

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

**IN THE MATTER OF APPLICATION)
FOR TRANSFER IN THE NAME OF)
CITY OF ARCO NO. 72488)**

**ORDER DENYING
PETITION TO INTERVENE**

Application for Transfer No. 72488 was filed by City of Arco with the Idaho Department of Water Resources ("IDWR") on June 12, 2006. Notice of the application was published, and Pete Stratis and Sheila Wood timely filed protests. Earl Maynard and Duane or Monarae Whipple petitioned to intervene. A pre-hearing conference was conducted on February 14, 2007. An order granting the petitions to intervene from Earl Maynard and Duane or Monarae Whipple was issued on February 26, 2007. A notice of hearing scheduled the hearing for April 3, 2007.

On February 27, 2007, IDWR received a document from James Wasylow titled "Petition to Intervene." The petition did not document service to any of the parties.

Intervention in matters before IDWR is controlled by IDAPA 37.01.01.350 – 354. IDAPA 37.01.01.352 provides:

Petitions to intervene must 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, unless a different time is provided by order or notice. Petitions not timely filed must state a substantial reason for delay.

The prehearing conference referred to in Rule 352 is the first prehearing conference conducted by IDWR.

A prehearing conference was held on February 14, 2007. The petition to intervene was untimely filed. James Wasylow offered the following reason for the untimeliness of his petition:

I was not aware of the legal notice for Application For Transfer of Water Rights filed by the City of Arco, or I was under the assumption that the protests filed would be sufficient for a resolution in this matter.

By stating that he didn't timely file a petition to intervene because he assumed the other protests would resolve any issue, Wasylow implies that he knew about the city's application for transfer. In the first portion of the sentence, Wasylow states that he was not aware of the legal notice of the city's application. Reading both portions of the sentence consistently, Wasylow did not know about the published notice, but Wasylow apparently knew about the application, that it was protested, and Wasylow consciously decided not to protest because others had protested.

Wasylow does not state factual changes that prompted the filing of his untimely protest after he had initially decided not to protest or not to timely intervene.

Wasylow did not state a substantial reason for the untimely filing of his petition to intervene.

ORDER

Based upon the foregoing, it is ORDERED that:

The Petition to Intervene of James Wasylow is **DENIED**.

DATED this 20th day of March, 2007.



Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of March, 2007 the foregoing document, as described below, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document: Order Denying Intervention to Intervene (Wasylow)

SHEILA D WOOD
PO BOX 567
ARCO ID 83213

DUANE OR MONARAE WHIPPLE
2994 W 2400 NORTH
ARCO ID 83213

PETE STRATIS
2337 N 300 WEST
ARCO ID 83213

EARL MAYNARD
2979 W 2400 NORTH
ARCO ID 83213

CITY OF ARCO
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 51030
IDAHO FALLS ID 83405-0130

JAMES WASYLOW
BOX 531
ARCO ID 83213

THE DYER GROUP LLC
WINSTON R. DYER PE
310 2ND EAST, STE 153
REXBURG ID 83440



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department 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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

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, requests 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 IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director 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.