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DEPARTMENT OF WATER RESOURCES

Josephine P. Beeman #1806
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
office@beemanlaw.com

Sarah A. Klahn
William A. Hillhouse II
White & Jankowski, LLP
511 16th St., Ste. 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Facsimile)
sarahk@white-jankowski.com
billh@white-jankowski.com

Attorneys for City of Pocatello

**BEFORE THE DIRECTOR
OF THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

| | | |
|---------------------------------------|---|-----------------------------|
| IN THE MATTER OF THE REQUEST FOR |) | |
| ADMINISTRATION IN WATER DISTRICT 120 |) | |
| AND THE REQUEST FOR DELIVERY OF WATER |) | |
| TO SENIOR SURFACE WATER RIGHTS BY |) | |
| A&B IRRIGATION DISTRICT, |) | |
| AMERICAN FALLS RESERVOIR DISTRICT #2, |) | CITY OF POCATELLO'S |
| BURLEY IRRIGATION DISTRICT, |) | RESPONSE TO IDAHO |
| MILNER IRRIGATION DISTRICT, |) | POWER COMPANY'S |
| MINIDOKA IRRIGATION DISTRICT, |) | DISQUALIFICATION OF |
| NORTH SIDE CANAL COMPANY, AND |) | THE DIRECTOR AS THE |
| TWIN FALLS CANAL COMPANY |) | HEARING OFFICER AS A |
| _____ |) | MATTER OF RIGHT |

Idaho Power joins the SWC in requesting that the Director of IDWR be replaced as the presiding officer for the hearing in this matter. Its request should be denied.

Contemporaneously with this brief, Pocatello filed "Pocatello's Brief in Response to 1) The Surface Water Coalition's Petition for Review of Directors June 3, 2005 Order Denying Requests to Appoint an Independent Hearing Officer and 2) The Surface Water Coalition's Disqualification of the Director as the Hearing Officer as a Matter of Right" (Pocatello's

Response Brief). Rather than belabor the matter, Pocatello incorporates herein by reference Pocatello's Response Brief. For the reasons outlined therein, Pocatello believes all petitions or requests to replace the Director—however captioned and under whatever legal theories—must be denied.

However, the threshold problem for Idaho Power is that it is not a party to this matter. Party status is the condition precedent to whatever statutory rights accrue under Idaho Code § 67-5252. That statute provides in relevant part:

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, and any party shall have a right to move to disqualify for bias, prejudice, interest, substantial prior involvement in the matter other than as a presiding officer, status as an employee of the agency hearing the contested case, lack of professional knowledge in the subject matter of the contested case, or any other cause provided in this chapter or any cause for which a judge is or may be disqualified.

(2) Any party may petition for the disqualification of a person serving or designated to serve as presiding officer:

(a) within fourteen (14) days after receipt of notice indicating that the person will preside at the contested case; or

(b) promptly upon discovering facts establishing grounds for disqualification, whichever is later.

....

(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.

(emphasis added).

Idaho Power, in its Petition for Disqualification as a Matter of Right states:

Even assuming the January 20, 2005 letter [by the Coalition] sought disqualification of the Director, which Idaho Power does not concede, Idaho Power was not subject to the *Jan. Order* [Jan. 25th 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).

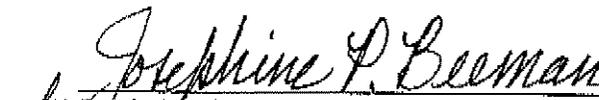
Idaho Powers filing for Disqualification as a Matter of Right at 4.

Idaho Power admits that without party standing it could not seek to disqualify the Director. Since Idaho Power is not yet a party to this proceeding, it has no standing to seek to disqualify the Director. This has not changed since January 2005.

Should the Director allow Idaho Power to participate in the hearing in this matter, Idaho Power's Petition should still be denied for the reasons described in Pocatello's Response Brief.

Respectfully submitted this 29th day of June 2005.


Josephine P. Beeman
Beeman & Associates, P.C.
Attorneys for the City of Pocatello


for Sarah A. Klahn
White & Jankowski, LLP
Attorneys for the City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this ^{29th} 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:

Roger D. Ling
Ling Robinson & Walker
PO Box 396
Rupert, Idaho 83350

C. Tom Arkoosh
Arkoosh Law Offices, Chtd.
PO Box 32
Gooding, Idaho 83330

John A. Rosholt
Travis L. Thompson
Barker Rosholt & Simpson
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167

W. Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, Idaho 83318

John Simpson
Barker Rosholt & Simpson
PO Box 2139
Boise, Idaho 83301-2139

Scott L. Campbell
Moffatt Thomas
101 S. Capitol Blvd., 10th Floor
PO Box 829
Boise, Idaho 83701-0829

Jeffrey C. Fereday
Michael C. Cramer
Givens Pursley
601 Bannock Street, Suite 200
PO Box 2720
Boise, Idaho 83701-2720

Michael S. Gilmore
Deputy Attorney General
Statehouse, Room 210
P. O. Box 83720
Boise, ID 83720-0010

Kathleen Marion Carr
Office Of The Field Solicitor
550 W. Front Street, MSC 020
Boise, Idaho 83724

Matt Howard, PN-3130
U.S. Bureau of Reclamation
1150 N. Curtis Road
Boise, ID 83706

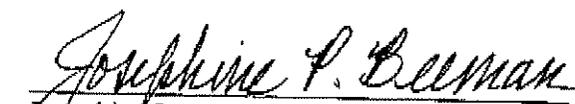
Ron Carlson
Lewis Rounds
IDWR Eastern
900 N. Skyline Drive
Idaho Falls, ID 83402-6105

Allen Merritt
Cindy Yenter
IDWR Southern
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301

James S. Lochhead
Adam T. DeVoe
Brownstein Hyatt & Farber
410 17th Street, 22nd Floor
Denver, CO 80202

James Tucker
Idaho Power Company
1221 West Idaho street
Boise, ID 83702

Terry Uhling
J. R. Simplot
P. O. Box 27
Boise, ID 83707


Josephine P. Beeman [6740]