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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Preston-Whitney Irrigation Co.

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

IN THE MATTER OF TRANSFER NO.
75705 IN THE NAME OF PRESTON-
WHITNEY IRRIGATION CO.

**PRESTON-WHITNEY IRRIGATION
COMPANY'S RESPONSE IN OPPOSITION
TO MOTION FOR DISQUALIFICATION
OF OFFICERS HEARING CONTESTED
CASES**

Preston-Whitney Irrigation Co. (hereinafter "Preston-Whitney"), by and through their counsel, Robert L. Harris of Holden, Kidwell, Hahn and Crapo, PLLC, hereby submits this *Response In Opposition to Motion for Disqualification of Officers Hearing Contested Cases*.

This matter concerns Preston-Whitney's filing of a Transfer Application on June 15, 2009 pursuant to Idaho Code § 42-222, not the separate Temporary Change Application filed by Preston-Whitney on June 24, 2010 pursuant to Idaho Code § 42-222A. A near verbatim motion asserting a blanket disqualification of Department employees was also filed in conjunction with the Temporary Change Application. However, the analyses under these separate filings is much more searching than the Petitioners submit. For the reasons set forth below, the *Motion to Disqualify* the current hearing officer because of "substantial prior involvement" or bias should be denied.

I. INTRODUCTION

On June 15, 2009, Preston-Whitney filed a Transfer Application to better align its water rights with its historic irrigation practices. On October 8, 2009, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners" or "Protestants"), filed protests against the transfer application. A *Notice of Pre-hearing Conference* was issued by hearing officer James Cefalo on April 20, 2009, setting a pre-hearing conference for May 3, 2010. It was determined at the May 3, 2010 pre-hearing conference to hold a second pre-hearing conference on June 28, 2010 once the Protestants had an opportunity to analyze and understand the information provided to them by Preston-Whitney.

On June 24, 2010, after learning that Franklin County had been the subject of a drought declaration by the Director and Governor, Preston-Whitney submitted a Temporary Change Application seeking use of the Glendale Canal for delivery of its water rights further up the Cub River. After a cursory review, at the June 28, 2010 meeting, the hearing officer indicated that on its

face, it did not appear to be deficient and under IDWR's standards relative to emergency drought temporary transfers, would likely be approved.

This statement regarding the Temporary Change Application is alleged by Petitioners to be substantial prior involvement in the regular Transfer Application, yet the Temporary Change Application was submitted nearly one year after the Transfer Application was filed. For this and the further reasons set for below, Petitioners' *Motion for Disqualification of Officers Hearing Contested Cases*, asserting a blanket disqualification for cause of all employees for the Idaho Department of Water Resources ("IDWR"), except for the Director, should be denied.

II. ARGUMENT

A. Disqualification Statute and Rule.

Petitioners have brought their *Motion for Disqualification of Officers Hearing Contested Cases* pursuant to Idaho Code § 67-5252 and IDAPA 37.01.01.412, which provide the following:

67-5252. Presiding officer -- Disqualification.

(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, 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.

(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; 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.

(3) A person whose disqualification for cause is requested shall determine in writing whether to grant the petition, stating facts and reasons for the determination.

(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.

(5) Where a decision is required to be rendered within fourteen (14) weeks of the date of a request for a hearing by state or federal statutes or rules and regulations, no party shall have the right to a disqualification without cause.

412. DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES (RULE 412).

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), Idaho Code.

B. Petitioners' have no right to assert a "blanket" disqualification of Department employees at this stage of the proceedings because such a petition was not filed before the hearing officer was designated, and further, is not timely at this stage of the proceedings.

Both Idaho Code § 67-5252(2) and Rule 412 provide 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." Yet the hearing officer in this matter has been designated for some time now, and the matter has been pending since objections were filed in October of 2009. If protestants to a water right application could assert blanket disqualification at any stage of an administrative proceeding, the potential for prejudice to the other parties would be significant. Such protestants could wait until right before the actual hearing is set to commence, assert a blanket disqualification, and delay the proceedings further. Stated another way, the blanket disqualification is not absolute. It must be exercised in a timely fashion.

In this matter, the hearing officer—a Department employee—has been designated as the hearing officer, and has conducted two pre-hearing conferences and issued orders pertaining to the matter. No prior objection or assertion of a blanket disqualification was made by the Protestants, and the matter continued for over a year. Therefore, the Protestants' motion must be denied because it is not timely.

This is not to say that other provisions of Rule 412 do not apply, and that the Protestants cannot move to disqualify the hearing officer even after the course of the proceedings has continued for some time. However, disqualification at a later time requires a showing of "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.” In addition to the blanket disqualification, the Petitioners have asserted “substantial prior involvement” and the “potential for bias.” These allegations are without merit, and are addressed in the following section.

C. The Petitioners have provided no evidence of substantial prior involvement by hearing officer James Cefalo. Preston-Whitney affirmatively asserts that there has been no substantial prior involvement by Mr. Cefalo with the Preston-Whitney Transfer Application.

In a mere one page document, Petitioners simply allege that “[d]ue to the status of the employees of the agency in this matter, and their substantial prior involvement, proceeding to a hearing before any of the employees of the Department, except for the Director would be prejudicial to the interests of Petitioners, because of potential for bias and pre-decision by Department employees.”¹ However, the Petitioners’ *Motion for Disqualification* contains no evidence of “substantial prior involvement” of the current hearing officer, James Cefalo. In the absence of such evidence, the motion is not supportable, and must be denied. Certainly more than a conclusory allegation is needed to disqualify Mr. Cefalo at this stage of the proceedings.

To the best of Preston-Whitney’s knowledge, James Cefalo was formerly employed with Water District 01 prior to his appointment as Water Resources Program Manager for the Eastern Region Office of IDWR in February of 2010. Mr. Cefalo’s new position resulted from the retirement of long-time IDWR employee Ernest Carlsen. Mr. Carlsen was employed with IDWR when the Transfer Application was submitted, and indeed, Mr. Carlsen did accompany Tim Luke on a site tour

¹ *Motion for Disqualification of Officers Hearing Contested Cases*, p. 2.

of the Golightly property in 2008. Perhaps if Mr. Carlsen was the hearing officer, Petitioners' motion would have some merit because of some prior involvement. Further, to the best of Preston-Whitney's knowledge, other Eastern Region Staff reviewed the Transfer Application prior to its advertisement and processing. Mr. Cefalo would not have been involved in that review because he was not yet an IDWR employee. He was employed with Water District 01. Additionally, Mr. Cefalo possesses a law degree, has worked for Water District 01 on water-related matters, appears to understand the issues involved in this matter, and surely possesses the skills and technical expertise necessary to function as a hearing officer in this matter. These facts suggest that Mr. Cefalo is more than capable of functioning as the hearing officer.

In short, Mr. Cefalo, has only been recently employed by IDWR within the past six months, which employment was engaged in after the Transfer Application was filed, advertised, and protested. Other than sending notices of the pre-hearing conferences, he does not appear to have had any prior involvement in this matter. Without any prior involvement (other than in his position as the designated hearing officer thus far), the Petitioners certainly cannot meet the "substantial" requirement under the above statute and rule. For these reasons, the Petitioners' *Motion for Disqualification* must be denied.

To the extent that the recently-filed and separate Temporary Change Application is considered by Petitioners' to be substantial prior involvement, such application was not processed prior to the administrative proceedings commencing from the Transfer Application. Indeed, the application is entirely separate, and was reviewed after the Transfer Application had long been filed. To the extent the Director reassigns processing of the Temporary Change Application to persons other than Mr. Cefalo, this is a matter entirely within the Director's discretion in how his staff

performs their day-to-day functions within the inner workings of IDWR. Yet, this does not mean that Mr. Cefalo should be disqualified as the hearing officer in the separate Transfer Application.

D. Petitioners have provided no evidence that Hearing Officer Cefalo is biased in this matter, or that there is a potential for bias.

Petitioners allege that if Mr. Cefalo is allowed to continue as the hearing officer, it would be “prejudicial to the interests of Petitioners, because of potential for bias and pre-decision by Department employees.”² An allegation of bias is a much more significant and searching inquiry than Petitioners assert. A person is not biased or has the potential to become biased simply because a person may have some knowledge of an application, or of a separate application involving the same applicant.

Allegations pertaining to bias within the Department were recently made in the Idaho Supreme Court case of *In re Idaho Department of Water Resources Amended Final Order Creating Water District No. 170, Thompson Creek Mining Company v. Idaho Department of Water Resources*, 148 Idaho 200, P.3d 318, (2009).³ This case centered on IDWR’s decision to create a new water district. Thompson Creek Mining Company argued that the Director of IDWR was biased and should have been disqualified because of slides presented by the Director at a public hearing stating that IDWR must establish WD170. Thompson Creek argued further that the Director’s knowledge of the Wild and Scenic Rivers Agreement improperly predisposed him to create WD170.

² *Motion for Disqualification* at 2.

³ Counsel for the Appellants Thompson Creek Mining Company were represented by Dylan Lawrence of Moffat, Thomas, Barrett, Rock and Fields, Chtd. The Idaho Department of Water Resources was represented by Deputy Attorney General Andrea Courtney.

Calling Thompson Creek's arguments "misguided," the Supreme Court held that "[a] decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances."⁴

Petitioners are making similar arguments in this case. They base their motions on perceived "substantial prior involvement" and a statement made by James Cefalo at a pre-hearing conference that Preston-Whitney's separately-filed Temporary Change Application would likely be approved by the Department. Yet, they have produced no evidence to prove that there has been any substantial prior involvement by Mr. Cefalo or, more importantly, that Mr. Cefalo is not capable of judging the controversy fairly on the basis of its own circumstances, which is the standard established by the Idaho Supreme Court. In the *Thompson Creek* case, the Supreme Court stated that:

The director believed that the creation of WD170 was necessary for the proper administration of water rights within the district area, which is the reason the public hearing was convened. His preliminary belief that WD170 should be created does not mean that the Director was not capable of judging that particular controversy fairly on the basis of its own circumstances.⁵

Similarly in this case, Mr. Cefalo's belief that the Department would likely approve the Temporary Change Application does not indicate bias, substantial prior involvement, nor that he is incapable of judging the controversy on the basis of its own circumstances as to the Transfer Application. Even if the Temporary Change Application is considered to be "related," the Idaho Supreme Court

⁴ *In re Idaho Department of Water Resources Amended Final Order Creating Water District No. 170, Thompson Creek Mining Company v. Idaho Department of Water Resources*, 148 Idaho 200, P.3d 318, 326 (2009) (internal citations omitted).

⁵ *Id.* at 327.

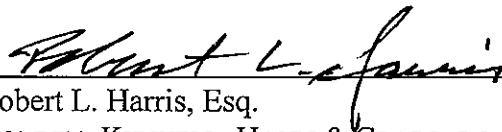
standard is that it must be shown that the hearing officer is not capable of judging a particular controversy fairly on the basis of its own circumstances. Absent some proof to meet this high standard, Mr. Cefalo should not be disqualified.

In short, there is no evidence that Mr. Cefalo is biased, or has the potential for bias, or that he is incapable of judging the controversy on the basis of its own circumstances. Without such evidence, the Petitioners' *Motion for Disqualification* is without merit and must be denied.

III. CONCLUSION

Petitioners have provided no evidence of any substantial prior involvement of Mr. Cefalo that would merit his disqualification in this matter. Furthermore, they have provided no evidence that Mr. Cefalo is not capable of judging the Transfer Application matter fairly on the basis of its own circumstances, even if Mr. Cefalo is responding to and processing, along with other IDWR staff, Preston-Whitney's Temporary Change Application. Accordingly, the Petitioners *Motion for Disqualification of Officers Hearing Contested Cases* should be denied.

DATED this 16th day of July, 2010.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 16th day of July, 2010.

**DOCUMENT SERVED: PRESTON-WHITNEY IRRIGATION COMPANY'S
RESPONSE IN OPPOSITION TO MOTION FOR
DISQUALIFICATION OF OFFICERS HEARING
CONTESTED CASES**

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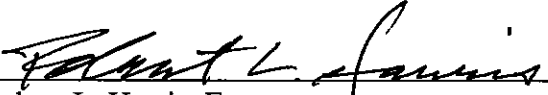
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I. INTRODUCTION

On June 15, 2009, Preston-Whitney filed a Transfer Application to better align its water rights with its historic irrigation practices. On October 8, 2009, Eldon and Mary Ann Golightly, Grant and Linda Chadwick, Bert and Laura Wheatley, Seth and Beth Wheatley, and Wheatley Properties, LLC, (hereinafter, collectively "Petitioners" or "Protestants"), filed protests against the transfer application. A *Notice of Pre-hearing Conference* was issued by hearing officer James Cefalo on April 20, 2009, setting a pre-hearing conference for May 3, 2010. It was determined at the May 3, 2010 pre-hearing conference to hold a second pre-hearing conference on June 28, 2010 once the Protestants had an opportunity to analyze and understand the information provided to them by Preston-Whitney.

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II. ARGUMENT

A. Disqualification Statute and Rule.

Petitioners have brought their *Motion for Disqualification of Officers Hearing Contested Cases* pursuant to Idaho Code § 67-5252 and IDAPA 37.01.01.412, which provide the following:

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B. Petitioners' have no right to assert a "blanket" disqualification of Department employees at this stage of the proceedings because such a petition was not filed before the hearing officer was designated, and further, is not timely at this stage of the proceedings.

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C. The Petitioners have provided no evidence of substantial prior involvement by hearing officer James Cefalo. Preston-Whitney affirmatively asserts that there has been no substantial prior involvement by Mr. Cefalo with the Preston-Whitney Transfer Application.

In a mere one page document, Petitioners simply allege that “[d]ue to the status of the employees of the agency in this matter, and their substantial prior involvement, proceeding to a hearing before any of the employees of the Department, except for the Director would be prejudicial to the interests of Petitioners, because of potential for bias and pre-decision by Department employees.”¹ However, the Petitioners’ *Motion for Disqualification* contains no evidence of “substantial prior involvement” of the current hearing officer, James Cefalo. In the absence of such evidence, the motion is not supportable, and must be denied. Certainly more than a conclusory allegation is needed to disqualify Mr. Cefalo at this stage of the proceedings.

To the best of Preston-Whitney’s knowledge, James Cefalo was formerly employed with Water District 01 prior to his appointment as Water Resources Program Manager for the Eastern Region Office of IDWR in February of 2010. Mr. Cefalo’s new position resulted from the retirement of long-time IDWR employee Ernest Carlsen. Mr. Carlsen was employed with IDWR when the Transfer Application was submitted, and indeed, Mr. Carlsen did accompany Tim Luke on a site tour

¹ *Motion for Disqualification of Officers Hearing Contested Cases*, p. 2.

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performs their day-to-day functions within the inner workings of IDWR. Yet, this does not mean that Mr. Cefalo should be disqualified as the hearing officer in the separate Transfer Application.

D. Petitioners have provided no evidence that Hearing Officer Cefalo is biased in this matter, or that there is a potential for bias.

Petitioners allege that if Mr. Cefalo is allowed to continue as the hearing officer, it would be “prejudicial to the interests of Petitioners, because of potential for bias and pre-decision by Department employees.”² An allegation of bias is a much more significant and searching inquiry than Petitioners assert. A person is not biased or has the potential to become biased simply because a person may have some knowledge of an application, or of a separate application involving the same applicant.

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² Motion for Disqualification at 2.

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Calling Thompson Creek's arguments "misguided," the Supreme Court held that "[a] decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances."⁴

Petitioners are making similar arguments in this case. They base their motions on perceived "substantial prior involvement" and a statement made by James Cefalo at a pre-hearing conference that Preston-Whitney's separately-filed Temporary Change Application would likely be approved by the Department. Yet, they have produced no evidence to prove that there has been any substantial prior involvement by Mr. Cefalo or, more importantly, that Mr. Cefalo is not capable of judging the controversy fairly on the basis of its own circumstances, which is the standard established by the Idaho Supreme Court. In the *Thompson Creek* case, the Supreme Court stated that:

The director believed that the creation of WD170 was necessary for the proper administration of water rights within the district area, which is the reason the public hearing was convened. His preliminary belief that WD170 should be created does not mean that the Director was not capable of judging that particular controversy fairly on the basis of its own circumstances.⁵

Similarly in this case, Mr. Cefalo's belief that the Department would likely approve the Temporary Change Application does not indicate bias, substantial prior involvement, nor that he is incapable of judging the controversy on the basis of its own circumstances as to the Transfer Application. Even if the Temporary Change Application is considered to be "related," the Idaho Supreme Court

⁴ *In re Idaho Department of Water Resources Amended Final Order Creating Water District No. 170, Thompson Creek Mining Company v. Idaho Department of Water Resources*, 148 Idaho 200, P.3d 318, 326 (2009) (internal citations omitted).

⁵ *Id.* at 327.

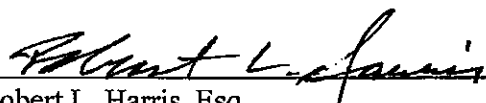
standard is that it must be shown that the hearing officer is not capable of judging a particular controversy fairly on the basis of its own circumstances. Absent some proof to meet this high standard, Mr. Cefalo should not be disqualified.

In short, there is no evidence that Mr. Cefalo is biased, or has the potential for bias, or that he is incapable of judging the controversy on the basis of its own circumstances. Without such evidence, the Petitioners' *Motion for Disqualification* is without merit and must be denied.

III. CONCLUSION

Petitioners have provided no evidence of any substantial prior involvement of Mr. Cefalo that would merit his disqualification in this matter. Furthermore, they have provided no evidence that Mr. Cefalo is not capable of judging the Transfer Application matter fairly on the basis of its own circumstances, even if Mr. Cefalo is responding to and processing, along with other IDWR staff, Preston-Whitney's Temporary Change Application. Accordingly, the Petitioners *Motion for Disqualification of Officers Hearing Contested Cases* should be denied.

DATED this 16th day of July, 2010.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 16th day of July, 2010.

**DOCUMENT SERVED: PRESTON-WHITNEY IRRIGATION COMPANY'S
RESPONSE IN OPPOSITION TO MOTION FOR
DISQUALIFICATION OF OFFICERS HEARING
CONTESTED CASES**

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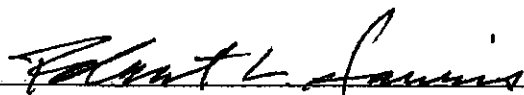
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