

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

IN THE MATTER OF DISTRIBUTION            )            **CM-DC-2011-003**  
OF WATER TO WATER RIGHTS            )              
NOS. 36-07072 AND 36-08356            )            ORDER DENYING REQUEST FOR  
                                                          )            DISQUALIFICATION OF THE  
                                                          )            DIRECTOR AND DENYING REQUEST  
                                                          )            FOR AN INDEPENDENT HEARING  
                                                          )            OFFICER; ORDER SUSPENDING  
(SEAPAC OF IDAHO)                        )            DISCOVERY AND VACATING  
\_\_\_\_\_ )            HEARING DATE

On August 23, 2011, SeaPac of Idaho, Inc. (“SeaPac”) filed a *Request for an Independent Hearing Officer; Request for Disqualification of the Director as the Hearing Officer* (“Request for Disqualification”). In its Request for Disqualification, SeaPac asks the interim Director of the Department of Water Resources (“Director”) to disqualify himself as the presiding officer, and to appoint a person who is not associated with the Department as the hearing officer. On October 24, 2011, SeaPac and the Idaho Ground Water Appropriators, Inc. (“IGWA”) filed a *Stipulation to Suspend Discovery and Vacate Hearing Date* (“Request to Suspend”). The Director denies SeaPac’s Request for Disqualification but grants the Request to Suspend.

A. SeaPac Fails to Allege Grounds for Disqualification Under the Ethics in Government Act.

In its Request for Disqualification, SeaPac cites IDAPA 37.01.01.412. The majority of this 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 in this proceeding. It provides: “Disqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.”

Idaho Code § 67-5252(4) also 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).

SeaPac 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, SeaPac's 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.

SeaPac 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. SeaPac 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.* SeaPac's argument fails for multiple reasons.

First, SeaPac 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 SeaPac 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. SeaPac's 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 SeaPac 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 SeaPac's Request for Disqualification is denied.

IT IS FURTHER ORDER that SeaPac and IGWA's Request to Suspend is granted. All discovery in this matter is suspended until further notice. The hearing currently scheduled to begin at the conclusion of the Jones' hearing (Docket No. CM-DC-2011-002) 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 28<sup>th</sup> day of November, 2011.

  
GARY SHACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28<sup>th</sup> day of November 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

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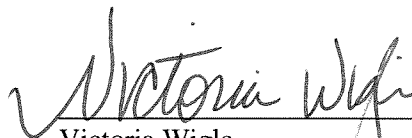
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