BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHTS NOS. 36-04013A, 36-0413B, AND 36-07148 (SNAKE RIVER FARM); AND TO WATER RIGHTS NOS. 36-07083 AND 36-07568 (CRYSTAL SPRINGS FARM)	)	**ORDER DENYING REQUEST FOR DISQUALIFICATION OF THE DIRECTOR AS A MATTER OF RIGHT**
	)	**(Clear Springs Delivery Call)**

This matter is before the Director of the Department of Water Resources ("Director" or "Department") as a result of *Clear Springs Foods, Inc. Disqualification of the Director as the Hearing Officer as a Matter of Right; Request for Discovery* ("Motion"), filed with the Department on August 12, 2005.

Disqualification of the Director as a Matter of Right

Clear Springs Foods, Inc. ("Clear Springs") asserts that Idaho Code § 67-5252 allows it to disqualify the Director, without cause, from presiding over the hearing in this matter. In support of its argument for disqualification, Clear Springs' Motion further states:

> 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 concept 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.

Motion at p. 4.

In ascertaining the meaning of a statute, the following well-established principles apply:

> The objective of statutory construction is to derive the intent of the legislature. Statutory construction begins with the literal language of the statute. Where a statute is unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning. Ambiguity occurs where reasonable minds might differ as to interpretations. However, ambiguity is not established merely because the parties present differing interpretations to the court. In the case of ambiguous language, courts will analyze the reasonableness of proposed interpretations and consider the "context in which language is

> used, the evils to be remedied and the objects in view." Generally, interpretations that could lead to absurd or unreasonably harsh results are disfavored.

Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 307, 311, 109 P.3d 161, 166 (2005) (internal citations omitted).

Idaho Code § 67-5252(1), the statute upon which Clear Springs bases its request for disqualification of the Director, 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.

For purposes of Title 67, Chapter 52 of the Idaho Code, "Person" is defined to mean "any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character." Idaho Code § 67-5201(15). "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.

In order to disqualify an "Agency head," a party must look to Idaho Code § 67-5252(4). *See* Idaho Code § 67-5252(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. . . .") (emphasis added). Idaho Code § 67-5252(4) states in full:

> 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.

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, *Hayden*, 141 Idaho at 311, 109 P.3d at 166, 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). Therefore, contrary to the argument advanced by Clear Springs, Rule 412 of the Department's Rules of Procedure does not "abrogate" Clear Springs' right to disqualify the Director without cause in accordance with Idaho Code § 67-5252(1). *Compare* Model Rule 412 ("Disqualification of the agency heads, if allowed, will be pursuant to sections 59-704 and 67-5252(4), Idaho Code.") *with* IDAPA 37.01.01.412 ("Disqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.") *and* Idaho Code § 67-5252(4) ("Where disqualification 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.").

The legislative intent of the Idaho Administrative Procedure Act indicates that the exclusive means for disqualification of the agency head is through Idaho Code § 67-5252(4). The legislative history of Idaho Code § 67-5252 demonstrates that the basis upon which the agency head may be disqualified in accordance with subsection (4) is found in Idaho Code § 59-704. Idaho Code § 59-704 states in pertinent 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. 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. If the legal advice is that a real or potential conflict may exist, the public official:
>
> . . . .
>
> (3) If he is an appointed or employed state public official, he shall prepare a written statement describing the matter to be acted upon and the nature of the potential conflict, and shall deliver the statement to his appointing authority. The appointing authority may obtain an advisory opinion from the attorney general or from the attorney representing that agency. The public official may then act on the advice of the attorney general, the agency's attorney or independent counsel.

Because Clear Springs has not alleged a conflict of interest, and the Director has not failed to disclose conflicts of interest, if any, the Director should not be disqualified in accordance with Idaho Code § 67-5252(4).

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).

Clear Springs contention that the Director is subject to automatic disqualification under Section 67-5252(1) leads to the absurd 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, Clear Springs argument could essentially result in two hearings – one before a presiding officer and another repeat hearing before the Director. There is simply no logical basis for presuming the Legislature intended to allow a meaningless hearing before a presiding officer if, as conceded by Clear Springs, the Director has the ultimate authority to make the final decision.

Disqualification of all Department Employees as a Matter of Right

In addition to arguing that the Director must be disqualified as a matter of right, Clear Springs argues that all Department employees must be disqualified without cause. *Motion* at p. 3. As stated previously, Idaho Code § 67-5252(1) only provides for disqualification of a singular "person" without cause. *See also* Idaho Code § 67-5201(15). The correct statutory provision through which to disqualify more than one Department employee is Idaho Code § 67-5252(2), which states in full:

> 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.*

Emphasis added.

Idaho Code § 67-5252(2) does not allow a party to disqualify all employees of the agency hearing the contested case as a matter of right. Instead, Idaho Code § 67-5252(2) states that a party must allege "cause." Because Clear Springs has not alleged cause in its blanket disqualification of all Department employees, Clear Springs' Motion on that ground should be denied.

Request for Discovery

In its Motion, Clear Springs requests the right to engage in discovery: "Discovery on the groundwater model results, assumptions and impacts, which is requested, is necessary prior to addressing the issues raised in the Order setting the status conference." *Motion* at p. 2. Pursuant to the status conference of August 16, 2005, it was stated that a partial agency record in this matter would be forthcoming. The partial agency record was distributed to the parties by the Department on September 16, 2005. If, after review of the partial agency record, Clear Springs determines that it needs to engage in further discovery, discovery will be made in accordance with the forthcoming scheduling order.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

1. Clear Springs Foods, Inc.'s request to disqualify the Director without cause is DENIED.

2. Clear Springs Foods, Inc.'s request to disqualify all Department employees without cause is DENIED.

3. Clear Springs Foods, Inc.'s request authorizing Discovery is GRANTED, subject to the terms of the forthcoming scheduling order.

DATED this 14th day of October, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2005, the above and foregoing document was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

JOHN SIMPSON BARKER ROSHOLT PO BOX 2139 BOISE ID 83701-2139 (208) 344-6034 jks@idahowaters.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
LARRY COPE CLEAR SPRINGS FOODS, INC. PO BOX 712 BUHL ID 83303-1237 (208) 543-5608	(x) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
MIKE CREAMER JEFF FEREDAY GIVENS PURSLEY PO BOX 2720 BOISE ID 83701-2720 (208) 388-1300 mcc@givenspursley.com cf@givenspursley.com	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail
NORTH SNAKE GWD 152 E MAIN ST JEROME ID 83338 (208) 388-1300	(x) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
MAGIC VALLEY GWD 809 E 1000 N RUPERT ID 83350-9537	(x) U.S. Mail, Postage Prepaid ( ) Facsimile ( ) E-mail
CINDY YENTER WATERMASTER - WD 130 IDWR – SOUTHERN REGION 1341 FILLMORE ST STE 200 TWIN FALLS ID 83301-3380 (208) 736-3037 cindy.yenter@idwr.idaho.gov	(x) U.S. Mail, Postage Prepaid ( ) Facsimile (x) E-mail

ALLEN MERRITT, REGIONAL MANAGER
CINDY YENTER, WATERMASTER - WD 130
IDWR – SOUTHERN REGION
1341 FILLMORE ST STE 200
TWIN FALLS ID 83301-3380
(208) 736-3037
allen.merit@idwr.idaho.gov
cindy.yenter@idwr.idaho.gov

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
(x) E-mail

FRANK ERWIN
WATERMASTER
WATER DIST 36
2628 S 975 E
HAGERMAN ID 83332

(x) U.S. Mail, Postage Prepaid
( ) Facsimile
( ) E-mail

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