

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

IN THE MATTER OF APPLICATIONS FOR)	
PERMIT NOS. 63-34079 AND 63-34080)	ORDER DENYING PETITION
IN THE NAME OF CHRIS EMMERT)	TO INTERVENE
_____)	

PROCEDURAL HISTORY AND ISSUE

On April 6, 2017, the Department conducted a hearing in the matter of Applications for Permit Nos. 63-34079 and 63-34080 in the name of Chris Emmert. On June 19, 2017, the hearing officer issued a *Preliminary Order Approving Applications for Permit* ("Preliminary Order") pursuant to Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01). The Department mailed the Preliminary Order to the parties on June 19, 2017. On June 30, 2017, the Department received *Boise Project Board of Control's Petition for Reconsideration of Preliminary Order Approving Applications for Permit* ("Petition for Reconsideration"). Pursuant to Rules 300 and 730.02.a of the Department's Rules of Procedure, the petitions was filed timely. On July 14, 2017, the Department received *Municipal Providers' Petition to Intervene* ("Petition to Intervene") and *Municipal Providers' Brief in Opposition to Petition for Reconsideration* ("Brief in Opposition") on behalf of the City of Meridian, the City of Caldwell, the City of Nampa, the City of Boise, the City of Kuna, and Suez Water Idaho, Inc., (collectively "Municipal Providers"). On July 19, 2017, the Department received the Boise Project Board of Control's *Motion to Strike* ("Motion to Strike") and *Memorandum in Opposition to Petition for Intervention and in Support of Motion to Strike*. On July 20, 2017, the Department received *Municipal Providers' Response to Boise Project's Motion to Strike and Memorandum in Opposition*.

RELEVANT RULES OF PROCEDURE

Rule 350 of the Department's Rules of Procedure ("Rule 350") states:

Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding.

Rule 352 of the Department's Rules of Procedure ("Rule 352") 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. Intervenor who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

Rule 730 of the Department's Rules of Procedure ("Rule 730") states, in pertinent part:

The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

Idaho Code § 67-5243(3) provides:

Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the service date of that order. The presiding officer shall render a written order disposing of the petition. The petition is deemed denied if the presiding officer does not dispose of it within twenty-one (21) days after the filing of the petition.

CONCLUSIONS

The Municipal Providers acknowledge that their Petition to Intervene is not timely. *Petition to Intervene* at 8. The Municipal Providers ask the Hearing Officer to grant their petition notwithstanding the fact that it is untimely. *Id.* Rule 352 states that a hearing officer may deny or conditionally grant untimely petitions to intervene "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."

The Hearing Officer, in an exercise of discretion, will deny the Municipal Providers' request to intervene because it would disrupt the proceeding, prejudice existing parties and would unduly broaden the issues.

The 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. *Petition to Intervene* at 6. However, this proceeding has nearly run its course (as least as before the Hearing Officer). Pursuant to Idaho Code § 67-5243(3) and Rule 730, the Hearing Officer has only until July 21, 2017, to completely dispose of the Boise Project Board of Control's Petition for Reconsideration. *A & B Irr. Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 656, 301 P.3d 1270, 1274 (2012). With a mere week left before the Hearing Officer is required to dispose of the Petition for Reconsideration, the Municipal Providers not only sought intervention but also filed their Brief in Opposition, seeking to oppose the Boise Project Board of Control's Petition for Reconsideration. The Brief in Opposition raises legal theories not previously advanced in the proceedings, namely that injury applies only at the point of diversion for a water right, the maximum use theory, and the use of this case to circumvent the *Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11). Injecting these legal arguments and theories into the proceeding at this point would disrupt the proceeding, broaden the scope of the proceeding, and prejudice

existing parties. The Hearing Officer cannot adequately respond to such arguments in such a compressed time frame.

The Municipal Providers state they have a direct and substantial interest in the proceeding because the reasoning in the Preliminary Order “could be turned against any of the Municipal Providers in any proceeding involving an application for a ground water right.” *Petition to Intervene* at 6. It may be true that the reasoning in the Preliminary Order could be used in a future proceeding involving one or more of the Municipal Providers. However, a preliminary order by a Department hearing officer does not establish irrefutable legal precedent. The Municipal Providers could raise their issues in another similar proceeding and pursue a different outcome based on the merits of their arguments. Because of that possibility, the interests of the Municipal Providers are not direct and substantial enough to outweigh the disruption and prejudice that granting intervention would cause.

ORDER

The Petition to Intervene is **DENIED**. Because the Petition to Intervene is denied, the Hearing Officer will not address the Brief in Opposition and the Motion to Strike.

Dated this 21st day of July, 2017.



Shelley W. Keen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2017, true and correct copies of the *Order Denying Petition to Intervene* were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

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A handwritten signature in black ink, reading "Darla Block", written over a horizontal line.

Darla Block
Technical Records Specialist