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

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-32573 IN THE
NAME OF M3 EAGLE LLC, ASSIGNED
TO THE CITY OF EAGLE

**M3 EAGLE'S RESPONSE TO
PROTESTANTS' JULY 20
DISQUALIFICATION MOTION**

M3 Eagle LLC ("M3 Eagle") through its counsel, Jeffrey C. Fereday and Michael P. Lawrence of Givens Pursley LLP, pursuant to Idaho Department of Water Resources ("IDWR" or "Department") Rule of Procedure 270.02, IDAPA 37.01.01.270.02, hereby responds to the Protestants' July 20, 2011 *Motion* ("DQ Motion") by which they request: 1) that Interim Director Gary Spackman be disqualified "without cause" from presiding over the remand proceedings in the above-captioned matter, and 2) a "blanket disqualification for cause" of all other Department employees or agents from filling this role.¹ The DQ Motion should be denied because the Interim Director is the agency head who may not be disqualified without cause, and he does not, to M3 Eagle's knowledge, have a conflict of interest that would require disclosure or recusal under Idaho's Ethics in Government Act.

¹ The Protestants' DQ Motion, although dated July 20, was hand delivered to IDWR and the other parties on July 25, making August 8 the deadline for responding according to Rule 270.02.

There also is no justification for Protestants' requested "blanket disqualification for cause" of all Department employees and agents. Protestants point to no facts justifying such a disqualification within the grounds enumerated in I.C. § 67-5252(1) and Department Rule 412, such as bias, prejudice, self-interest, or substantial prior involvement in the case. The Protestants are correct that all Department employees and agents are bound by Judge Sticklen's June 30, 2011 *Amended Order* ("Amended Order") in Ada County District Court case no. CV-OC-2010-03180 (the "Judicial Review Case"), but that is not grounds for blanket disqualification.

The DQ Motion appears to be another attempt by Protestants to upset the remand proceedings because they are dissatisfied with the Judicial Review Case's outcome. As with their June 30 motions wherein they attempted to expand the scope of the remand proceedings and alter the negotiated settlement between IDWR and M3 Eagle, the DQ Motion should be denied.

I. THE INTERIM DIRECTOR IS THE AGENCY HEAD AND IS NOT SUBJECT TO DISQUALIFICATION "WITHOUT CAUSE."

The Protestants request disqualification of the Interim Director "without cause," but the statutes and regulations providing for disqualification (regardless of cause) do not apply to agency heads such as the Interim Director.

Idaho Code § 67-5252—the statute addressing the disqualification of presiding officers in contested cases—states, in pertinent part:

(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

(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 section 59-704, Idaho Code.

(Emphasis added.) Concerning any proposed disqualification of the Department’s director as a hearing officer, IDWR Rule 412 states that “[d]isqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code [quoted above].” IDAPA 37.01.01.412.

The Interim Director is the Department’s agency head. I.C. § 67-5201(4) (“Agency head” means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law.); I.C. § 42-1801, -1804, -1805 (prescribing the authority and duties of the Department’s Director). The Department’s rules expressly distinguish a hearing officer from the agency head:

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 37.01.01.412. How this distinction works with the statutory provisions governing disqualification of “presiding officers” in contested cases has been described as follows:

There are two kinds of presiding officers: a “hearing officer,” who is someone other than the agency head, and the “agency head” itself. Different disqualification rules potentially apply to these two categories of presiding officers.

Michael Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 321-23 (1993-94).

In short, the Interim Director is IDWR’s agency head, and Section 67-5252’s provisions allowing parties to disqualify a presiding officer “without cause” do not apply to him.² The

² Even if the “without cause” provisions applied to the Interim Director, it appears that Protestants’ DQ Motion would be untimely under the rule and statute. A disqualification “without cause” must be raised within fourteen days “after receipt of notice indicating that the person will preside at the contested case.” I.C. § 67-5242(2)(a). The Interim Director was designated the presiding officer in the above-captioned matter on June 20, 2008 by former Director Tuthill. Judge Sticklen’s Amended Order remanding the matter back to IDWR for additional proceedings was issued on June 30, 2011. Protestants’ DQ Motion—hand delivered on July 25, 2011—failed to meet this deadline.

standard for whether the Interim Director can be disqualified is contained in Section 59-704's conflict of interest provisions, which in relevant part state:

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. . . . 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.

(Emphasis added.) This statute does not actually require an appointed public official to be disqualified or recused. Rather, it requires disclosure of the conflict and states that the official "may" seek legal advice as to whether the situation gives rise to a conflict of interest and, if so, the official then must "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" who also may obtain an advisory legal opinion. In other words, any attempted "disqualification" would have to be based on the Interim Director having a conflict of interest and then either removing himself voluntarily or failing to meet the requirements of Section 59-704. The Protestants request for disqualification "without cause" is not encompassed within this statutory structure.

In any case, to M3 Eagle's knowledge, the Interim Director has no conflict of interest.

The term "conflict of interest" is defined in the Ethics in Government Act as follows:

"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

I.C. § 59-703(4) (emphasis added). M3 Eagle knows of no evidence that the Interim Director, his family members, or any of their associated businesses have a private pecuniary interest in M3 Eagle or its water right application. Accordingly, there appears to be no conflict of interest for him to disclose as required under Section 59-704.

M3 Eagle recognizes that the Interim Director may appoint some other hearing officer.

Department Rule 410, IDAPA 37.01.01.410, states:

A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. The appointment of a hearing officer is a public record available for inspection, examination and copying.

As provided in the rule, a hearing officer may be an independent contractor or a Department employee appointed by the agency head. Thus, the Interim Director has discretion to appoint a hearing officer from within or from outside the Department, but he is not required to do so under the present circumstances.

II. THE PROTESTANTS ARE NOT ENTITLED TO A "BLANKET DISQUALIFICATION FOR CAUSE" OF ALL IDWR EMPLOYEES OR AGENTS.

The Protestants "assert a right to a blanket disqualification for cause of all employees or agents of [IDWR] under Section 67-5252(2)(b)," DQ Motion at 1. Section 67-5252(2)(b) in relevant part states that "[a]ny party may petition for the disqualification of a person serving or

designated to serve as presiding officer . . . promptly upon discovering facts establishing grounds for disqualification” Section 67-5252(2) also provides that “[a]ny 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.” Grounds for disqualification include:

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.

I.C. § 67-5252(1).³

Here, M3 Eagle is aware of no grounds for blanket disqualification of all IDWR employees and agents. Protestants correctly recognize that the entire Department is bound by the January 19, 2011 Agreement (“Agreement”) between M3 Eagle and IDWR and the June 13, 2011 *Joint Stipulation and Motion for Remand with Directions* (“Stipulation”) in the Judicial Review Case. DQ Motion at 1-2. Beyond this, IDWR (and each of the parties) is bound by the District Court’s Amended Order. The DQ Motion fails to mention the Amended Order. As the Interim Director found in his August 2, 2011 *Order Acknowledging Party Status of Protestants and Denying Motion to Alter or Amend Findings* (“August 2 Order”), “IDWR is obligated under these earlier agreements and is required under the Amended Order to conduct remand

³ Similar to the statute, Department Rule 412, IDAPA 37.01.01.412. provides:

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.

proceedings consistent with the terms and conditions of the Stipulation.” Thus, the Amended Order and Stipulation do, as Protestants state, “control[] [IDWR’s] actions, decisions and all orders, rulings on evidence and all other matters during the remand proceedings,” DQ Motion at 2, at least to the extent that such orders and rulings are within the scope of issues described by the Amended Order (which includes the attached Stipulation and incorporated exhibits).

This does not “prejudice all proceedings . . . against Protestants.” *Id.* at 2. They will have an opportunity to participate in the remand proceedings within the scope dictated by the Amended Order. August 2 Order at 1 (“the Protestants have always been and still remain parties in the contest[ed] matter before IDWR and are entitled to Notice and to participate in the remanded proceedings . . .”). Whether the Amended Order’s terms and exhibits are not to Protestants’ liking is beside the point. The Amended Order describes the law of this case going forward. Protestants had full and fair opportunities to affect those documents’ contents—whether through developing the existing hearing record upon which they were based, through providing comment to IDWR as the settlement was negotiated, or by properly intervening in the Judicial Review Case as a party.

If the Interim Director chose to appoint some other hearing officer, M3 Eagle does not see any apparent reason why he must look outside the Department to do so. There is no indication that all IDWR employees or agents are tainted with bias, prejudice, interest, substantial prior involvement in the case, their employment status, or lack or professional knowledge of the subject matter. I.C. § 67-5252(1). M3 Eagle is aware of IDWR employees with experience acting as hearing officers in contested water right application proceedings who have had no substantive involvement with the M3 Eagle application and who have no apparent bias, prejudice, or self interest.

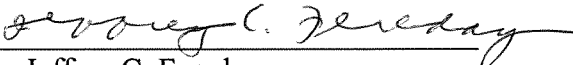
In any case, appointment of an “independent non-departmental hearing officer” would not accomplish the Protestants’ goal of escaping the requirements contained in the Amended Order and Stipulation. An independent hearing officer could not ignore the Amended Order’s requirement that the remand proceedings be conducted as provided for in the Stipulation.

Moreover, an independent hearing officer (in fact, even a non-agency head Department employee serving as hearing officer) could make only a recommended or preliminary decision subject to final review by the Interim Director. I.C. §§ 67-5244, -5245; IDAPA 37.01.01.720.01, .730.01. In other words, even if an independent hearing officer were appointed, the remand proceedings still of course would be limited in scope to the matters set forth in the Amended Order and Stipulation, and the final decision would be made by the Interim Director who is “is obligated . . . to conduct the remand proceedings consistent with the terms and conditions of the Stipulation.” August 2 Order at 2.

Based on the foregoing, M3 Eagle respectfully requests the Interim Director deny the Protestants’ DQ Motion.

Respectfully submitted this 4th day of August, 2011.

GIVENS PURSLEY LLP

By 
Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2011, the foregoing was filed, served, or copied as follows:

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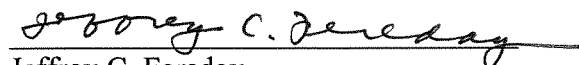
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