ADMINISTRATOR'S MEMORANDUM

Application Processing Memo No. 68
Transfer Processing Memo No. 25

To: Regional Offices
Water Allocation Bureau

From: L. Glen Saxton

Re: **CONDITIONAL PROTEST WITHDRAWAL FOR RESOLUTION OF A CONTESTED APPLICATION**

Date: July 29, 2003

The purpose of this memorandum is to provide guidance to Department staff regarding the procedure to be followed upon receipt of a conditional withdrawal of a protest to a water right application.

Protests to water right applications are often resolved through stipulated agreement resulting from negotiations between parties. In some cases, an agreement between parties includes a statement that the protest is withdrawn provided the Department includes specific language as conditions of approval of the water right application. Sometimes, however, the stipulations proposed in the "conditional" withdrawals are not acceptable to the Department for a variety of reasons. Department Rule of Procedure 612 provides that "When a settlement is presented to the presiding officer, the presiding officer will prescribe procedures appropriate to the nature of the settlement to consider the settlement."

The Department should encourage settlement of contested cases through informal means and should make every effort to facilitate such settlements. To increase the likelihood that the settlement agreement will be acceptable to the Department, staff that conduct pre-hearing conferences should advise the parties that proposed settlement conditions may be considered unacceptable if the conditions are:

- Contrary to law or rules of the Department
- Outside Department jurisdiction
- Unreasonably burdensome upon the Department including staff time and Department resources
- Inconsistent with Department policy
- Inconsistent with proper management of the water resource or orderly administration of water rights
- Unclear or ambiguous meaning or intent.

Instruction should be provided at the conference stage before negotiations commence, if possible, and parties should be informed that this guidance does not prohibit or limit settlement agreements between the parties separate from requirements of the Department.

If a conditional protest withdrawal proposes settlement conditions to be applied to an approval, the Department must determine if the conditions are appropriate prior to determining that a protest is withdrawn. Regional Managers facilitating protest resolutions have broad discretion to determine the acceptability of proposed conditions but in some questionable cases, may want to seek legal or administrative review.

If the settlement conditions are determined to be unacceptable, the Department should prepare a letter to inform the parties that the conditional protest withdrawal is not acceptable and should list the reasons why the conditions cannot be accepted. The letter should also inform the parties that the protests will not be considered by the Department as withdrawn, that the pending application remains an active contested case before the Department, and that the parties have further opportunity to resolve the contested matter through continued negotiations.

If the settlement conditions are determined to be acceptable, and the application is otherwise approvable, the Department should acknowledge receipt of the conditional withdrawal of protest. The acknowledgement letter should inform the parties that the Department may modify the conditions as written to fit the approval format or may substitute a standard condition of the Department with essentially the same language and intent. Minor revisions can be made to help clarify certain references within a condition such as the addition of water right or transfer numbers, and well or other diversion locations. Standard conditions of the Department may be used to accommodate data entry and help avoid conflicting interpretations by Water Masters, Department staff and other water users. However, in preparation of an approval document, Department staff should not modify or replace specific language that relates only to interaction of the parties or the factual circumstances unless a change is necessary to prevent conflicting interpretations. In such cases, or in cases where acceptability is questionable, State office staff should consult with the Regional Manager and other staff who facilitated the protest resolution and, if significant changes appear to be warranted, the Department should notify the parties in writing of the changes or concern, prior to issuance of an approval. If a party objects in writing to the proposed changes, IDWR will inform the parties that the protest is not considered withdrawn, that the pending application remains an active contested case before the Department, and that the parties have further opportunity to resolve the contested matter through continued negotiations.

When multiple parties protest an application, one or more of the parties may withdraw their protests prior to hearing. If a withdrawal of protest agreement does not resolve the entire contested case, failure to determine acceptability of proposed condition language at the time of withdrawal could result in a later rejection of the proposed language after the dispute between the other parties is resolved. Conditional language proposed in a withdrawal agreement between the applicant and less than all of the protestants should be reviewed prior to hearing on the matter and a letter issued stating whether the proposed language would be acceptable to IDWR if the application is ultimately approved. Care should

be exercised in issuing the letter, however, if, by finding the proposed condition to be acceptable, IDWR might be viewed as having predetermined the outcome of the contested case.

Approvals are issued as preliminary orders of the Department and also must be provided to all parties involved in the conditional withdrawals. Parties can petition for reconsideration of a preliminary order for any reason, including disagreement with the conditions of approval, if any were modified, substituted or added by the Department.

This guidance does not limit or prohibit the use of settlement agreements that do not impose conditions on the approval. In such cases, the existence of an agreement can be recognized with a standard condition of the Department as follows:

> The diversion and use of water described in Transfer <00000> may be subject to additional conditions and limitations agreed to by the protestant(s) and the right holder under a separate agreement to which the Department is not a party and which may be enforceable by a court of law.