

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-32573, IN THE)
NAME OF M-3 EAGLE ASSIGNED)
TO THE CITY OF EAGLE¹)
_____)

**ORDER DENYING REQUEST
TO DISQUALIFY INTERIM
DIRECTOR AS HEARING OFFICER**

Background

On November 21, 2006, M3 Eagle filed an application for water right no. 63-32573 seeking a municipal ground water right permit for reasonably anticipated future needs to supply M3 Eagle’s proposed planned community project in north Ada County, Idaho. Protests were filed to the M3 Application by individuals and representative groups (collectively referred to as “Protestants”) and a contested case hearing was scheduled before Idaho Department of Water Resources (“Department”). On June 20, 2008, Gary Spackman was appointed to serve as hearing officer by then Director David R. Tuthill, Jr. On July 16, 2009, during the time the contested matter was pending before the Department, the hearing officer was appointed Interim Director. The hearing was concluded on July 30, 2009 and the Interim Director issued an Amended Final Order on January 25, 2010.

M3 Eagle filed a petition for judicial review before the Fourth District Court on February 19, 2010. The Protestants did not file petitions for judicial review, nor did they file timely petitions to intervene.² On June 13, 2011, Petitioner M3 Eagle LLC and Respondents Idaho Department of Water Resources and Gary Spackman filed a Joint Stipulation and Motion for Remand with Directions (“Stipulation”) to dismiss the judicial review case and to request that the contested matter be remanded to the Department for further proceedings consistent with terms and conditions in the Stipulation. On June 30, 2011, the Fourth District Court issued an Amended Order dismissing the judicial review case and remanding the contested matter back to Department for further proceedings consistent with terms and conditions in the Stipulation.

On July 25, 2011, the Department received a document from the Protestants entitled *Motion* which requested that the Interim Director / Hearing Officer Gary Spackman be disqualified pursuant to Department Rules of Procedure 411 and 412, I.C. §§ 59-704 and 67-5252 and Rule 40 of the Idaho Rules of Civil Procedure. The Protestants’ Motion also asserted a right to a blanket disqualification for cause of all employees of the Department. In response to

¹ The original caption was changed to reflect that an assignment of water right application and permit no. 63-32573 to the City of Eagle was filed with IDWR on June 13, 2011.

² John Thornton sought to intervene in the judicial review proceeding in his personal capacity on February 4, 2011, 350 days after the petition for judicial review was filed. His motion was denied by the district court. .

Protestants' motion, on August 4, 2011, IDWR received from M3 Eagle LLC *M3 Eagle's Response To Protestants July 20 Disqualification Motion*. Subsequent to M3 Eagle's response, Protestants filed a *Petition for Disqualification for Cause* on August 5, 2011.

I. DISQUALIFICATION OF THE DIRECTOR AS MATTER OF RIGHT IS DENIED

For contested case hearings, I.C. § 67-5242(2) provides that, "The agency head, one (1) or more members of the agency head, or one (1) or more hearing officers may, in the discretion of the agency head, be the presiding officer at the hearing." Agency head is defined to mean "an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law." I.C. § 67-5201(4). In the case of the Department of Water Resources, the individual in whom the ultimate legal authority of the agency is vested is the Director. See I.C. §§ 42-1801, -1804, and -1805. Addressing the potential disqualification of a presiding officer, I.C. § 67-5252 provides, in pertinent part, as follows:

(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

(2) 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;

. . . .

(4) 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 I.C. § 59-704.

Department Rule of Procedure 410 providing for the appointment of hearing officers states that, "A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency." IDAPA 37.01.01.410. Rule of Procedure 411, which contrasts hearing officers with the agency head, provides: "Agency heads are not hearing officers, even if they are presiding at contested cases. The term 'hearing officer' as used in these rules refers only to officers subordinate to the agency head." IDAPA 37.01.01.411. Department Rule of Procedure 412 addresses the disqualification of officers hearing contested cases:

Pursuant to Section 67-5252, Idaho Code hearing officers are subject to disqualification for bias, prejudice, interest, substantial prior involvement in the case other than as a presiding officer, status as an employee of the agency, 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 promptly petition for the disqualification of a hearing officer after receiving notice that the officer will preside at a contested case or 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 agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4).*

IDAPA 37.01.01.412 (emphasis added).

Protestants' attempt to disqualify the Agency Head without cause is not available relief under the Department Rules of Procedure and I.C. § 67-5252 and is not appropriate. Because the Interim Director is the agency head and disqualification would result in an inability to decide the contested case, the actions of the agency head must be reviewed as a conflict of interest under the provisions of I.C. § 59-704. To the extent any conflict of interests might exist, I.C. § 59-704 allows the agency head to disclose the conflict to the parties and proceed forward to act as the presiding officer. The Interim Director is not aware of any facts that need to be disclosed to meet the requirements of Idaho I.C. § 59-704. Nor have the Protestants alleged any such facts.

Nor is there a basis to disqualify the Interim Director for cause. In their recent Petition, the Protestants alleged the Interim Director should be disqualified for bias, prejudice and his status as an employee deciding the case. Settlement negotiations between the Department and M3 Eagle during the time the case was before the District Court do not constitute ex parte communications under I.C. § 67-5253. Protestants elected not to participate as a party in the judicial review case, but now assert bias and prejudice because they do not agree with recent settlement terms negotiated by the Interim Director in that case. Instead Protestants seek to negate the terms of settlement negotiated by the parties by attacking the qualifications of the Interim Director to serve as hearing officer more than three years after his initial appointment. In his role as hearing officer, the Interim Director has issued a number of different orders and taken different actions in this matter over the past three years. Protestants have not, at any time, alleged the Interim Director to be bias or prejudice in this matter over the past three years until now. They allege bias and prejudice because they are evidently not pleased with his more recent decisions. Although the Protestants may be disappointed with the recent settlement terms, the Interim Director's decision to settle the judicial review case and have the matter remanded back to the agency does not constitute bias or prejudice.

II. PROTESTANTS HAVE WAIVED THEIR RIGHT TO DISQUALIFY

A final consideration is whether the Protestants' disqualification as a matter of right was filed within the time limit established by statute. If not, the disqualification must be considered waived. I.C. § 67-5252(2)(a) provides that any party may petition for the disqualification of a person serving or designated to serve as a presiding officer within fourteen days after receipt of notice indicating that the person will preside at the contested case.

Mr. Spackman is presently the presiding officer for this matter and has been the only officer presiding over this matter since its commencement in 2008. He was initially appointed by Director Tuthill to serve as the hearing officer in this matter in an Order issued on June 20, 2008

and has served more than 3 years as the presiding officer. Mr. Spackman, notwithstanding his appointment as Interim Director on July 16, 2009 continued to preside over all facets of the hearing and issued the Final Order and Amended Final Order that was later appealed by M3 Eagle. For the past year, in his capacity as Interim Director, Mr. Spackman has been directly involved in the settlement negotiations that resulted in the judicial review case being dismissed and the matter being remanded to the Department for further proceedings.

Protestants' motion to disqualify the presiding officer more than 3 years after the date of his appointment is contrary to the express language in I.C. § 67-5252, Idaho Rule of Civil Procedure 40(d)(1) and not consistent with IDAPA 37.01.01.412. The presiding officer conducted the hearing and authored the agency decisions and is intimately familiar with the issues in this matter. The remand of the matter back to the Department does not create a new or different contested case with the need to appoint a different or independent hearing officer. The remand is limited to opening the record to consider evidence regarding to the reasonably anticipated future needs information from the Assignee City of Eagle.


ORDER

Based upon a review of the record and pleadings of the parties relating to this issue and consistent with the forgoing discussion and analysis,

IT IS HEREBY ORDERED as follows:

1. The Protestants' Motion to disqualify the Interim Director without cause under Department Rules of Procedure and I.C. § 67-5252 is DENIED.
2. The Protestants' Motion to appoint an independent hearing officer in this matter pursuant to I.C. § 67-5252 and is DENIED.
3. The Protestants' disqualification of the Interim Director to serve as the presiding officer in this case as a matter of right is DENIED because it was not timely filed within fourteen days as required by I.C. § 67-5252(2)(a).
4. The Protestants' Motion to disqualify the Interim Director with cause under Department Rules of Procedure and I.C. § 67-5252 is DENIED.

DATED this 9th day of August 2011.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 2011, a true and correct copy of the document described below was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: **ORDER DENYING REQUEST TO DISQUALIFY
INTERIM DIRECTOR AS HEARING OFFICER**

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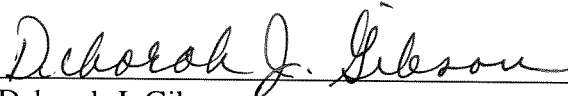
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