

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

IN THE MATTER OF MITIGATION PLAN) OF THE NORTH SNAKE AND MAGIC) VALLEY GROUND WATER DISTRICTS) IMPLEMENTED BY APPLICATIONS FOR) PERMIT NOS. 02-10405 AND 36-16645 AND) APPLICATION FOR TRANSFER NO. 74904) TO PROVIDE REPLACEMENT WATER FOR) CLEAR SPRINGS SNAKE RIVER FARM)) (Water District Nos. 120 and 130)) _____)	ORDER DENYING PETITION FOR DISQUALIFICATION
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This matter is before the Director of the Department of Water Resources (“Director” or “Department”) as a result of the *Spring Users’ Joint Petition for Disqualification of the Director as Presiding Officer* (“Petition”), received by the Department on August 27, 2008. The Spring Users’ petition for the disqualification of the Director “as a matter of right (‘without cause’) Alternatively, the Spring Users petition for the disqualification of the Director . . . for cause” *Petition* at 1. In addition, the Spring Users petition to disqualify certain Department employees for cause.

Disqualification of the Director as a Matter of Right

The Spring Users assert that Idaho Code § 67-5252(1) allows disqualification of the Director from presiding over the hearing in this matter as a matter of right. 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.

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, 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 Spring Users’ 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 Spring Users’ argument could essentially result in two hearings: one before a presiding officer and another repeat hearing before the Director. The delay caused would work directly against the Spring Users’ repeated requests for expediency. The Spring Users’ petition to disqualify the Director without cause is denied.

Disqualification of the Director for Cause

In support of their Petition to disqualify the Director for cause, the Spring Users cite Idaho Code § 67-5252(1) and assert the following bases:

- (1) the Director’s “substantial prior involvement in this matter other than as a presiding officer,”
- (2) the Director’s apparent bias in favor of the *2008 Plan* and his acceptance of the *2008 Plan* as a means of allowing out-of-priority ground water diversions during the 2008 irrigation season, and
- (3) the likelihood that the Director may be a necessary fact witness as one or the only IDWR employee with knowledge pertaining to the Director’s procedure for submission and consideration of the *2008 Plan*, and/or the Director’s actions and responses to the parties in this matter.

Petition at 2.

As stated previously, 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.

The Spring Users have not cited Idaho Code § 67-5252(4), have not stated that a conflict of interest exists, and the Director has not failed to disclose a conflict of interest, if any. Moreover, the Spring Users' perceived belief as to the Director's "apparent bias" due to his prior involvement in this and related proceedings is not a sufficient basis for disqualification even if it were the appropriate standard under which to review the Petition.

A party may move to disqualify a judge from presiding on the grounds of bias. I.R.C.P. 40(d)(2)(A)(4). An affidavit "stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion" must accompany the motion. I.R.C.P. 40(d)(2)(B). Adverse rulings, by themselves, do not demonstrate disqualifying bias. *Bell v. Bell*, 122 Idaho 520, 530, 835 P.2d 1331, 1341 (Ct.App.1992). To be disqualifying, the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Desfosses v. Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct.App.1991) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793 (1966)). A judge's participation in prior legal proceedings involving related

parties or issues is not grounds for disqualification for bias. *Roselle v. Heirs and Devisees of Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct.App.1990).

Samuel v. Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, 88, 996 P.2d 303, 307 (2000).

The Director's technical expertise, knowledge, and review of the record in this and other related proceedings is necessary in order for the Director to perform his constitutional and statutory responsibilities as an impartial and informed decision-maker and does not constitute bias. The Spring Users' petition to disqualify the Director for cause is denied.

Disqualification of Department Employees

Citing Idaho Code § 67-5252(1) and (2), "the Spring Users petition for the disqualification of all employees of IDWR who have participated in IDWR's procedure and review of the *2008 Plan*." *Petition* at 2. 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.

The Spring Users have alleged cause sufficient to disqualify any Department employee who "participated in IDWR's procedure and review of the *2008 Plan*."

ORDER

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

The Spring Users' petition to disqualify the Director without cause is DENIED.

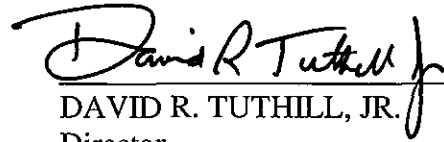
The Spring Users' petition to disqualify the Director for cause is DENIED.

The Spring Users' petition to disqualify those Department employees who participated in the Department's procedure and review of the *2008 Plan* is GRANTED.

IT IS FURTHER ORDERED that pursuant to Department Rule of Procedure 710, IDAPA 37.01.01.710, this is an interlocutory order and is not subject to review by reconsideration or appeal. The Director may review this interlocutory order pursuant to Rule

711, IDAPA 37.01.01.711.

DATED this 29th day of August, 2008.



DAVID R. TUTHILL, JR.
Director

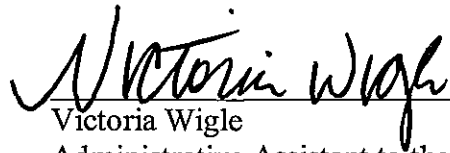
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of August 2008, the above and foregoing, was served by the method indicated below, and addressed to the following:

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