



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

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C.L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Director

February 5, 2013

Ron Shurtleff  
Watermaster, Water District 65  
102 North Main St  
Payette, ID 83661

Re: Potential Conflict of Interest

Dear Mr. Shurtleff,

The Idaho Department of Water Resources (IDWR or Department) received your correspondence dated January 17, 2013. In your letter, you ask whether your appointment as watermaster of Water District 65 (WD65) and potentially serving on the board of directors for the Lower Payette Ditch Company (LPDC) would be a conflict of interest. The LPDC holds water rights from the Payette River that are delivered by you as watermaster of WD65.

Based on recent discussions you've had with IDWR staff, I believe you are aware that the Idaho Attorney General issued an opinion in 2010 about a different water district watermaster who was also serving as a director of an irrigation district (see attached Attorney General's opinion dated April 6, 2010). As I interpret the opinion, the law does not directly prohibit you from serving in both the watermaster and the canal company board of director positions. Nonetheless, a watermaster is considered an employee of the Department, and must adhere to the Department's guidelines of employee conduct. Importantly, the opinion stated:

... [T]he conflict of interest provisions of the Department's "Employee Conduct" policy generally would bar the same person from simultaneously serving as the WD34 watermaster and as a director of the BLRID. The Department's policy has an important exception, however: it does not apply "upon written authorization of the Director."

The granting of the authority to except from the general prohibition to you serving in both positions does not excuse you or me from our responsibilities to prevent the conflicts and appearances of conflict that the provisions of the Department's Employee Conduct protect against. As a result, I will appoint you as watermaster of WD65 but will expect the following actions in both your role as watermaster and as a LPDC director:

1. In any activities of the LPDC board, whether you are acting independently as a board member or collectively as an entire board, you must identify any possible conflict between the board activity and your watermaster responsibility.

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You cannot excuse yourself from your watermaster duties when there is a conflict. As a result, you must openly identify the conflict to avoid the appearance of conflict and recuse yourself from the LPDC activity when it conflicts or may conflict with your watermaster duties.

2. You should not receive any monetary compensation or pecuniary benefits for serving as a BLRID director, regardless of how small the compensation may be.

Note that the requirements listed above are intended to address potential conflict of interest issues that may arise. These requirements can be withdrawn from your duties if the conflict of interest is no longer present.

Congratulations on your re-election as watermaster. The Department appreciates the job that you have done in this position. Your strong work ethic, integrity and dedication to the WD65 watermaster position has made this authorization possible. I have great trust in you. Please contact me if you have any further questions or concerns on this matter. Your certificate of appointment for the ensuing year will be forwarded to you separately by the regional office.

Sincerely,



Gary Spackman  
Director

Enclosures: Attorney General Opinion, April 6, 2010 & IDWR Employee Conduct Policy

C: John Westra, IDWR Western Region Manager  
Lower Payette Ditch Company



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

April 6, 2010

Senator Steve Bair  
947 W. 200 S.  
Blackfoot, Idaho 83221

Senator Jeff C. Siddoway  
1764 E. 1200 N.  
Terreton, Idaho 83450

Dear Senator Bair and Senator Siddoway:

You have requested legal guidance from the Office of the Attorney General regarding potential conflicts of interest issues that may arise if a person who is on the board of directors of the Big Lost River Irrigation District ("BLRID") also serves simultaneously as the watermaster for Water District No. 34 ("WD34"). The BLRID is located in Butte and Custer counties and within WD34, and is one of the largest water users in WD34, if not the largest.

### QUESTIONS PRESENTED

Your inquiry encompasses two analytically distinct but related questions:

1. May a member of the board of directors of the Big Lost River Irrigation District simultaneously serve as the watermaster for Water District No. 34?
2. If a member of the board of directors of the Big Lost River Irrigation District simultaneously serves as the watermaster for Water District No. 34, how should potential conflicts of interest be addressed?

### CONCLUSIONS

1. Yes, a person may simultaneously serve on the BLRID board and as watermaster for Water District 34, but only with the approval of the Director of the Department of Water Resources. Idaho law does not explicitly bar the same person from simultaneously serving as a

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watermaster and as an irrigation district director. The Ethics in Government Act only requires the watermaster to disclose potential conflicts of interest, and the Idaho Code's requirements that officers devote their full time to their official duties and not accept pecuniary benefits from persons subject to their regulatory or administrative authority do not appear to bar watermasters from serving on the board of an irrigation district and being compensated for such service. Moreover, the common law doctrine of incompatible offices also does not apply because the position of director of the BLRID is a private position rather than a public office. The Department of Water Resources' employee conflict of interest policy, however, applies to the watermaster and precludes the watermaster from also being a director of the BLRID absent the consent of the Director.

2. If a member of the board of directors of the BLRID simultaneously serves as the watermaster for Water District No. 34, the person must disclose to the Director, as required by the Ethics in Government Act, any actual or potential conflicts of interest that arise as a result of simultaneously serving as a director of the BLRID. Provided the watermaster makes such required disclosures, the watermaster need not be recused and may continue to perform the functions and duties of the watermaster's office. Pursuant to his broad authority to supervise and instruct the watermaster, however, the Director may appoint the board member to the position of watermaster subject to specific instructions for addressing any actual or potential conflict of interest, or may take direct control of the watermaster's water distribution duties in the event of an actual conflict of interest after appointment.

## ANALYSIS

### **I. May A Member Of The Board Of Directors Of The Big Lost River Irrigation District Simultaneously Serve As The Watermaster For Water District No. 34?**

No provision of the Idaho Code and no reported decision of the Idaho Supreme Court or the Idaho Court of Appeals address the question of whether the same person may simultaneously serve as a watermaster<sup>1</sup> and as a director of an irrigation district located in the same water district. In the absence of such controlling authority, your question is appropriately analyzed under applicable provisions of the Idaho Code, the common law doctrine of incompatible offices, and the Department of Water Resources' policy relating to conflicts of interest.

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<sup>1</sup> The term "watermaster" as used herein refers only to a watermaster elected and appointed to distribute water in a water district pursuant to chapter 6, title 42 of the Idaho Code.

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**A. The Idaho Ethics In Government Act Of 1990.**

The Ethics in Government Act of 1990 (“Ethics in Government Act”), Idaho Code §§ 59-701 – 59-705, is intended to, among other things, assure the impartiality of public officials, inform citizens of potential conflicts of interest between an official’s public trust and private concerns, prevent public office from being used for personal gain, prevent special interests from unduly influencing governmental actions, and assure that governmental functions and policies reflect the public interest. Idaho Code § 59-702.

Under the Ethics in Government Act, actual or potential conflicts of interest must be disclosed, but they do not require recusal or removal from office. Provided an official’s potential conflicts of interest are properly disclosed as provided in the act, Idaho Code §§ 59-704(1)-(5), the official may still fulfill his or her duties:

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.

Idaho Code § 59-704. Thus, the Ethics in Government Act does not bar the same person from simultaneously serving as watermaster for WD34 and as a director of the BLRID.

**B. Idaho Code § 59-511: Officers To Devote Entire Time To Duties.**

Idaho Code section 59-511 provides, in relevant part: “Each executive and administrative officer shall devote his entire time to the duties of his office and shall hold no other office or position of profit.” Idaho Code § 59-511. This statute would bar the watermaster for WD34 from simultaneously serving as a director of the BLRID if a watermaster is an “executive or administrative officer,” and if a BLRID directorship is an “office or position of profit.” *Id.*

While neither section 59-511 nor any other provision of chapter 5 of title 59 defines these statutory terms, the chapter’s focus on the state treasury and legislative appropriations suggests that a watermaster is not an “officer” for purposes of the statute. Chapter 5 of title 59 addresses “Salaries of Officers” and is concerned with officers whose salaries are paid out of “the state treasury” pursuant to legislative appropriations. Idaho Code §§ 59-501, 59-503, 59-508. The Legislature has specifically provided that watermasters’ salaries are not paid out of the state

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treasury or pursuant to legislative appropriations, but rather are paid by the water districts, and are charged against the lands of the water users in the water district. Idaho Code §§ 42-610, 42-612, 42-613, 42-618. Thus, the statutory structure of which Idaho Code section 59-511 is a part, and the purposes it serves, suggest that a watermaster is not an “executive or administrative officer” for purposes of the statute. See *Xerox Corp. v. Ada County Assessor*, 101 Idaho 138, 141, 609 P.2d 1129, 1132 (1980) (holding that statutes that are in pari materia “must be construed to effect a common purpose”).<sup>2</sup>

This conclusion is supported by the fact that in the absence of a resolution by the water users of a water district authorizing the watermaster to work throughout the year, a watermaster works—and is paid—only during the irrigation season. Idaho Code § 42-608. Moreover, in smaller water districts, the watermaster position is often a part-time position. Thus, if Idaho Code section 59-511 applies to watermasters, it would bar a person who serves as watermaster during part of the year from obtaining employment during the remainder of the year, and would also bar a part-time watermaster from holding another job.<sup>3</sup> This would impose an economic hardship on watermasters and discourage qualified persons from seeking the position. It is unlikely the Legislature intended such a result.

### C. Idaho Code § 18-1356.

Idaho Code section 18-1356 provides that the public servants of an “agency exercising regulatory functions” may not “accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation.” Idaho Code § 18-1356(1). The statute further provides that public servants having “administrative authority” may not “accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant.” Idaho Code § 18-1356(3).

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<sup>2</sup> No reported decision of the Idaho Supreme Court or the Idaho Court of Appeals has held that Idaho Code section 59-511 applies to watermasters, and this office is not aware of any such holding by any Idaho court. It should be noted, however, that the Idaho Supreme Court has referred to a watermaster as an “administrative officer” in some other contexts. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 390, 263 P. 45, 48 (1927); *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 20, 47 P.2d 916, 919 (1935); *Mays v. District Court of Sixth Judicial Dist. in and for Butte County*, 34 Idaho 200, 206, 200 P. 115, 116 (1921).

<sup>3</sup> Further, the office of director of the BLRID might not constitute an “office or position of profit” for purposes of Idaho Code section 59-511. The only payments to directors authorized by the BLRID’s bylaws are reimbursements for expenses, and “a minimum sum” for each day spent attending board meetings or while engaging in official business. *Big Lost River Irrigation District By-Laws And Policies 2004* at 8 (Article III § 6). Reimbursements for expenses probably would not be deemed “profit,” and even the “minimum sum” might not constitute a “profit.” Attending board meetings or engaging in BLRID business, for example, could result in a loss of income the director otherwise would have received in pursuing his or her occupation. Thus, a court might conclude that the “minimum sum” a director receives is not “profit” but simply mitigation for such a loss.

The Department exercises the “regulatory function” of distributing water to the water users in WD34, and the watermaster is subject to the Director’s control, direction and supervision in such matters. Idaho Code §§ 42-602, 42-607, 42-613A. Further, the BLRID is “subject to such regulation,” and the BLRID’s payments to directors could qualify as a “pecuniary benefit.” Idaho Code § 18-1356(1). Thus, Idaho Code section 18-1356(1) could be interpreted as barring the WD34 watermaster from serving simultaneously as a BLRID director. For similar reasons, Idaho Code section 18-1356(3) also could be interpreted as establishing the same bar.<sup>4</sup>

Such an interpretation is unlikely, however, because Idaho Code section 18-1356 is a criminal statute addressing “bribery and corruption,” and includes an exception that probably would apply to the question at hand. Under this exception, the prohibitions of Idaho Code section 18-1356(1) and (3) do not apply to “fees” or “any other benefit” to which the recipient “is otherwise legally entitled.” Idaho Code § 42-1836(5)(a). The “minimum sum” and expense reimbursements the BLRID pays to its directors probably constitute a “fee” or “other benefit” to which the directors are “legally entitled” under the BLRID’s bylaws and title 43 of the Idaho Code, which governs irrigation districts. Thus, Idaho Code section 18-1356 would not bar the WD34 watermaster from simultaneously serving as a BLRID director.

#### **D. The Common Law Doctrine Of Incompatible Offices.**

The common law doctrine of incompatible offices applies in determining whether there is an inherent conflict of duties between two public offices.<sup>5</sup> *See generally* 63C Am. Jur. 2d *Public Officers and Employees* § 58 (discussing the “nature and determination of incompatibility”). Under the incompatible offices doctrine, the same person may not simultaneously hold two public offices that are inherently incompatible. *Stolberg v. Caldwell*, 402 A.2d 763, 773 (Conn. 1978).

The threshold inquiry for purposes of an incompatibility analysis is whether both of the offices in question are governmental or public offices, because the incompatibility doctrine only applies to incompatible public offices. *See Coyne v. State ex rel. Thomas*, 595 P.2d 970, 973 (Wyo. 1979) (“Incompatibility of office or position requires the involvement of two governmental offices or positions”); 63C Am. Jur. 2d *Public Officers and Employees* § 60

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<sup>4</sup> The WD34 watermaster’s statutory authority to distribute water to the water users in WD34 probably would constitute “administrative authority,” and the BLRID would be “interested” in any “matter” of water distribution pertaining to its water rights that came before the watermaster. Idaho Code § 18-1356(3).

<sup>5</sup> A common law inquiry is appropriate because the Idaho Code provides that the common law provides the rule of decision “in all cases not provided for in these compiled laws.” Idaho Code § 73-116; *see also* Attorney General Opinion 91-7 (Aug. 5, 1991), at 9-10 & n.9 (discussing application of the common law doctrine of incompatibility to the offices of watermaster and water district treasurer).

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(similar); Lawrence G. Wasden, *Idaho Ethics in Government Manual* (Idaho Office of the Attorney General) (Aug. 2008) at 20 (“one person holding two public offices”); Bill Lockyer, *Conflicts of Interest* (Office of the Attorney General, California Dept. of Justice), at 114 (2004) (“the doctrine concerns a conflict between potentially overlapping public duties. . . . To fall within the common law doctrine of incompatible offices, two elements must be present. First, the official in question must hold two public offices simultaneously.”) (citation omitted).<sup>6</sup>

Any potential incompatibility between a public office and a private office is addressed under a traditional conflict of interest analysis. The incompatible offices doctrine is not the same as a traditional conflict of interest analysis, and the two should not be confused or be viewed as interchangeable. See Lockyer, *Conflicts of Interest* at 114 (distinguishing “the doctrine of incompatibility of offices on the one hand and the conflict-of-interest notion of incompatible activities on the other”); *Coyne*, 595 P.2d at 973 (explaining that “incompatibility of office or position is not the same as conflict of interest”); *Detroit Area Agency on Aging v. Office of Services to the Aging*, 534 N.W.2d 229, 233 (Mich. Ct. App. 1995) (distinguishing “incompatibility” and “conflict of interest”).

For purposes of your inquiry, it is assumed that the office of watermaster for WD34 is a “public office” under an incompatibility analysis. Determining whether the office of director of the BLRID is a “public office” requires a brief review of applicable Idaho law.

The BLRID is an irrigation district established pursuant to title 43 of the Idaho Code. Under Idaho law, an irrigation district “is a public corporation having such incidental municipal powers as are necessary to its internal management and the proper conduct of its business.” *Barker v. Wagner*, 96 Idaho 214, 217, 526 P.2d 174, 177 (1974) (citation omitted). The “primary purpose” of an irrigation district is to acquire and operate an irrigation system “as a business enterprise for the benefit of land owners within the [irrigation] district.” *Id*; see also *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 587, 548 P.2d 80, 87 (1976) (“an irrigation district’s primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of its shareholders.”). Thus, an irrigation district holds title to water rights and other property in trust for the benefit of its shareholders. Idaho Code § 43-316; *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 158 n.1, 219 P.3d 804, 805 n.1 (2009).

In short, irrigation districts are structured and intended to create private rather than public benefits. The Idaho Supreme Court’s decision in *Brizendine* is instructive on this point. In *Brizendine*, the Court explained that the Idaho Tort Claims Act does not protect irrigation districts because unlike a “municipal or public corporation,” the primary purpose of irrigation districts is not to promote “the welfare of the general public” or “the public good,” but rather to

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<sup>6</sup> This document may be viewed at the following URL: <http://ag.ca.gov/publications/coi.pdf>.



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acquire and operate “an irrigation system as a business enterprise for the benefit of its shareholders.” *Brizendine*, 97 Idaho at 587, 548 P.2d at 87.

Consistent with the private purposes and benefits of an irrigation district, its directors are elected by its shareholders, not the general public. Idaho Code § 43-201 Further, the directors owe a fiduciary duty and a duty of loyalty to the irrigation district and its shareholders, Idaho Code § 43-204B, not to the general public. Thus, it is unlikely that the office of director of an irrigation district is a “public office” for purposes of an incompatibility analysis under Idaho law. The doctrine of incompatible offices therefore would not bar the same person from simultaneously serving as WD34 watermaster and as a director of the BLRID.

It is important to note that this conclusion does not mean that the duties of the WD34 watermaster and those of a director of the BLRID are “compatible” or would never conflict. As previously discussed, the incompatible offices doctrine cannot be substituted for a traditional conflict of interest analysis. Further, the Department’s conflict of interest policy provides that Department employees may not simultaneously hold a private office that is not compatible with their public office functions. The next section discusses the application of these policies to your inquiry.

#### **E. The Department’s Employee Policy On Conflicts Of Interests.**

The Rules of the Division of Human Resources and Personnel Commission (“Personnel Rules”) require all “appointing authorities” to establish the policies and standards “necessary to prevent conflicts of interest.” IDAPA 15.04.01.024. The Director is subject to this obligation because he is statutorily authorized to appoint the watermasters for water districts. Idaho Code § 42-605(3); *see also* IDAPA 15.04.01.010.06; Idaho Code § 67-5302(3) (defining “appointing authority”). The Department has adopted a written “Employee Conduct” policy that addresses conflict of interest issues.<sup>7</sup>

The Department’s policy expressly recognizes that “a high standard of conduct, honesty and impartiality, by Department employees is essential to insure the proper performance of business and strengthen public faith and confidence in the integrity of the Department and its employees.”<sup>8</sup> “Employees are expected to act impartially in performing official duties and not

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<sup>7</sup> The Department’s “Employee Conduct” policy is part of a larger policy document that is maintained on the Department’s intranet. A copy of the “Employee Conduct” policy is attached hereto.

<sup>8</sup> Attachment at 1 (“Personal Conduct”). The Personnel Rules also recognize that “a high standard of honesty, ethics, impartiality, and conduct by state employees is essential to ensure proper performance of state business and strengthen the faith and confidence of the people of Idaho in the integrity of state government and state employees.” IDAPA 15.04.01.024.

give preferential treatment to any outside organization or individual.”<sup>9</sup> The policy seeks to avoid not only actual conflicts of interest but also any potential for the appearance of impropriety.<sup>10</sup>

The Department’s policy also provides that outside activities “must be compatible with the role of the employee as a public employee. The [outside] employment must not conflict with the best interest of the Department or the proper performance of the employee’s responsibilities.”<sup>11</sup> Thus, Department 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.”<sup>12</sup> This prohibition applies to the WD34 watermaster if he or she is considered a Department “employee” for purposes of a conflict of interest analysis in matters of water distribution. See Letter from David G. High, Assistant Attorney General, to Martel L. Miller, Deputy Director, Department of Administration (Apr. 12, 1977), at 2 (concluding that a watermaster is an employee of the Department for purposes of the Idaho Tort Claims Act).<sup>13</sup>

While a watermaster is elected by the water users of a district and paid by the water district, the watermaster must also be appointed by the Director. Idaho Code §§ 42-605(3), (10). The Director has “direction and control” over the distribution of water in a water district, Idaho Code § 42-602, and as previously discussed, the watermaster is subject to the Director’s supervisory authority in such matters. Idaho Code §§ 42-602, 42-613A. The watermaster must take an oath to “faithfully perform” his water distribution duties as defined by Idaho law and file it with the Department. Idaho Code § 42-605(10).

Further, the Idaho Supreme Court has held that a watermaster is not an “employee” or “agent” of the water users for purposes of distributing water in a water district. *Jones v. Big Lost River Irr. Dist.*, 93 Idaho 227, 229, 459 P.2d 1009, 1011 (1969). Rather, in this capacity the watermaster is “responsible to” and “works for” the Department. *Id.*; see also *Marty v. State*, 117 Idaho 133, 140, 786 P.2d 524, 531 (1989) (stating that the watermaster was an agent of the Department); *Nettleton v. Higginson*, 98 Idaho 87, 93, 558 P.2d 1048, 1054 (1977) (referring to the watermaster as “the state’s agent”); *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625, 629 (Ct. App. 1988) (same). Accordingly, for purposes of a conflict of interest

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<sup>9</sup> Attachment at 4 (“Gratutities”).

<sup>10</sup> See Attachment at 2-3 (“which might have the appearance of impropriety”); *id.* at 3 (“appearance of impropriety . . . reasonable perceptions . . . avoid the appearance of impropriety”).

<sup>11</sup> Attachment at 2 (“Outside Activities”).

<sup>12</sup> Attachment at 2 (“Outside Activities”).

<sup>13</sup> “A watermaster is a public administrative officer who performs functions both for the Department of Water Resources and for his water district. He is elected by and paid by water users in the water district. Thus, for some purposes he could be considered an employee of the water district.” *Id.* at 1.

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analysis in matters of water distribution, the WD34 watermaster is appropriately viewed as an “employee” of the Department.

This conclusion finds support in the nature and purpose of water districts under Idaho law. A water district is not a private entity but rather is “an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.” Idaho Code § 42-604. Water districts are an essential part of the “framework of evenhanded oversight” for administering water rights under Idaho law, and the Department of Water Resources’ “principal tool” for carrying out its legislative mandate to distribute water in accordance with the prior appropriation doctrine. *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211-12, 220 P.3d 318, 329-30 (2009). It would be inconsistent with the nature and purposes of a water district to conclude that watermasters should not be subject to conflict of interest policies requiring that their official water distribution duties be performed impartially, without giving preferential treatment, and without creating the appearance of impropriety.<sup>14</sup>

As previously discussed, the Department’s conflict of interest policy bars employees from accepting or serving “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.”<sup>15</sup> A chair on the BLRID’s board of directors plainly constitutes “a policy-making position or office” of a “board.” Thus, the question becomes whether an “opportunity” for a conflict of interest “might arise” if the WD34 watermaster simultaneously serves on the BLRID board of directors.

An opportunity for a conflict of interest might arise if the watermaster serves as a BLRID director. For instance, the WD34 watermaster plays an important role in administering the “Rotation Credit” system, under which certain surface water rights in WD34 can be “rotated” for storage water credits in Mackay Reservoir. IDAPA 37.03.12.040.02. The BLRID owns Mackay Reservoir, and the “Rotation Credit” system is subject to the BLRID’s approval and consent. IDAPA 37.03.12.040.02.b; *see also Order of Partial Decree for General Provisions in Administrative Basin 34 (In re SRBA, Subcase No. 91-00005-34)* (May 8, 2001), at Exhibit A (“Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the Big Lost River Irrigation District . . .”). Further, while a watermaster is a “ministerial officer” and may distribute water “only in compliance with applicable decrees,” *Almo Water Co. v. Darrington*, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972), the everyday work of a watermaster in discharging this duty necessarily involves the exercise of discretion in making certain determinations, such as whether a water user is actually receiving

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<sup>14</sup> See generally Attachment at 2-4.

<sup>15</sup> Attachment at 2 (“Outside Activities”).

the decreed quantity, or whether a water delivery call would be futile because water would not reach the senior appropriators in a sufficient quantity for it to be applied to beneficial use.<sup>16</sup> *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). It is important that there be no actual conflict of interest, or even an opportunity for the appearance of impropriety, in the exercise of this discretion.

Thus, the conflict of interest provisions of the Department's "Employee Conduct" policy generally would bar the same person from simultaneously serving as the WD34 watermaster and as a director of the BLRID. The Department's policy has an important exception, however: it does not apply "upon written authorization of the Director."<sup>17</sup> The Department's policy does not provide the standards for exercising this authority, but presumably the Director may take relevant considerations into account in making an exception to the basic prohibition against simultaneously serving as WD34 watermaster and on the BLRID's board of directors

In sum, nothing in the Idaho Code, reported Idaho decisions, or the common law doctrine of incompatible offices would bar the same person from simultaneously serving as the WD34 watermaster and as a BLRID director. In contrast, the Department's conflict of interest policies would apply to bar such a situation, unless the Director made an exception to the general policy in a written authorization or decision. Under the Department's policies, the question of whether to allow the same person to simultaneously serve as the WD34 watermaster and as a director of the BLRID is committed to the sound discretion of the Director.

## **II. If A Member Of The Board Of Directors Of The Big Lost River Irrigation District Simultaneously Serves As The Watermaster For Water District No. 34, How Should Potential Conflicts Of Interest Be Addressed?**

The Ethics in Government Act explicitly requires a public official to disclose potential or actual conflicts of interest, and defines the required process and means of disclosure. Idaho Code § 59-704. Provided the required disclosures are made, the public official need not recuse himself or herself: the official may still participate in the proceedings and take any action authorized by law. *Id.*<sup>18</sup>

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<sup>16</sup> This is not intended to be an exhaustive list of the instances in which a watermaster's duty might require the exercise of discretion.

<sup>17</sup> Attachment at 2 ("Outside Activities").

<sup>18</sup> The act provides that an "elected legislative public official" must also take any action required by the rules of the body of which he/she is a member after disclosing a conflict of interest. Idaho Code § 59-704(1). Such rules might conceivably require recusal, but the act itself does not, and in any event a watermaster is not a "legislative public official."

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These provisions require the WD34 watermaster to disclose actual or potential conflicts of interest to the Director. Provided the watermaster discloses actual or potential conflicts of interest to the Director, the watermaster need not recuse himself or herself and may continue performing the duties of the watermaster's office.<sup>19</sup>

While the Ethics in Government Act does not require recusal of the watermaster if there is a potential or actual conflict of interest, the Director has authority to give the watermaster specific instructions in such a situation, and even to take direct control of the watermaster's functions to avoid or resolve a conflict of interest. While the watermaster performs the distribution of water in a water district, it is the Director who has "direction and control" over such matters. Idaho Code § 42-602. The Director also has supervisory authority over watermasters in the distribution of water. *See id.* ("Director of the Department of Water Resources To Supervise Water Distribution Within Water Districts") (section title); *id.* § 42-613A (referring to "the supervisory responsibilities of the director of the department of water resources over the activity of watermasters delivering water within water districts").

Thus, should an actual or potential conflict of interest arise as a result of the WD34 watermaster also serving as a director of the BLRID, the Director could address the situation by issuing specific instructions to the watermaster. Alternatively, the Director could remove the watermaster from the conflict situation and take direct control of water distribution.

The Director might also consider providing instructions to the watermaster before conflicts arise. Such proactive instructions could help avoid or resolve conflict situations more quickly and efficiently than by responding only after they have already developed. The Director could issue such instructions pursuant to his supervisory authority, and such instructions could take any one of several forms. For instance, the Director could issue such instructions as part of his written approval under the Department's "Employee Conduct" policy, or as part of his formal appointment of the watermaster. The instructions could also be issued in a separate letter or order to the watermaster.

In sum, the only requirement Idaho law establishes with regard to actual or potential conflicts that arise as a result of the same person simultaneously serving as the WD34 watermaster and as a director of the BLRID is that the watermaster properly disclose such conflicts as set forth in Idaho Code § 59-704. Beyond this, if the Director in his discretion

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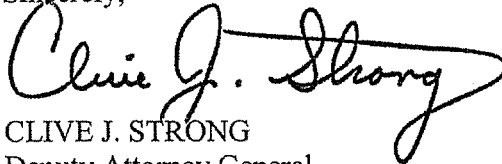
<sup>19</sup> The official has the option of seeking legal counsel to determine whether an actual or potential conflict of interest exists. Idaho Code § 59-704. Should the legal advice be that there is an actual conflict of interest, an appointed official must disclose the conflict through a filing with the appointing authority. *Id.* § 59-704(3). The appointing authority may seek an advisory opinion from the Attorney General, and the official may then act on the legal advice. *Id.*

Senator Steve Bair  
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decides to waive the Department's conflict of interest policy and appoint a BLRD board member as the watermaster, he has broad authority to supervise the watermaster's water distribution activities to address any conflict of interest situation, including, but not limited to, issuing specific instructions to the watermaster or taking direct control of the watermaster's water distribution functions, if necessary or advisable to ensure the proper distribution of all water rights.

I hope that the foregoing discussion responds to the concerns underlying your request for legal guidance. Please feel free to contact me should you have any comments or questions on any of these matters. This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

Sincerely,

A handwritten signature in cursive script that reads "Clive J. Strong". The signature is written in black ink and is positioned above the printed name.

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

CJS/pb

Attachment

Via U.S. Mail and e-mail

cc: Gary Spackman, Interim Director, Department of Water Resources  
John Homan, Deputy Attorney General

## EMPLOYEE CONDUCT

### PERSONAL CONDUCT

The maintenance of a high standard of conduct, honesty, and impartiality, by Department employees is essential to insure the proper performance of business and strengthen public faith and confidence in the integrity of the Department and its employees. Accordingly, the Department has established standards and policies deemed necessary to prevent conflicts of interest.

The rules of good taste and good judgment are the rules of good office conduct. Employees are expected to apply such rules to conversation, attitude, and personal appearance.

Any employee who willfully engages in activities prohibited by this section is subject to dismissal, suspension, or other disciplinary action.

### DRESS

Employees are encouraged to dress in a manner consistent with their status as professionals and in relation to their duties. Employees are expected to practice personal hygiene, cleanliness and neat, tasteful, well cared for clothing is to the credit of all and expected of each employee.

### PUNCTUALITY/ATTENDANCE

Employees are expected to maintain regular, punctual attendance. When an employee is unable to report to work as scheduled, he/she shall notify the responsible party as specified by the supervisor, prior to the absence, if at all possible.

### WORK AREA

The work area of each employee should be properly maintained and provide a pleasant, orderly, and professional appearance. Any display of material reasonably considered to be or having the potential to be offensive to others is prohibited.

### RELIGIOUS EXPRESSION

Employees may freely exercise their religious beliefs as long as doing so does not infringe on workplace efficiency and the requirements of Civil Rights Act of 1964 as amended, concerning nondiscrimination on the basis of religion.

Employees and supervisors should respect the individuality of each person, and although they may share their belief that religion is important in a person's life, they must refrain from attempting to influence the religious beliefs of clients, colleagues, coworkers or subordinates while acting in any capacity as an employee of the Department.

No employment decision shall be made on the basis of religion. In accordance with state and federal law, the department will reasonably accommodate employees' religious practices.

### 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.

#### **PERSONAL USE OF DEPARTMENT EQUIPMENT AND MATERIALS**

State-owned or leased equipment, supplies and facilities are provided for the use of employees in the performance of official public duties. Such equipment, supplies and facilities may not be used in furtherance of personal business ventures and should not be used for private activities that would result in an increase in cost to the state or provide an appearance of impropriety. Violation of this policy may be cause for dismissal or other disciplinary action.

This policy can best be described as "use good judgment" and "avoid the appearance of impropriety" and is recognition of the public's right to expect that state employees respect the public's ownership of vehicles, equipment, supplies and facilities. Employees are advised to seek approval from their supervisors of any questionable activities or uses of state facilities or equipment within "gray areas" of acceptability. If the employee and his/her supervisor find the activity acceptable, no further approval is required. However, when the employee and the supervisor have serious concerns about acceptability, it probably indicates the activity should be avoided. In addition to the concern about appearances, the guiding rule is that there should be no increase in cost to the state.

#### **DUAL STATE EMPLOYMENT**

There shall be no conflicting hours of work when a classified employee is employed by more than one state agency. The state is considered one employer for determining the number of hours worked. Therefore, dual state employment can result in errors in accrual of credited state service and leave, and can create an overtime situation. The classified employee contemplating an appointment with another state agency shall receive prior approval from the Division Administrator. The employee shall also contact the HR Manager who will contact the Div. of Human Resources.

Supervisors contemplating hiring an employee holding a classified position in another state agency shall immediately contact the HR Manager prior to making the appointment.

## **GRATUITIES**

State employees shall never solicit in their official capacity any gratuity or other benefit from any person under any circumstances. State employees shall not accept gratuities or other benefits from any person who is subject to their legal jurisdiction or who is likely to become interested in any contract or transaction over which they exercise any discretionary function. Advertising trinkets normally given to the public such as pencils, pens, or other small gifts are exempt.

Employees shall not accept gratuities or other benefits exceeding a total retail value of \$50 per person/organization or composite within a calendar year.

Honorariums shall not be accepted by state employees from Idaho citizens, associations, corporations or governmental entities for appearances or services given in the course of their official duties.

Employees are expected to act impartially in performing official duties and not give preferential treatment to any outside organization or individual.

## **TELEPHONE CALLS**

Employees are prohibited from making personal long-distance telephone calls, which are charged to the Department unless previously authorized. While local personal telephone calls are not prohibited, the number and duration of such calls shall be kept to a minimum. Employees who violate this policy will be required to reimburse any charges and may be subject to further disciplinary action.

A personal telephone call to family members, by an employee who is traveling overnight on official business for the Department, is permitted. One ten (10) minute call per day is allowed.

## **RECORDING MEETINGS**

Unauthorized electronic recording of any meeting or investigation within the problem solving process is prohibited. Any violation of this policy may be lead to disciplinary actions up to and including dismissal. (9-1-09)

## **NON-SMOKING**

Pursuant to Executive Order No. 2005-10, all state-owned or state-leased buildings, facilities, state-owned vehicles or areas occupied by state employees shall be designated as "non-smoking".

## **NEPOTISM**

No employee shall work under the immediate supervision of a supervisor who is a spouse, child, parent, brother, sister or the same relation by marriage.

## **ANIMALS IN THE OFFICES**

Animals are not permitted into any of IDWR's offices and will not be transported in any state vehicle. Employees will not be compensated for personal vehicle mileage to take an animal with them on an official IDWR business trip unless there is no other vehicle available and prior approval has been obtained from the supervisor.

Exceptions will be made when the animal is a service animal for disabled persons or an in-training service animal.

### **POLITICAL ACTIVITIES**

Pursuant to the provisions of the Hatch Act and Section 67-5311 Idaho Code, no classified employee shall:

- A. Use his official authority or influence for the purpose of interfering with an election to or a nomination for office, or affecting the results thereof;
- B. Directly or indirectly coerce, attempt to coerce, command, or direct any other such officer or employee to pay, lend or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency or person for political purposes; or
- C. Be a candidate and hold elective office in any partisan election.

State employees shall retain the right to:

- A. Register and vote in any election;
- B. Express an opinion as an individual privately and publicly on political subjects and candidates;
- C. Display a political picture, sticker, badge or button;
- D. Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;
- E. Be a member of a political party or other political organization and participate in its activities;
- F. Attend a political convention, rally, fund-raising function or other political gathering;
- G. Sign a political petition as an individual;
- H. Make a financial contribution to a political party or organization;
- I. Take an active part, in support of a candidate, in an election;
- J. Be politically active in connection with a question which is not specifically identified with a

political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

K. Service as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by state or local law;

L. Be a candidate and hold elective office in any nonpartisan election;

M. Take an active part in political organization management; and

N. Otherwise participate fully in public affairs, except as prohibited by law, in a manner, which does not materially, compromise the neutrality, efficiency, or integrity of the employee's administration of state functions.

#### **EXECUTIVE OFFICIAL LOBBYIST**

Effective July 1, 2006, House Bill 707 requires the registration of individuals who lobby the executive branch of state government. Anyone who contacts an executive official must be registered as a lobbyist if the contact is made in an attempt to influence the consideration, amendment, adoption or rejection of: (1) a rule or rulemaking decision; (2) ratemaking decision; (3) procurement; (4) contract bid or bid process; (5) financial services agreement; or (6) bond issue.

Included in the definition of executive official: a state department or agency director, deputy director, division administrator or bureau chief as established and enumerated in sections 67-2402 and 67-2406, Idaho Code and the membership and the executive or chief administrative officer of any board or commission that is authorized to make rules or conduct rulemaking activities pursuant to section 67-5201, Idaho Code.

For staff in the above categories, the Secretary of State has requested that you inquire of anyone contacting you for the purposes listed above whether they are registered as a lobbyist with the Secretary of State before talking with them.

#### **DUES, FEES, AND MEMBERSHIPS IN PROFESSIONAL ASSOCIATIONS**

In reference to Executive Order #2007-07 the State will not pay for any kind of professional, occupational, or trade license, certificate, permit or occupational registration for any state employee or officer. Dues to professional, occupational or trade associations in which membership is restricted to persons who are licensed, certified or registered under Idaho law will not be paid.

However, this executive order does not preclude the Department from paying dues to organizations relating to their responsibilities in state government, or where such dues are part of a requirement of employment. Requests will be considered on a classification basis, taking into consideration job requirements and responsibilities. Each request shall be in writing to and approved by the Division Administrator.

Payette River Basin, State of Idaho  
**State Water District No. 65**

Watermaster  
Ron Shurtleff

102 North Main Street  
Payette, Idaho 83661

Phone 208-642-4465  
Fax 208-642-1042  
E-mail, waterdist65@srvinet.com

January 17, 2013

Tim Luke  
Idaho Department of Water Resources  
322 East Front Street  
Boise, ID 83720

Dear Mr. Luke,

The Lower Payette Ditch Company is the entity who supplies my farm with irrigation water. My family has been patrons of the company since 1888. I have not served on the ditch companies Board of Directors, however recently I have been asked to serve on that board.

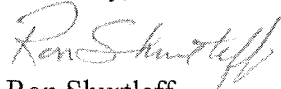
I have answered them in this manner; that I would be willing to serve, if the policies of the Department of Water Resources would allow the situation, and if the Advisory Board of Water District No. 65 could also be comfortable with me serving on the canal board.

I am writing to seek Department Policy that might address this situation where a Watermaster is to also serve on a local canal companies Board of Directors. If a policy is in place I would be very happy to get your guidance and recommendation.

The Lower Payette Ditch Company is to conduct their Annual Meeting on January 29, 2013. I am hoping to be able to provide a definite response at their meeting.

Thank you for considering this request. If you need any further information please contact me at 208-642-4465.

Sincerely,



Ron Shurtleff