

Gibson, Deborah

From: Spackman, Gary
Sent: Thursday, August 21, 2008 10:11 AM
To: Gibson, Deborah
Subject: FW: Standing in Water Right Hearings
Attachments: Order on Pre-Hearing Motion To Limit Protests and Simplify Procedure.pdf

Debbie,

Would you please place a copy of the attached order in the No. Kootenai file for future reference? Thanks.
Gary

From: Rassier, Phil
Sent: Tuesday, August 19, 2008 3:14 PM
To: Anderson, Hal
Cc: Spackman, Gary
Subject: RE: Standing in Water Right Hearings

Hal,

Idaho does not preclude an out-of-state water right holder from participating as a protestant in a contested water right hearing before the Idaho Department of Water Resources. Attached for your reference is an IDWR order issued in 2002 denying a motion to dismiss protests from Washington citizens to an application for a water right permit for a natural gas electric generating facility on the Rathdrum Prairie in northern Idaho filed by Cogentrix Energy, Inc. The applicant requested dismissal of the out-of state protests on the ground that they raised Washington water issues as opposed to Idaho water issues. In denying the motion to dismiss, the hearing officer stated that the issues considered would be limited to those set forth in the governing Idaho statute and would not include issues concerning allocation of water between the states.

Phil

Phillip J. Rassier would give standing to an out-of-state water right holder in an administrative protest hearing
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
Phone: (208) 287-4808
Fax: (208) 287-6700
Email: phil.rassier@idwr.idaho.gov

From: Anderson, Hal
Sent: Monday, August 18, 2008 6:00 PM
To: Rassier, Phil
Subject: FW: Standing in Water Right Hearings

Phil,

Have you given this any thought? I am leaving for Salt Lake Thursday. This issue has to do with other states wanting to protest water right applications in the Bear River basin. --Hal

8/21/2008

Hal N. Anderson
Administrator
Planning and Technical Services Division
Idaho Department of Water Resources
322 East Front Street
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From: Don A. Barnett [<mailto:dbarnett@barnettwater.com>]
Sent: Monday, August 18, 2008 11:36 AM
To: Anderson, Hal; slowry@seo.wyo.gov; willatkin@utah.gov
Subject: Standing in Water Right Hearings

Several months ago, under the direction of the Management Committee, Jack wrote to the three state water administrative leads asking them to indicate whether or not they would give standing to an out-of-state water right holder in an administrative protest hearing. Their responses might impact the TAC's recommendation as to the involvement of the Commission in new applications. Thus far Jack has not heard back from any of the States. Though we don't need a formal response, if the three of you could be in a position to discuss your respective State's thoughts on the matter it would help in our discussions on Thursday. Thanks

Don A. Barnett, P.E., P.G.
Bear River Commission
106 W. 500 S., Suite 101
Bountiful, Utah 84010
(801) 292-4663 (phone)
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8/21/2008

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 95-09069 IN THE)	ORDER ON PRE-HEARING
NAME OF NORTH IDAHO POWER)	MOTION TO LIMIT PROTESTS
LLC.)	AND SIMPLIFY PROCEDURE
_____)	

This matter is presently set for hearing before the Idaho Department of Water Resources ("IDWR") during the week of February 11, 2002, in Coeur d'Alene, Idaho.

On December 21, 2001, North Idaho Power LLC ("Applicant") filed a Pre-hearing Motion To Limit Protests and Simplify Procedure ("motion") in the above-captioned matter. On January 7, 2002, the organizational and individual protestants in this proceeding ("Protestants") filed a joint answer to the motion entitled Protestants' Answer To North Idaho Power Motion To Limit Protests and Simplify Procedures ("answer").¹ On January 7, 2002, intervenor Kootenai Generation LLC filed Intervenor Response To Applicant's Pre-Hearing Motion To Limit Protests And Simplify Procedure stating that it did not oppose Applicant's motion.

Applicant's motion seeks an order from the Hearing Officer:

1. Dismissing protests that raise Washington water interests and limiting the scope of protests considered at the hearing to only those protests addressing Idaho issues;
2. Limiting the number of witnesses and attorneys participating in the hearing because of the similar interests presented by the Protestants; and
3. Allowing the testimony of Applicant's expert witness, Sherl Chapman, out of order because he is not available to testify during the first two days of the hearing.

Request to Dismiss or Limit Protests

The Applicant requests an order from the Hearing Officer "dismissing protests that raise Washington water interests and limiting the scope of protests considered at the hearing to only those protests addressing Idaho issues." The applicant explains that its purpose is to dismiss protests or portions of protests that seek to inject out-of-state interests into this proceeding.

¹ The Protestants joining in the answer include REBOUND, International Brotherhood of Electrical Workers Local #73, Kootenai Environmental Alliance, Friends of the Aquifer, Idaho Conservation League, Upper Columbia River Group of the Sierra Club, and the seven individuals, Douglas Barnard, Ric Puterbaugh, Ken D. Brown, Kenneth Lemas, Robert Axtell, Merton Oles, and Craig Markham.

Specifically, the Applicant argues that Washington water rights and Washington water interests should be excluded from any consideration under the applicable decision criteria of Idaho Code § 42-203A(5). In particular, Applicant notes that the "local public interest" criterion of I.C. § 42-203A(5)(e) is narrowly defined as "the affairs of the people in the area directly affected by the proposed use," which Applicant asserts cannot reasonably be interpreted to include "out-of-state" interests.

In response, the Protestants state that Applicant has mischaracterized the claims and interests set forth by their protests, which they maintain, are "fully grounded in the statutory criteria." Protestants emphasize that the focus of the protests is on impacts of the proposed water permit in Idaho and to Idaho's interests. Protestants note that as individuals they own homes or live in Idaho, and that as organizations they have significant membership in Idaho and are registered as non-profit corporations or have offices in Idaho.

Protestants argue that to the extent they intend to offer evidence of impacts in Washington State, there are two reasons the Hearing Officer should accept and consider the evidence. First, it is asserted that impacts in Washington will reflect back into Idaho, affecting aquifer allocation, water quality, fisheries habitat, and economic interests in Idaho. Secondly, Protestants assert that it is within the discretion of IDWR to consider evidence related to the "local public interest," even if that should include evidence of impacts in Washington.

Having reviewed the Applicant's motion and the response of the Protestants, it appears that granting the relief requested would require that important factual and legal issues in this matter be decided prior to the hearing. The Hearing Officer will be in a better position to make these determinations following the creation of a record by the parties. For that reason, the better approach is to allow the parties to proceed to hearing on the issues as presently defined in this proceeding.

The issues to be considered are limited to those identified under the decision criteria of I.C. § 42-203A(5) for approval of an application for permit to appropriate water. This is not a proceeding for the equitable apportionment of water between the states of Idaho and Washington and the Hearing Officer does not intend to consider evidence or argument relating to the allocation of water between states.

The Hearing Officer denies Applicant's request to dismiss any protests filed in this matter or to otherwise limit the protests prior to the hearing.

Request to Simplify Procedure

With respect to item two, relating to simplification of the hearing process, Rule 560 of the Idaho Department of Water Resources' ("IDWR") Rules of Procedure provides:

If two (2) or more parties or persons have substantially like interests or positions, to expedite the proceeding and avoid duplication, the presiding officer may limit the number of them who testify, examine witnesses, or make and argue motions and objections.

IDAPA 37.01.01.560.

To the extent the Hearing Officer determines at hearing that the testimony of two or more parties or persons becomes repetitive or redundant, the Hearing Officer will limit the number of witnesses allowed to testify, or limit the extent of the testimony offered by a particular witness. Also, if a party is represented by more than one attorney, the Hearing Officer will limit attorney participation so that only one attorney for a party will conduct the examination or cross-examination of any particular witness. A similar practice will be followed with respect to opening and closing statements, or legal argument made on any motion or evidentiary objection raised during the hearing.

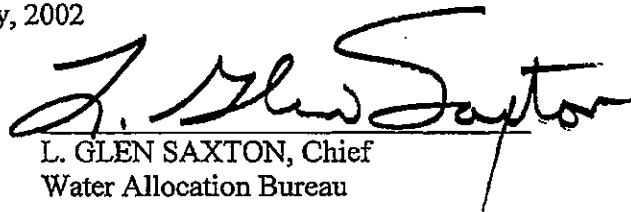
Request to Allow Testimony Out of Order

Applicant has requested that its expert witness, Sherl Chapman, be permitted to testify out of order at the hearing because he will not be available to testify during the first two days of the hearing. Protestants have not objected to this request. The request will be approved.

ORDER

IT IS HEREBY ORDERED that the relief requested by the Applicant in its Pre-hearing Motion To Limit Protests and Simplify Procedure is DENIED, in part, and APPROVED, in part, as set out above. In summary, the request to dismiss or limit protests is denied; the request to simplify hearing procedure is approved, in part; and the request to allow Applicant's expert witness to testify out of order is approved.

DATED this 16th day of January, 2002


L. GLEN SAXTON, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2002, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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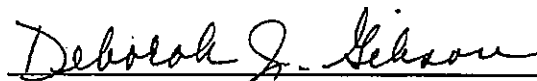
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Deborah J. Gibson

Administrative Assistant
Water Allocation Bureau