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DEPARTMENT OF
WATER RESOURCES

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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 PETITION FOR INTERVENTION
	)	AND IN SUPPORT OF MOTION TO
	)	STRIKE
	)	

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 and in support of the Motion to Strike filed contemporaneously herewith. IDAPA 37.01.01.210. For the reasons set forth below, this Hearing Officer should deny the Petitioners' Petition to Intervene, and strike their Brief in Opposition to Petition for Reconsideration.

ARGUMENT

A. The Municipal Providers Cannot Intervene at this Late Date in these Proceedings:

The Department's rule concerning the timely filing of a petition to intervene requires that such a petition 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 in the two protested applications of the Emmerts was held on September 29,

2016, nearly nine months before the Municipal Entities filed their Petition to Intervene, and a month AFTER the Hearing Officer entered his Preliminary Order Approving the water right applications. Nevertheless, the Municipal Entities argue that they meet the standard of “a substantial reason for delay” which will permit the Hearing Officer to grant late intervention pursuant to rule 352. They do not.

The Municipal Entities argue that they substantially delayed intervention in the proceedings because they did not know the full nature of the protest and injury alleged until the Boise Project Board of Control filed its’ Petition for Reconsideration on June 30, 2017. The Boise Project’s expert witness, R.D. Schmidt’s pre-filed testimony, wherein the induced seepage from the Boise Project canals, which deliver water to Lake Lowell, and to downstream irrigation district patrons, was filed on March 30, 2017. The full report detailing the magnitude of the injury to the canals was entered as an exhibit on April 6, 2017, and the audio recordings of the witnesses testimony was posted to the Department’s website on April 6, 2017. The Boise Project argued in its post-hearing closing argument filed on April 24, 2017, that mitigation should be required as the result of any approval of the applications. There is simply no support for the Municipal Entities’ argument that there was a substantial reason for delaying their efforts to intervene in this proceeding.

There is another important factor that inhibited the Municipal Entities’ attempts to intervene in this proceeding; they have no direct and substantial interest in any part of the subject matter of the Emmerts’ applications for permit to appropriate water for farming operations on their farm, as required by the Department as a predicate for intervention in formal case proceedings. IDAPA 37.01.01. 353. The rule mirrors Idaho’s standing requirements. In order to establish standing to intervene in this proceeding the Municipal Entities would have to establish

that they will in fact be injured, as well as “a fairly traceable causal connection between the claimed injury and the challenged conduct, and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.” *Security Financial Fund, LLC v.*

Thomason, 153 Idaho 343, 347, 282 P.d3 604, 608 (2012), *citing Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). Furthermore, “[t]he injury must be distinct and palpable and not be one suffered alike by all citizens in the jurisdiction.” *Troutner v.*

Kempthorne, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006), *citing Selkirk-Priest Basin Ass’n, Inc. v. State ex rel Batt*, 128 Idaho 831, 833-34, 919 P.2d 1032, 1034-35 (1996).

The Municipal Entities argument that they have a direct and substantial interest in these proceedings, when boiled down to its essence, is that they are concerned that future applications for water right permits may be required to provide mitigation for injuries caused to other water rights. This is a not a distinct and palpable injury, and it is presently suffered by any water right applicant that causes injury to another water right. The department is duty bound by law to evaluate any water right application, whether protested or not, to determine whether it causes injury to another water right, and if so, “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). The Municipal Entities’ argument that they have a substantial interest in these proceedings because they fear the on-going application of Idaho Code section 42-203A(5), is patently absurd, and on this ground the Petition should be denied.

Additionally they argue that they will take the case as they find it, which is required by Department rule 352. At this stage, the case between the actual parties in interest is concluded, aside from reconsideration and appellate issues. No new evidence or legal theories may be

advanced at this stage in the proceedings. The record is closed. Nonetheless, prior to even being granted authority to intervene in the action, the Municipal Entities have submitted a brief in opposition to the Boise Project's Petition for Reconsideration advancing three legal theories never at issue in the Emmert application proceedings.¹

They argue, with no support in Idaho law, that a water right holder is only entitled to protect its water right at the point of diversion, and that once diverted, the water right holder has no authority to protect the appropriation from injury. They next raise the spectre of the "maximum use theory" going on at great length, but never actually explaining how the maximum use theory is implicated in the two water rights applications at issue in this proceeding. Lastly, they attempt to tell the Hearing Officer that this case is "really about" the Boise Project attempting to circumvent the conjunctive management rules, applicable to call cases. These legal issues did not arise in the proceedings on the Emmert water right applications, because they do not pertain in any manner to whether these two water right applications cause injury to the Boise Project's water rights, and they still do not. And in the first instance, no such argument can or should ever be raised that a water right holder can only protect their right against injury at the point of diversion, because it is absolutely not supported by Idaho law. Under that theory, once the Boise Project's water rights are diverted into its canals, anyone would be able to place a pump in its canals and take whatever water they deemed themselves entitled to. The Municipal Entities do not propose to take the case as they found it, and rather intend to inject inapplicable new legal arguments into the proceedings. For this additional reason, the Petition to Intervene should be denied.

¹ It is worth noting that the SRBA Court's Administrative Order One does not allow intervention on a petition for reconsideration. "AO1 § 13(a) does not provide for a new party to enter a subcase on a motion for reconsideration (as opposed to a motion to alter or amend)." *Order on Challenge of Facility Volume Issue*, 12/29/1999.

B. The Municipal Providers' Brief in Opposition to Petition for Reconsideration Must Be Stricken:

In this instance, where the Municipal Entities failed to timely attempt intervention in this proceeding, which given their tenuous claim to direct and substantial interest in the proceedings would always have been a difficult proposition, they can only be considered "public witnesses" pursuant to the Department's rule 158. IDAPA 37.01.01.158. A public witness may only provide testimony and put on exhibits during a contested case hearing if it provides five days prior notice to the parties to the proceeding of intention to participate as a public witness and also an explanation as to the nature of the proposed testimony. IDAPA 37.01.01.355. A public witness is not granted any authority to make motions or participate in briefing. Any such participation by a public witness is limited to the provision of testimony and exhibits, after notice, during the formal hearing. As the Municipal Entities have not, and cannot under the analysis provided above, become parties to this contested case, the brief submitted by them should be stricken from the record as improperly filed by a non-party to the proceedings.

CONCLUSION

It would be unprecedented to allow the Municipal Entities to enter the proceedings on the Emmerts' applications at this late date. The Municipal Entities' attempt to claim that they have a direct and substantial interest in the proceedings because of the potential for future application of Idaho law concerning mitigation for injury does not meet the standard for entry into the case. At best the Municipal Entities are alleging a generalized concern about future precedent, and one that is not distinct and palpable to the Municipal Entities, which does not meet the direct and substantial interest requirement of Rule 353. Further, the Municipal Entities do not propose to take the case as they find it, but rather without permission to do so, have a filed a brief injecting new legal issues in the proceedings that were never raised in the contested case because they are

inapplicable to the issues decided by the Hearing Officer. As the Municipal Entities have not and cannot become parties to the proceedings on application no. 63-34079 and 63-34080, the brief submitted by the Municipal Entities should be stricken from the record.

DATED this 19th day of July, 2017.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2017, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PETITION TO INTERVENE AND IN SUPPORT OF MOTION TO STRIKE** by the method indicated below, and addressed to each of the following:

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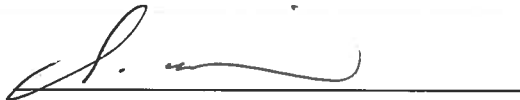
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