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Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN FALLS CANAL COMPANY	**IDAHO POWER COMPANY'S DISQUALIFICATION OF THE DIRECTOR AS THE HEARING OFFICER AS A MATTER OF RIGHT**

Idaho Power Company ("Idaho Power"), by and through its counsel, respectively submits this *Disqualification of the Director as the Hearing Officer as a Matter of Right* pursuant to Idaho Code § 67-5252(1). As grounds therefore, Idaho Power states as follows:

FACTS

The Surface Water Coalition hand delivered a letter to the Director on January 14, 2005, requesting administration of junior ground water rights within Water District No. 120 in 2005. *See January 14, 2005 Coalition Letter to Dreher*. On January 20, 2005, the Coalition sent the Director another letter concerning questions about statements Department personnel had made to the public about the Coalition's request for water right administration. See *January 20, 2005 Letter to Dreher*. The Coalition requested the Director identify the Department personnel and their statements, and remove those individuals from participating in the Department's response to the request for water right administration. *See id.* at 3.

The Director immediately responded to the Coalition's January 20, 2005 letter and issued an Order on January 25, 2005 ("*Jan. Order*"). The Director deemed the Coalition's letter "to be a petition for disqualification pursuant to Idaho Code § 67-5252." *Jan. Order* at 1. Consequently, the Director denied "the request to recuse and remove the Director as the presiding officer in responding to the delivery calls made by the Surface Water Coalition." *Id.* at 6.

Shortly after the Director issued his first order, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a petition to intervene on February 3, 2005. On February 11, 2005, Idaho Power Company filed a letter in support (petition to intervene) of the Coalition's request for water right administration by priority. In response to the Coalition's request for water right administration the Director issued an initial order on February 14, 2005 ("*Feb. Order*"). The order was designated as "interlocutory" except for two matters and claimed to initiate a "contested case" pursuant to Idaho Code § 67-5240. *Feb. Order* at 33. The Director also granted IGWA's petition to intervene. *See id.* at 34. Following the Director's *Feb. Order* the

Idaho Dairyman's Association ("IDA") filed a petition to intervene on February 18, 2005. Later, on March 7, 2005, the United States Bureau of Reclamation ("Reclamation") also filed a petition to intervene. The Director granted IDA's and Reclamation's petitions to intervene and denied Idaho Power's motion to intervene by order on April 6, 2005. Approximately two weeks later the Director issued a final order responding to the Coalition's water right delivery request on April 19, 2005, which was then superceded by an amended order on May 2, 2005 ("*May Order*"). On April 26, 2005, the City of Pocatello ("Pocatello") and several state agencies ("State Ground Water Users") filed petitions to intervene. The Director granted the petitions to intervene by order on May 11, 2005.

Petitions requesting a hearing on and/or reconsideration of the Director's *May Order* were filed by the Coalition, Reclamation, Idaho Power, IGWA, IDA, Pocatello, J.R. Simplot Company, and the State Ground Water Users following the *May Order*. The Coalition and Idaho Power requested the Director to appoint an independent hearing officer to conduct the hearing on the Director's *May Order*. The Director responded to the various petitions and requests by his order of June 3, 2005 ("*June Order*"). The Director denied the requests for an independent hearing officer.

ARGUMENT

I. THE IDAHO APA GRANTS A PARTY TO A CONTESTED CASE THE RIGHT TO DISQUALIFY A HEARING OFFICER AS A MATTER OF RIGHT.

Idaho Code § 67-5252(1) provides the following with respect to presiding officers in administrative "contested cases":

> (1) Except as provided in subsection (4) of this section, any party ***shall have the right to one (1) disqualification without cause of any person serving or designated to serve as presiding officer*** . . .

I.C. § 67-5252(1)(emphasis added).

Subsection (4) states the following:

> (4) Where disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the actions of the agency head shall be treated as a conflict of interest under the provisions of section 59-704, Idaho Code.

I.C. § 67-5252(4).

Thus, the Idaho APA allows any party to disqualify the "presiding officer" (i.e. the Director) as a matter of right pursuant to I.C. § 67-5252(1)[1]. Idaho Power hereby exercises this right to disqualify the Director without cause, and respectfully requests appointment of an independent hearing officer in this matter.

II. IDAHO POWER'S DISQUALIFICATION IS TIMELY

Even assuming that the January 20, 2005 letter sought disqualification of the Director, which Idaho Power does not concede, Idaho Power was not subject to the *Jan. Order* because Idaho Power was not a party to this proceeding at that time. Further, the Director initially denied Idaho Power intervention in this matter, and Idaho Power therefore could not exercise its right to disqualification without cause under I.C. § 67-5252(1).

Moreover, the "contested case" to review the Director's *May Order* was only initiated within the last month. Only after the Director issued his June 3, 2005 order, denying the request to appoint an independent hearing officer, did Idaho Power receive formal notice that the Director would serve as the "hearing officer" and preside over the hearing on the *May Order*. Because Idaho Power is filing this notice within 14 days of receiving notice that the Director will act as the hearing officer in reviewing the *May Order*, Idaho Power's request is timely under the Idaho APA and the Department's rules.

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[1] The term "presiding officer" is not defined in the Idaho APA or the IDWR Rules of Procedure. However, the term presiding officer is plainly intended to include the concepts of a "hearing officer" and an "agency head."

Idaho Power therefore exercises its right to disqualification without cause of the Director from presiding over the hearing in this matter. Idaho Power also respectfully requests that the Director certify any order regarding disqualification in this matter as a "final order."

DATED this 14th day of June 2005.

IDAHO POWER COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2005 a true and correct copy of the foregoing **IDAHO POWER COMPANY'S DISQUALIFICATION OF THE DIRECTOR AS THE HEARING OFFICER AS A MATTER OF RIGHT** was deposited in the United States Mail, postage prepaid addressed to:

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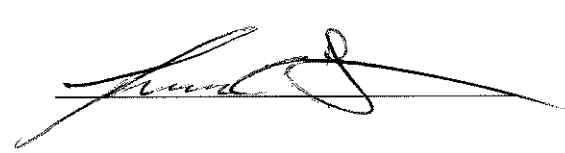
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