

STATE OF IDAHO
 County of BONNER)^{ss}
 FILED _____
 AT _____ O'Clock ____M
 CLERK, DISTRICT COURT

 Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER**

WATERFRONT PROPERTY)
MANAGEMENT, LLC., an Idaho LLC, and)
R&S PROPERTIES, an Idaho Limited)
Partnership,)
)
 Petitioners,)
)
 vs.)
)
STATE OF IDAHO, BD. OF LAND)
COMMISSIONERS, DEPT. OF LANDS, and)
the STATE OF IDAHO TRANSP. DEPT.,)
)
 Respondents.)

Case No. **S CV 2007 23**

**MEMORANDUM DECISION AND
 ORDER DENYING PETITIONERS’:
 “MOTION TO DISQUALIFY FOR
 CAUSE” AND ORDER GRANTING
 “RESPONDENTS’ MOTION TO
 STRIKE PETITIONERS’ MOTION TO
 DISQUALIFY FOR CAUSE“**

I. INTRODUCTION AND BACKGROUND.

On January 29, 2009, petitioners filed a “Motion to Disqualify for Cause” pursuant to I.R.C.P. 40(d)(2), contending “that the judge is interested in the action or proceeding (I.R.C.P. 40(d)(2)(A)(1), and/or that the judge is biased or prejudiced for the Respondents against the Petitioners in the case (I.R.C.P. 40(d)(2)(A)(4).” Motion to Disqualify for Cause, pp. 1-2. Petitioners claim “This motion shall be supported by an affidavit stating the grounds upon which disqualification is based and the facts relied upon in support of the motion.” *Id.*, p. 2. Indeed, an affidavit is required by the rule: “Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party ‘s attorney stated distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion.” I.R.C.P. 40(d)(2)(B).

Petitioners' motion to disqualify for cause came to this Court's attention soon after it was filed on January 29, 2009. This Court has held off scheduling a hearing on the Motion to Disqualify for Cause until petitioners did what I.R.C.P. 40(d)(2)(B) requires them to do, and until petitioners did what they told this Court and respondents they would do...file an affidavit. As of this date, no affidavit has been filed by petitioners.

A hearing is required under I.R.C.P. 40(d)(2)(B), and the motion to disqualify can only be granted or denied after that hearing. I.R.C.P. 40(d)(2)(B). While a hearing is required, it is only required if petitioners follow the rules. Idaho Rule of Civil Procedure 40(d)(2)(B) specifies that the presiding judge must grant or deny the motion "upon notice and hearing *in the manner prescribed by these rules for motions*". *Lamm v. State*, 143 Idaho 763, 766, 152 P.3d 634, 637 (Ct.App. 2006). (italics in original). "The italicized language refers to the notice and hearing requirements for motions that are established in I.R.C.P. 7(b)(3)(D)." *Id.* Idaho Rule of Civil Procedure 7(b)(3)(D) requires the moving party to request oral argument and file a brief, and if the moving party fails to do so the court may deny such motion without notice if the court deems the motion has no merit. *Id.* This Court finds petitioners' motion to disqualify for cause to be without merit as no affidavit has been filed.

If the motion to disqualify were properly filed, this Court would be divested of jurisdiction until it ruled on the petitioners' motion to disqualify for cause. *Davis v. Irwin*, 65 Idaho 77, 139 P.2d. 474 (1943); *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972). This Court specifically finds petitioners have not properly filed their motion to disqualify for cause, as they have failed to comply with the requirement of I.R.C.P. 40(d)(2)(B) by failing to file an affidavit.

On February 6, 2009, respondent State of Idaho Transportation Department (ITD) filed "Respondent ITD's Motion to Strike Petitioners' Motion to Disqualify for Cause" and "Respondent ITD's Memorandum in Support of Motion to Strike Petitioners' Motion to

Disqualify for Cause”. The essence of that motion to strike is ITD’s claim that petitioners failed to comply with I.R.C.P. 84, which governs cases involving judicial review of an agency’s actions, such as this case, specifically, I.R.C.P. 84(o) which requires: “All motions must be accompanied with a supporting memorandum or brief.” No brief has been filed by petitioners. Petitioners have failed to comply with I.R.C.P. 84(o).

II. ORDER.

IT IS HEREBY ORDERED petitioners’ Motion to Disqualify is DENIED without hearing (*Lamm v. State*, 143 Idaho 763, 766, 152 P.3d 634, 637 (Ct.App. 2006)) due to petitioners’ failure to comply with I.R.C.P. 40(d)(2)(B), I.R.C.P. 7(b)(3)(D) and I.R.C.P. 84(o).

IT IS FURTHER ORDERED respondent’s Motion to Strike Petitioners’ Motion to Disqualify for Cause in GRANTED, due to petitioners’ failure to comply with I.R.C.P. 84(o), and although not mentioned by ITD as a basis for its Motion to Strike, for petitioners’ failure to comply with I.R.C.P. 40(d)(2)(B) and I.R.C.P. 7(b)(3)(D).

Entered this 9th day of March, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		<u>Lawyer</u>	<u>Fax #</u>
John A. Finney	(208) 263 8211		Clive Strong, Steven J. Schuster	(208) 334-2297
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Jeanne Clausen, Deputy Clerk