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DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573, IN THE MANE OF M3 EAGLE ASSIGNED TO THE CITY OF EAGLE	) MOTION FOR) CLARIFICATION AND/) OR RECONSIDERATION

Protestant, moves for a clarification and/or reconsideration of the August 9th, 2011 Order denying the Motions for Disqualification without cause and the later motion for Disqualification for Cause under Rule 770, Water Resources Rules of Procedure. The grounds for this motion are set forth in the Protestant Brief in Support thereof filed herewith.

Wherefore, Movant requests that this matter be clarified and reconsidered.

Respectfully submitted this 23 day of August, 2011.

Alan Smith

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BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573, IN THE MANE OF M3 EAGLE ASSIGNED TO THE CITY OF EAGLE	BRIEF IN SUPPORT OF MOTION FOR CLARIFICATION AND/ OR RECONSIDERATION

On July 25, 2011 the Protestants filed a Motion requesting the Interim Director and PRESIDING OFFICER/HEARING OFFICER be disqualified without cause. In that Motion, Protestants timely disclosed and notified Water Resources and all parties that they intended to call the Interim Director as a witness.

The Protestant have given the Department more than adequate time to designate another hearing Officer/Presiding officer. Under Rule 605, Idaho Rules of Evidence, a judge may not testify in a case in which he sits or presides.

Ten (10) days after the filing of the Motion to Disqualify the Director without cause no ruling on that motion had been received. Out of concern that such motion was being ignored, the Protestants filed a motion to Disqualify for cause. That Motion and the supporting affidavit were filed on August 5. 2011. This was not filed in response to M3 Eagle's response. That response by M3 Eagle may have been filed on August 4, but was not mailed to Protestants until August 5th and was not received until August 6th 2011 after the Motion of Protestants.

Rule 40 (d) (2) provides as follows:

> "Any such disqualification for cause ... shall be made by a Motion to disqualify accompanied by an affidavit .... Such Motion for disqualification for cause may be made at any time."

The Department Order of August 9th fails to address the provision of Rule 40 (d)(2)(B). I.R.C.P. The Rule does not conflict with the other statues involved, i.e.; 59-704 and 67-5252.

Section 59-704, Idaho Code, does not even likely apply in the present case as it only covers "conflicts of interests". Protestants have not alleged such. Protestants alleged bias and prejudice after over twenty (20) meetings with M3 and/or their legal counsel which resulted in the January 19, 2011 Agreement to reconsider the entire case and reopen the evidence. All of those secretive and closed door conferences took place without Protestants being notified or given any opportunity to appear as interested litigants before the Water Resources Department. M3 has admitted the Protestants were never invited to appear at any such negotiation conferences. Protestants were assured that they would have an opportunity to review a draft of any agreement; however, when we received a copy thereof it was already signed by the Director. Protestants contend all of this process is indicative of BIAS AND PREJUDICE on the part of the Director/presiding officer.

Moreover, the City of Eagle legal staff appears to have been notified of all of these so called negotiation conferences when the City was not even a party at that time, but the Protestants who had been litigants during the entire process were never notified of any of these meetings. The agreement states as follows:

> "M3 Eagle and IDWR, in consultation with the City, have concurred on several findings and conclusions ... and will continue to confer and seek agreement on additional findings ..." (See Agreement of January 19, 2011, p.2.)

The Protestants who had been litigants throughout were, nevertheless, excluded on an outrageous theory that they were not parties in the Appeal. This is further indication of the Bias and Prejudice toward the Protestants, all of which was allowed by the Department and the Director who signed this agreement.

Section 67-5252, Idaho Code, recognizes the right of any party to disqualify any presiding officer without cause and or for bias and prejudice or:

> "... any cause for which a judge is or may be disqualified."

This language therefore encompasses Rule 40 (d)(2)(B) and its language that a "disqualification for cause may be made at any time."

Idaho Code, 67-5252, does contain a provision that disqualification motions must be made within fourteen (14) days after receiving notice as to who the presiding officer will be in a contested case. Any conflict between 67-5252 and Rule 40 (d)(2)(B) is immaterial as the disqualification motion filed by Protestants was filed on August 5th, well within the time allowed as the Protestants received notice of who the presiding officer would be in the Order of August 2, 2011settting hearing dates.

Furthermore, the Director/Presiding Officer knew that Protestants had been litigants throughout some 16 or 17 days of hearings and that Protestants would be participating litigants on Remand and to sign an Agreement to make only such new findings as would be agreeable to M3 and to severely restrict the hearing on Remand so that nothing in the way of evidence unfavorable to the M3 application could be presented was fundamentally unfair and prejudicial to the rights of the Protestants under 42-203A, Idaho Code.

The three (3) years in which the Director/Presiding Officer has served as hearing officer and on which the August 9th, 2011 Order places great emphasis is of little significance in the present case. The Protestants were procedurally unable to file any disqualification motion before the case was remanded as it was still in District Court. Disqualification motions were timely filed after Remand and as soon as the Protestants learned who the presiding officer/sitting judge would be.

Disqualification without Cause:

Rule 40(d)(1)(F) specifically allows disqualification without cause of the presiding judge in a new trial situation. That Rule states absolutely no restriction as to removal of the same judge who presided in the original trial. Obviously a judge who presided in the first trail may be removed without cause in the new trial as long as the motion is timely made. The conclusion of the Director in the August 9th Order that this is not analogous to a "new trial" when a new party, the City of Eagle, and entirely new matters and issues that were not before the Department in the original hearing seems absurd, lacking in any real merit and made solely for the purpose of denying the disqualification motion.

The Remand with the City of Eagle now an active party in the case, evidence regarding planning horizon, service area, projected population, projected population growth, projected water demands, and last, but not least, the thirty-two (32) new findings as to the water supply issues and aquifer sufficiency of the Valley Floor and near the Boise River as set out in the TVHP are all new matters which never arose in the original trial. In other words, the focus of the original hearing on the upslope pumping area and the PGSA are no longer issues. The original hearing and the Remand hearing will not even remotely resemble each other. The most profound indication of that is the abstruse effort to ignore the prior decision in this case.

The Director should reconsider the August 9th order and should grant the Motion for Disqualification without cause as it is in essence, a new trail under 40 (d)(1)(F), I.R.C.P.

Disqualification for Cause Affidavit

The motion to disqualify the Director and presiding officer is supported by an affidavit which sufficiently states multiple reasons why the disqualification for bias and prejudice is sought. Affiant has alleged on adequate knowledge, information and belief

that the pre-judged and pre-determined findings and the severe restriction as to issues and evidence on Remand is a prejudicial decision and that extra-judicial sources have been involved in that same decision, is sufficient as grounds for removal for cause.

Moreover, substantial contributions have been made to various politicians by he M3 companies and political influence has been utilized to help M3 obtain the full water right it wants. Protestants further believe that political influence has been used to bring about this negotiated settlement favoring the M3 application and to assure that M3 will obtain the full water right it wants whether or not it qualifies as a municipal provider. These are all extra judicial sources affecting the outcome of this case. Protestants also believe the Water Resources Department has been directed, instructed and pressured into settling this case, all for the benefit of M3.

Dual Capacity of the Director

The Director, who is the agency head, is, of course, the chief negotiating officer of the agency he heads. However, in the present case he also sits as a judge.

> "When acting upon a quasi-judicial ... matter he is neither a proponent nor an opponent ... but sits in the seat of a judge." Cooper v. Board of County Commissioners of Ada County, 101 Idaho 407, 614 P.2d 947 (1980). City of Burley v. McCaslin Lumber Co., 107 Idaho 909, 693 P.2d 1108, (ct. app. 1984). Lowery v. Board of County Commissions for Ada County, 115 Idaho 64 (App.), 764 P.2d 431 (ct. app. 1988).

The Director's decision arising out of these negotiations to enter only those new findings which M3 would agree to certainly would cause any other litigants concern regarding bias or prejudice. Add to that the effort to severely restrict the Remand Proceedings so as to eliminate any matters that might be unfavorable to M3's application makes that concern ever more profound. It does not end there, that January 19th Agreement and the 32 new findings abstrusely makes no finding and does not even give any indication as to the reason the Amended Final Order of January 25, 2010 is no longer valid or of any force or effect.

Even the slightest appearance of impropriety or unfairness, or bias, or prejudice is sufficient reason and cause for a judge to step down.

Disqualification of an Agency Head

The summary conclusions by the Director in the August 9th Order that (1) disqualification of the agency head would result in an inability of the Department to decide the contested case, and (2) no improper ex parte communications took place in any of the multiple meetings with M3 are used as primary reasons to deny both disqualification motions.

Protestants disagree. The selection of an independent hearing officer with some adequate knowledge of water law may result in a more sustainable decision. It does not necessarily follow that removal of the agency head would result in an inability to decide the case.

The August 9th Order states that the Director "has been directly involved in the settlement negotiations" for the past year or 480 days (see p. 4.) Nevertheless, the Director states that no discussions occurred which would "constitute ex parte communications under I.C., Section 67-5253". Both of these conclusions appear untenable.

Section 67-5253(4) states as follows:

> (4) "Where disqualification of the agency head ... would result in an inability to decide a contested case, the action of the agency head shall be treated as a conflict of interest under the provisions of I.C. 59-704."

The purpose of that section of the Idaho Code is to trigger into effect the provisions of 59-704(3), Idaho Code so that an advisory opinion may be obtained from the attorney general as to whether the appointed or employed state official should remain on the case. None has been provided.

The Case Law

The purpose of Rule 40 (d)(1), Disqualification without Cause was discussed by the Court of Appeals where the Court concluded as follows:

> The purpose of this rule is to insure a fair tribunal by allowing a party to disqualify a judge thought to be unfair and biased." (emphasis added.) Jahnke v. Moore, 112 Idaho 944, 737 P.2d 465 (ct. app. 1987.)
>
> "If the movant is concerned that the judge may be biased or unfair for some real or imagined reason, all that is required is a timely-filed motion under this rule." Jahnke v. Moore, supra.
>
> "(the) motion was timely filed after the second trail date was set, the district judge was automatically disqualified and without authority to hear the matter. "Jahnke v. Moore, supra.
>
> " ... it has been held that a right to disqualification without cause ... may exist after a remand." Jahnke v. Moore, supra. (unless) on remand, the parties had agreed to submit the merits of the case without further evidence and only additional

briefing." Alumet v. Bear Lake Grazing Co., 119 Idaho 999, 812 P.2d 286 (1989).

The disqualification without cause should also be honored in this case as the Remand is, in essence, a new trial with entirely new issues concerning the TVHP and a new party, the City of Eagle.

The disqualification for cause should be granted for the following reasons.

> The truth of the filed affidavit charging bias or prejudice on the part of the judge is not what disqualified the judge, but the affidavit itself. Price v. Featherstone, 64 Idaho 312 P.2d 853 (1942); Davis v. Irwin, 65 Idaho 77, 139 P.2d 474 (1943); Anderson v. Winstead, 65 Idaho 161, 140 P.2d 233 (1943).
>
> A hearing as to the truth or falsity of the affidavit and whether the judge was actually prejudiced as a matter of law was not required. State v. Ash, 94 Idaho 542, 493 P.2d 701 (1972).

While the revisions of the Rule and later cases give a judge or hearing officer discretion as to whether to grant or deny a motion to disqualify himself for cause, Leibelt v. Liebelt, 125 Idaho 309, 870 P.2d 9 (1994), the point of the earlier cases remains, i.e. the movant does not have to prove the affidavit is true or whether the judge is actually prejudiced as a matter of law.

The Director makes several immaterial assumptions as to why the Protestants seek disqualification. (See p.3, August 9the Order). Those assumptions are correct in the one regard – the Protestants do not appreciate the way the contrived contractual agreement of January 19th was done and signed before we ever saw it, after we had been assured by the Staff Attorney General a draft of any such agreement would be provided for our review.

However, the sole reason Protestants seek disqualification is because the Director has agreed in that January 19th Agreement to make only those findings to which M3 will agree. This places M3 in a favorable status over other litigants in the Remand proceedings. Protestants therefore believe it is an abuse of discretion for the Director to deny either motion for disqualification and remain as the presiding officer on Remand.

As to the faulting of John Thorton for not seeking to intervene until 350 days after the petition for judicial review was filed – there was a prompt motion to intervene after he received notice of the already signed January 19th Agreement and the matter was not remanded for some 480 days after petition filing.

The Protestants mistakenly believed that the Water Resources Department would follow its charge under the law and the case law to defend its decision and Amended Order of January 25, 2010.

"When named as a respondent on Appeal the government board's role is limited to defending its decision below" Lowery v. Board of County Commissioners for Ada County. 115 Idaho 64 (App.); 764 P.2d 431 (ct. app. 1988).

Had that been done, intervention would have been unnecessary. Instead the Department abandoned that decision and negotiated away the whole farm.

Respectfully submitted this 23 day of August, 2011.

Alan Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of August, 2011, a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION was filed, served, or copied as follows:

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