

HEARING PROCEDURE - APP FOR AMENDMENT

Preliminary Matters (With tape recorder off)

- Send roster of attendance. Review roster to determine if all parties are present.

THIS IS A REQUIREMENT OF THE RULES OF PROCEDURE.

- State name - hearing officer appointed by the Director of the department.
- I would like to have a brief conference before the hearing is started to:

a) Discuss procedure

THIS IS VERY WORTHWHILE TO DO, SINCE MANY PARTIES REPRESENT THEMSELVES AND HAVE NO CONCEPT OF WHAT A HEARING IS ABOUT. THIS ALSO ELIMINATES SOME QUESTIONS THAT ATTORNEYS MAY HAVE, SINCE THE HEARING PROCEDURE IS LESS FORMAL THAN A COURTROOM SETTING.

b) Define and limit the issues, if possible

OFTEN PROTESTANTS ARE NOT WILLING TO CONCEDE THAT AN ISSUE IS NOT OF CONCERN TO THEM, EVEN IF IT IS NOT. MANY OF THE CONCERNS OF PROTESTANTS ARE MATTERS WHICH THE HEARING OFFICER CAN NOT CONSIDER.

c) Answer any preliminary questions

THE HEARING RECORD WILL BE FAR CLEANER IF MANY OF THE PROCEDURAL QUESTIONS WHICH WOULD ARISE DURING THE HEARING ARE DISCUSSED BEFORE THE HEARING STARTS.

d) Premark proposed exhibits

PREMARKING MEANS ASSIGNING AN IDENTIFICATION NUMBER TO AN EXHIBIT SUCH AS "APPLICANT'S EXHIBIT 3". THIS IS WORTH DOING BEFORE THE HEARING SO THAT COPIES OF PREMARKED EXHIBITS CAN BE DISTRIBUTED AND REVIEWED BEFORE THE HEARING. IF EXHIBITS ARE MARKED ONE BY ONE AS THEY COME UP IN THE HEARING, TIME IS USUALLY WASTED WHILE PARTIES REVIEW EACH EXHIBIT TO DETERMINE IF THEY WISH TO OBJECT TO ADMISSION OF THE EXHIBIT.

USE NUMERALS OR LETTERS ON THE APPLICANT'S EXHIBITS AND THE OTHER DESIGNATION ON THE PROTESTANT'S EXHIBITS.

IF COPIES ARE NEEDED FOR THE PARTIES, THE HEARING DOESN'T NEED TO BE DELAYED WHILE A PARTY IS HAVING COPIES MADE.

AFTER EXHIBITS HAVE BEEN MARKED, RETURN THE ORIGINAL TO THE REQUESTOR, SINCE THE REQUESTOR MAY OR MAY NOT OFFER THE EXHIBIT AS PART OF THE HEARING RECORD.

e) Define and limit the issues where possible - 42-211, I.C.

- The issues the department can consider relative to a protested application amendment are the following:

- (a) that it will reduce the quantity of water under existing water rights, or Yes
- (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or Yes
- (c) where it appears to the satisfaction of the director that such application is not made in goodfaith, is made for delay or speculative purposes, or Yes
- (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or —
- (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or Yes
- (f) that it is contrary to conservation of water resources within the state of Idaho, or Yes
- (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;

- 42-202B (Local public interest is defined as the interests of the people in the area directly affected by the proposed use in the affects of such use on the public water resource).

IF THE CONTESTED MATTER IS REALLY HEATED, IT IS NOT WORTHWHILE TO TRY TO LIMIT THE ISSUES, BECAUSE THE PROTESTANTS WILL SAY THAT EVERY MATTER IS AN ISSUE.

IF YOU KNOW THAT A PARTICULAR MATTER WHICH YOU CAN NOT CONSIDER WILL BE BROUGHT UP IN THE HEARING, ADVISE THE PARTIES THAT IT IS A NON-ISSUE AND NOT TO BRING IT UP.

- General procedure:

- a) Only parties or their witnesses can participate in the hearing.

IN SOME CASES, "PUBLIC WITNESSES", AS PROVIDED IN PROCEDURE RULE 355 MAY BE GRANTED LIMITED TIME TO PARTICIPATE.

- b) Make a tape recording of testimony under oath.

THE TAPE IS THE OFFICIAL RECORD IN THE MATTER UNLESS THE HEARING OFFICER RULES OTHERWISE. THE NOTES OF A COURT REPORTER COULD BE THE OFFICIAL RECORD.

- c) Exhibits may be introduced and offered for admission.

MANY TIMES THE PARTIES WILL STIPULATE TO THE ADMISSION OF MANY OF THE EXHIBITS UP FRONT, THUS SAVING TIME. OFFERED EXHIBITS THAT ARE NOT OBJECTED TO BECOME

PART OF THE RECORD WHETHER SPECIFICALLY ADMITTED BY THE HEARING OFFICER OR NOT.

IF THERE IS AN OBJECTION TO ADMISSION OF AN EXHIBIT, THE OBJECTOR NEEDS TO DESCRIBE THE REASON FOR THE OBJECTION. I GENERALLY NOTE THE OBJECTION AND ADMIT THE EXHIBIT. IF THERE APPEARS TO BE NO RELEVANCE TO AN EXHIBIT, ON OCCASION, I WILL NOT ADMIT IT. IF A PROPOSED EXHIBIT IS NOT ADMITTED, HOWEVER, IT MUST BE KEPT AS A PART OF THE RECORD FOR ANY REVIEWING AUTHORITY.

- d) The dept will issue a **Preliminary Order** to which a party may file a **Petition for Reconsideration, exceptions and briefs** in support of the exceptions. Note that a preliminary order becomes final, if a petition for reconsideration, exceptions and briefs are not filed.
- e) After the department reviews and considers such petitions, exceptions and briefs that may be filed, the Director will issue a **Final Order**. Any party may seek review of a Final Order in district court. **If this matter is taken to district court, the record which will be used by the court is the record which will be created today.**

For this reason it is important to observe certain rules:

1. **Extend courtesy to the person who is testifying.**
2. **Observers who are not being examined should not respond to questions, even though they may know the answer to a question.**

OFTEN A WITNESS DOES NOT KNOW AN ANSWER TO A QUESTION AND WILL BE COACHED BY SOMEONE OBSERVING THE HEARING. DON'T ALLOW THIS. THE WITNESS EITHER KNOWS AN ANSWER OR DOES NOT. THE PERSON WHO KNOWS THE ANSWER CAN BE CALLED LATER IN THE HEARING AS A WITNESS IF THE ANSWER TO A QUESTION IS THAT IMPORTANT.

3. **Testimony shall be given under oath.**
4. **Allow an examiner to finish a question before responding.**

A GOOD WITNESS WILL NOT ANTICIPATE WHAT A QUESTION WILL BE AND WILL WAIT UNTIL THE COMPLETE QUESTION HAS BEEN ASKED BEFORE RESPONDING TO IT. IN ADDITION, THE TAPE RECORDER SOMETIMES WILL NOT CLEARLY PICK UP RESPONSES WHEN MORE THAN ONE PARTY IS TALKING AT THE SAME TIME.

5. **Allow a witness to respond to a question before asking another question.**
6. **TURN OFF ALL CELL PHONES**

ATTORNEYS OFTEN WILL TRY NOT TO LET A PARTY COMPLETELY RESPOND TO A

QUESTION OR TO QUALIFY THE RESPONSE BEFORE ASKING ANOTHER QUESTION, ESPECIALLY IN CONNECTION WITH A CONTROVERSIAL MATTER.

- **Specific procedure:**

- a) The applicant and associated witnesses proceed first.
- b) The protestant and associated witnesses are next.

IF THERE ARE A NUMBER OF PROTESTANTS, THE HEARING OFFICER SHOULD ASK WHO WANTS TO PROCEED FIRST AND TO DETERMINE THE REMAINING ORDER TO PROCEED.

- c) Direct examination may be cross-examined. Redirect and re-cross will be allowed. (The applicant may present rebuttal testimony upon request).

BE AWARE THAT RATHER THAN CROSS-EXAMINE THE DIRECT TESTIMONY OF A WITNESS, UNREPRESENTED (PRO-SE) PARTIES OFTEN START TESTIFYING ON THEIR OWN ABOUT THINGS THEY WANT IN THE RECORD. THIS BECOMES EVIDENT WHEN THEY RAMBLE WITHOUT ASKING A QUESTION. DON'T ALLOW THIS, SINCE THEY ARE NOT UNDER OATH AND WILL GET THEIR CHANCE TO TESTIFY LATER IN THE PROCEEDING. EXPLAIN THIS TO PARTIES ON THE RECORD, IF NECESSARY.

CROSS-EXAMINATION IS LIMITED TO THE SCOPE OF DIRECT TESTIMONY. DON'T LET ATTORNEYS OR OTHERS ASK QUESTIONS BEYOND THE SCOPE OF THE DIRECT TESTIMONY OR USE THE CROSS-EXAMINATION PROCESS TO SERVE AS A MEANS OF DISCOVERY FOR OTHER ONGOING OR LATER LEGAL PROCEEDINGS.

- If a group of parties are involved, determine the spokesman.

THIS IS OFTEN IMPORTANT TO PREVENT A LARGE NUMBER OF PEOPLE FROM PROVIDING THE SAME TESTIMONY.

- I will officially notice the department's water right file, other department water right records, holdings in past decisions and orders of the department, well driller reports, water measurements and stream flow records in department files such as U.S. Geological Reports or similar reports.

TAKING OFFICIAL NOTICE OF THESE RECORDS IS VERY IMPORTANT IN ORDER THAT THE HEARING OFFICER IS NOT LIMITED TO JUST THE EXHIBITS OFFERED AT HEARING. IF DEPARTMENT DOCUMENTS WHICH ARE NOT A PART OF THE RECORD ARE USED TO SUPPORT THE DECISION, A COPY OF THE DOCUMENT NEEDS TO BE INCLUDED IN THE RECORD. IF YOU GET AN OBJECTION TO TAKING NOTICE OF WATER RIGHT RECORDS BECAUSE THE NOTICE IS TOO BROAD, JUST NOTE THE OBJECTION FOR THE RECORD.

BY NOTICING "HOLDINGS" IN PAST DECISIONS AND ORDERS OF THE DEPARTMENT, AS OPPOSED TO "PAST DECISIONS", ON APPEAL ALL OF THE EXHIBITS, TESTIMONY, ETC. FROM A PRIOR HEARING AND DECISION DO NOT NEED TO BE PRODUCED AS A PART OF THE RECORD. ONLY THE "HOLDINGS" NEED TO BE INCLUDED AS PART OF THE RECORD.

- This notice will eliminate the need to introduce these documents as exhibits and will make a more efficient hearing.
- Ask that counsel (the parties) remain seated when questioning witnesses

or conducting cross examination unless it is necessary to approach a witness in connection with an exhibit. Reason - microphones may not pick up testimony.

THE REAL REASON FOR HAVING COUNSEL REMAIN SEATED IS TO ELIMINATE THE SHOWMANSHIP SUCH AS WANDERING ALL OVER THE HEARING ROOM THAT SOME ATTORNEYS LIKE TO DO. I ASK THEM TO SIT DOWN IF THEY FORGET.

- **EXHIBITS** - Ask if there will be exhibits and how many. Premark and exchange exhibits before start of hearing.
- Are there any other preliminary matters to be addressed before the start of the hearing?

THIS IS A CATCH ALL QUESTION THAT OFTEN ALERTS THE HEARING OFFICER OF MOTIONS THAT MAY BE FORTHCOMING. OFFICIAL MOTIONS MAY NEED TO BE REPEATED FOR THE RECORD ONCE THE HEARING STARTS.

MOTIONS CAN REQUEST DISMISSAL OF THE APPLICATION OR PROTEST, INTERVENTION OR DELAY OF HEARING.
IF THE MOTION CAN'T BE RULED UPON, THE RESPONSE IS:

"TO TAKE THE MOTION UNDER CONSIDERATION." THE MOTION CAN THEN BE ADDRESSED IN THE RECOMMENDED ORDER OR PRELIMINARY ORDER.

- Motions questioning constitutionality or jurisdiction. RESPONSE IS:

"MOTION IS BEYOND MY AUTHORITY TO DETERMINE. THE MOTION WILL BE ADDRESSED TO HIGHER AUTHORITY BUT IN THE MEANTIME, WE WILL PROCEED WITH THE HEARING".

HEARING (With tape recorder on)

- "I am Allen Merritt from the Southern Region Office of the Department of Water Resources in Twin Falls. I will be the hearing officer today on behalf of the Director of the department, David Tuthill."
- Other department staff present is Bob Foster from our Salmon Office.
- "The purpose of the hearing is to receive evidence and testimony in connection with protested Applications for Amendment of Permits 75-7052 and 75-7589 filed in the name of Williams Lake Recreational Water & Sewer District.
- This hearing will be conducted in compliance with applicable provisions of:
 - Chapters 2 and 17, Title 42, Idaho Code.
 - Chapter 52, Title 67, Idaho Code,
 - The Rules of Procedure.
- Date, time and place.

- Date: June 26, 2007
- Time :
- Place: BLM Offices in Salmon Idaho
- Take appearances of parties starting with the applicant.

THE APPEARANCE OF A PARTY IS THE NAME AND ADDRESS OF RECORD AND INVOLVEMENT IN THE MATTER, i.e. ATTORNEY FOR ...

THE TAKING OF APPEARANCES ALSO HELPS THE TRANSCRIBER OF A HEARING TAPE TO ASSOCIATE VOICES WITH NAMES.
- If the issues have been limited in the conference, describe the issues as determined in the conference. i.e. which items are or are not issues.
 - (a) that it will reduce the quantity of water under existing water rights, or
 - (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or
 - (c) where it appears to the satisfaction of the director that such application is not made in goodfaith, is made for delay or speculative purposes, or
 - (d) that the applicanthas not sufficient financial resources with which to complete the work involved therein, or
 - (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or
 - (f) that it is contrary to conservation of water resources within the state of Idaho, or
 - (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;
- Seek concurrence from the parties of the issues.

BE SURE THE RECORD INCLUDES A RESPONSE FROM ALL PARTIES IF THE ISSUES HAVE BEEN LIMITED. CONCURRENCE IN THE PRIOR UNRECORDED CONFERENCE IS NOT SUFFICIENT.
- Read in all stipulations and record counsel's acknowledgment thereof.

APPLICANT

- Turn the matter over to the applicant.

DON'T ASK FOR AN OPENING STATEMENT BUT BE AWARE YOU MAY RECEIVE ONE.

MOST TIMES THE APPLICANT OR HIS ATTORNEY WILL JUST START CALLING WITNESSES.

- Swear in the applicant's witness.

"Do you solemnly affirm that the testimony you are about to present at this hearing is the truth the whole truth and nothing but the truth?"

"Thank you."

"You may be seated."

or

"Please state your name and address for the record." (If an attorney does not represent the witness. If the witness has an attorney, let the attorney ask the name and address question.

- Allow direct examination of witnesses.

- Exhibit sequence:

1. **MARK** exhibits as received and return
2. **IDENTIFY** or **EXPLAIN** the exhibit.
THIS IS CALLED FOUNDATION.
3. **OFFER** exhibit.
4. **EXAMINATION** of exhibit by other parties.
THIS HAS USUALLY BEEN DONE IF PREMARKED EXHIBITS HAVE BEEN DISTRIBUTED TO THE PARTIES.
5. **ADMIT** or **REJECT** exhibit on the record.
6. **TESTIFY** from the exhibit if admitted.

- Note:

- Admitted exhibits should be marked Admitted, initialed and dated. Any exhibits which are offered but rejected must be retained for future review of the record.

- Allow cross-examination.

- Allow re-direct and re-cross.

- Go thru all of applicant's witnesses in the same manner. i.e. Swear in, allow direct examination, allow cross examination, re-direct and re-cross.

PROTESTANT

- Swear in, receive direct testimony, allow x-examination.
- Go thru all of protestant's witnesses in the same manner.

- "I believe this concludes direct testimony."

IF THERE IS REBUTTAL TESTIMONY - IT WILL BE REQUESTED AT THIS POINT BY THE APPLICANT.

- For rebuttal testimony, allow only direct, cross and redirect. (The applicant gets the last word).
- IDWR will take official notice of the water right file and the following information:
 - a) The department's file for Amendment of Permits 75-7052 and 75-7589.
 - b) Holdings in past decisions and orders of the department as the holdings and orders may apply to the protested application.
 - c) The department's water right records.
 - d) Reports, water measurements and stream flow records in department files such as U.S. Geological Survey reports.
 - e) Well Driller Reports (well logs) in department files.
- Check to see that all the exhibits are accounted for?
- Is there anything further before I conclude this hearing and/or close the record?
 - a) Check with the applicant.
 - b) Check with the protestant.
 - c) Check with intervenor.

DON'T ASK FOR A CLOSING ARGUMENT OR SUMMARY, BUT BE AWARE THAT YOU SOMETIMES WILL RECEIVE ONE.

- Submittal of briefs summarizing the law or respective positions?

ATTORNEYS USUALLY WANT TO SUBMIT A BRIEF OF THE LAW OR FACTS IN THE MATTER.

SOMETIMES A PARTY WILL OFFER TO DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE HEARING OFFICER'S USE. **ALWAYS DECLINE SUCH AN OFFER.**

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- "The department will issue a preliminary order in this matter which we will mail to the parties. (within 60 days or earlier.)"
 - "This hearing is now concluded and the record is closed."

- or -

- "This hearing is now concluded but the record will remain open for 10 days for the submittal of _____. Please note that any information submitted for the record after this hearing must be provided to all parties to this matter who will have 14 days to respond to the information."
- Set specific times for the exchange of any documents or post hearing briefs and responses thereto.
- Other time frames:
 - Parties have **14** days from the service date of a Recommended Order to file a Petition for Reconsideration with the hearing officer. (Procedure Rule 720.02.a.).
 - Parties may file exceptions or briefs in support of exceptions with the Director within **14** days of:
 - a) Service date of Recommended Order,
 - b) Service date of a denial of a petition for reconsideration of a Recommended Order, (Note: this time period is 7 days past the 2 weeks in which to file a petition for reconsideration).
 - c) Failure within 21 days to grant or deny a Petition for Reconsideration, whichever is later. (Procedure Rule 720.02.b.).
 - Parties have **14** days to respond to briefs and exceptions. (Procedure Rule 720.02.c.).
 - Within **56** days of receipt of written briefs or oral argument, whichever is later, the agency head will issue a Final Order. (Procedure Rule 720.02.c.).

GENERAL MATTERS

- Be sure testimony relative to exhibits can be understood. The tape recorder does not have "eyes". Hence, testimony such as "The size of the pond is about from here to here" is not meaningful when reviewing the tape and exhibits after the hearing.
- If an objection is made, ask the reason for the objection if not already stated. Allow a response to the objection from the opposing side for the record before noting or ruling on the objection. Most objections merely

need to be noted for the record, and then allow the testimony to proceed. Let in most testimony and exhibits unless it clearly is not relevant or is of no value to the proceeding.

- The hearing officer is responsible for a clear record and is entitled to ask questions of any witness to obtain needed information. I generally allow direct testimony and cross examination of a witness before asking a question that has not yet been addressed. The reason is that a hearing officer's question in most cases will prompt additional redirect testimony and re-cross questions.
- Remember that it is **your** hearing and you, not someone else, are in charge and are responsible for a complete, orderly record.
- Don't let an attorney or a party intimidate or interrupt you. There is also no need to compete with a party or attorney to maintain control. Just pound the gavel on the table, if necessary, to get everyone's attention. This works very well.