

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 MILLER FAMILY REAL ESTATE, LLC)
_____)

**ORDER GRANTING
PETITION TO INTERVENE**

On March 15, 2011, Miller Family Real Estate, LLC (“Applicant”) filed Application for Permit No. 13-7784 with the Idaho Department of Water Resources (“Department”). The Application for Permit was advertised to the public on May 19th and 26th, 2011. Protests were filed by Strongarm Reservoir Irrigation District, Brent Abbott, Merrill Ranch Partnership, LLC, and Treasureton Irrigation Company. The Department discovered an error in the original advertisement, and the Application was re-advertised on June 9th and 16th, 2011. No additional protests were filed during the re-advertisement period. A pre-hearing conference has been scheduled for November 18, 2011. A hearing date has not been set.

On September 26, 2011, PacifiCorp filed a “Late Protest” requesting “full intervention in this matter.” The Department considers PacifiCorp’s late protest to be a petition to intervene. On October 17, 2011, the Applicant filed a Motion to Dismiss Late Protest / Opposition to Motion to Intervene. The Applicant argued that PacifiCorp’s Petition to Intervene did not comply with the Department’s form and content requirements for such a petition and that the petition would unduly broaden the issues in this contested case.

Rule 352 of the Department’s Rules of Procedure (IDAPA 37.01.01) states that a petition to intervene is timely if it is filed “at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier Petitions not timely filed must state a substantial reason for delay.” PacifiCorp’s Petition to Intervene is timely because it was filed before any pre-hearing conference has been held in this matter. Because PacifiCorp’s Petition to Intervene is timely, it does not need to state a “substantial reason for delay.”

Rule 351 of the Department’s Rules of Procedure (IDAPA 37.01.01) states that petitions to intervene must comply with Rules 200, 300, and 301 of the Rules of Procedure. Rule 301 sets forth specific standards for the form of pleadings. Rule 301.02 suggests that all pleadings must include a caption noting the case number and title of the proceeding. PacifiCorp’s petition to intervene clearly states the application number, the name of the Applicant, the issues of protest, and the contact information for PacifiCorp. Further, the Applicant was mailed a copy of the petition. PacifiCorp’s Petition to Intervene satisfies the requirements of Rule 351.

Rule 353 (IDAPA 37.01.01.353) states: “If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties.”

PacifiCorp's Petition to Intervene sufficiently establishes a direct and substantial interest in the subject matter of the proceeding. Further, given the unique nature of PacifiCorp's water rights, its interests are not adequately represented by an existing party.

The Applicant argues that PacifiCorp's Petition will unduly broaden the issues raised in the timely protests. "[N]one of the Protestants expressed any concern over the Bear River drainage and the Bear River Compact." (Applicant's Motion to Dismiss, page 7) PacifiCorp's Petition also refers to the Bear Lake Settlement Agreement and related storage delivery contracts. The protests filed by Merrill Ranch Partnership and Treasureton Irrigation Company do state the following concern: "Injury to prior water rights." This issue of protest is not limited to just the senior rights held by the protestants and arguably includes all senior rights in the Bear River drainage.

Rule 353 allows the presiding officer to grant a petition to intervene with limiting conditions. In this case, it is appropriate to limit PacifiCorp's involvement to those issues already raised in timely protests.

ORDER

IT IS HEREBY ORDERED that PacifiCorp's Petition to Intervene is **GRANTED**. However, PacifiCorp's participation in this matter is limited to those issues already raised in the timely-filed protests. PacifiCorp may not raise arguments related to Bear Lake, the 1995 Bear Lake Settlement Agreement, Bear Lake storage delivery contracts, or the Bear River Compact, as these issues were not raised in any of the timely protests.

Dated this 20th day of October, 2011.


James Cefalo

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2011, I mailed a true and correct copy, postage prepaid, of this document to the applicant(s) and protestant(s) listed below:

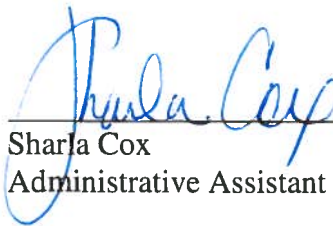
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Sharla Cox
Administrative Assistant

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration within fourteen (14) days after service as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service.

Note: the petition must be received by the Department within this fourteen (14) day period. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.