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Department of Water Resources
Eastern Region

Attorneys for Henry's Lake Overlook Property Owners Association, Inc.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 21-
13262 IN THE NAME OF HENRY'S LAKE
OVERLOOK PROPERTY OWNERS
ASSOCIATION, INC.

**ASSOCIATION'S OPPOSITION TO
IDFG'S PETITION TO INTERVENE**

Henry's Lake Overlook Property Owners Association, Inc. (the "Association"), by and through its attorney of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., files the *Association's Opposition to IDFG's Petition to Intervene*, pursuant to the Rules of Procedure of the Idaho Department of Water Resources, specifically IDAPA 37.01.01.270.01. *IDFG's Petition to Intervene* (the "Petition") should now be denied because it will certainly unduly broaden the issues involved in this proceeding—particularly now that the only protest to application for permit no. 21-13262 (hereinafter simply "21-13262") was withdrawn on February 26, 2019 (two days prior to the Association's deadline to respond to the *Petition*).

The Idaho Department of Fish and Game (“IDFG”) missed the deadline to file a protest, but now asks to be allowed to intervene in this proceeding in order to assert concerns relating to its water right and other related environmental concerns. This cannot be allowed because IDFG has not shown (and cannot show) that its intervention “does not unduly broaden the issues” involved here. IDAPA 37.01.01.353.

I. BACKGROUND

On December 18, 2018, the Association—through its attorney—submitted to the Idaho Department of Water Resources (“IDWR”) an application for 21-13262 along with an explanatory cover letter (the “Letter”). Although not required under any Idaho rule or state, the Association also sent a courtesy copy of the Letter and all of the application documents associated with 21-13262 to the Attorney General’s office who represents IDFG in its interactions with the Association in proceedings related to voided permit 21-13038, which relates to the same subdivision governed by the Association. (See Letter, p. 2). IDWR considered the application documents associated with 21-13262 received on December 19, 2018, and thereafter published notice of 21-13262, as required by statute. Idaho Code § 42-203A.

By statute, any protest to 21-13262 was due by February 4, 2019. Idaho Code § 42-203A. On January 30, 2019, IDWR received a *Notice of Protest* (the “Protest”) from the Fremont-Madison Irrigation District (“FMID”). That is the only timely protest received by IDWR.

On February 25, 2019, IDWR received the *Notice of Appearance* and *Petition* submitted by IDFG (on February 21, 2019), because IDFG missed the deadline to submit a protest.

On February 26, 2019, FMID submitted a *Withdrawal of Protest* to IDWR, which unconditionally withdrew the *Protest*.

II. LEGAL STANDARD

A party may intervene in a proceeding only under certain circumstances. IDAPA

37.01.01.350. Rule 353 of the Idaho Department of Water Resources Rules of Procedure provides:

If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

IDAPA 37.01.01.353. Thus, the analysis of a petition to intervene requires consideration of:

(a) whether it is timely, (b) the potential intervenor showing a "direct and substantial interest in any part of the subject matter of a proceeding," (c) a showing that the intervention would "not unduly broaden the issues," and (d) whether the potential intervenor's "interest is adequately represented by existing parties." *Id.*

The rules provide further specificity about timeliness. A petition to intervene is timely filed if it is "filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice." IDAPA 37.01.01.352.

III. ARGUMENT

Here, there has not been a prehearing conference, nor is a formal hearing scheduled, so the Association concedes that the *Petition* is timely. Likewise, given IDFG's prior involvement with 21-13038 (a prior voided permit proceeding relating to the Association), the Association concedes that IDFG has a direct and substantial interest in 21-13262. The Association also agrees that no other party represents IDFG's interest in these proceedings on 21-13262 as no other party claims

any interest in IDFG's water right, and, obviously, there are now no other protestant-parties to 21-13262.

As described below, however, IDFG cannot show that its intervention will "not unduly broaden the issues" in this contested case. IDAPA 37.01.01.353. For that reason, the *Petition* must be denied.

A. IDFG's Intervention Will Unduly Broaden the Issues Involved in this Application.

Only FMID had timely protested 21-13262. FMID's *Protest* was based on (and the entire scope of the contested case is) whether "approval of the water right will impact or injure [FMID] or its electors. Specifically, potential impact to Henrys Lake, Henrys Fork and/or Island Park Reservoir." (*Protest*, p. 1 (¶ 6)). FMID stated that, to resolve its *Protest*, it wanted "[a]ssurance that the water right application will not impact or injury [FMID] or its electors." (*Protest*, p. 1 (¶ 7)). That was the only described issue in this proceeding. However, FMID has now unconditionally withdrawn its *Protest*. (See *Withdrawal of Protest* filed on February 26, 2019). This leaves no protest to 21-13262 pending before IDWR.

IDFG failed to timely protest the *Application*. IDFG had notice—both **legal notice**, as required per Idaho Code § 42-203A, and **actual notice** provided by the Association in the Letter—but IDFG failed to timely act. Nevertheless, IDFG does not seek to intervene to address a specific argument, but IDFG seeks to generally intervene in this *Application* and become another protestant in order to address all of the issues in Idaho Code § 42-203A in relation to its Water Right No. 21-2100 ("21-2100"). (*Petition*, p. 2). Those issues are vastly different from the issues raised by FMID.

In this context, it is also noteworthy that IDFG does not attempt to show that its Petition, if granted, would not “unduly broaden the issues” of this proceeding. IDAPA 37.01.01.353.

IDFG’s entire argument in support of its intervention request is:

IDFG has a direct and substantial interest in protecting its existing use of water under 21-2100. These interests are not adequately represented by [FMID], who also protested this water right application. In addition, a prehearing has not yet been set in this matter.

(*Petition*, pp. 3-4). IDFG’s *Petition* addresses every element of IDAPA 37.01.01.353, **except** whether the *Petition* would “unduly broaden the issues.”

However, this is not a part of the rule that IDWR can ignore, nor is this merely a factor among many for IDWR to consider in analyzing a petition to intervene. The rule specifies, among other elements, that the intervenors **must** show—and bears the burden of showing—that the intervention “does not unduly broaden the issues.” IDAPA 37.01.01.353 (emphasis added). IDFG’s failure to address this essential element alone warrants denial of the *Petition*. IDFG’s failure to meet its burden means that the *Petition* must therefore be denied.

IDFG argues that 21-13262 “is simply a repackaging of voided water right permit 21-13038.” (*Petition*, p. 3). However, this assertion is not relevant. IDFG has provided no authority upon which to base a challenge to the Association’s application for 21-13262. Nor has IDFG provided any basis for IDWR to craft a rule that one protest of a prior water right permit constitutes a *per se* basis to intervene (and/or protest, whether timely or untimely, as IDFG is trying to do here) in any and all future permit applications that relate in some way to the prior permit or property associated with such permits. Such a rule would be beyond IDWR’s statutory authority. In sum, IDFG’s “repackaging” argument is unavailing, as it has no legal or lawful basis.

Injection of IDFG's new issues, relating to different water rights and different issues associated with those water rights, will prejudice the Association. IDFG's intervention will expand the issues in this proceeding into a complex consideration of other possible issues that IDFG chooses to raise. IDFG had a fair opportunity to protest 21-13262 when it was first published—and IDFG chose not to do so. As a result, it would unduly broaden the issues involved in this application to allow IDFG to intervene and significantly change the dynamic of this proceeding.

IV. CONCLUSION

IDFG's failure to timely protest the *Application* has legal consequences. In this context, the State should be held to the same standards as every other water user in Idaho. While there is a provision allowing intervention, there is no provision of IDWR's rules that allows for an untimely protest. Further, because IDFG has not shown—or even addressed—that its intervention “does not unduly broaden the issues” here, the *Petition*—filed 17 days after the protest deadline—must be denied. IDAPA 37.01.01.353.

DATED this 28th day of February, 2019.



Robert L. Harris, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 28th day of February, 2019.

DOCUMENT SERVED: ASSOCIATION'S OPPOSITION TO IDFG'S PETITION TO INTERVENE

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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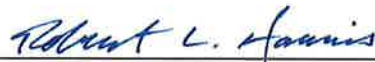
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