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DEPARTMENT OF
WATER RESOURCES

Attorneys for Ditch Companies

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE
STATE OF IDAHO

IN THE MATTER OF
ACCOUNTING FOR
DISTRIBUTION OF WATER
TO THE FEDERAL ON-
STREAM RESERVOIRS IN
WATER DISTRICT 63

MOTION TO DISQUALIFY

COMES NOW, Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (hereinafter collectively known as "Ditch Companies"), by and through their counsel, Sawtooth Law Offices, PLLC, and pursuant to I.C. § 67-5252 and IDAPA 37.01.01.412, hereby move to disqualify the Director of the Idaho Department of Water Resources (IDWR), or any member/employee of IDWR, from presiding over the above-captioned matter. This *Motion* is supported by the *Affidavit of Counsel* submitted

herewith, as well as the documents already part of this record for this matter.

I. INTRODUCTION

On October 22, 2013, the Director initiated this Contested Case by filing a *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference*. The *Notice* then set the matter for a status conference to occur on December 6, 2013. Following the status conference, on December 27, 2013, the Director stayed the matter pending the decision from the Idaho Supreme Court in the case involving Basin Wide Issue No. 17. On September 10, 2014, the Director issued an *Order Lifting Stay and Notice of Status Conference* which set the matter for a status conference on October 7, 2014. Other than these initial notices there have been no pleadings, decisions or determinations in this matter. More specifically, there has been no determination as to whether the Director or someone else will be the presiding officer over of this matter. Accordingly, the Ditch Companies hereby move to disqualify the Director and/or IDWR from presiding over this matter for the reasons set forth below, including the fact that the Director and IDWR's involvement in the matter would be best suited as a non-party wherein they could continue to play an active role procurement and dissemination of necessary documents and information as well as continue to be involved in any potential settlement options/alternatives.

II. ARGUMENT

1. Disqualification Without Cause.

Idaho Code section 67-5252(1) provides that “any party shall have the right to one (1) disqualification without cause of any person serving or designated to serve as the presiding officer.” In this matter, there has been no decision as to whether the Director intends to preside over this matter but the Director did sign the document referred to as the *Notice of Contested Case and*

*Formal Proceedings, and Notice of Status Conference and Order Lifting Stay and Notice of Status Conference*¹ and thus to the extent the Director intends to preside over this matter the Ditch Companies move to disqualify the Director based upon its “right to one (1) disqualification without cause.” The Ditch Companies further move to disqualify any other employees of IDWR based upon its right to disqualify the agency head and the agency employees as provided in I.C. § 67-5252 which provides “[a]ny 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 designation of a presiding officer.”

2. Disqualification based upon Bias, Prejudice, Interest, Substantial Prior Involvement.

Idaho Code section 67-5252(1) also provides for the “right to move to disqualify for bias, prejudice, interest, substantial prior involvement in the matter other than as presiding officer, 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.” (emphasis added.) A similar right to disqualification of officers hearing contested cases is provided in IDAPA 37.01.01.412. The Director and/or IDWR have been involved in the issues intended to be addressed in this matter much more than simply fulfilling their roles in the accounting and administration of water rights in Basin 63. In fact, the Director and IDWR have been advocating and/or participating in settlement discussions and have taken various positions regarding the resolution of this matter.

See Affidavit of Counsel.

On or about September 17, 2014, the Director provided a presentation to the Interim Natural

¹ IDAPA 37.01.01.550 requires the notice of hearing to include the name of the presiding officer. The *Notice* and *Order* referenced above do not indicate the name of the presiding officer for this matter.

Resources Committee which explained the issue presented in this Contested Case, described many of the arguments which may arise, described the Director's opinions relating to the issues, identified consequences concerning these issues and identified ongoing settlement discussions which the Director and/or IDWR are aware of and/or have been involved in. *Affidavit of Counsel, Exhibit A.*²

In fact, page 17 of the Director's presentation references "draft settlement agreement language" and the Director's consideration of the merits to such settlement options. *Id. (Exhibit A)*. The presentation also makes several statements as to the Director's opinions as to the complaints the Director has received and the Director's opinions as to several "considerations" including "possible consequences" the Director has already considered. Thus, the Director has considered issues which may be raised in this matter and has openly expressed opinions before the matter has been presented to the Director. Moreover, the Director is not only aware of settlement options being considered at this point but has been involved in such discussions as the Director has provided settlement proposals with proposed priority dates and analysis of those dates. The parties to this matter cannot expect to get a fair, impartial and objective presiding officer over this matter when the presiding officer has already considered many of the issues which may be raised, expressed opinions on those issues and engaged in settlement discussions concerning the very issues which the presiding officer may be asked to decide. The prohibition against decision makers which are biased, prejudiced and which have had substantial prior involvement in the matter is fundamental and essential for purposes of due process for the parties, especially considering the standards of review of any agency

² It has been nearly one year since this Contested Case was initiated and the communication referenced herein is just a glimpse of the discussions and involvement of the Director and IDWR during this period, much of which would be considered improper ex parte communication, and would demonstrate further biased, prejudice and substantial prior involvement of the Director and IDWR. The Director and IDWR, whether it appoints an independent hearing officer or not, should disclose such communication to the parties, and as appropriate allow discovery on the issues.

determinations or orders. The Director and IDWR are clearly biased and prejudiced based upon their substantial prior involvement concerning the issues and their knowledge and involvement in the settlement proposals being suggested/considered by the Director and IDWR. Accordingly, the Director should disqualify himself, and any other employee of IDWR, from presiding over this matter and should appoint an independent hearing officer to preside over this matter.

It is not being suggested that the Director and IDWR should have no involvement in this matter. To the contrary, the Director and IDWR's involvement in this matter will continue to be necessary and in fact appointing an independent hearing officer to preside over this matter will allow the Director and IDWR to continue to participate in the matter, provide their expertise and guidance, and also allow the Director and IDWR to continue to participate in any further settlement discussions or alternatives. Indeed, the Director and IDWR are essential to procuring, accumulating and disseminating the historical documents relating to the distribution and accounting in Basin 63 and may also be helpful to any settlement discussions, including consideration of settlement alternatives/options which may be feasible to resolve this matter. However, such assistance or involvement would be restricted if the Director and IDWR were to preside over this matter as it would not be proper for the Director or IDWR to be the presiding officer and still participate in any negotiations or discussions concerning the possible resolution.

In fact, Idaho Code § 67-5253 specifically forbids such communication and provides “a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the proceeding, with any party, except upon notice and opportunity for all parties to participate in the communication.” A similar prohibition against ex parte communication, “unless required for the disposition of a matter specifically authorized by statute to be done ex parte”,

is provided in IDAPA 37.01.01.417. During the nearly one year since the Director initiated this case, the Director and IDWR have engaged in ex parte communication with parties, non-parties, Legislators and others, involving more than simply procedural issues, and while this provides the basis for disqualification as discussed above, should the Director and IDWR desire to continue to be part of and participate in further discussions concerning these issues then it is necessary for the Director to appoint an independent hearing officer.

Finally, this Motion is being filed in advance of the upcoming status conference scheduled for October 7, 2014 which presumably will discuss scheduling and other matters. The Ditch Companies contend that this motion must be addressed, whether it is set for a subsequent hearing or at the status conference before the matter proceeds any further. In other words, a threshold question is whether an independent hearing officer will be appointed, and if so, then said independent hearing officer should address scheduling and other matters. Indeed, a decision, in writing, is necessary pursuant to I.C. § 67-5252(3), which provides that “[a] person whose disqualification for cause is requested shall determine in writing whether to grant the petition, stating facts and reasons for the determinations.”

III. CONCLUSION

For the above-referenced reasons, the Ditch Companies respectfully move to disqualify the Director and IDWR from presiding over this matter. Both have already rendered opinions as to the issues and consequences in this matter before the parties have had an opportunity to present their respective cases and both have had a substantial prior involvement and have participated in and proposed settlement alternatives/options relating to the very issues which will be decided in this matter. Neither the Director or IDWR can be a fair, impartial and objective presiding officer and

both would be more helpful continuing to provide guidance or expertise as a non-party similar to their role in the Snake River Basin Adjudication and thus both would also be available to participate in and assist with the discussions of feasible settlement alternatives.

DATED this 2nd day of October, 2014.

SAWTOOTH LAW OFFICES, PLLC

By: 
S. Bryce Farris

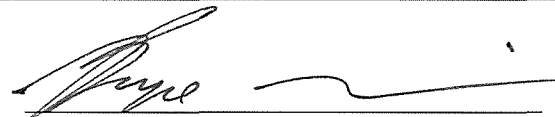
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2014, I served the foregoing to the following and by the method indicated below:

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