

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

IN THE MATTER OF APPLICATION)	ORDER DENYING REQUEST FOR
FOR PERMIT NO. 36-7999 IN THE)	DELAY, DENYING MOTION TO
NAME OF DEVIL'S CORRAL LLC)	DISMISS, AND DENYING REQUEST
_____)	FOR CONFERENCE

BACKGROUND

On June 10, 2019 applicant Devil's Corral LLC (DC) filed an *Unopposed Motion for Temporary Stay of Proceedings* (Motion for Stay). The Motion for Stay requested a stay of proceedings for 180 days for purposes of continued settlement discussion between the parties, and also contained stipulated amendments to the scheduling order. On June 20, 2019 the Department of Water Resources (Department) issued an *Amended Notice of Hearing and Amended Scheduling Order* (Amended Scheduling Order) which granted the stay and established rescheduled hearing dates of February 12-14, 2020.

On December 10, 2019, pursuant to the Amended Scheduling Order, protestant Idaho Department of Fish and Game (IDFG) timely submitted *IDFG's Disclosure of Expert Reports*.

Also on December 10, 2019 applicant DC, through its agent George Panagiotou (collectively, DC), sent an email to the Hearing Officer requesting an additional extension of the contested case proceedings for twelve months. The Hearing Officer responded to the email, noting that any request for delay should be filed in the form of a motion pursuant to the Department's Rules of Procedure. On December 23, DC sent a second email requesting that "all Notices, Depositions and Hearings be canceled till a later time". The email also requested that Don Campbell and Jason Helms be "removed from this list" (DC email December 23, 2019).

On December 13, 2019, intervenor Idaho Ground Water Appropriators, Inc. (IGWA) filed an *Objection to Request for Delay; Motion to Dismiss Application for Permit No. 36-7999 and Memorandum in Support* (Motion to Dismiss). IGWA argues that it would not be in the public interest to grant DC's request for delay (*Motion to Dismiss at 5*), and that application for permit 36-7999 (Application) must be dismissed because the Application is speculative and because DC is required to be represented by an attorney in these proceedings, and DC is not currently represented by an attorney (*Motion to Dismiss at 6*).

On December 23, 2019, IDFG filed *Motion Requesting Status Conference* (Motion Requesting Conference). IDFG raises questions regarding which individuals might still be called as witnesses, and requests a telephonic conference "at the earliest possible date". IDFG states that deposition dates have been scheduled for four witnesses named by DC, and two of those witnesses appear to have been removed from the case by DC, based on DC's December 23, 2019 email.

In response to the Department's inquiry to all parties regarding availability for a status conference during the week of December 30, 2019, DC sent a third email to the Hearing Officer on December 30, 2019, stating that DC will not participate in "any conference calls or depositions regarding IDWR Application for Permit # 36-7999 for the next twelve months." The Hearing Officer responded to the email, advising DC that the February 12-14, 2020 hearing had not been canceled, and directing DC to confirm to the parties via email which witnesses would testify for DC at the hearing. As of this writing, DC has not confirmed the participation of any of the potential witnesses.

ANALYSIS AND CONCLUSIONS

1. Additional stay of this contested case is not justified.

Rule 260 of the Department's Rules of Procedure (IDAPA 37.01.01) states:

01. Motions – Defined. All other pleadings requesting the agency to take any other action in a contested case . . . are called "motions".

02. Form and Contents. Motions should:

- a. Fully state the facts upon which they are based;
- b. Refer to the particular provision of statute, rule, order, notice or other controlling law upon which they are based; and
- c. State the relief sought.

Pursuant to Rule 260, a request to stay the contested case proceedings (which is a request for the agency to take an action in the contested case) must be filed in the form of a motion. DC's December 10, 2019 email requesting an additional delay of this case was not filed in the form of a motion, as described in Rule 260. The Hearing Officer is not required to act on the email request. This order responds to IGWA's objection in its Motion to Dismiss, although it also answers DC's request for additional delay.

Even if the DC email qualified as an acceptable motion, a request for additional delay of this contested case must be denied, pursuant to Rule 40.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08). Rule 40.01.d states:

An applicant may request in writing that commencement of processing of his or her application be delayed for a period not to exceed one (1) year or that processing be interrupted for a period not to exceed six (6) months. The Director at his discretion may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay. The Director may approve a request for delay for a shorter period of time or upon conditions, and *may renew the approval upon written request* (emphasis added). IDAPA 37.03.08.40.01.d

IGWA argues in its Motion to Dismiss that "there is no rational basis to allow an application for permit submitted on August 31, 1981 to continue indefinitely while the applicant decides precisely what to do." *Motion to Dismiss at 5*. IGWA further asserts "Given the ground water user's obligations and commitments made under their settlement agreement, and the vast number of water users it impacts, it is not in the public interest to

allow further delays in the processing of 36-7999, which could affect these ground water rights.” *Id.*

This application is 38 years old and has already experienced significant delays. Processing of the contested case was resumed at DC’s request in 2017. Since that time, the hearing has been re-scheduled four times. Most recently, DC requested a six-month delay to allow time for settlement discussions. These discussions do not appear to have been fruitful. The present hearing schedule resumed on December 13, 2019 and culminates with the hearing scheduled February 12-14, 2020.

The Director has discretion under Rule 40.01 to grant an additional processing extensions, not to exceed six months, unless the delay will cause injury or would not be in the public interest. At this stage of the hearing schedule, expert reports have been filed by IDFG. Protestants have expended significant time and resources in preparation for hearing. Another stay of hearing would be prejudicial to protestants, and would not be in the public interest. The request for delay should not be granted.

2. Devil’s Corral LLC is required to be represented by an attorney.

IGWA argues that DC is required to be represented by an attorney in contested case proceedings before the Department. *Motion to Dismiss* at 8. Based on the relevant case law, the Department concurs. See *Indian Springs LLC v. Indian Springs Land Investment, LLC*, 147 Idaho 737, 744-745, 215 P.3d 457, 464-465 (2009). DC is required to have legal representation for filing motions or responses in this contested case, and during the administrative hearing. Since DC’s previous attorney withdrew on August 31, 2019, DC has submitted no formal pleadings, and the administrative hearing has not yet been held. At this time, there has been no apparent violation of this requirement by DC. Dismissal is not warranted on this basis, but neither is additional delay.

3. Determination of speculation requires development of evidentiary record.

To evaluate if an application is speculative, the Director must judge the intent of the applicant based on the “substantive actions” of the applicant with regard to the project:

“The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person’s intent can only be based upon the substantive actions that encompass the proposed project.” IDAPA 37.03.08.045.01.c.

DC’s statement that “I need time to redesign the project to fit both the permit and my development plans” (*DC email December 10, 2019*) suggests that the Application is still a part of DC’s proposed project. A prior order issued in this proceeding established that DC’s plainly stated goals were to “...maintain the 1981 priority date of the Application, avoid readvertising, and gain an approved permit under which the first phase of the project

may be developed.”¹ IGWA includes evidence in the present Motion to Dismiss that DC recently offered to sell the Application to IGWA. *Motion to Dismiss at 7*. Taken out of context, this action might be interpreted as speculative, however, IGWA does not explain the circumstances surrounding the communication, which occurred during the recent stay of proceedings. DC’s substantive actions with regard to the Application are questions of fact that must be established through testimony and documentary evidence. There is not sufficient evidence at this point to dismiss the application for being speculative.

4. There is no longer a basis for the proposed status conference.

IDFG’s Motion Requesting Conference describes uncertainty surrounding DC’s expert witnesses. During discovery, Charles Brockway, Jason Helms and Don Campbell were identified as potential expert witnesses for DC. Consequently, IDFG scheduled depositions for Brockway, Helms and Campbell for January 6-7, 2020. DC’s December 23, 2019 email asking for Helms and Campbell to be “removed from this list” suggests that Helms and Campbell will not be called as witnesses in this contested case. According to the Amended Scheduling Order, the deadline for completing depositions is January 10, 2020. Because of the short notice and the time of year, the Hearing Officer was unable to schedule a status conference prior to the scheduled depositions.

ORDER

IT IS HEREBY ORDERED that DC’s request for delay is DENIED.

IT IS FURTHER ORDERED that IGWA’s Motion to Dismiss is DENIED.

Because there is no longer a need for a status conference to address IDFG’s witness questions, the Motion Requesting Conference is also DENIED.

Dated this 7th day of January, 2020



Cindy Yenter
Hearing Officer

¹ *Order on Sufficiency of Amended Application, Denying Joint Motion to Dismiss and Scheduling Conference, November 18, 2018, pg. 3.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2020 true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Denying Request for Delay, Denying Motion to Dismiss, and Denying Motion for Conference

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