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Department of Water Resources

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Attorneys for City of Pocatello

BEFORE THE DIRECTOR
OF 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	)	**RESPONSE TO IDAHO POWER COMPANY'S PETITION FOR REVIEW OF WATER RESOURCE COALITION'S MITIGATION ORDER AND MOTION TO STRIKE**

INTRODUCTION

On April 29, 2005, in response to the Idaho Department of Water Resources Director's order of April 19, 2005, the City of Pocatello joined with Basic American Foods, Inc., ConAgra/ Lamb Weston and the J.R. Simplot Company and filed the "Water Resource Coalition Application for Approval of a Mitigation Plan" (the "WRC Application"). The Water Resource Coalition filed an amended application on May 5, 2005, following the Director's amended order of May 2, 2005.

On May 4, 2005, Idaho Power Company filed a "Protest to IGWA's Initial Plan for Providing Replacement Water" (the "Protest"). The Protest did not include allegations directed at the WRC Application then pending. On May 6, 2005, the Director entered his interlocutory order approving the WRC Application in substantial part.

On May 20, 2005, Idaho Power Company filed its "Petition for Review of Orders Approving Replacement Water Plans," which was directed to the WRC Application, IGWA's Plan, and a separate Application filed by J.R. Simplot Company (the "Petition"). Idaho Power Company did not serve the Petition on the Water Resource Coalition or its counsel, Josephine P. Beeman.

ARGUMENT

The Petition, insofar as it applies to the WRC Application and order, is improper and should be stricken for the following reasons:

1. Failure to serve. The Petition was not served on the applicant Water Resource Coalition. IDAPA 37.01.01-008 requires all documents filed in a contested case to be filed with the Director "showing service upon *all other parties*." Furthermore, IDAPA 37.01.01-203 requires parties to a contested case to "serve all future documents . . . upon all other parties' representatives." *See also* IDAPA 37.01.01-302 (requiring proof of service on all other parties). "Defective . . . pleadings may be returned or dismissed." IDAPA 37.01.01-304. Thus, the Director has the discretion to dismiss the Petition for failure to serve. *See also* IDAPA 37.01.01-417 (prohibiting a party to a contested case from *ex parte* communications with the Director).
2. Lack of standing. Under IDAPA 37.01.01-711, a petition to review an interlocutory order can be made only by "a party or person affected by an interlocutory order." Idaho Power Company is not a party to this matter because it did not protest the WRC

Application. Moreover, the Petition fails to allege or demonstrate that Idaho Power Company was affected by the May 6 Order concerning the WRC Application. Therefore, Idaho Power Company has no standing to make such a Petition with respect to the Water Resource Coalition.

3. Collateral Attack on May 2 Order. Based upon its Petition, it appears that Idaho Power Company's complaint is really intended to undermine and collaterally attack the terms of the Director's May 2 Order, rather than actually challenge the order related to the WRC Application.

   a. Despite being denied intervention in the Delivery Call proceedings that gave rise to the May 2 Order, Idaho Power Company petitioned separately for a hearing with respect to the May 2 Order, as did Pocatello and others.

   b. On June 3, 2005, the Director issued an Order granting the request for a hearing with respect to the delivery call. That hearing will provide the proper forum for the issues associated with the delivery call.

   c. Pocatello does not concede that Idaho Power Company is entitled to participate in the hearing on the delivery call.

   d. Idaho Power Company should not be allowed to avoid the obstacles to its participation in that hearing by collaterally attacking the May 2 Order in a Petition about replacement water plans.

For the foregoing reasons, the City of Pocatello, on its own behalf and as a member of the Water Resource Coalition, respectfully requests that Idaho Power Company's Petition for Review be stricken for lack of jurisdiction and lack of standing and for being an improper collateral attack on the May 2 Order.

Respectfully submitted the 10th of June 2005.

Josephine P. Beeman

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Josephine P. Beeman (for)
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2005, I caused to be served a true and correct copy of the foregoing document by regular U.S. Mail, postage prepaid, to:

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