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DEPARTMENT OF
WATER RESOURCES

Attorneys for Boise Project Board of Control

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PERMITS TO	)	
APPROPRIATE WATER NOS. 63-	)	
34079 & 63-34080, IN THE NAME OF	)	MEMORANDUM IN OPPOSITION
CHRIS EMMERT	)	TO SECOND PETITION TO
	)	INTERVENE
	)	
	)	

The Boise Project Board of Control, by and through its counsel of record, the law firm Barker Rosholt & Simpson LLP, and pursuant to the Department's rule of procedure 210, hereby submits this Memorandum in Opposition to Petition to Intervene filed herewith. IDAPA 37.01.01.210. For the reasons set forth below, the Director should deny the Petitioners' Second Petition to Intervene.

ARGUMENT

Pursuant to Procedural Rule 352, petitions to intervene must be filed at least fourteen days before the date set for a formal hearing, or by the date of the prehearing conference, whichever is earlier. IDAPA 37.01.01.352. Here, Municipal Providers admit they filed an untimely petition. *Second Petition to Intervene* at 8. Under the rules for untimely petitions, petitioners must state a substantial reason for delay. IDAPA 37.01.01.352 (emphasis added). The presiding officer may deny untimely petitions 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.” *Id.* Also, we agree with Petitioners that pursuant to Procedural Rule 353, petitioner must also show a direct and substantial interest in any part of the subject matter of the proceeding as it would be illogical to require a higher burden of timely petitions than untimely ones. IDAPA 37.01.01.353. *Second Petition to Intervene* at 8.

Municipal Providers’ petition for intervention does not state a substantial reason for their delay. The petition will unduly broaden the issues, and Municipal Providers do not have a direct and substantial interest required for intervention. Furthermore, the petition will disrupt the proceedings and prejudice existing parties. Municipal Providers’ Second Petition to Intervene should be denied for failing to comply with the IDAPA rules controlling untimely motions.

A. Municipal Providers have not stated a substantial reason for delay in filing an untimely motion:

As stated above, the Department’s rule concerning the timely filing of a petition to intervene requires the petition to 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[.]” IDAPA 37.01.01.352. The pre-hearing conference was held on September 29, 2016. Nearly nine months after this conference, the Municipal Providers filed their first Petition to Intervene. Further, this filing was also one month after the Hearing Officer entered the Preliminary Order Approving the water right applications. Because Municipal Providers filed an untimely petition, they must state a substantial reason for delay. IDAPA 37.01.01.352. Failing to state good cause for untimely filing allows the presiding officer to deny the entire petition. *Id.*

The Municipal Providers claim that they only became aware of the potential need to intervene when Boise Project filed their *Petition for Reconsideration*. *Second Petition to*

Intervene at 17. Boise Project filed this petition on June 30, 2017. *Memorandum in Opposition to Petition to Intervene* at 2. However, the issue was first introduced in R.D. Schmidt's full report which Boise Project entered as an exhibit on April 6, 2017. *Id.* Boise Project also stated this proposition at the post-hearing closing argument on April 24, 2017. *Id.* Municipal Providers filed their Petition to Intervene on July 14, 2017, nearly *nine* months after the prehearing conference. Even considering Municipal Providers' claim of ignorance, they should have been aware of the mitigation issue as early as April 6, 2017, over three months before Municipal Providers filed. Prolonged, unreasonable ignorance should not justify this delay.

Municipal Providers have failed to provide a substantial reason for this significant delay, and the Hearing Officer should deny their Second Petition to Intervene on these grounds.

B. Municipal Providers' request to intervene will unduly broaden the issues:

As required under Department rule 352, Municipal Providers state that they do not seek to broaden the issues in the case and that they will accept the case as they find it. *Second Petition to Intervene* at 14. However, the Hearing Officer merely granted reconsideration on two out of the three narrow issues brought up in the Boise Project Board of Control's ("Boise Project") Petition for Reconsideration. The Hearing Officer removed an overly broad statement as part of Robert D. Schmidt's expert testimony¹, leading to a modification of Petrich's oral testimony in Conclusion of Law no. 2², and amended Conclusion of Law no. 6 to reflect Emmert's failure to meet his burden of persuasion to establish a satisfactory mitigation requirement pursuant to Rule 45.01a.iv of the Water Appropriation Rules (IDAPA 37.03.08).

¹ Schmidt's statement that "[t]wo dimensional AEM modeling is not suitable for such three-dimensional complexities" was overly broad for the narrow subject of the finding and was not necessary for the finding. *Order Granting Petition for Reconsideration* at 2.

² The Hearing Officer found Petrich's skepticism well-reasoned and supportive of a claim that the proposed ground water pumping is unlikely to affect the water in the Boise Project's canals. *Id.*

The Municipal Providers motion to intervene does not concern any of the issues raised in the petition for reconsideration or prior proceedings. The Municipal Providers seek to inflate the issues of this case to encompass personal concerns outside the scope of these proceedings. Just as before, Municipal Providers raise legal theories never at issue in the Emmert application proceedings. The Municipal Providers' claim that a water right holder is only entitled to protect its water right at the point of diversion, is not only without support in Idaho law, but is a completely new issue. The Municipal Providers assert that Emmert introduced this issue in his written closing argument, but this statement is misleading. *Second Motion to Intervene* at 14. Emmert merely asserted that the Director of the Idaho Department of Water Resources ("Department") looks at the point of diversion to determine whether the flows of the Boise River are reduced for the purposes of granting new groundwater rights application. *Id.* It is hyperbolic to conflate this statement with an assertion limiting all injuries to the point of diversion for a water right.

The Municipal Providers also seek to raise a claim under the "maximum use theory" without relating the application to the case at hand. The only prior use of the "maximum use theory" in prior proceedings was in Emmert's written closing arguments to provide a justification for the general policy of conservation that the Director of the Department uses to determine a reasonable pumping level in an aquifer. *Applicant's Closing Arguments* at 12. Emmert's use of the "maximum use theory" is a non-issue. This theory was merely a foundational element to establish a background for general Idaho water policy. Inflating this minute contextual detail to a claim inciting additional argument and briefing would unduly broaden the issues.

Finally, the Municipal Providers attempt to inject into the proceedings the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11). The Emmert applications are for new water rights, and do not implicate conjunctive management call proceedings. Procedural Rule 352 clearly does not only apply to new issues, but also provides the Hearing Officer with the discretion to deny interventions that will “unduly broaden the issues.” Since the avoidance of the Conjunctive Management Rules was introduced to provide context for the actual application, elevating these rules to an entirely separate issue requiring additional briefing apart from prior proceedings would undoubtedly broaden the issues.

These complicating theories were not advanced in the previous proceedings, and will cause the Hearing Officer to substantially deviate from the issues at hand. Taking into account the incredibly narrow grounds upon which the Hearing Officer ruled on Boise Project’s Petition for Reconsideration, these new claims would assuredly result in unduly broadening the issues.

Because Municipal Providers’ claims would unduly broaden the issues in this proceeding, the Hearing Officer should deny the Second Petition to Intervene.

C. Municipal Providers do not have a direct and substantial interest in any part of the subject matter of these proceedings:

The Municipal Providers only have a generalized interest in the outcome of this proceeding as they are merely concerned that future applications for water right permits may be required to provide mitigation for injuries caused to other water rights. This concern does not rise to the level required for intervention. The “interest which entitles a person to intervene in a suit against other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose in the direct legal operation and effect of the judgment.” *People v. Green*, 1 Idaho 235 (1869); *Pittock v. Buck*, 15 Idaho 47 (1908).

In this instance, the Municipal Providers are alleging an interest held by every water right applicant and holder in Idaho. The Municipal Providers concede that they do not have an interest in the 235 acre-feet of groundwater sought by Emmert, but are concerned with the possible future consequences for the Municipal Providers. *Second Petition to Intervene* at 16. They go on to highlight the conditionality of their interest. “If Municipal Providers are required to mitigate for all future water rights they acquire, the overall impact could be enormous.” *Id* (emphasis added). This contingency would not be the direct outcome of this proceeding.

The Municipal Providers admit their concerns are not unique and are applicable to “all municipal providers throughout Idaho, and, *to all ground water users.*” *Second Petition to Intervene* at 9 (emphasis added). This interest is so general that the logical extension of this position would result in the ability of every Idaho individual, municipality, and corporation with a present groundwater right, or with a future potential to acquire a groundwater right, to properly be granted intervention in this proceeding.

Furthermore, the Municipal Providers would have ample opportunities to raise these issues and pursue a different outcome based on the merits of their arguments in cases personal to them. The Department must evaluate any water right application to determine whether it causes injury to another water right, and “may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water applied for, or may grant a permit upon conditions.” I.C. § 42-203A(5). These determinations are particular to each application. The Municipal Providers will have the opportunity to argue their position to the Department in the event that the Department attempts to require mitigation for injuries caused to other water rights during the Municipal Providers’ application process.

Although it is proper to allow intervention where one shows merely that he “may” be bound by the judgment, the Municipal Providers would not be bound by this judgment. *Duff v. Draper*, 96 Idaho 299 (1974). At best, this determination could persuade the Department to require mitigation for injuries caused to other water rights when deciding whether or not to grant the Municipal Providers’ future groundwater applications. These proceedings are not, in any way, binding on future water rights applicants.

Therefore, the Municipal Providers do not have the direct and substantial interest in these proceedings to satisfy the requirements for intervening. They merely have a generalized interest shared by every present and future entity who has, or may acquire, a water right. To grant the Municipal Providers’ Second Petition to Intervene would open the floodgates to afford any and every Idaho water right holder a direct and substantial interest in every application for a water right. This outcome is patently absurd.

Because Municipal Providers fail to meet the direct and substantial interest requirement for intervening, the Hearing Officer should deny their Second Petition to Intervene.

D. Municipal Providers’ request to intervene would prejudice and disrupt the proceedings

Under Department Rule 352, intervenors must take the case as they find it. IDAPA 37.01.01.352. The presiding officer may deny a petition to intervene if it would prejudice existing parties, or disrupt the proceedings. *Id.* Injecting the claims into the proceedings at this point would delay a ruling as the Municipal Providers would have to develop and defend new legal theories. Furthermore, the Municipal Providers’ issues would complicate and detract from the current proceedings prejudicing both parties. The presiding officer’s time would be further

divided and would be more likely to confuse these separate issues. For these reasons, the Hearing Officer should deny Municipal Providers' Second Petition to Intervene.

CONCLUSION

The Municipal Providers have failed in every regard to satisfy the requirements necessary to justify an untimely petition. The Municipal Providers did not provide a substantial reason for their significant filing delay. Their attempt to validate a claim of direct and substantial interest of the proceedings only succeeded in elucidating the generalized nature of their position. These proceedings will not bind the Municipal Providers, and will, at best, be merely persuasive on the Director's future consideration of water rights applications. A generalized concern about the proceeding's persuasive potential to impact the application process for future water rights does not satisfy the direct and substantial interest required under Rule 353. Furthermore, Municipal Providers assert new and different claims that will unduly broaden the issues resulting in delays and prejudicing both parties. The Hearing Officer should deny Municipal Provider's Second Petition to Intervene.

DATED this 11th day of August, 2017.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in dark ink, appearing to read 'Shelley M. Davis', is written over a horizontal line.

Shelley M. Davis
Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August, 2017, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO SECOND PETITION TO INTERVENE** by the method indicated below, and addressed to each of the following:

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