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Protestant

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573, IN THE NAME OF M3 EAGLE ASSIGNED TO THE CITY OF EAGLE	REBUTTAL BRIEF AND FINAL ARGUMENT

This is and will continue to be a LANDMARK CASE and will set a very important PRECEDENT and it is IMPERATIVE that the DECISION OF IDWR GET IT RIGHT. The burden that has been placed on the Water Resources Department by Chapter 2 of Title 42, IDAHO CODE is tremendous. Allotting and granting vast future needs water rights to municipal providers or municipalities some 20-30-40 years into the future when no one can be certain how much ground water is available is ridiculous. The wisdom of the entire "future needs municipal provider:" provisions of Title 42, Idaho Code should be questioned.

It is extremely doubtful whether the municipal provider provisions of that law were ever intended to go beyond a situation where new subdivision growth along city boundaries could be serviced by a municipality which already had a nearby integrated water service in place. That law certainly was never intended to apply to a private planned community miles away from city boundaries. The efforts of M3 to stretch the intent of the law by adding the name of a nearby city to the application and annexing miles of rural property to make it all look legal are outrageous.

Conclusion of law #14, Final Order states:

> 14. "The M3 development is, by its nature, the very type of development that the legislature did not recognize as qualifying for a water right for reasonably anticipated future needs." (The June 30, 2011 District Court Order did not change this conclusion of law.)

M3 knew at the time it filed this "application" that it was DEFECTIVE, VOID, and INVALID. To prove this point even further – M3 presented absolutely no proof in its "case in chief" and offered absolutely no evidence because it had none to show it was a municipal provider under Idaho Code Section 42-202(2) or 42-205 B (5) (a) (b) or (c). The above conclusion of law supports the Protestants' position that the DEFECTIVE and VOID APPLICATION does not exist and can not be assigned – the only granted REQUEST to M3 was a 3.28 cfs water right for municipal purposes and that is all M3 can assign to the City of Eagle or any other municipal entity.

Black's Law Dictionary defines an "application" as a "REQUEST or a document containing a request." Bouvier's Law Dictionary defines an "application" as a "REQUEST for something". This is most often a request or application to a governmental agency, usually state or local for approval, and a permit or license. In the present case, that REQUEST or APPLICATION FOR A FUTURE NEEDS MUNICIPAL WATER RIGHT HAS BEEN DENIED by reason of the failure of M3 to meet the requirements of Idaho Statutory law, i.e.; Idaho Code, Section 42-202 (2) and 42-205 B (5) (a) (b) and (c).

At the conclusion of the hearing evidence this tribunal found as follows:

> "At the time the record closed for this contested case, annexation into the City of Eagle was not possible because the M3 property was not contiguous with any City of Eagle boundary".
> (See Final Order, Findings of Fact #7, p. 4).

The ONLY APPLICATION BEFORE THIS TRIBUNAL WAS THE REQUEST OF M3 EAGLE. ONCE THAT REQUEST WAS DENIED, THERE WAS NO APPLICATION IN EXISTENCE THAT COULD BE ASSIGNED TO THE CITY OF EAGLE.

THE APPEAL

The Appeal was filed in February of 2010 and those facts regarding contiguity and annexation by the City of Eagle did not occur until after the appeal. The Agreement negotiated between IDWR and Appellant M3 sought to bring those additional facts before the District Court nearly a year after the Appeal was filed and stalled and delayed in the court. These factors were critical to the M3 assignment of its "municipal" water right application to the City of Eagle. M3 needed to supplement the record by this negotiated agreement with the IDWR judiciary. (See "negotiated" Agreement of January 19, 2011, item 5E, iii, p. 6). Water Resources and the Director are both named "respondents" in this Appeal. Being named as a respondent does not make litigants of either Water Resources or the Director in this Appeal. Water Resources and the Director (who was the hearing officer) are carrying out quasi-judicial functions in the Appeal and the Director's function is still judicial. The government's role is limited to explaining and defending the decision that has been made and the judgment it has rendered.

> "When acting upon a quasi-judicial ... matter that (administrative agency) governing board is neither a proponent nor an opponent ... but sits in the seat of a judge." (Emphasis and insert added).
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> 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 Commissioners for Ada Cty., 115 Idaho 64, (App.) at p. 71, 764 P.2d 431, (ct. app. 1988).
>
> "When named as a respondent on Appeal the government board's role is limited to defending its decision below." (See Lowery v. Board, supra, at p. 71). (See also Cooper, City of Burley cases, supra.)

In the Lowery case, THE COURT SPECIFICALLY CONCLUDED THAT A PASSIVE, NON-PARTISAN POSTURE OF THE BOARD DURING THE APPEAL WAS PROPER WHILE AT THE SAME TIME EXPLAINING ITS DECISION BELOW. THE COURT FURTHER CONCLUDED THAT THE BOARD'S ROLE ON APPEAL WAS NOT THAT OF ACTIVE ADVOCACY. (at p. 71).

JURISDICTION

All of the negotiations and the January 19th "negotiated Agreement" were entered into by the Department without jurisdiction to do so.

> "Ordinarily, once an Appeal has been filed or a petition for review granted, the lower tribunal is deprived of the jurisdiction to correct its decision." (Lowery case, supra, p.71)

Several other Idaho cases have held:

> "The Appeal, when perfected, divests the trial court of jurisdiction." Dolbeer v. Harten, 91 Idaho 141, 417 P, 2d 407 (1967). Lowery case, supra at p. 71. Hells Canyon Excursions, Inc. v. Oakes, 111 Idaho 123, (App.) 721 P.2d 223, (ct. app 1986) at p 125.

In the Hells Canyon case, as in the present case, post trial motions had been denied before the Appeal was filed. On Appeal, the Court determined as follows:

> "However, because the district court had already decided those motions, they were no longer pending and the subsequent notice of appeal transferred jurisdiction of the case ... to the appellate court, Dolbeer v. Harten, supra. The district court therefore had no power or authority – because it lacked jurisdiction – to reconsider its earlier decision and to enter a different ruling ..." (underlines added.)

IDWR and the Director have no jurisdiction to enter into a "negotiated settlement agreement" that changes the findings of fact and conclusions of law, adds new findings, and nullifies, revokes and reverses a sound and well founded prior judgment in this case solely by negotiated agreement and without any well founded legally right basis to do so. That is exactly what the "January 19, 2011 Agreement" does. It even requires a SECOND AMENDED ORDER that reverses the prior judgment. (See p. 5, Agreement). That Agreement is not only outrageous it seeks to CIRCUMVENT THE LAW AND IS IN DEROGATION OF THE JUDICAL FUNCTION OF BOTH IDWR AND THE DIRECTOR AND THE JUDICIAL STATUS ASSIGNED TO AN ADMINISTRATIVE AGENCY BY STATUTORY LAW. THAT AGREEEMENT IS NOT VALID.

ORDER OF REMAND

The district court order only follows the "negotiated agreement", not the Idaho statutory law, including 42-203 A(5) and 42-202 (2) and 42-205 B(5)(a)(b) and (c) and also does not follow the case law of Idaho set forth above. The court made no ruling on

any matter other than a motion to intervene by Protestants, simply remanding the case back to IDWR. That appellate court did not specifically alter, modify or reverse any part of the judgments of December 21, 2009 or January 25, 2010 by IDWR.

ASSIGNMENT

An Application which is nothing more than a "request" for a future needs municipal water right that was DEFECTIVE AND VOID from the very date it was filed can not now achieve the status of a valid application that can be assigned to the City of Eagle. The attempted assignment of a "future needs municipal water right application" which M3 never qualified for is a nullity.

Moreover, the clause in the assignment states:

> "if any provision of this assignment conflicts with any provision of the Development Agreement, the Development Agreement prevails."

Under that Development Agreement a non-qualifying private developer owns, controls, and manages the water right until it is eventually assigned to the City of Eagle on a phase by phase basis. (Ex. #58, p. 24, (2.2E). This will enable M3 to own the water right or portions of it for 20-30-40 years. THERE IS NO ASSIGNMENT NOW as M3 contends.

CITY OF EAGLE

It appears clear from the evidence presented in the Remand Hearing that the City of Eagle has made little effort to meet the "water goals" it sets out on p. 18 and 19 of City Exhibit #2, especially efforts to obtain or develop surface water supplies and surface storage facilities for fire protection. (See City of Eagle, Exhibit #2, Section 4.6.2, Domestic Water Goals A, F, G, p. 18.)

The City of Eagle has taken in by annexation vast rural areas of thousands of acres. The land and water grab going on with the municipalities is phenomenal. The City of Eagle intends to apply for 26. 57 cfs and the monitoring of what it is already pumping at the Legacy and Eagle Field subdivisions does not appear to be adequate. It has failed to comply with the Department Order of March 10, 2006 and did not notify the

Protestants of the ordered pumping test so they would have an opportunity to collect data from their wells while the pump test was being conducted. This hardly seems to be a mere oversight on the part of Eagle City. Pumping at Legacy and Eagle Field has already caused injury to nearby ground water well owners.

Protestants attempted to present testimony as to actual damages from 3 witnesses who are nearby well owners. Those witnesses had been impacted negatively by pumping from the Legacy and Eagle Field wells operated by the City of Eagle. Those witnesses were not allowed to testify in the Remand Hearing under the Order of October 17, 2011 which broadened the limitations of the earlier order beyond the term clearly stated, i.e. "potential injury from pumping" to also include "potential or actual injury from pumping". The Protestants view that as another overly restrictive limitation in the Remand Hearing by judicial order carried out as a result of an improper and invalid negotiated agreement by the judiciary of IDWR.

Ordinarily, depositions are not a part of the record or testimony. Protestants do not believe it is out of line to summarize a few statements from the depositions since the deposition testimony was made a part of the record when the complete transcripts were attached to the Affidavit of Michael Lawerence and the October 17, 2011 Order states that those depositions have already been reviewed by the Director.

Mike Moyle farms northeast of Star, Idaho. Mr. Moyle stated that the drinking water started tasting "bad" after pumping started in the Legacy Subdivision. He also stated that when he planted potato fields which have to be sprinkled, his neighbors began having well problems – when he plants crops such as corn and mint that can be flood irrigated the neighbors wells have functioned well. This is a very good indication from those that live in the area and know what is happening to area ground water supplies just how DELICATE THIS GROUND WATER SITUATION HAS BECOME. This also supports the Findings of Fact made by the Director in the Final Order as to the amount of "unpumped cfs" available for "future use" which was so severely attacked by counsel for M3 in its post trial motions. (See Final Order, December 21, 2009, Findings #38 and #39).

THE OPPONENT BRIEFS

The closing final arguments and briefs of the City of Eagle and M3 are devoted primarily to faulting the Mat Weaver and Dr. Reading analysis, population projections, and future water needs, and to bemoaning any reduction in the permitted water right from the 23.18 cfs requested.

Apparently M3 now contends that the Protestants have not only lost any right to present evidence beyond the scope of the remand limitations, but have also lost any right to raise any points of law beyond the scope of those limitations. Outrageous! It is further asserted that the Protestants have no standing to raise any points of law. (See p. 30). Ludicrous.

The point is – the assignment is meaningless because the Development Agreement prevails over it. The language of the assignment states:

> "[a]ny remaining ownership interest retained by M3 Eagle shall terminate and pass to City once the Remand Proceeding before the Department is complete, a final order is entered ...."

This has no real meaning because the Development Agreement which prevails allows ownership to remain with the private developer over many years in violation of statutory law.

The cases of Hardcastle v. Board of Commissioners of Jefferson County, 110 Idaho 956, 710 P.2d 1216 (1986) and Drake v. Craven, 105 Idaho 734, 672 P.2d 1064 (ct App. 1983) are not in direct point or very applicable to a case involving water law. In the Hardcastle case no other persons would be affected in the stipulation and no implications for other persons were involved. The same is true in Drake v. Craven as the rezoning application had been denied and the stipulation involving the quasi-judicial tribunal dealt with only minor procedural matters. Neither of those cases concerned a reconsideration of the entire judgment of a quasi-judicial tribunal and replacement and substitution of 41 findings of fact, and 22 conclusions of law and a judgment on the merits with 32 cherry picked totally different findings, all done through negotiation.

Again the Department Policy stated in Rules 612 and 614 is as follows:

> "...settlement agreements that are not unanimously accepted by all parties or that have significant implications for persons not parties ..."

are not in accordance with Departmental policy. Settlements that have "implications for the administration of the law for persons other than the affected parties and are not consistent with the agency's charge under the law" are also matters of Departmental Policy which must be considered. (IDWR Rules 612 and 614). The settlement agreement of January 19, 2011 fails on each point set forth immediately above. IDWR has a judicial charge under the law.

CONCLUSION

At the conclusion of the remand hearing the Director took the Protestants' motion to dismiss the proceedings on remand under advisement. That motion was founded on the judicial impropriety of a quasi-judicial tribunal setting aside a judgment on the merits in a contested case solely through negotiation. A second ground for that motion was the DEFECTIVE ASSIGNMENT to the City of Eagle.

The Litigants are entitled to rely on the judgment on the merits. It will not be set aside, even on appeal, unless it is clearly erroneous. A judgment should not be vacated or disturbed unless refusal to take such action appears to the court inconsistent with substantial justice. (See I.R.C.P. Rule 59, 60 and 61.)

In the present case, the negotiated agreement of January 19th sets aside every finding of fact and conclusion of law, (41 and 22 of each, respectively) and substitutes a totally different decision and judgment. M3 cites no case precedent where such an outrageous process has been upheld because they can not find any. The Hardcastle and Craven decisions M3 relies on are a far cry from what they are asking the Department to allow in the present case.

The 32 new findings in Exhibit "A" do not follow the requirements of the I.R.C.P. as "the court must find the facts specifically and state separately its conclusions of law thereon and direct the entry of an appropriate judgment". There are no conclusions of law set forth at all in the 32 negotiated findings. (See Rule 52(a)). It is also customary for the judge to sign the findings and conclusions.

The meaningless "assignment" to the City of Eagle has been discussed and covered earlier in this brief and is incorporated by reference into this Conclusion. The crafty and disingenuous clause in the attachment to the assignment to the effect that "the Development Agreement prevails over the assignment" was put there for a purpose – to allow M3 TO OWN THIS WATER RIGHT.

It is obvious that M3 will retain ownership of a 30 or 40 year water right as the phases will not be completed for years. This water right has great value and M3 is not about to turn it over or let it go. M3 insists on holding ownership of this water right and it could care less whether it is in violation of the statutory law of Idaho or whether it makes the Idaho Department of Water Resources look like fools as long as it gets the result it wants.

The Protestants urge the Director to put this nonsense to an end by granting the motion. M3 has manipulated the entire legal process to obtain the full water right it wants. M3 has applied for a municipal provider water right it knew it did not qualify for; has used the appeal process as another way to circumvent the law; has manipulated Water Resources into negotiations contrary to the Department's judicial charge under the law; and has drafted a meaningless assignment that would allow M3 to slip by the prior decision of the Department and own this water right in violation of the intent of the law.

Respectfully submitted this 7 day of December, 2011.

Alan Smith, Spokesperson for Eagle Pines and Individually

John Thornton, Spokesperson for North Ada County Ground Water Users Associations

Norm Edwards, Individually and as a member of Eagle Pines Water Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of December, 2011, a true and correct copy of the foregoing Rebuttal Brief and Final Argument was served on the following parties as set forth below:

NOTICE OF SERVICE AND DISCOVERY

Jeffrey C. Fereday GIVENS PURSLEY LLP 601 West Bannock Street PO Box 2720 Boise, ID 83701-2720	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile
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