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MAY 05 2009

Department of Water Resources

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Attorneys for the Idaho Water Resource Board

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

|                                  |   |                              |
|----------------------------------|---|------------------------------|
| IN THE MATTER OF APPLICATION TO  | ) |                              |
| RENT WATER FROM THE WATER        | ) | RESPONDENT'S OPPOSITION TO   |
| SUPPLY BANK NOS. 74-2320 AND 74- | ) | MOTION TO VACATE HEARING SET |
| 15190 IN THE NAME OF THE IDAHO   | ) | FOR MAY 13, 2009 AND REQUEST |
| WATER RESOURCE BOARD             | ) | FOR TELEPHONIC HEARING       |
|                                  | ) |                              |

Respondent, the Idaho Water Resource Board ("Board"), opposes James Whittaker's ("Whittaker") Motion to Vacate Hearing Set For May 13, 2009 ("Motion to Vacate") filed on May 1, 2009. Whittaker initiated this contested case by filing a protest on April 2, 2008, and apparently decided not to retain counsel until sometime during the last week of April 2009. Over one year after filing his protest and just a few days before hearing, Whittaker now asks for additional time to prepare his case. In addition, although Whittaker has been on notice since November 7, 2008, that employees of the Idaho Department of Water Resources ("Department") would serve as hearing officers in this proceeding, he now requests that "no employee of the

RESPONDENT'S OPPOSITION TO MOTION TO VACATE HEARING  
SET FOR MAY 13, 2009 AND REQUEST FOR TELEPHONIC HEARING, Page 1

Idaho Department of Water Resources be appointed as the hearing officer in this matter.” Motion For Independent Hearing Officer, May 1, 2009. Whittaker’s failure to retain counsel in a timely manner and belated request that a non-Department employee serve as hearing officer are not grounds for vacating the May 13, 2009 hearing.

This case was initiated by Whittaker’s protest which was filed on April 2, 2008. Clearly, Whittaker could have retained counsel in sufficient time to prepare for a formal contested case hearing, but apparently chose not to do so. Whittaker’s failure to use diligence in an administrative proceeding he initiated should not serve as a basis for vacating the May 13, 2009 hearing.

Moreover, Whittaker has been on notice since November 2008 that a Department employee would serve as a hearing officer in this case. A November 7, 2008 Notice of Prehearing Conference stated that the “presiding officer at the pre-hearing will be Ernest Carlson, of the Idaho Department of Water Resources.” The notice was signed by “Ernest Carlson, Hearing Officer.” Hearing Officer Carlson issued a subsequent Notice of Hearing on January 15, 2009, scheduling a formal hearing for March 11, 2009 and notifying the parties that the presiding officer at the hearing would be Gary Spackman, a Department employee. On March 10, 2009, Hearing Officer Spackman issued an order granting the Board’s motion for a continuance and ordering the parties to submit information that would allow for rescheduling the hearing during the months of April or May. On April 9, 2009, Hearing Officer Spackman’s Notice of Hearing scheduled a formal hearing for May 13, 2009.

IDAPA 37.01.01.412 requires prompt action by a party who wishes to disqualify one or all Department employees from presiding over a contested case. Rule 412 states in relevant part:

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 the presiding officer. (Emphasis added.)

There can be little doubt that Whittaker received timely and more than adequate notice that a Department employee was designated as the hearing officer in this case. Although Rule 412 does not set forth a time limit for a petition to disqualify a designated hearing officer, Idaho Rule of Civil Procedure 40(d)(1)(B) provides a useful framework for determining whether a petition to disqualify is timely. IRCP 40(d)(1)(B) states, in relevant part:

A motion for disqualification without cause must be filed not later than seven (7) days after service of a written notice or order setting the action for status conference, pretrial conference, trial or for hearing on the first contested motion, or not later than twenty-one (21) days after service or receipt of a complaint, summons, order or other pleading indicating or specifying who the presiding judge to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pretrial conference, a contested proceeding or trial before the judge sought to be disqualified.

Motions for disqualification for cause may be filed at any time, but must be accompanied by an affidavit "stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion." IRCP 40(d)(2).

A petition to disqualify Mr. Spackman submitted three months after notice of his designation as a hearing officer and just a few days before the formal hearing cannot be considered prompt. Nor is filing an unsupported motion to disqualify all Department employees twelve months into a contested case proceeding consistent with the requirements of Rule 412. That motion should have been filed before any hearing officers were designated. A timely filing would have allowed the Department adequate time to determine whether designating a non-employee hearing officer was justified or practical. For these reasons, the submittal of the Motion For Independent Hearing Officer does not warrant a delay in the proceedings.

The Board's counsel and witnesses have arranged their schedules in order to prepare for and attend the May 13, 2009 hearing and the Board will incur additional expenses in the event the hearing is rescheduled. More importantly, if the hearing is delayed, it could prevent the Board from proceeding with the rental of water right no. 74-2320 from the Water Supply Bank during the June 01, 2009 through November 15, 2009 rental period. The Board has made a commitment to rent water right no. 74-2320, and others, for the purpose of improving instream flow conditions at the mouth of Eighteenmile Creek and in certain reaches of the Lemhi River. The proposed rental represents the Board's intent to address limiting factors in the Lemhi River Basin that affect fish species listed as threatened under the Endangered Species Act. To delay for one year the Board's ability to rent water for this purpose is not the proper remedy for Whittaker's failure to retain counsel or his failure to request a substitute hearing officer in a timely manner.

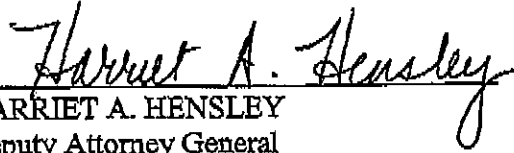
For these reasons, the Board requests that the Motion to Vacate be denied and that the hearing be held on May 13, 2009 as scheduled. In the alternative, any order granting the Motion to Vacate should include a condition allowing the Board to rent water right no. 74-2320 from the Water Supply Bank for the June 01, 2009 through November 15, 2009 rental period.

The Board also requests that the Hearing Officer schedule a telephonic hearing on Whittaker's motions within the next few days to address and timely resolve these preliminary matters and to avoid any unnecessary expense and delay. Counsel for the Board is available for hearing at the following times: Wednesday May 6, 2009, 8:00 am – 5:00 pm, Thursday May 7, 2009, 8:00 am - 1:00 pm, and Friday May 8, 2009, 8:00 am - 3:30 pm.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of May 2009.

LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

  
HARRIET A. HENSLEY  
Deputy Attorney General  
Natural Resources Division

**CERTIFICATE OF SERVICE**

I certify that on the 5<sup>th</sup> day of May 2009 I caused to be served a true and correct original/copy of the foregoing RESPONDENT'S OPPOSITION TO MOTION TO VACATE HEARING SET FOR MAY 13, 2009 AND REQUEST FOR TELEPHONIC HEARING upon the following parties by the method listed below:

## 1. The original to:

GARY SPACKMAN, HEARING OFFICER  
IDAHO DEPT OF WATER RESOURCES  
PO BOX 83720  
BOISE ID 83720-0098

☐ U.S. Mail, postage prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☒ Fax 287-6700

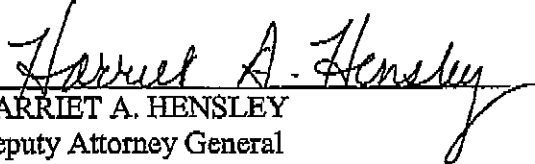
## 2. Copies to:

ROBERT HARRIS  
HOLDEN KIDWELL  
1000 RIVERWALK DR.  
PO BOX 50130  
IDAHO FALLS ID 83405-0130

☐ U.S. Mail, postage prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☒ Fax (208) 523-9518

MORGAN CASE  
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PO BOX 83720  
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☐ U.S. Mail, postage prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☒ Fax 287-6700

  
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Natural Resources Division



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*Phone: (208) 334-2400**Natural Resources Division FAX: (208) 854-8072***Transmittal Cover**

To: Gary Spackman, Hearing Officer, IDWR  
Fax: 287-6700

Robert Harris, Holden Kidwell PLLC  
Fax: 208-523-9518

Morgan Case, IDWR  
Fax: 287-6700

From: Harriet A. Hensley  
Deputy Attorney General  
Natural Resources Division

Document Description: *Respondent's Opposition to Motion to Vacate Hearing Set for May 13, 2009 and Request for Telephonic Hearing.*

In the Matter of Application to Rent Water from the Water Supply Bank Nos. 74-2320 and 74-15190 in the Name of the Idaho Water Resource Board

Total Number of Pages (Including This Page): 7

Sender: Pat Boehm

Date: May 5, 2009

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