

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

<b>In Re SRBA</b>	)	<b>Consolidated Subcase No. 67-13701</b>
	)	<b>Nez Perce Tribe Springs &amp; Fountains</b>
<b>Case No. 39576</b>	)	<b>Claims</b>
	)	
	)	<b>ORDER DENYING NEZ PERCE</b>
	)	<b>TRIBE’S MOTION TO DISQUALIFY</b>
_____	)	<b>PRESIDING JUDGE R. BARRY WOOD</b>

**I.**

**PROCEDURAL BACKGROUND**

1. According to the Tribe’s motion filed May 18, 2000, on July 30 and October 8, 1998, the Nez Perce Tribe (“Tribe”), and the United States as trustee for the Tribe filed 1,886 amended water right claims in the SRBA which have been consolidated, with subcase no. 67-13701 designated as the lead subcase. The claims, brought pursuant to Article 8 of the Nez Perce Treaty of 1863, are for one-half the natural flow of the springs and fountains located within the boundaries of the Tribe’s 1855 Reservation boundaries ceded by the Tribe in 1863.
2. The claims were objected to in September of 1999 by the State of Idaho, Idaho Power Company, members of the “Federal Claims Coalition” and a *pro se* objector.
3. On February 2, 2000, the Court entered an Order of Reference appointing Special Master Dolan as special master for the Nez Perce claims in Reporting Areas 19, 22, and 24 and Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85, and 86.
4. On February 7, 2000, the Tribe filed a motion to disqualify Judge Wood in unrelated consolidated subcase 03-10022.

5. On February 11, 2000, this Court issued a *Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)* and a *Supplemental Disclosure Pursuant to I.R.C.P. 40(d)(2)(A)* on February 28, 1999.
6. On March 23, 2000, this Court entered 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*, which document also contained one additional disclosure.
7. On May 18, 2000, the Tribe filed *The Nez Perce Tribe's Motion to Disqualify Presiding Judge R. Barry Wood and Memorandum in Support Thereof* (“*Motion to Disqualify*”) in the instant subcase.
8. On June 5, 2000, the *State of Idaho's Response to Motion to Disqualify Presiding Judge* with accompanying *Affidavit of Steven W. Strack* were filed.
9. On June 6, 2000, *Thompson Creek, et al.'s Response to Motion to Disqualify*, with accompanying *Affidavit of Counsel* (Campbell) were filed.
10. On June 7, 2000, counsel for “Objectors, Comprising the Federal Claims Coalition,” Albert P. Barker, lodged a *Memorandum in Opposition to Nez Perce Tribe's Motion to Disqualify Presiding Judge R. Barry Wood and Memorandum in Support Thereof*.
11. On June 9, 2000, the *United States' Response to Nez Perce Tribe's Motion to Disqualify Presiding Judge R. Barry Wood* and accompanying *Affidavit of Peter C. Monson* were filed.
12. On July 14, 2000, this Court entered its *Order Re: United States' Motion for Entry of an Order Re: Judicial Conduct*.

## II.

### MATTER DEEMED FULLY SUBMITTED FOR DECISION

Pursuant to I.R.C.P. 40(d)(2)(B), and following notice to the parties, the hearing on the Tribe's May 18, 2000, *Motion to Disqualify* for cause was held in open court on

June 20, 2000. At the conclusion of the hearing, no party requested additional briefing and the Court having requested none, this matter is deemed fully submitted for decision the next business day, or June 21, 2000.

### III.

#### GROUNDINGS FOR THE MOTION AND RELIEF REQUESTED

As grounds for its *Motion to Disqualify*, the Tribe asserts the following:

- (1) That Judge Wood and two of his family members, within the third degree of consanguinity, are parties to the SRBA and have surface and groundwater *irrigation*<sup>1</sup> claims therein which are in actual and direct conflict with instream flow claims filed in the SRBA by the Nez Perce Tribe, and the United States as trustee for the Tribe, in Consolidated Subcase No. 03-10022;
- (2) That by virtue of Judge Wood's personal family conflicts of interest in Consolidated Subcase No. 03-10022, it creates an appearance of partiality for Judge Wood to preside over the Tribe's springs and fountains claims, Consolidated Subcase No. 67-13701;
- (3) That by virtue of these conflicts of interest, Rule 40(d)(2), I.R.C.P. is violated because Judge Wood is a party, or is interested, in the outcome of Consolidated Subcase No. 67-13701 (Rule 40(d)(2)(A)(1)), Judge Wood is related to parties by blood or marriage within the third degree (Rule 40(d)(2)(A)(2)), and because Judge Wood is "biased or prejudiced" against the Tribe (rule 40(d)(2)(A)(4)); and, finally,
- (4) That for Judge Wood to preside over the consolidated springs and fountains subcase would violate the Tribe's federal and state constitutional rights of due process.

[FN 1] The Tribe and the United States have made clear several times on the record that *de minimus* domestic and stockwater claims, alone, would not be sufficient basis for moving to disqualify Judge Wood, or any other judge in the State of Idaho (or, for that matter, the special masters in the SRBA) from presiding over all or part of the SRBA. The Court and various party objectors to the Nez Perce instream flow claims have ignored that argument, and have instead opted to mischaracterize and exaggerate the bases for the Tribe's disqualification motions filed to date.

The Tribe seeks to have Judge Wood disqualified from presiding over the consolidated springs and fountains subcase no. 67-13701. The Tribe does not seek to

have stricken the Court's order appointing Special Master Dolan but rather to have Special Master Dolan appointed to preside as a "qualified judge" pursuant to I.R.C.P. 40(d)(5).

#### IV. APPLICABLE LAW

I.R.C.P 40(d)(2) provides in its entirety as follows:

**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 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.1 of the Idaho Judicial Canons provides:

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.

In determining whether a case of bias or prejudice has been made out by the moving party: "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the Judge learned from his participation in the case." *Defosses v. Defosses*, 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct. App. 1991)(citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)). Further, "[w]hether a Judge's involvement in a case reaches a point where disqualification from further participation in a defendant's case becomes necessary is left to the sound discretion of the Judge himself." *State v. Wood*, 132 Idaho 88, 95, 967 P.2d 702, 707 (1998)(quoting *Sivak v. State*, 112 Idaho 197, 206, 731 P.2d 192, 201 (1986)).

## V.

### **PRIOR ORDERS ADOPTED BY REFERENCE HEREIN**

To avoid the necessity of repeating in detail in this Order the content and holdings of two prior orders of this Court in the SRBA, the Court herein adopts by reference as if set full herein the following two orders as grounds for disallowing the Tribe's motion in

the present consolidated subcase: *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*, filed March 23, 2000; and *Order Re: United States' Motion for Entry of an Order Re: Judicial Conduct*, filed July 14, 2000.

## VI. ADDITIONAL DISCUSSION

The Court **denies** the Tribe's motion on both procedural and substantive grounds. Procedurally, I.R.C.P. 40(d)(2) requires that a motion for disqualification for cause shall be "accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied on in support of the motion." *Samuel v. Hepworth, Nungester, & Lezamiz, Inc.*, 134 Idaho 84, 88, 996 P.2d 303, 307 (2000)(citing I.R.C.P. 40(d)(2)(B)). The Tribe did not file an affidavit in support of its motion. However, at oral argument on the motion, counsel for the Tribe adopted by reference and incorporated into its motion the *Affidavit of Peter C. Monson* ("Affidavit") filed by the United States.<sup>1</sup> See *Reporter's Transcript, Hearing on Motion to Disqualify Presiding Judge, of June 20, 2000 (Tr.)* p.19, ll. 10-13. Although the United States filed a response brief in support of the Tribe's motion together with the supporting *Affidavit*, the United States is not the movant in this action. Therefore, the Tribe failed to comply with the strict requirements of I.R.C.P. 40(d)(2). More importantly, the *Affidavit* filed by the United States is somewhat inconsistent with the Tribe's motion and fails to support a conflict of interest with respect to the Tribe's springs and fountains claims.

In a footnote contained in the Tribe's motion, the Tribe states that:

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<sup>1</sup> At oral argument counsel for the Tribe represented that it did not believe that it was necessary to repeat the affidavit materials that were filed in the instream flow subcase. *Tr.* p.11, ll. 20-24.

The Tribe and the United States have made clear several times on the record that *de minimus* domestic and stockwater claims, alone, would not be sufficient basis for moving to disqualify Judge Wood, or any other judge in the State of Idaho (or, for that matter, the special masters in the SRBA) from presiding over all or part of the SRBA. The Court and various party objectors to the Nez Perce instream flow claims have ignored that argument, and have instead opted to mischaracterize and exaggerate the bases for the Tribe's disqualification motions filed to date.

Despite the Tribe's present contention that *de minimis* domestic and stockwater claims would not be a sufficient basis for disqualifying Judge Wood, the *Affidavit* makes repeated references to the *de minimis* domestic and stockwater claims held by Judge Wood and certain of his family members.

Substantively, neither the Tribe's motion nor the *Affidavit* demonstrate or even allege a conflict between the Tribe's springs and fountains claims and the claims held by Judge Wood and his family members, in terms of some type of hydrological connection or other competing interests between the respective claims. In other words, the threshold issue is whether the interests of Judge Wood and/or his family members present a potential or actual conflict with the Tribe's springs and fountains claims. Rather, the Tribe's motion is predicated in its entirety on the conflicts alleged by the Tribe as between the Tribe's unrelated instream flow claims and the surface and groundwater irrigation claims of Judge Wood and/or his family members. These allegations were previously addressed at length in consolidated subcase 03-10022. The Court fails to see, under the circumstances attendant with respect to the instream flow claims, how a conflict is created in all other unrelated subcases in which the Tribe is a party.

The inference gleaned from the statement contained in the above quoted footnote is that the Tribe does not allege a conflict of interest *per se* simply because Judge Wood or certain of his family members have claims in the SRBA. If the Tribe were asserting that a conflict arises simply by Judge Wood or his family members being a party to the SRBA then the claimed purpose (*i.e.*, domestic, stockwater or irrigation) of the water right would be irrelevant as the alleged competing interests would nonetheless exist. Since the Tribe is now asserting that *de minimis* domestic and stockwater claims do not rise to the level of a conflict of interest even though Judge Wood and his family members are parties to the SRBA as a result of such claims, then under the Tribe's own reasoning

the significance of the hydrological connection or competition between the individual water right claims gives rise to the alleged conflict of interest as opposed to simply being a party to the SRBA. In other words, the issue is whether the Tribe's springs and fountains claims and the water right claims of Judge Wood and his family members are derived from a common source to the extent that the claims are in significant competition for the same water. Again, in regards to the springs and fountain claims, the Tribe has made no allegation that the claims of Judge Wood and his family members are in conflict with the Tribe's claims, nor does the *Affidavit* state facts that would suggest a conflict as between the respective claims.<sup>2</sup>

The basis for the Tribe's motion stems from the asserted conflicts previously alleged by the Tribe in consolidated subcase 03-10022 with respect to the Tribe's instream flow claims. The Tribe asserts that the alleged conflicts regarding the instream flow claims impart a bias or prejudice against the Tribe with respect to the springs and fountains claims. The Court rejects this argument on several bases. First, this Court previously ruled that the conflicts alleged in consolidated subcase 03-10022 did not constitute a sufficient basis for disqualifying Judge Wood. The same reasoning applies in this consolidated subcase. The Tribe has alleged no additional facts with respect to its springs and fountains claims to suggest otherwise. In fact, the Tribe has not even alleged competing interests between the respective claims. Therefore, if the conflicts alleged by the Tribe with respect to its instream flow claims would not support a disqualification, without more, its incongruous that the alleged conflicts would support a disqualification with respect to the springs and fountains claims.

The Tribe also has not alleged facts that support its allegation of bias or prejudice. The facts contained in the United States' *Affidavit* allege only that Judge Wood has a conflict as to the Tribe's instream flow claims. The Tribe provides no facts to suggest that Judge Wood is otherwise partial, bias or prejudice against the Tribe. The Tribe concludes that because the Judge has an alleged conflict in one subcase as a result of his

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<sup>2</sup> The Court recognizes that Judges should abstain from public comment about pending cases. *See e.g. Smith v. Smith*, 124 Idaho 431, 435, 860 P.2d 634, 638 (1993). However, limited discussion herein regarding the absence of apparent hydrological connectivity is necessary for resolution of the Tribe's motion.



or his family members' ownership of property, that a bias or prejudice is somehow implicated in an unrelated subcase in which no competing interests have even been alleged.<sup>3</sup> In *Smith v. Smith*, 124 Idaho 431, 4325, 860 P.2d 634, 638 (1993), the Idaho Supreme Court stated: "The Code of Judicial Conduct outlines when judges must disqualify themselves because of bias. Judges should disqualify themselves if they have a personal bias concerning a party or personal knowledge of disputed facts and deem that their impartiality might reasonably be questioned." *Id.* (citing Canon 3(C)(1)(a)). In *Samuel v. Hepworth, Nungester, & Lezamiz, Inc.*, at 88, 996 P.2d at 307, the Idaho Supreme Court held: "To be disqualifying, 'the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the Judge learned from his participation in the case.'" *Id.* (citing *Defosses v. Defosses*, 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct. App. 1991)(citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)). "Vague and factually unsubstantiated allegations are wholly insufficient." *Id.* (citing *Hays v. Craven*, 131 Idaho 761, 763, 963 P.2d 1198, 1200 (Ct. App. 1998). A disqualifying prejudice cannot be deduced from adverse rulings by a Judge, whether they are right or wrong. *Id.* (citing 46 Am Jur 2d *Judges* § 221 (1969)).

In the instant subcase, as well as in consolidated subcase 03-10022, Judge Wood has demonstrated no bias or prejudice against the Tribe nor does Judge Wood possess a bias or prejudice against the Tribe. The genesis of the Tribe's motion in consolidated subcase 03-10022 was the alleged competing water right claims of Judge Wood and/or his family members, not an allegation of bias or prejudice by Judge Wood against the Tribe. In regards to the springs and fountains claims, the Tribe does not allege any facts that would suggest competing interests between claims. Therefore, the springs and fountains claims present an entirely different situation and the arguments raised by the

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<sup>3</sup> Its important to not lose sight of the fact that the alleged conflicts arising in consolidated subcase 03-10022 were the result of Judge Wood's (and certain family member's) ownership of property with appurtenant water right claims. The alleged conflicts did not arise as a result of the Tribe contending that Judge Wood harbored a bias or prejudice against a particular party (i.e. the Tribe).

Tribe with regard to its instream flow claims do not apply in this case.<sup>4</sup> Any claims of bias or prejudice rely entirely on circumstances not present in this subcase as well as factually unsubstantiated allegations.

**VII.**  
**CONCLUSION**

For the reasons set forth herein, the Tribe's motion to disqualify the presiding judge is hereby DENIED.

IT IS SO ORDERED:

DATED: July 14, 2000.

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

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<sup>4</sup> This is particularly true, since consistent with the Court's order in consolidated subcase 03-10022, the Tribe now takes the position that simply being a party to the SRBA is insufficient grounds to support a disqualification.