

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

IN THE MATTER OF APPLICATION	)	
FOR PERMIT NO. 21-13262 IN	)	
THE NAME OF HENRYS LAKE	)	ORDER DENYING
OVERLOOK PROPERTY OWNERS	)	PETITION TO INTERVENE
<u>ASSOCIATION, INC.</u>	)	

On December 19, 2018, Henrys Lake Overlook Property Owners Association, Inc. (“HLO”) filed Application for Permit 21-13262 (“Application 21-13262”) with the Department, seeking a permit to divert 0.20 cfs from ground water for domestic use. The Department published notice of Application 21-13262 on January 18 and 25, 2019. The notice established a protest deadline of February 4, 2019.

Fremont-Madison Irrigation District (“FMID”) filed a timely protest on January 30, 2019. On February 25, 2019, Idaho Department of Fish & Game (“IDFG”) filed a *Petition to Intervene* (“Petition”). FMID withdrew its protest, without condition, on February 26, 2019.

On February 28, 2019, HLO filed an *Opposition to IDFG’s Petition to Intervene* (“Opposition”). HLO asserts that IDFG’s *Petition* is deficient because it does not address the question of whether IDFG’s intervention would unduly broaden the issues of the contested case. *Opposition* at 3-6. HLO also asserts that IDFG’s intervention will unduly broaden the issues of the case and should therefore be denied. *Id.*

Rule 352 of the Department’s Rules of Procedure (IDAPA 37.01.01) states:

Petitions to intervene must be 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. Petitions not timely filed must state a substantial reason for delay. The presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons. Intervenors who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

Rule 353 of the Department’s Rules of Procedure (IDAPA 37.01.01) states:

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.

IDFG's *Petition* is timely because it was filed at least fourteen days prior to the date of the prehearing conference. A prehearing conference has not yet been scheduled. Further, IDFG has demonstrated a direct and substantial interest in the subject matter of the proceeding. IDFG's *Petition* describes a concern about impact to spring water right 21-2100 held by IDFG and located near the proposed ground water point of diversion. *Petition* at 2-3. HLO concedes that IDFG has a direct and substantial interest in Application 21-13262. *Opposition* at 3.

Undue Broadening of Issues

Idaho Code § 42-203A(5) sets forth the criteria used to evaluate all applications for permit. Section 42-203A(5)(a) requires the Department to evaluate whether a proposed development will "reduce the quantity of water under existing water rights." The Department must conduct this evaluation whether or not an application for permit is protested. IDFG's *Petition* states a concern that the proposed diversion will reduce the quantity of water available to satisfy IDFG's water right 21-2100. One might argue that IDFG's intervention in the matter would not unduly broaden the issues before the Department, because the Department is already required, by statute, to evaluate impacts to existing water rights. Such an argument, however, is inconsistent with the Department's Rules of Procedure and diminishes the effectiveness of the protest deadline described in Idaho Code § 42-203A(4).

The Department's Rules of Procedure were adopted to "govern contested case proceedings." IDAPA 37.01.01.001.02. The term "issues," as used in Rule 353 (IDAPA 37.01.01), refers to the issues raised by protestants in the context of a contested case, not to the evaluation criteria described in Section 42-203A(5). Although the review criteria in Section 42-203A(5) provide the standards to evaluate an application for permit, the review criteria do not constitute contested case issues. If there are no active protests against an application, then there are no contested case issues. A petition to intervene in a matter with no remaining active protests will unduly broaden the issues of the contested case. Because there are no remaining active protests against Application 21-13262, there are no active issues in the contested case. Therefore, IDFG's intervention in the matter will unduly broaden the issues of the case.

Idaho Code § 42-203A(4) states, in pertinent part:

Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest, together with the statutory filing fee . . . , against the approval of such application, which protest shall . . . clearly set forth his objections to the approval of such application.

Section 42-203A(4) requires protests to be filed within the time set forth in the public notice of the application. Establishing a firm deadline for filing protests promotes efficiency in government because it marks the day when the Department can move forward with its review of an application. A petition to intervene in a case with no remaining active protests equates to a late-filed protest and diminishes the effectiveness of the protest deadline. If IDFG were allowed to intervene in this case, where there are no remaining active protests, IDFG's intervention would be the same as filing the sole protest against the application. The Department could not proceed with its review of the application until IDFG's issues were addressed, either through settlement or hearing. Stated differently, in the absence of IDFG's *Petition*, the Department could proceed with its review of Application 21-13262. Because there are no remaining active protests against Application 21-13262, IDFG's *Petition* is, in effect, a protest – filed three weeks after the protest deadline – and should not be granted.

CONCLUSIONS OF LAW

IDFG's *Petition* will unduly broaden the issues of the contested case for Application 21-13262 and must be denied.

ORDER

IT IS HEREBY ORDERED that IDFG's *Petition* is DENIED. Pursuant to Rule 710 (IDAPA 37.01.01), this order denying intervention is an Interlocutory Order.

Dated this 2nd day of April, 2019.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of April 2019, I mailed a true and correct copy of the foregoing ORDER DENYING PETITION TO INTERVENE, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

RE: APPLICATION FOR PERMIT NO. 21-13262

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