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Attorneys for Miller Family Real Estate LLC

RECEIVED
OCT 17 2011
Department of Water Resources
Eastern Region

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

IN THE MATTER OF APPLICATION FOR	)	
PERMIT NO. 13-7784, IN THE NAME OF	)	APPLICANT'S MOTION TO
MILLER FAMILY REAL ESTATE, LLC	)	DISMISS LATE PROTEST; OR IN
	)	THE ALTERNATIVE
	)	OPPOSITION TO MOTION TO
	)	INTERVENE
	)	

COMES NOW, Applicant, Miller Family Real Estate LLC ("Miller"), by and through its attorneys of record Barker Rosholt & Simpson LLP, and hereby moves the Hearing Officer for an order dismissing the untimely protest filed by PacifiCorp Energy ("PacifiCorp"). In the alternative, Miller opposes any attempt by PacifiCorp to intervene in these proceedings and expand the scope of the issues before the Department.

INTRODUCTION

The Hearing Officer should dismiss PacifiCorp's "Late Protest." Indeed, PacifiCorp does not even attempt to justify its failure to comply with the statutory requirements for filing a protest.

Likewise, any attempt to intervene should be denied since PacifiCorp seeks to unduly broaden the issues before the Department. None of the protests that were timely filed have

sought to litigate issues relating to the entire Bear River drainage or the Bear River Compact. Each of the timely filed protests address local issues relating to the relationship of priorities and use of diversion structures. Allowing PacifiCorp to participate will expand the issues before the Department in violation of the Department's Rules of Procedure.

Accordingly, the Hearing Officer should dismiss the "Late Protest." In the alternative, any request for intervention should be denied.

STATEMENT OF FACTS

On March 15, 2011, Miller filed an Application for a Permit to Appropriate Water ("Application") with the Idaho Department of Water Resources ("IDWR"). Pursuant to applicable law and regulations, IDWR published notice of the Application on May 19 and 26, 2011. That notice provided that "Any protest against the approval of this application must be filed... *on or before June 6, 2011.*" (Emphasis added).

After notice was provided, IDWR realized that the legal description for the place of use in the original notice was incorrect. Importantly, each of the other elements of the proposed water right – including the points of diversion – were identified correctly on the original notice.

In light of the error in the place of use description, IDWR republished notice of the Application. On June 9 and 16, 2011, notice of the Application was published for a second time. The second notice provided that "Any protest against the proposed change must be filed with the Department of Water Resources... *on or before June 27, 2011.*" (Emphasis added).

Four timely protests were filed:

1. Strongarm Reservoir Irrigation District ("Strongarm") on May 31, 2011;
2. Brent Abbot ("Abbott") on June 1, 2011;
3. Merrill Ranch Partnership LLC ("Merrill") on June 2, 2011; and

4. Treasureton Irrigation Company (“Treasureton”) on June 2, 2011

On September 26, 2011 – nearly four months after the original protest date and nearly three months after the second protest date – IDWR received a *letter* from PacifiCorp entitled “Late Protest.” Importantly, the “Late Protest” did not attempt to justify the untimely filing. Rather, the “Late Protest” expressed interest in the subject matter, indicating that since the sources of the proposed water right “are tributary to Bear River, PacifiCorp has an interest in this application.” The letter concluded that PacifiCorp “respectfully requests that it be allowed full intervention in this matter.”

On October 6, 2011, IDWR sent a letter to Miller, indicating that it is treating the “Late Protest” as a “Petition to Intervene.”

LEGAL STANDARD

I. Timeliness of Protests

The Department’s Water Appropriation Rules govern these proceedings. IDAPA 37.03.08, *et seq.* Appropriation Rule 040.03(a)(iii) provides that protests “will only be considered if received by the department ... prior to the expiration of the protest period announced in the advertisement unless the protestant successful intervenes in the proceeding.”

II. Petitions to Intervene

Appropriation Rule 040.03(b) states that intervention is governed by the Department’s Rules of Procedures, IDAPA 37.01.01, *et seq.* Parties seeking to intervene must show (1) they have a “direct and substantial interest in any part of the subject matter;” (2) they will “not unduly broaden the issues” before the Department; and (3) their interests are not adequately represented by existing parties. Procedural Rule 353. If the hearing officer determines “that an intervenor

has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.” *Id.*

ARGUMENT

I. PacifiCorp’s “Late Protest” is Statutorily Barred and Should be Dismissed.

Idaho Code § 42-203A governs the procedures for processing an application for permit. It provides that “any protest against the approval of such application, in form prescribed by the department, *shall be filed with the department within ten (10) days from the last date of publication* of such notice.” *Id.* at § 42-203A(1) (emphasis added). The statute requires:

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 as provided in section 42-221, Idaho Code, against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application.

Id., at § 42-203A(4) (emphasis added). The Department’s Appropriation Rule 40.03(a)(ii) mirrors this requirement, by providing that protests “*will only be considered if received ... prior* to the expiration of the protest period.”

The Department’s website, under “Protesting an Application,” further explains this necessary procedure:¹

If you wish to file a protest against an application, there are certain things you must do.

- The protest must be RECEIVED by the Department no later than 10 days after publication of the second and last legal notice. The last date for protest is included in the legal notice.

¹ See IDWR’s website at http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterRightProcess/water_rights_process.htm.

- The protest must include the name and address of the person making the protest and must be signed by the protestant, or the protestant's agent or attorney. The protest must be accompanied by a non-refundable \$25 protest fee per application, required under state law.
- The person protesting the application, called the protestant, needs to clearly describe why they object to the approval of the application. It is important that the objections be stated in clear, concise terms that accurately and clearly describe the nature of the objection and how the protestant will be injured if the application is approved.
- The protestant is required to send a copy of the protest to the applicant.

Here, there is no dispute that the PacifiCorp protest is a “Late Protest.” Indeed, PacifiCorp admits as much. Yet, PacifiCorp provides no justification for its failure to timely protest the Application. PacifiCorp received double notice of the Application due to the error in the place of use legal description. The exact date for the deadline for protest was provided in both publications, and yet both times PacifiCorp failed to file a timely protest. PacifiCorp had every opportunity to file a timely protest, received double notice and yet still failed to file any document with the Department until the September 23, 2011 “Late Protest.”

Importantly, even with the wrong legal description for the place of use in the first notice, it did include the correct points of diversion – located in the Bear River drainage. This is significant because PacifiCorp’s protest claims an interest based on the fact that the proposed sources are within the Bear River drainage. Yet, PacifiCorp failed to file a timely protest.

In *United States v. Locke*, 471 U.S. 84, 105 S. Ct. 1785 (1985), the Supreme Court overturned the lower court’s holding that “even if the statute required a filing on or before December, appellees had ‘substantially complied’ by filing on December 31.” *United States v. Locke*, 471 U.S. 84, 100-01, 105 S. Ct. 1785, 1795-96, 85 L. Ed. 2d 64 (1985). In rejecting the district court’s holding, the Supreme Court wrote:

The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. ***Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.*** ‘Any less rigid standard would risk encouraging a lax attitude toward filing dates,’ *United States v. Boyle*, 469 U.S., at 249, 105 S.Ct., at 692. A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.

Id. (Emphasis added). PacifiCorp does not even attempt to justify its untimely filing. The law requiring timely protests cannot be ignored. Accordingly, the “Late Protest” should be dismissed.

II. If PacifiCorp’s “Late Protest” is Going to be Treated as a “Petition to Intervene,” it Must be Denied Because PacifiCorp Failed to Comply with the Form and Content Requirements and Because PacifiCorp Seeks to “Unduly Broaden the Issues.”

A. PacifiCorp’s “Late Protest” Does not Comply with the Form and Content Requirements of the Department’s Rules of Procedure.

The Department’s Procedure Rule 351 is very clear: Any “petitions to intervene must comply with Rules 200, 300, and 301.” (Emphasis added). Importantly, Procedural Rule 301 governs the form of pleadings in this matter. It requires that all pleadings not filed on agency forms comply with the specific requirements set forth in the rules. *Id.* Procedural Rule 301.02 requires that “documents complying with this rule will be in the following form.” The Procedural Rule then provides that the documents must be in pleading form and include a caption.

PacifiCorp’s “Late Protest” fails to comply with even the most basic form requirements. Rather than in pleading form, the “Late Protest” is simply a letter from PacifiCorp on PacifiCorp

letterhead. Accordingly, the “Late Protest” should be rejected for failure to comply with these requirements.

B. PacifiCorp Seeks to “Unduly Broaden the Issues” Before the Department, as Such, any Request to Intervene Should be Denied.

Procedural Rule 353 provides that any intervention request must show (1) a “direct and substantial interest,” (2) that the interests are not adequately represented by an existing party, and (3) that the intervention will not unduly broaden the issues in the case. PacifiCorp cannot meet this standard. In particular, PacifiCorp’s intervention will “unduly broaden the issues” raised by the timely protests.

The timely protests filed by Strongarm, Abbott, Merrill and Treasureton each address issues regarding the local water supply. Strongarm expresses concern that its senior water right would not be filled. Abbott identifies specific water rights and expresses concern relating to “his Stockton Creek water rights.” Merrill and Treasureton filed identical protests, each addressing issues regarding the feasibility of diverting water from Cottonwood Creek, and issues relating to the local public interest and local economy. Importantly, none of the Protestants expressed any concern over the Bear River drainage and the Bear River Compact.

Put simply, the issues raised by the timely protests do not give rise to issues relating to the entire Bear River drainage.

It is settled law in Idaho that intervenors take the case as they find it. An intervenor is not entitled to raise new claims outside the scope of the original parties’ pleadings. *Wing v.*

Amalgamated Sugar Co., 106 Idaho 905 (Idaho App. 1984); *Anderson v. Ferguson*, 56 Idaho 554 (1936). Yet, the issues raised by PacifiCorp are far outside the scope of the protests filed in this matter. Had PacifiCorp desired to raise these issues, it should have filed a timely protest.

Allowing PacifiCorp to intervene in these proceedings and expand the scope of the issues before the Department would fly in the face of the statutory and regulatory requirement that a party file timely protests. *Supra*. Allowing PacifiCorp to intervene and assert issues relating to the entire Bear River drainage would circumvent the law and prejudice Miller.

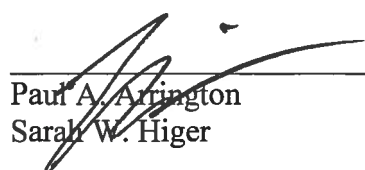
Finally, the fact that PacifiCorp intervention is not necessary is further apparent from Idaho Code §42-203A(5)(a), which requires the Department to determine whether the proposed appropriation will reduce the quantity of water available under existing water rights, and Idaho Code §42-203A(5)(b), which requires the Department to determine whether the water supply is sufficient for the intended use. Both requirements assure the Department will adequately address the concern raised by PacifiCorp in its "Late Protest."

CONCLUSION

Since PacifiCorp failed to file a timely protest, its "Late Protest" should be dismissed. Furthermore, if the "Late Protest" is being treated as a petition to intervene, PacifiCorp cannot meet its burden and the petition should be denied.

Dated this 14th day of October, 2011

BARKER ROSHOLT & SIMPSON LLP



Paul A. Arrington
Sarah W. Higer

Attorneys for Miller Family Real Estate LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2011, I caused to be served a true and correct copy of the foregoing by mail addressed to each of the following:

Original mailed to:

James Cefalo
Idaho Dept of Water Resources
900 N. Skyline Drive, Suite A
Idaho Falls, ID 83402

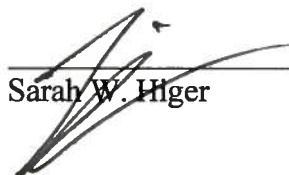
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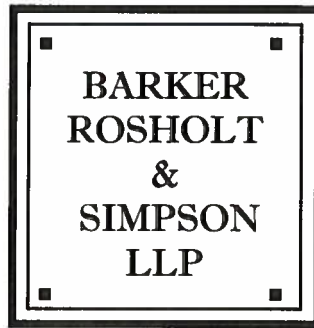
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October 14, 2011

James Cefalo
Idaho Dept. of Water Resources
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Idaho Falls, ID 83402

Re: Miller Family Real Estate, LLC
Permit No. 13-7784

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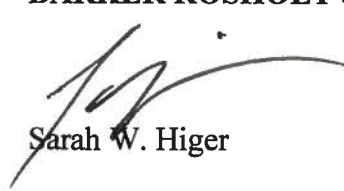
Dear Mr. Cefalo:

Enclosed for filing is the original Applicant's Motion to Dismiss Late Protest; or in the Alternative Opposition to Motion to Intervene.

Please let me know if you any questions about this document.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP



Sarah W. Higer

SWH/se
Enclosure