

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).

Jones has failed to allege that the Director's participation would result in a private pecuniary benefit or would otherwise qualify as a conflict of interest under the Ethics in Government Act. Moreover, the Director affirms that his participation will not result in a conflict of interest as defined under the act. Given the failure to allege a private pecuniary benefit and the lack of any actual conflict of interest under the Ethics in Government Act, Jones' request for the Director to disqualify himself pursuant to IDAPA 37.01.01.412 is denied.

B. The Director can fairly and impartially review the work of agency staff.

Jones also questions the Director's ability to "fairly and impartially critique and evaluate the testimony and evidence produced and advanced by the Department and its staff and experts." Request for Disqualification at 3. Jones argues that a conflict exists "as a matter of law" any time any agency head might be asked to critique the work of his own agency. *Id.* Jones' argument fails for multiple reasons.

First, Jones fails to cite any legal authority to support this argument. The Director notes that the rules of procedure for this agency allow for the participation of the agency head as well as agency staff in an administrative hearing. See IDAPA 37.01.01.414 (discussing agency head participation); IDAPA 37.01.01.201 (discussing agency staff participation); IDAPA 37.01.01.602 (discussing agency staff participation). The Director is vested with the authority to issue the final decision and would issue the final order regardless of who conducts the hearing. If the legislature had been concerned about the possibility of a conflict, it undoubtedly would have addressed this issue in statute or through its oversight of agency rules.

Finally, the role of the agency in this administrative proceeding is a balanced one. It is the role of the parties to present testimony and produce evidence in the proceeding. The role of the agency staff is to help the Director evaluate that evidence. The scheduling order in this proceeding provides that the Parties will file their expert reports first, then the Parties will have an opportunity to file rebuttal expert reports. Once the rebuttal reports have been filed, agency staff assists the Director by evaluating the reports submitted by the parties through submittal of any agency report. Following the submittal of the agency report, the parties will have the opportunity to critique agency staff's evaluation of the information through submittal of rebuttal

reports. Just because the Director will be reviewing the work of agency staff does not mean that the Director cannot fairly and impartially evaluate the information provided by staff, especially in this case where the primary role of the staff will be reviewing the work of the Jones and IGWA's technical experts and then the parties will have an opportunity to submit a report in response to the staff report. The Director can fairly and impartially review the work of agency staff. Jones' Request for Disqualification is denied.

C. It is appropriate to suspend the current discovery schedule and vacate the hearing.

Based upon the Request to Suspend filed by Jones and IGWA and in the interest of promoting settlement, the Director agrees to suspend the discovery schedule and the hearing date for this proceeding. A scheduling conference will be set for February 29, 2012.

ORDER

For the forgoing reasons, IT IS HEREBY ORDERED that Jones' Request for Disqualification is denied.

IT IS FURTHER ORDER that Jones and IGWA's Request to Suspend is granted. All discovery in this matter is suspended until further notice. The hearing currently scheduled to begin April 16, 2012, is vacated. A scheduling conference is set for February 29, 2012 at 10:00 a.m. at the Idaho Department of Water Resources located at 322 Front Street, Boise, Idaho.

DATED this 30th day of November, 2011.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

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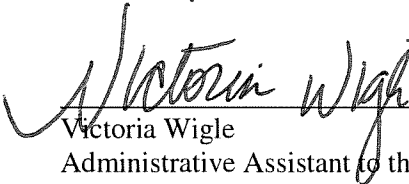
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