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Attorneys for SeaPac of Idaho

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF )	CM-DC-2011-003
WATER TO WATER RIGHTS NOS. 36- )	
07072 AND 36-08356 )	REQUEST FOR AN INDEPENDENT
(SEAPAC OF IDAHO) )	HEARING OFFICER; REQUEST FOR
)	DISQUALIFICATION OF THE
)	DIRECTOR AS THE HEARING
)	OFFICER

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SeaPac of Idaho, Inc. (“SeaPac”), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby submits this Request for an Independent Hearing Officer and Request for Disqualification of the Director as the Hearing Officer.

**I.**  
**INTRODUCTION**

On July 12, 2011, SeaPac delivered a letter to the Idaho Department of Water Resources (the “Department”) demanding that the Director require the watermaster for Water District 130

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to administer water rights as required by Idaho Code section 42-607 and pursuant to the Department's conjunctive management rules, IDAPA 37.03.11 in order to supply SeaPac with water under its senior rights. On August 10, 2011, the Department issued its Scheduling Order, noting that "Interim Director Gary Spackman will be the presiding officer."

## **II. ANALYSIS**

### **A. Request for Independent Hearing Officer**

Idaho Code section 42-1701A(2) permits the Director to "direct that a hearing be conducted by a hearing officer appointed by the Director." IDAHO CODE ANN. § 42-1701A(2). From this, SeaPac requests that the Director appoint an independent hearing officer to preside in this matter pursuant to Idaho Code section 42-1701A(2). Such an appointment is appropriate in this case for the reasons listed in Part II(B), *infra*.

### **B. Disqualification of Director as Presiding Officer Pursuant to Idaho Code Sections 59-704 and 67-5252(4)**

The Department's rules specifically address disqualification of "agency heads":

Pursuant to Section 67-5252, Idaho Code hearing officers are subject to disqualification for bias, prejudice, interest, substantial prior involvement in the case other than as a presiding officer, status as an employee of the agency, lack of professional knowledge in the subject matter of the contested case, or any other reason provided by law or for any cause for which a judge is or may be disqualified. Any party may promptly petition for the disqualification of a hearing officer after receiving notice that the officer will preside at a contested case or upon discovering facts establishing grounds for disqualification, whichever is later. Any party may assert a blanket disqualification for cause of all employees of the agency hearing the contested case, other than the agency head, without awaiting the designation by a presiding officer. A hearing officer whose disqualification is requested shall determine in writing whether to grant the petition for disqualification, stating facts and reasons for the hearing officer's determination. Disqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.

IDAPA 37.01.01.412.

Idaho Code section 67-5252(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.

In the matter currently before the Department, the Director has an official conflict of interest between his role as the agency head of the Department and his ability in that role to fairly and impartially critique and evaluate the testimony and evidence produced and advanced by the Department and its staff and experts. Indeed, such an official conflict should exist as a matter of law, as any agency head would be hesitant to critique, and potentially reject, any conclusions or positions taken by the very department for which he or she heads. This, of course, is not a personal assessment of the individual Director in this case, but instead is a general assessment of the Director serving as a presiding officer in a case in which the Department staff's recommendations and analyses play a pivotal role. Simply put, no agency head could serve an autonomous and independent role critiquing and criticizing the very department for which he or she heads.

Although SeaPac recognizes and appreciates that the Director's role as presiding officer advances and addresses agency fiscal concerns, procedural expediency, and judicial economy, SeaPac respectfully asserts that such concerns should not be prioritized over the need for a presiding officer to be in a position to fairly and impartially critique and criticize positions asserted by the Department and to permit the development of a complete record through a truly adversarial proceeding.

Furthermore, SeaPac acknowledges that an appointed hearing officer can only issue a recommended order, Idaho Code section 67-5244, or a preliminary order, Idaho Code section 67-

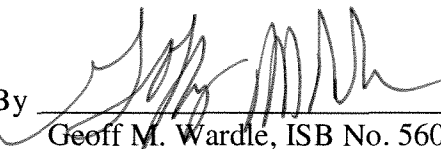
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5245, both of which are ultimately reviewable by the agency head, and that the agency has the ultimate decision-making in issuing a final order. Although the procedure of appointing an independent hearing officer obviously does not remove the entirety of the conflict, it serves to place an independent officer in a position to fairly and impartially critique the Department's positions, develop the record, and allow a truly adversarial proceeding to progress within the relevant rules and regulations, while the agency head makes the ultimate determination based upon the record.

### III. CONCLUSION

SeaPac's requests are timely under the Idaho APA and the Department's rules. For the foregoing reasons, SeaPac respectfully requests the disqualification of the Director from presiding over the hearing in this matter and the appointment of an independent hearing officer.

DATED THIS 22<sup>nd</sup> day of August, 2011.

By   
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Geoff M. Wardle, ISB No. 5604  
Attorney for SeaPac of Idaho, Inc.

CERTIFICATE OF SERVICE

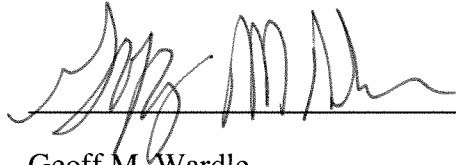
I HEREBY CERTIFY that on this 22<sup>nd</sup> day of August, 2011, I caused to be served a true copy of the foregoing REQUEST FOR AN INDEPENDENT HEARING OFFICER; REQUEST FOR DISQUALIFICATION OF THE DIRECTOR AS THE HEARING OFFICER by the method indicated below, and addressed to each of the following:

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Idaho Department of Water Resources.  
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Geoff M. Wardle