

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

**IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 95-17241 IN THE)
NAME OF STEVE BARNHART)**

**ORDER DENYING MOTION TO
RESCHEDULE HEARING DATE**

On December 8, 2016, Steve Barnhart (“Barnhart”) filed Application for Permit 95-17241 with the Idaho Department of Water Resources (“Department”). Protests were filed by Scott Spray, Charlotte Felts, and Joan & Tim Tope (collectively “Protestants”).

On May 8, 2017, the Department issued a *Notice of Hearing and Disclosure Order* (“Notice”) for this contested case. The hearing was scheduled to take place on September 19, 2017 in Coeur D’Alene. The Notice was sent by certified mail to all of the parties and return receipts confirmed all of the parties received the Notice. The Notice required witness lists and copies of all proposed exhibits be provided to the hearing officer on or before September 1, 2017. None of the parties provided any witness lists or exhibits by the disclosure deadline.

On September 6, 2017, Joan Tope emailed the hearing officer a copy of a letter (“Motion”) signed by all of the Protestants, asking the hearing officer to delay the hearing by two months. Although the letter did not contain the terms “petition” or “motion”, the hearing officer treated the letter as a motion to reschedule the hearing. The Motion was not served on Barnhart. Therefore, the hearing officer emailed a copy of the Motion to Barnhart and provided Barnhart an opportunity to respond. On September 11, 2017, Barnhart notified the hearing officer, through email, that he opposed the Motion and wanted to proceed with the hearing scheduled for September 19th.

Protestants raise two primary arguments in support of their Motion. First, Protestants argue they have been “deceived and defrauded” by Barnhart and the Department. Protestants provided a copy of an unsigned amended application, which removed some of the proposed beneficial uses from Application 95-17241. Protestants also provided a copy of an unsigned permit, prepared by the Department, reflecting the elements and beneficial uses set forth in the unsigned amended application. Protestants argue they have prepared for the hearing under the assumption that the application was amended. According to Joan Tope, she only recently discovered the application had not actually been amended. Protestants assert they “cannot do the hearing based on the original application without more time to work on it.” Protestants propose advancing the hearing date two months to “give [them] time to get more exhibits and witnesses.”

There is no evidence in the Department’s file for Application 95-17241 indicating the application was ever amended. It appears the draft amended application and draft permit were created to facilitate settlement discussions between the parties. Removing beneficial uses from a proposed permit or changing the elements of a proposed permit are techniques often employed by parties to resolve a contested permit application. Further, the Department occasionally prepares a draft permit to assist in settlement negotiations, allowing the parties to review and discuss

proposed conditions. There is no evidence before the Department that the draft amended application or the draft permit were prepared with an intent to deceive the Protestants. In fact, Joan Tope admits that the Protestants rejected the proposed amendment because the changes did not resolve the issues of protest. Once the proposed amendment was rejected, the proposed amendment would naturally be discarded without signature. There is no expectation that Barnhart would provide notice to the parties that he was returning to the original application.

Pursuant to Rule 610 of the Department's Rules of Procedure (IDAPA 37.01.01), any offers made during settlement negotiations in a contested case are not part of the administrative record. Therefore, the draft amended application and draft permit are not admissible in the record for Application 95-17241.

Second, Protestants argue that certain documents were not made available by the Department until after the September 1 disclosure deadline. The documents in question are from an investigation performed by the Department in April 2017 based on a complaint of illegal water use on a property (owned by Phillip Barnhart) near the proposed place of use. The investigation report constitutes a record of the Department. As such, the hearing officer will take official notice of the investigation report at the hearing, thereby rendering the Protestants arguments about missing disclosure deadlines moot.

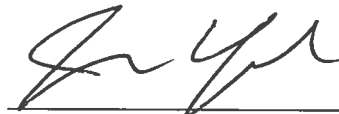
Protestants have not provided a compelling reason for rescheduling the hearing date. All of the parties have been aware of the hearing date for at least three months. A simple investigation of the water right file, which is available to the public online, would have revealed that Application 95-17241 had not been amended. All parties have had ample opportunity to retain experts, assemble exhibits, and coordinate witnesses for the September 19th hearing.

ORDER

IT IS HEREBY ORDERED that the Protestants' motion to reschedule the hearing date for contested Application 95-17241 is DENIED. The administrative hearing will take place as scheduled on September 19, 2017.

This is an Interlocutory Order issued pursuant to Rule 710 (IDAPA 37.01.01).

Dated this 12th day of September, 2017



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2017 a true and correct copy of the document described below was served by mailing the copies with the United States Postal Service, postage prepaid and properly addressed to the following:

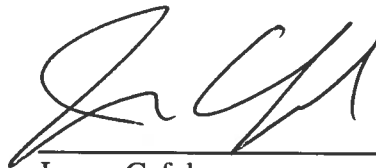
Document Served: Order Denying Motion to Reschedule Hearing Date

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James Cefalo
Hearing Officer