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January 6, 1986

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THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Rydalch:

Your request for legal guidance on a possible conflict of interest has been referred to me for response.

QUESTION PRESENTED:

Does your personal economic interest in water rights and water distribution companies located on a drainage that may be impacted by negotiations over the reserved water rights of the Shoshone-Bannock Tribes prevent you, under article VI of the water resources board's by-laws, from participating in future board actions regarding these negotiations?

BRIEF ANSWER:

Not unless the economic interest at issue is of an immediate and personal nature and related to your interest alone or solely to the canal and reservoir companies in which you have an interest; at this time, the nature of the board's role in the negotiations does not indicate that such a conflict will arise.

BACKGROUND:

In 1985, the Idaho Legislature passed what is now I.C. § 42-1406A, which requires the director of the department of water resources to commence adjudication of the water rights of the Snake River. The legislature also passed H.C.R. No. 16, which resolved that the State of Idaho should attempt to negotiate issues relating to the reserved water rights of the Fort Hall Indian Reservation before a petition for an adjudication is filed with the district court. The water resources board

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("board") has been designated by Governor Evans as the "lead agency to coordinate state activities related to the reserved water rights negotiations and the [Snake River] adjudication," and to represent the state in these negotiations. Executive Order No. 85-9 (May 24, 1985). During the course of these negotiations, it is possible that agreements will be entered into that may impact distribution of water on the Snake River Basin above Milner Dam. You are a shareholder in the North Fork Reservoir Company and the St. Anthony Canal Company, and receive water from these companies for your farming operation which is located upstream from Milner Dam.

ANALYSIS:

Article VI of the board's bylaws states:

2. No Board member shall vote or participate in any discussion or action of the Board nor be present during the Board's deliberations on any matter before the Board in which he has any beneficial financial interest, whether direct or indirect or is an officer, agent or employee of the group seeking Board action or if the Board member or his family will gainfully benefit.

This is a broad conflict-of-interest disqualification that bans participation by board members during board proceedings which (1) benefit the financial interest of the board member directly or indirectly; (2) affect any group of which the board member is an officer, agent, or employee; or (3) gainfully benefit any individuals in the board member's family. The disqualifications in (2) and (3) are fairly self-explanatory, so I will focus on what is meant by direct or indirect beneficial financial interest.

As you mentioned in your request letter, it is uncertain what types of action the board may take in response to the negotiations. Because analysis of conflict of interest problems depends upon the facts of a given situation, I cannot give you detailed guidance. I will describe current Idaho conflict law as it bears on your question.

In general, conflicts of interest arise whenever an officer's private interests impair or influence the performance of a public duty. McRoberts v. Hoar, 28 Idaho 163, 174-5, 152 P. 1064 (1915); Attorney General Opinion No. 76-15, Annual Report at 78. However, merely because a public official's action benefits his or her own personal interests does not mean that there is a conflict of interest. For example, no one would suggest that a farmer/legislator should be disqualified from

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voting on a farm bill; indeed, the legislator may have been elected to represent agricultural interests.

But there is a point at which a conflict may arise. In Attorney General Opinion No. 76-15, the issue was the interpretation of I.C. § 67-6506, which prohibits a member or employee of a zoning or planning commission or a county board of commissioners from acting in a public capacity when he or she has an economic interest in a proceeding or action. The conclusion was that "[a] member/employee should disqualify himself from the performance of a public duty when the economic interest at issue is of an immediate nature, particular and distinct from the public interest." Id. at 77 (emphasis added).

As a general rule, then, any actions that a public official takes which affect his or her own personal interests not in common with a class of other people could present a conflict of interest. If the public official is only a member of a class that are all more or less equally affected by an action, there is no conflict of interest.

This general rule is adhered to by states that are recognized as having strict conflict of interest laws. For example, the Code of Ethics adopted by the legislature of the State of Washington concludes that a member "does not have a personal interest which is in conflict with the proper discharge of his duties if no benefit or detriment accrues to him as a member of a business, profession, occupation or a group, to greater extent than to any other member of such business, profession, occupation or group." Ethics: A Special Report on Conflict-of-Interest Legislative and Lobbying Regulation in 5 States, The Citizens' Conference on State Legislatures (1975) at 155.

Two statutes bear on the issue at hand. First, I.C. § 42-1732 discusses the qualifications required for board members:

Appointment of board members shall be made solely upon consideration of their knowledge, interest and active participation in the field of reclamation, water use or conservation and no member shall be appointed a member of the board unless he shall be well informed upon, interested in, and engaged actively in the field of reclamation, water use or conservation of water.

This sentence clearly expresses the legislative intent that board members be individuals involved in irrigation. Obviously, the legislature expected board members to be involved in decisions in which they had an interest in a broad sense as Idaho water users. Therefore, the prohibitions contained in the

bylaws must not be read so expansively as to frustrate the legislature's intent that board members "be well informed upon, interested in and engaged actively in the field of . . . water use."

This basic principle is illustrated in Mosman v. Mathison, 90 Idaho 76, 408 P.2d 457 (1965), where the Idaho Supreme Court considered a conflict of interest of a highway district commissioner. Under the statutory scheme in effect at that time, commissioners were elected from subdistricts and given exclusive general supervision and jurisdiction over all highways in their district. The court recognized that public officials must act without influence of their personal interests. Id. at 85. But the court also recognized that the overall statutory scheme for supervision and jurisdiction over highways must be considered and that a commissioner was of necessity affected by highway improvements in the district where he lived. Id. To reconcile this problem, the court adopted the so-called rule of necessity:

The courts generally recognize that when the members of the only tribunal with jurisdiction to act are disqualified by reason of bias, prejudice, or interest, still such tribunal is not prohibited from acting, where such disqualification would prevent a determination of the proceeding. Such exception is also recognized as being applicable to administrative officers, commissioners, commissions, boards and other bodies.

Id. (citations omitted). This "rule of necessity" should be applied to the board's conflict of interest bylaws; they must not be read so strictly that they frustrate the legislature's intent in setting the statutory qualifications for board members.

More pointedly, I.C. § 42-1757 deals with conflicts of interest by board members: "No member of the board shall participate in the action of the board, nor be present during the board's deliberations, concerning an application for a loan by an entity in which such board member is an officer, agent or employee, or in which such board member has any interest." This statute describes at least one specific situation, namely, loan applications, where the legislature feels a conflict of interest would be present for individual board members. The language of the statute closely tracks the language of article VI of the bylaws, but it is narrowly drawn to disqualify only when the action affects the board member in an immediate, personal way. The same interpretation must be given to the board's bylaws.

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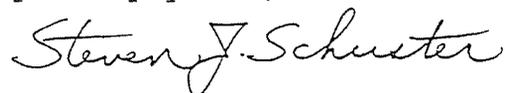
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In light of these general principles, it seems unlikely that the board's role in negotiations with the tribes and federal agencies will affect you in a personal and immediate way. According to Executive Order No. 85-9, the board's role is that of the "lead agency" in coordinating state activities relating to state water user interests, including those of the state itself, in negotiations regarding the reserved water rights of Indian tribes and of federal agencies. Any settlement reached by the board will be submitted for district court approval so that the agreement is enforceable; in court, the agreement could be attacked by intervening parties. Also, the board's authority derives from Executive Order No. 85-9, not from statute. This authority could therefore be changed at any time by a subsequent Executive Order by Governor Evans or his successor in office. Given this situation, it seems unlikely that the board alone, in its capacity as lead agency coordinating reserved water rights negotiations, will have a controlling impact on water distribution above Milner Dam.

In conclusion, article VI of the board's bylaws must be harmonized with the above statutory provisions and common law development of conflicts of interest. If the board contemplates action on reserved water rights that will impact your personal interests alone, or only the canal or reservoir companies in which you have an interest, you should disqualify yourself because of a conflict of interest. When a conflict arises, you should seek further counsel at that time. If, as seems more likely, the contemplated action affects you or the canal or reservoir companies only as members of a class of water users or companies that are more or less equally affected, then there is no conflict of interest. Whenever a question of a conflict of interest arises, full disclosure to other board members is always appropriate.

Please contact me if you have any further questions on this matter.

Very truly yours,



Steven J. Schuster
Deputy Attorney General
Natural Resources Division

SJS:kjb/cjm