

Memorandum

To: John Homan, Deputy Attorney General, Office of the Attorney General

From: Gary Spackman, IDWR Interim Director *Gary S* 3/24/2010

Date: March 9, 2010

Re: Request for Guideline from Attorney General's Office Regarding Potential Watermaster Conflict of Interest in Water District No. 34

Pursuant to Idaho Code § 42-605(9) and (10), the Director of the Idaho Department of Water Resources (Director or Department) is authorized to appoint and remove watermasters of water districts that have been created by the Department. A water district watermaster is elected annually by the water users present at an annual water district meeting and subsequently appointed by the Director upon submission of annual meeting minutes by the meeting chairman and secretary, and upon completion and submission of an oath of office by the elected watermaster.

Last week the water users of Water District No. 34 at their regular annual meeting elected a watermaster who is currently serving on the Board of Directors of the Big Lost River Irrigation District (BLRID). The BLRID, who holds storage water rights in Mackay Reservoir and delivers stored water to numerous ditches below the reservoir between Mackay and Arco, is the largest single water delivery entity in Water District 34. As you know, Phil Rassier received an e-mail inquiry from BLRID's attorney, Kent Fletcher, inquiring as to who at the Attorney General's Office he should contact "for an opinion on whether this situation creates an inherent conflict of interest." A copy of the e-mail correspondence from Mr. Fletcher to Phil is attached. Given that Phil is retiring from state service effective March 11, 2010, I wish to ask that you prepare a written guideline to me concerning this particular watermaster conflict of interest question. Specifically, is it appropriate for the Director to appoint a person elected at an annual water district meeting to the position of watermaster if that person is also serving as a member of the board of directors of an irrigation district that is the largest water right owner in the water district?

Rassier, Phil

From: Kent Fletcher [wkf@pmt.org]
Sent: Wednesday, March 03, 2010 10:18 AM
To: Rassier, Phil
Subject: Big Lost River Irrigation District

Phil,

Have another interesting situation dealing with BLRID. A water user named Jay Jensen was part of a group that recently sued the district concerning the manner of operation of some of the canals.

Simultaneously, he ran for Director of the district and won in the November election and was sworn in at the January meeting. His attorney then amended the complaint to remove him as a party and the suit has gone forward, although I've advised the board that he should not be participating in any discussions or decisions pertaining to the suit.

To complicate matters, he was just elected Basin 34 water master, defeating the incumbent water master. As you know, the BLRID delivery system is very complex, with the water master overseeing delivery of the district's storage rights and individual natural flow rights at multiple diversion points along the Big Lost River. Over the years there have been many controversies between the District and the water master, particularly concerning claims that the water master was not doing his job properly and allowing various water users to pressure him into allowing diversions that were contrary to the rights of the District and other water users located in the District. There have also been issues concerning ground water rights including curtailment issues.

Even though he is in charge of overseeing deliveries to the district and to natural flow users in the district, Mr. Jensen does not believe there is any conflict with him being on the board of BLRID and simultaneously serving as water master. Other directors differ with Mr. Jensen's opinion. Who should I contact at the AG's office for an opinion on whether this situation creates an inherent conflict of interest? In addition, does IDWR have a problem with the water master sitting on the board? Thanks for any help you can provide.

Kent



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

MEMORANDUM

TO: Gary S. Spackman
Director

FROM: John W. Homan 
Deputy Attorney General

DATE: March 22, 2010

RE: Watermaster Conflict of Interest Water District No. 34

This memorandum is provided in response to the request for guidance from the Director of the Idaho Department of Water Resources dated March 9, 2010. In the request for guidance, the Director posed the question whether it is appropriate to appoint an individual to the office of watermaster who is planning to continue to sit as a member of the board of directors of an irrigation district that is the largest water right owner in the water district?

Under Chapter 6, Title 42 of the Idaho Code, the Idaho Department of Water Resources (Department) is charged with supervision over water distribution in the state. Idaho Code Section 42-604 provides that water districts created for the essential government function of water distribution are considered an instrumentality of the State of Idaho. Water districts as instrumentalities of the state exist for the purpose of assisting the Department in carrying out its statutory duty of distributing the public waters of the state in accordance with the rights of prior appropriation. Under Idaho Code Section 42-607, watermasters elected by the waterusers within the water district and appointed by the Director maintain a duty to distribute the waters of the public water supply under the direction of the Department. Watermasters are public officers and serve as an extension of the Department to aid in the distribution of water. Big Wood Canal Co. v Chapman, 45 Idaho 380, 391(1927). As public officers, watermasters are subject to certain ethical laws, including conflict of interest provisions, designed to protect the public interest and as state officers benefit from legal services provided by the Office of the Attorney General.

The Rules of the Division of Human Resources & Idaho Personnel Commission (Personnel Rules) require all appointing authorities to establish policies and standards necessary to prevent conflicts of interest for employees. (IDAPA 15.04.01.24). The Department is considered an appointing authority under these rules and the Director is required by statute to make various appointments, including watermaster appointments. Although Idaho Code Section 42-605 does not identify standards for the appointment or removal of watermasters by the Director, the Department does maintain an official written policy for "Employee Conduct" which does address conflict of interest issues. Attached hereto are excerpts entitled "Outside Activities" and "Private Interests" from the official policy on Employee Conduct issued by the Idaho Department of Water Resources. Absent specific statutory standards for appointment, it is reasonable for the Director to apply the Personnel Rules and the Department's policy for employee conduct when appointing watermasters.

Consistent with the Personnel Rules and the Department's Employee Conduct policy to prevent conflicts of interests, water district watermasters should not accept or serve on any board in which an opportunity for conflict of interest might arise between the activity and the watermaster without written approval from the director.

In this case, the individual elected as watermaster in Water District No. 34 currently sits on the board of directors for the Big Lost River Irrigation District. Once appointed, the watermaster is under a duty and takes an oath to distribute water according to law under the supervision of the Director. Idaho Code Section 43-304 prescribes that the business of the irrigation district is the delivery of water to its members under the supervision of the board of directors. Under Idaho Code Section 43-204B, board members of an irrigation district maintain a duty of loyalty and a fiduciary duty to act in the best interest of the district. Additionally, under Idaho Code Section 43-202, board members of irrigation districts are required to take an oath and execute a bond. An individual seeking to serve as watermaster while sitting on the board of directors of an irrigation district will be required to carry out water distribution duties that may conflict and may be contrary to the best interests of the irrigation district. Although some decisions made by the watermaster and irrigation district concerning water distribution could occasionally be compatible, opportunities for conflict of interests will be commonplace.

Given that water distribution is the core activity and central purpose in both the water district and the irrigation district, the opportunities for conflict would not be occasional but instead continual, thereby making any recusal alternative repetitive, inefficient and potentially compromising the water distribution responsibilities of the respective districts. Because an individual seeking to hold both the office of watermaster and a seat on the board of directors for an irrigation district must take an oath to each, he or she contemporaneously incurs a duty of loyalty to each. As such, the watermaster's statutory duties may often conflict with the irrigation district's board member's duty of loyalty to the irrigation district. This relationship will create a problematic conflict of interest that should be resolved before the appointment as watermaster can proceed forward.

The Department's Employee Conduct Policy does not specifically identify watermasters, but the language in the policy is clearly meant to prevent Department employees from being placed in a position where a conflict of interest might arise. Although the director does retain the

discretion to make exception from the Department's policy, the preferable alternative is for director to follow the existing Department employee conduct policy and not appoint an individual who sits on the board of directors of an irrigation district as watermaster. The appointment may go forward if conflict is resolved in the event the individual elects to resign from the irrigation district board of directors.

All who accept public office, whether elected or appointed, also accept an ethical duty to serve honestly and in the public's interest. While the state and the people must demand compliance with Idaho's ethics laws, public officials should understand that these laws set a minimum standard of behavior. Crossing these lines can result in fines and incarceration. Responsible and ethical public officials hold themselves to an even higher standard than mere compliance.

IDAHO DEPARTMENT OF WATER RESOURCES

EMPLOYEE CONDUCT

OUTSIDE ACTIVITIES

The Department neither encourages nor objects to employees taking outside employment. However, such employment must be compatible with the role of the employee as a public employee. The employment must not conflict with the best interest of the Department or the proper performance of the employee's responsibilities. Employees must avoid outside compensated employment in water resources energy conservation in the State of Idaho or on matters which affect the State of Idaho.

Employees shall not accept or serve in any policy-making position or office of an organization, board or commission in which an opportunity for conflict of interest might arise between the activity and department employment, except upon written approval of the Director.

All employees who have outside compensated employment are to submit a written statement describing such employment for concurrence by the Director and a copy forwarded to the HR Manager for the employee's personnel file.

No employee may make use of state equipment, facilities, time or public contacts in furtherance of any compensated outside employment. No employee shall influence the award of a contract from which they shall personally benefit, directly or indirectly.

Any employee, regardless of position or status within the Department, who indulges in activities that are contrary to the Department's policies, may be subject to discharge or other disciplinary action.

PRIVATE INTERESTS

Any activity performed in the course of employment which might have the appearance of impropriety or preferential treatment of family or relatives, significant other, etc., is prohibited.

Employees shall not profit, directly or indirectly from public funds under their control.

Contracting – Employees shall not have a private interest in any contract, or grant or other written agreement made by them in their official capacity.

Employees may not contract with the Department of Water Resources or with another state agency or entity within state government. To prevent the appearance of impropriety in department contracts, the employee should refrain from disclosing insider, proprietary or confidential information to family, friends or business associates. This is especially so when there are or could be reasonable perceptions drawn that unfair contracting practices have occurred because of these relationships to employees.

Employees should not act, but withdraw from any matter coming before them in the course of their official duties, if they or their family, relatives significant other, etc., have a private interest in it. For example, if any employee has a private interest in, or is likely to become interested in, a contract of IDWR, the employee should not take part in the preparation or approval of the contract or bid specifications.