

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA)	
)	
Case No. 39576)	ORDER RE: UNITED STATES'
)	MOTION FOR ENTRY OF AN
)	ORDER RE: JUDICIAL CONDUCT
)	
)	ORDER FOR DISCLOSURE BY
)	JUDICIAL OFFICERS
)	(Questions Regarding Alleged
)	Conflicts of Interest)
_____)	

I.

APPEARANCES

Mr. Steven Strack, Esq., Boise, Idaho, Deputy Attorney General, for the State of Idaho.

Mr. Albert Barker, Esq., Hawley Troxell Ennis & Hawley, Boise, Idaho, for the Boise-Kuna Irrigation Dist., *et al.*

Mr. Scott L. Campbell, Esq., Ms. Angela D. Schaer, Esq., Elam & Burke, Boise, Idaho, for Pioneer Irrigation Dist., *et al.*

Mr. Roger D. Ling, Esq., Ling Nielsen & Robinson, Rupert, Idaho, for A & B Irrigation Dist., *et al.*

Mr. Terry T. Uhling, Esq., Boise, Idaho, for J.R. Simplot Company, *et al.*

Mr. Daniel V. Steenson, Esq., Ringert Clark, Chtd., Boise, Idaho, for Nampa-Meridian Irrigation Dist., *et al.*

Mr. Herbert W. Rettig, Esq., Rettig & Rosenberry, Caldwell, Idaho, for Farmers Co-op Ditch Co., Ltd.

Mr. Craig R. Zaiss, Esq., Parma, Idaho, for Black Canyon Irrigation Dist.

Mr. John A. Rosholt, Esq., Mr. John K. Simpson, Esq., Rosholt, Robertson & Tucker, Twin Falls, Idaho, for Twin Falls Canal Company, *et al.*

Mr. Ray W. Rigby, Esq., Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Rexberg, Idaho, for Egin Bench Canal, Inc., *et al.*

Ms. Josephine Beeman, Esq., Beeman & Hofstetter, Boise, Idaho, for City of Ashton, *et al.*

Mr. Peter Monson, Esq., Denver, Colorado, for the United States Department of Justice, Environment and Natural Resources Div., Indian Resources Section.

Mr. Steven Moore, Esq., Native American Rights Fund, Boulder, Colorado, for the Nez Perce Tribe.

Ms. K. Heidi Gudgell, Esq., Lapwai, Idaho, for the Nez Perce Tribe.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

The *United States' Motion for Entry of an Order Re: Judicial Conduct* (“*Motion Re: Judicial Conduct*”) was filed with the Court on March 22, 2000. Parties to the SRBA were notified thereof via the docket sheet on April 7, 2000, and responses thereto were to have been filed within thirty days following the docket sheet notice, or May 8, 2000. Several responses were timely filed. On May 31, 2000, the United States filed its *Reply Brief in Support of its Motion for Entry of an Order Re: Judicial Conduct*. Therefore, the matter is deemed fully submitted for decision on the next business day, or June 1, 2000.

III.

BRIEF PROCEDURAL BACKGROUND

1. On February 4, 2000, the United States filed a *Motion for Status Conference and Request for Expedited Consideration*, seeking to discuss facts and procedures relating to judicial disqualification in the SRBA. The United States' motion was heard in open court on February 22, 2000, at which time the United States agreed to present a more detailed motion (statement of the relief requested) in writing within 30 days.

2. On March 22, 2000, the United States filed its *Motion Re: Judicial Conduct*, together with a proposed order.
3. On March 23, 2000, the Court issued a ***Response to United States' Motion for Status Conference and Order on Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry Wood, and Motion to Disqualify Judge Wood, ("Order Re: Disqualification")*** in which the Court ordered that parties to the SRBA would have 30 days following docket sheet notice to file a response to the *Motion Re: Judicial Conduct*.
4. On April 20, 2000, the State of Idaho filed its response to the *Motion Re: Judicial Conduct*.
5. On April 25, 2000, the Nez Perce Tribe filed its response to the *Motion Re: Judicial Conduct*.
6. On May 5, 2000, the Objectors¹ filed their response to the *Motion Re: Judicial Conduct*, together with an *Affidavit of Angela D. Schaer*.
7. On May 31, 2000, the United States filed its *Reply Brief in Support of its Motion for Entry of an Order Re: Judicial Conduct*.

IV.

ISSUES PRESENTED

1. Do the Idaho Rules of Civil Procedure (specifically Rule 40(d)(2)) and the Cannons of Judicial Ethics contained in the Idaho Code of Judicial Conduct (specifically Cannons 3 C and D), provide adequate procedural safeguards regarding judicial

¹ The term "Objectors" in subcase 03-10022 includes the State of Idaho, Idaho Power Company, Potlatch Corporation, several irrigation districts, and many municipalities within the State of Idaho.

disqualification so as to ensure the integrity and impartiality of the SRBA Court, or are additional procedural safeguards necessary?

2. If additional procedural safeguards regarding judicial disqualification are necessary, what are they?

V.

DISCUSSION

A. Application of Existing Rules and Procedures

The Idaho Supreme Court has established procedures whereby a court and the parties appearing before it can identify potential conflicts of interest, ascertain whether such conflicts give rise to disqualification, and then determine how to proceed in light of the alleged disqualifying conflict of interest.² These procedures are found in Idaho Rule of Civil Procedure 40(d) and Judicial Canon 3 C and D, which are reproduced below:

Rule 40(d)(2). Disqualification for cause.

(A) Grounds. Any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds:

1. That the judge or magistrate is a party, or is interested, in the action or proceeding.
2. That the judge or magistrate is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.
3. That the judge or magistrate has been attorney or counsel for any party in the action or proceeding.
4. That the judge or magistrate is biased or prejudiced for or against any party or the case in the action.

(B) Motion for Disqualification. Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon

² This Court recognizes that, as of 1988, Idaho (along with Utah and Louisiana) does not require any financial disclosures by judges, such as the ABA Model Code of Judicial Conduct requirement found in Canon 4 H. See Judith Rosenbaum and Steven Lubet, *Financial Disclosures by Judges: Functional Analysis and Critique*, 40 U. Fla. L. Rev. 241, 242 n.2 (1988).

which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

CANON 3 C. Disqualification

1. Judges should disqualify themselves in proceedings in which impartiality might reasonably be questioned or where personal knowledge of disputed evidentiary facts might reasonably affect their impartiality in the proceeding. Judges shall disqualify themselves in instances where:

a. they have a personal bias or prejudice concerning a party, or the party's attorney;

b. they served as a lawyer in the matter of controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or the judge or such lawyer has been a material witness concerning it;

c. they know that they, individually or as a fiduciary, or their spouse or minor children residing in their household, has a financial interest in the subject matter in controversy, in a party to the proceeding, or any other interest, that could be substantially affected by the outcome of the proceeding;

d. the judge and the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

2. Judges should inform themselves about their personal and fiduciary financial interests, and make a reasonable effort to inform themselves about the personal financial interests of their spouse and minor children residing in their household.

3. For the purposes of this section:

a. the degree of relationship is calculated according to the laws of the State of Idaho;

b. "**fiduciary**" includes such relationships as executor, administrator, trustee, and guardian;

c. "**Financial Interest**" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management field of the fund;

(ii) an officer in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a financial interest in the organization only if the outcome of the proceedings should substantially affect the value of the interest;

(iv) ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

d. the fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not itself disqualify the judge.

[emphasis in original]

CANON 3 D. Remittal of Disqualification

Judges disqualified by the terms of Canon 3C1 of Canon 3C1d may, instead of withdrawing from the proceeding, disclose on the record the basis of their disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge’s participation, all agree in writing that the judge’s relationship is immaterial or that the judge’s financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all the parties and lawyers, shall be incorporated in the record of the proceeding. When a party is not immediately available, the judge without violating this section may proceed on the written assurances of the lawyer that his party’s consent will be subsequently filed.

The United States, in its May 31, 2000 Reply Brief, states that “it is necessary for this Court to establish whether, and to what extent, the Idaho Code of Judicial Conduct and the other rules related to disqualification of judicial officers applies in the SRBA.” Reply Brief at 5. At the outset, it is important to clear up any misperceptions that may have arisen regarding the application of the existing rules and procedures by stating that Idaho Rule of Civil Procedure 40(d)(2) and Cannons 3 C and D fully apply in the SRBA. This Court is not aware that it has ever suggested otherwise.

That being said, the Court reiterates, as discussed at length in the March 23, 2000 ***Order Re: Disqualification***, that for purposes of evaluating judicial disqualification under the foregoing rules, each subcase within the SRBA is now, and has always been, treated as a distinct piece of litigation (although at times multiple subcases with one or more identical issues may be consolidated and heard together). In other words, a judicial officer having a water right claim, and hence being a party to the overall SRBA, is alone insufficient to create grounds for judicial disqualification. There must be some significant connection between the judicial officer's interests in a water right claim and the subject matter of a particular subcase to create a disqualifying conflict. For example, if the judicial officer objected or responded to a claim, and therefore became a party to a particular subcase, or perhaps if there is some clear and significant hydrologic connection between the judicial officer's water right interest and some other party's claim in the SRBA.

Proceedings in the SRBA are replete with indications that, except for some administrative aspects, each subcase is treated as a distinct piece of litigation. Final decisions rendered in a subcase can be appealed without affecting the progress of the remainder of the SRBA subcases. *See e.g., Riley v. Rowen*, 131 Idaho 831, 965 P.2d 191 (1998). Attorneys representing claimants in the SRBA look at their representation in individual subcases for determining conflicts of interest, otherwise each attorney within the water bar would only be able to represent one claimant in the SRBA. This is further supported by the 1991 opinion letter of the Idaho State Bar Counsel regarding whether a former law clerk for the SRBA could ethically participate as a lawyer in the SRBA. Bar Counsel reasoned that:

If the entire Snake River adjudication is viewed as one inseparable 'matter,' then your law clerks would, for all practical purposes, be foreclosed from ever participating in the adjudication. It would be impossible for them to obtain the necessary consent from the thousands of parties to the case.

In quoting ABA Formal Opinion 342 (1975), the opinion further states:

The troubling language in the above passage is: 'The same lawsuit or litigation is the same matter.' It is doubtful that the drafters of that

opinion contemplated a ‘litigation’ the size of the Snake River adjudication. **It seems more practical to view the individual contested claims as distinct pieces of litigation.** (emphasis added).

See March 12, 1991, letter to Hon. Daniel Hurlbutt, Exhibit F to Affidavit of Scott L. Campbell filed in consolidated subcase 03-10022. Still another example is the distinction made in *Administrative Order 1* between a party to the adjudication and a party to a subcase. *See AOI* §§ 2(q) and (p), 10(k), 13(a). The bottom line is that Idaho Rule of Civil Procedure 40(d)(2) and Judicial Cannons 3 C and D apply in the SRBA, but the evaluation of judicial disqualification under these rules needs to be made in the context of a particular subcase, not in the SRBA as a whole.

B. Need for Additional Rules and Procedures

The United States argues in its *Motion Re: Judicial Conduct*, that because of tremendous importance of the Snake River Basin Adjudication to the citizens of Idaho, as well as federal and tribal interests, and because of the hydrological connection of all water in the Snake River Basin, additions to the above quoted rules are needed to ensure an independent and impartial judiciary. The United States recommends the following:

1. All judicial officers, including special masters, shall within 30 days of the date of this Order, file a full and complete statement disclosing any and all interests – financial, fiduciary, or otherwise – held by the judicial officer, his or her spouse and minor children, or a person within the third degree of relationship to either of them, which may be affected by the outcome of Case No. 39576 or any sub-case therein. The disclosures shall disclose all facts which might reasonably raise a question about impartiality, including but not limited to those set forth in Canon 3(C) of the Idaho Code of Judicial Conduct. Such disclosures shall be filed in Case No. 39576 as well as all sub-cases over which the judicial officer presides, or over which the judicial officer is later assigned judicial responsibility.
2. Notice of the filing of the Disclosure shall be made to all parties to the SRBA. Disclosures shall be served upon all parties in the manner provided by the Court’s Administrative Order No. 1. In cases in which the judicial officer has a conflict of interest which mandates disqualification under the Idaho Code of Judicial Conduct, the officer shall so advise the parties and the case(s) over which the judicial officer presides shall be assigned to another judicial offer as provided by I.R.Civ.P. 40(d)(5). The parties to these case(s) shall be afforded an opportunity to remit the disqualification, in accordance with Canon 3(D). A reasonable time shall be allowed for such remittals, and may vary depending on the nature and

complexity of the disclosure and the number of parties and their availability, but in no event should the period be less than 45 days. If the remittal process is utilized, and one or more parties or attorneys do not remit the disqualification in a timely manner, the case or sub-case shall be assigned to another judicial officer provided by I.R.Civ.P. Rule 40(d)(5).

3. If after disclosing all relevant interest, a judge or master decides not to disqualify themselves, parties in the case(s) presided over by the affected judicial officer shall have an opportunity to move for disqualification under Rule 40(d)(2). The Court shall establish a reasonable time in which disqualification motions may be filed, which may vary depending on the nature and complexity of the disclosure and the number of parties and their availability, but in no event shall it be less than 45 days. If such a disqualification motion is filed, the court shall rule on it as provided by Rule 40(d)(5).
4. If no motion for disqualification is filed by the date established by the Court, or if all parties and attorneys agree to remit the disqualification, the case shall proceed.

This Court is reluctant to create any additional procedures regarding judicial disqualification which would apply solely to the SRBA without some compelling reason to do so. Having special disqualification procedures for the SRBA is likely to cause confusion and the potential for conflict with existing procedures promulgated by the Idaho Supreme Court. That being said, the Court is not adverse to the idea of requiring the judicial officers³ of the SRBA to make an initial (present) public disclosure via the Docket sheet procedure of their water right interests and those of their family members within the third degree of consanguinity or affinity, and to make future public disclosures in the event these interests change. As explained below, other than the aforementioned public disclosures together with the established rules (*i.e.*, I.R.C.P. 40(d)(2) and Cannons 3 C and D), no additional procedural safeguards are necessary to ensure an independent and impartial judiciary.

Except for some general statements regarding the importance of the issues presented in the SRBA, and the general recognition of the hydrological connection of all water in the Snake River Basin, the United States has not stated with any specificity why the rule of civil procedure and Cannons of Judicial Ethics quoted above are inadequate

³ The term “judicial officer” refers to the presiding judge and the special masters.

when applied to the SRBA in light of this Court's March 23, 2000 *Order Re: Disqualification*, nor has the United States articulated how its proposed additions to the existing rules have been tailored to meet any perceived inadequacies. This is especially true as discussed in the *Order Re: Disqualification*, that the SRBA main case is considered one case for some administrative purposes, but in substance and in practice the SRBA is comprised of thousands of separate and distinct pieces of litigation, called subcases. Again, this is clearly illustrated by the fact that each subcase result can be appealed while the remainder proceed forward. Simply being a party to the SRBA main case, without more, is insufficient to create a disqualifying conflict of interest.⁴ The more fitting approach is to focus on the individual subcase for purposes of determining whether a conflict of interest exists. In this regard, the existing rules together with public disclosures are sufficient to meet the concerns voiced by the United States.

Nevertheless, this Court recognizes that because the degree of hydrological connection between any two water rights in the SRBA may not be readily apparent, and because not all subcases are presently at issue⁵ before the Court, there is the potential that a judicial officer may fail to recognize whether their water right interests (or those of their family) may conflict with the subject matter of any particular SRBA subcase. As noted by the United States in its *Motion Re: Judicial Conduct*, most if not all water in the Snake River Basin is interconnected. *A&B Irrig. Dist. V. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997). However, as explained by this Court in great detail in the March 23, 2000 *Order Re: Disqualification*, for purposes of evaluating whether a

⁴ The United States' proposed Order re: Judicial Conduct states that: "All judicial officers . . . shall . . . file a full and complete statement disclosing any and all interest . . . which may be affected by the outcome of Case No. 39576 or any sub-case therein." The United States apparently overlooks this Court's lengthy discussion in the *Order Re: Disqualification* that for purposes of evaluating conflicts of interest in the SRBA, the proper inquiry is to look at whether a judicial officer's interests are in conflict with the subject matter of a particular subcase, not whether such officer's interests may be affected by the outcome of the main SRBA case. Indeed, to require a judicial officer to evaluate how, and to what extent, their interests may be affected by the ultimate outcome of the main SRBA case "is to posit a conundrum which is not decipherable by ordinary mortals." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 872 (1988)(Rehnquist, J. dissenting). Nearly every person and entity in or operating in Idaho, and probably every sovereign with interests in Idaho, is likely to be affected to some extent by the ultimate outcome of the main SRBA case. However, the final resolution of the case is years away, many issues remain to be identified and/or resolved, and many water right claims have yet to be reported out by the Director.

⁵ In fact, many water right claims have not yet been reported by IDWR, and IDWR's projections indicate that some water right claims will not be reported until 2005 or 2006.

disqualifying conflict of interest is present, it is the degree or significance of the hydrological connection that must be evaluated. An example of this is IDWR's *Supplemental Director's Report* filed December 30, 1999, regarding proposed conjunctive management general provisions wherein IDWR states a two-part test is needed to determine whether conjunctive management general provisions are appropriate and necessary⁶:

1. The significance of the hydraulic connection. There likely is some hydraulic connection between all sources of water within the Snake River Basin, since they are all part of the same basin. However, to warrant conjunctive management, the connection must be of sufficient significance to raise the potential for injury. [footnote one] "Significant connection" is, therefore, a threshold criterion in determining whether provisions for conjunctive management are appropriate.

2. The potential for controversy. Absent the potential for controversy about whether conjunctive management is necessary to ensure that water rights are protected, debates about conjunctive management are theoretical. "Potential for controversy" is therefore another threshold criterion in determining whether provisions for conjunctive management are necessary.

[footnote one]: *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Because the specific facts relating to the hydrological connection between any two water rights in the SRBA may not be easily discernable, a full disclosure of the water right interests of the SRBA judicial officers would allow the parties in the SRBA to investigate whether their particular water right claim is in conflict with that of an SRBA judicial officer as that subcase comes before the Court.

Once the judicial officer or a party recognizes facts which may lead to a disqualification, the rule of civil procedure and Canons of Judicial Ethics quoted above provide an adequate mechanism for the Court and the parties to decide how to proceed.

⁶ It is to be underscored that this is the opinion of IDWR. IDWR, by statute, is "an independent expert and technical assistant to assure that the claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code." I.C. § 42-1401B. The matter is set for trial before this Court commencing on October 30, 2000, as well as proceeding on an independent mediation track. As such, the Court does not adopt this language or position as its own, but merely uses this language as illustrative of the problem presented.

Adding to the existing procedures would accomplish little, if anything, and would likely be confusing, cumbersome, and incompatible with the existing procedures. Furthermore, to the extent that the United States' proposal changes, rather than adds to, the existing rules, the United States has not demonstrated that this Court has the authority to make such changes, absent being granted such authority from the Idaho Supreme Court.

VI. ORDER

The Presiding Judge has already made the following disclosures which presently satisfy the requirements of this Order:

- 1) *Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)* (February 11, 2000).
- 2) *Supplemental Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)* (February 28, 2000).
- 3) *Order Re: Disqualification* (March 23, 2000).

The SRBA special masters shall, within 30 days of this Order, file a disclosure with the Court which discloses their water right interests in the SRBA, and those of their family members within the third degree of consanguinity or affinity. Further, all SRBA judicial officers shall keep themselves reasonably informed of their water right interests, and those of their family members within the third degree of consanguinity or affinity, and shall file supplemental/amended disclosures as necessary to reflect any future changes in such interests. Parties to the SRBA will be provided notice of these disclosures through the docket sheet.

IT IS SO ORDERED:

DATED: Friday, July 14, 2000.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication