *private pecuniary benefit* of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, . . . .

Idaho Code § 59-703(4)(emphasis added).

The Ditch Companies assert as a basis for disqualification that, since the Director originally initiated this contested case in 2013, the Director has “engaged in ex parte communication with parties, non-parties, Legislators and others, involving more than simply procedural issues. . . .” *Motion* at 6. Specifically, the Ditch Companies point to a presentation the Director gave to the Interim Natural Resources Committee on September 17, 2014, concerning issues in this contested case and assert this presentation demonstrates the “[t]he parties to this matter cannot expect to get a fair, impartial and objective presiding officer over

this matter when the presiding officer has already considered many of the issues which may be raised, expressed opinions on those issues and engaged in settlement discussions concerning the very issues which the presiding officer may be asked to decide.” *Motion* at 4.<sup>1</sup>

The Ditch Companies have not alleged that the Director’s participation as hearing officer in this contested case proceeding would result in a private pecuniary benefit. The Ditch Companies have not demonstrated the Director’s participation would otherwise qualify as a conflict of interest under the Ethics in Government Act. Importantly, “[a] decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances.” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 208, 220 P.3d 318, 326 (2009) (quotations omitted); see *Louisiana Ass’n of Indep. Producers & Royalty Owners v. F.E.R.C.*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (“Agency officials may meet with members of the industry both to facilitate settlement and to maintain the agency’s knowledge of the industry it regulates . . . such informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.” (quotations and citations omitted); see also *Ass’n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1154 (D.C. Cir. 1979) (“An agency member may be disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking.”); see also *PLMRS Narrowband Corp. v. F.C.C.*, 182 F.3d 995, 1002 (D.C. Cir. 1999) (“In order to avoid trenching upon the agency’s policy prerogatives, therefore, we presume that policymakers approach their quasi-legislative task of rulemaking with an open mind—but not an empty one.”); see also *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1179 (D.C.Cir.1980) (“Agency decisionmakers are appointed precisely to implement statutory programs, and so inevitably have some policy preconceptions”); see also *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C.Cir.1980) (“An administrative official is presumed to be objective [and] mere proof that [he or] she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption”). The Director’s participation in discussions and presentations related to this matter have been entirely appropriate. The Director affirms that his participation as hearing officer in this matter will not result in a conflict of interest and that he has not pre-judged issues that he may be asked to decide. The Ditch Companies’ request for disqualification of the Director for cause will be denied.

### **Disqualification of Department Members/Employees for Cause**

The Director will be the presiding officer in this contested case proceeding. Therefore, the Ditch Companies request for disqualification of all members/employees of the Department pursuant to Idaho Code § 67-5252(2) need not be addressed.

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<sup>1</sup> The Ditch Companies attached slides from this presentation to the Affidavit as Exhibit A.

**ORDER**

For the forgoing reasons, IT IS HEREBY ORDERED that the Ditch Companies' Motion requesting disqualification of the Director is DENIED.

IT IS FURTHER ORDERED that The Ditch Companies' request to appoint an independent hearing officer in this matter is DENIED.

IT IS FURTHER ORDERED that the Director will be the presiding officer in this contested case proceeding and, therefore, the Ditch Companies' request for disqualification of all Department members/employees need not be addressed.

Dated this 3<sup>rd</sup> day of October 2014.

  
GARY SPACKMAN  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of October 2014, I served the foregoing *ORDER DENYING MOTION TO DISQUALIFY; DENYING REQUEST FOR INDEPENDENT HEARING OFFICER; APPOINTING DIRECTOR AS HEARING OFFICER* to the following and by the method indicated below:

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