

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**FOR THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION )	<b>ORDER DENYING PETITION</b>
FOR PERMIT NO. 63-32573, IN THE )	<b>FOR RECONSIDERATION AND</b>
<u>NAME OF THE CITY OF EAGLE<sup>1</sup></u> )	<b>CLARIFICATION</b>

On March 23, 2011, the North Ada County Ground Water Users' Association, Eagle Pines Water Users' Association and individuals Alan Smith and Norman Edwards (collectively "Protestants") filed a *Motion for Reconsideration and Clarification* ("Petition") of the March 9, 2012 *Second Amended Final Order* ("Order") issued by the Interim Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The Order granted a water right permit for 23.18 cfs to the City of Eagle for its reasonably anticipated future water needs.

On April 5, 2012, M3 Eagle LLC submitted *M3 Eagle's Response to Protestants' Motion for Reconsideration and Clarification*.

In its Petition, the Protestants first assert that the Department did not decide or rule on the Protestants' *Renewed Motion to Dismiss Remand Proceedings* in the Order. Protestants originally filed a *Motion to Dismiss Remand Proceedings* on October 5, 2011. In response, the Department issued an *Order Denying Motion to Dismiss Remand Proceedings* on October 14, 2011. Three days later on October 17, 2011, the Protestants filed a document entitled *Renewed Motion to Dismiss Remand Proceedings* reasserting the arguments that the Department lacked jurisdiction to negotiate a settlement while the matter was before the district court on judicial review and that the assignment of the permit and application to the City of Eagle was not appropriate. During the closing remarks at the remand hearing on October, 19, 2012, the Hearing Officer acknowledged that there was not a procedure for filing a renewed motion but indicated that he would take all pending motions under advisement.

In its renewed motion, the Protestants once again assert that the Department was acting in quasi-judicial role rendering it improper to negotiate a settlement with any party involved in the case. As explained in the October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings*, once the District Court acquires jurisdiction under judicial review, the Department become a party in the district court case and is no longer acting in a quasi-judicial role. See *Sagewillow, Inc. v. Idaho Dept. of Water Res.*, 138 Idaho 831, 846, 70 P.3d 669, 684 (2003) (When the Department is named in an administrative appeal, it becomes a party to the appeal.)

Negotiated settlements often take place between the parties during judicial review. Rule 49 of the Idaho Appellate Rules describes a process for parties to engage in settlement discussions during appellate review. Under Rule 84(r) of the Idaho Rules of Civil Procedure, these same procedures are available to parties before the district court in a judicial review action.

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<sup>1</sup> The original caption was changed to reflect that an assignment of water right application and permit no. 63-32573 to the City of Eagle was filed with IDWR on June 13, 2011.

Moreover, in this case, the district court actually issued an order approving the negotiated Joint Stipulation and remanding the matter back to the Department to hold a hearing. The cases cited by the Protestants focus only on a district court's ability to issue an order once an appeal has been filed and are distinguishable from administrative proceedings, such as this one. In an administrative proceeding, the Department acts not in a purely judicial role, but in a quasi-judicial role. The Department issues an order in the proceeding, but also becomes a party to the proceeding on appeal. Because it is a party in the appeal, the Department can stipulate to have the matter remanded back to the Department for further evaluation. The cases cited by the Protestants do not address or prohibit an agency from negotiating a settlement once that agency becomes a party to a judicial review action under jurisdiction of the district court.

In its *Renewed Motion to Dismiss Remand Proceedings*, the Protestants argue that the City of Eagle could not be assigned Application for Permit No. 63-32573 and Permit No. 63-32573 by M3 Eagle LLC. The Protestants assert that the City of Eagle must file its own application for a municipal water right and is ineligible to obtain a water right through an assignment from M3 Eagle LLC. Protestants' contention that the City of Eagle cannot be assigned the application in this matter because of the Department's original January 25, 2010 Amended Final Order is incorrect. Nothing in Idaho law prevents a holder of a pending application for permit for ground water or an approved application for a permit for ground water from assigning its interest in either a pending or approved permit. M3 Eagle LLC is free to assign its interest in the permit at any time. Protestants' assertion that the assignment to the City of Eagle is a ruse and that M3 Eagle LLC remains the owner of a municipal water right is also incorrect. The assignment of water right applications and water right permits are specifically addressed under IDAPA 37.03.08.02(d) and Idaho Code § 42-221(E). The permit and application were assigned to the City of Eagle on June 13, 2011. The Department required the assignment to the City of Eagle, a qualified municipal provider, as a condition of agreeing to the remand. The remand hearing was held to provide the City of Eagle the opportunity to supplement the record with the information required by Idaho Code §§ 42-202(2) and 42-202B(5).

In its Petition, the Protestants assert that their due process rights have been violated because the Department and M3 Eagle LLC, the other party to the judicial review case, participated in settlement negotiations without notification to the Protestants. Protestants had the opportunity to participate as parties in the judicial review case, but elected otherwise. Because the Protestants choose not to become parties to the appeal, the Department and M3 Eagle LLC were not required to notify the Protestants of the settlement conferences held between the parties to the judicial review action.<sup>2</sup> As explained earlier, settlement negotiations in appellate cases are acknowledged by the appellate rules and were available to the parties in this case. Protestants incorrectly claim the Department has repeatedly ignored this jurisdiction argument and refused to rule on the issue. The Department specifically addressed this issue in its October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings*.

Protestants argue that Idaho Code § 42-203A requires that new notice be published upon the assignment of the Application for Permit No. 63-32573 and Permit No. 63-32573 to the City of Eagle. Protestants argue that although there has been no change to the place, period or nature of the

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<sup>2</sup> Even though under no obligation to do so, the Department did provide the Protestants with updates as to the status of settlement discussions during the process.

intended use or other substantial changes in the method of diversion or proposed use of the water, the mere change in ownership on the application triggers a legal requirement for new notice and publication. This is incorrect. A notice of a changes in ownership, such as a notice of assignment of ownership on an application or permit, is processed pursuant to Idaho Code § 42-248 and does not require publication. Idaho Code § 42-203A only requires notice and publication for new applications to appropriate water. Since the Notice of Application for Permit No. 63-32573 was published statewide on May 1 and 8, 2008, all publication requirements have been met.

Finally, the Protestants object to monitoring conducted exclusively by the City of Eagle or M3 Eagle LLC and suggests that the Department's hydrogeology staff perform the monitoring. The Department required, as a condition of the permit, that the City of Eagle comply with all aspects of the approved ground water monitoring plan. The comprehensive monitoring plan requires the permit holder to submit data semi annually and file annual interpretative reports with the Department to track ground water withdrawals. The monitoring effort requires that the City of Eagle, M3 Eagle LLC and the Department all participate and cooperate to obtain and evaluate ground water data. The Department role is to review the data and the interpretative reports to determine the extent of ground water decline. If the permit holder fails to comply with the conditions in the permit, the law provides that the permit may be cancelled.

### ORDER

Based upon a review of the record and pleadings of the parties relating to this issue and consistent with the forgoing discussion and analysis,

IT IS HEREBY ORDERED as follows:

1. The Protestants' *Motion for Reconsideration and Clarification* is DENIED.
2. The Protestants' *Renewed Motion to Dismiss Remand Proceedings* is also DENIED.

DATED this 12<sup>th</sup> day of April, 2012.

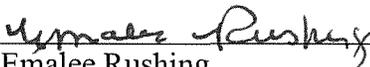
  
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GARY SPACKMAN  
Interim Director

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of April, 2012, a true and correct copy of the documents described below were 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(s) Served: ORDER DENYING PETITION FOR RECONSIDERATION AND CLARIFICATION and Explanatory Information to Accompany an Order Denying Petition for Reconsideration

Name	Address	City	State	Postal Code
BRUCE SMITH MOORE SMITH BUXTON & TURCKE, CHTD.	950 W. BANNOCK, STE. 520	BOISE	ID	83702
CITY OF EAGLE	660 E CIVIC LANE	EAGLE	ID	83616
JEFFREY C FEREDAY GIVENS PURSLEY LLP	601 W BANNOCK ST PO BOX 2720	BOISE	ID	83701
M3 EAGLE LLC	533 E RIVERSIDE DR STE 110	EAGLE	ID	83616
ALAN SMITH EAGLE PINES WATER USERS ASSN	3135 N OSPREY RD	EAGLE	ID	83616
JOHN THORNTON	5264 N SKY HIGH LN	EAGLE	ID	83616
NORTH ADA COUNTY FOOTHILLS ASSN ATTN: DAVID HEAD	855 STILLWELL DR	EAGLE	ID	83616
NORMAN L EDWARDS	884 W BEACON LIGHT RD	EAGLE	ID	83616

  
Emalee Rushing  
Administrative Assistant

## **EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION**

**(To be used in connection with actions when a hearing was held)**

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.