EAGLE PINES WATER ASSOCIATION
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PROTESTANTS
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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	**FINAL ARGUMENT**
FOR PERMIT NO. 63-32573	)	
IN THE NAME OF M3 EAGLE, LLC	)	
ASSIGNED TO THE CITY OF EAGLE	)	

This has been a bizarre, absurd and frivolous case from the very start with a "private developer" applying for a "future needs water right" when they knew or should have known they did not qualify as a municipal provider under the statutory language of I.C. 42-202 B (5).

After some three and one-half (3 ½) years of endless hearings we are right back where we started – more hearings and not much has changed.

M3 is bound and determined to own a future needs municipal water right when they do not qualify. The amount of maneuvering that has taken place so that M3 can slide around the laws of this State has been endless and egregious. Annexation by the City of Eagle since the prior hearing and "a so called assignment" to the City of Eagle by M3 of its municipal provider application for a water right are the most recent attempts to obtain the result M3 desires. That application was void from the start as M3 failed to qualify under 42-202(2) Idaho Code when it was filed.

This Water Resources Tribunal found in conclusion of law #7, at p. 10 of its Final Order: Idaho Code 42-202(2) states:

> "An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualified as a municipal provider...."
> And in Conclusion of Law #9, at p. 11 "M3 Eagle does not qualify as a municipal provider under Idaho Code 42-202." (underline added).

After three and one-half (3 ½) years there is still no FINALITY in this present case. The entire Appeal Process has been used to slip around the law, CIRCUMVENT THE LAW and obtain the result M3 desires – a result which will allow a PRIVATE DEVELOPER TO OWN A THIRTY (30) YEAR FUTURE NEEDS MUNICIPAL WATER RIGHT WORTH MILLIONS.

As to the matter of FINALITY, the Director clearly stated the Department's concern in the Amended Final Order of January 25, 2010. That was as follows:

> "After sixteen (16) days of hearing and the submittal of volumes of evidence, M3 Eagle had a full and lengthy opportunity to present its information, and all the parties and the Department should have the reasonable expectation of finality without the possibility of an iterative process where an applicant can present additional information in an attempt to finally satisfy its burden and obtain exactly what it applied for."

That analysis by the Director was totally correct as was the determination to deny the "reconsideration and reopening of the record post-trial motions". That decision is firmly supported by the Hells Canyon decision where it was held:

> "...reconsideration is in derogation of the policy of finality and should not be entertained by the Court. This principle would preclude reconsideration by the Court on its own initiative ...." Hells Canyon Excursions v. Oakes, 111 Idaho 123, (app) 721 P.2d 223 (ct. app. 1986).

On February 19, 2010 M3 filed a Petition for Judicial Review of the Amended Final Order. That appeal languished in District Court for over a year until an Amended Order and Order of remand was entered by the Court on June 30, 2011. That failure to pursue the appeal and delay was used to draw the Water Resources Department into negotiations with M3 in order to control the outcome of the case and obtain exactly what M3 desires –OWNERSHIP OF A FUTURE NEEDS MUNICIPAL WATER RIGHT. All of this was in defiance of the Doctrine of Finality and was designed to draw the Department into negotiations as though it was a litigant when the only function of the Department (on appeal or otherwise) is a JUDICIAL function.

THE DEPARTMENT ROLE IS JUDICIAL ONLY

The DEPARTMENT IS NOT A LITIGANT – its only role is a JUDICIAL ROLE and it has no business, no purpose and NO LEGITIMATE JUDICIAL FUNCTION IN BECOMING INVOLVED IN NEGOTIATIONS with some or all of the litigants. In fact, to negotiate in any way when it is a Judicial or Quasi-judicial agency amounts to Judicial impropriety.

Protestants have repeatedly cited cases in several prior briefs in support of this principle which have been ignored. All of those cases dealt with appeals where quasi-judicial tribunals were named Respondents on Appeal.

DEPARTMENT ROLE IS AS A JUDGE

The Department Role in both the original Hearings and on Appeal is that of a Judge not a litigant. When the Department is named as a Respondent on Appeal it does not become a litigant or proponent or opponent.

When named as a Respondent on Appeal the government boards' role is limited to defending its decision below.

Lowery v. Board of County Commissioners for Ada Cty.,
115 Idaho 64 (App.) 764 P.2nd 431 (ct. app., 1988). (underline added.)
See also: the Cooper and City of Burley cases cited below.

"When acting upon a quasi-judicial matter the (Department) 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.2nd 949, (1980).
City of Burley v. McCaslin Lumber, 107, Idaho 909, 693 P.2d 1108 (ct. app. 1984).
Lowery v. Board of County Commissioners for Ada County, (supra. At p. 71).

All those cases involving quasi-judicial tribunals make it very clear that the agency , or in this case, the Department of Water Resources maintains its judicial function even when named a respondent on appeal; its only role on appeal is to defend its decision. It most certainly does not become a litigant and cannot enter into negotiations with some or all of the litigants.

The Attorney General Staff mistakenly failed to follow the clear mandate of the appellate case law and defend the Director's decision. Instead, they began to become involved in negotiations with Appellant M3 on some theory that the Department had become a litigant. That was entirely incorrect and resulted in the Department DESERTING ITS JUDICIAL FUNCTION.

The Director's Decision was never defended and, in fact, was abandoned completely to take on the role of negotiator, not only in derogation of the Department's judicial functions, but also of the case law cited above. All the Rules of Procedure of the Water Resources Department make it clear that the Departmental Function is a judicial one only. (See Rule 613, Burdens of Proof; Rule 650, Official Record; Rule 730, Preliminary Orders; Rule 740, Final Orders; Rule 712-01, Findings of Fact and Conclusions of Law, to name only a few.)

This is a critical issue in this case and at the risk of being redundant those cases clearly state as follows:

"When acting upon a quasi-judicial matter the (Department)
is neither a proponent nor an opponent ... but sits in the seat
of a judge."
and;
"When named a Respondent on Appeal (its) rôle is limited to defending its decision below." (underline added).
Cooper v. Board of County Commissioners of Ada County, 101 Idaho 407,
614 P.2nd 949, (1980).

City of Burley v. McCaslin Lumber, 107, Idaho 909, 693 P.2d 1108 (ct. app. 1984).
Lowery v. Board of County Commissioners for Ada County, (supra. At p. 71).

THE JANUARY 19, 2011 AGREEMENT IS INVALID

The negotiated agreement of January 19, 2011 is invalid as are the judicial acts arising out of that Agreement. All of these judicial acts, rulings and Orders in these Remand Proceedings result from improper negotiations by a judicial authority and not from any judicial necessity, purpose, or effort of a judicial tribunal to rectify or correct any faults, mistakes, or errors in a prior decision or ruling. Since there is no legitimate judicial necessity or purpose of that nature all of the judicial acts are invalid as is the entire January 19, 2011 Agreement and all of its provisions and findings are for naught.

This includes the Order of October 3, 2011 limiting evidence as follows:

1. Evidence establishing that the M3 Eagle Project has been annexed by the City of Eagle.

2. Evidence related to the City of Eagle's planning horizon and reasonable anticipated future municipal needs for the City of Eagle's service area, including the M3 Eagle Project, based on the City of Eagle's current water rights portfolio and planning information.

3. Information on the quantity of water appropriate for permit 63-32573 appurtenant to the M3 Project in relationship to the water needs of the City's service area.

These judicial acts done solely as a result of improper negotiations cannot and will not stand on appeal. This can still be corrected by the Director by dismissing all Remand proceedings . There is no legitimate or lawful process that can arise from pursuing this Remand.

Moreover, the January 19th negotiated Agreement invades the province of the Court and should not be tolerated by the Court. It controls the decision and rulings of the Director on procedural and evidentiary matters which are critical in the case such as water sufficiency, public

interest, and others under 42-203 A5, I.C. That alone is grounds for dismissal of Remand proceedings.

THE AGREEMENT DOES NOT SUPERSEDE THE LAW

These negotiated Judicial acts are in violation of the Idaho Rules of Civil Procedure, case law and are in derogation of the "doctrine of finality". They were also done one year later when the Rules and case law only allow days.

The lower tribunal cannot, one year later, decide to "reconsider its decision", "reopen the evidence" and place "limitations and restrictions on the procedural and evidentiary rights of others" by some "written agreement".

> "...reconsideration is in derogation of the policy of finality and should not be entertained by the court. This principle would preclude reconsideration by the court on its own initiative . . ." Hells Canyon Excursions v Oakes, 111 Idaho 123, (app) 721 P.2d 223 (ct. app. 1986)

The director is required by law and by its own Rule 415 to follow the case precedent set by the Courts of Appeal and the Idaho Supreme Court. The cases cited above, Cooper case, City of Burley case and the Lowery case all involved case decisions by a higher court in which an Administrative Agency – a quasi judicial tribunal – was named a Respondent on appeal. All three of those cases clearly state as follows:

> "When acting upon a quasi judicial . . . matter (the agency) is neither a proponent nor an opponent . . . but sits (as a) judge." (emphasis and insert added).
>
> "When named as a respondent on appeal the government board's role is limited to defending its decision below." (underline added)

Those decisions set a clear precedent for the case at hand. Those decisions must be followed – NOT IGNORED. The Attorney Generals of the Water Resources Department did not

and have not defended the Director's decision, but have improperly abandoned it and engaged in negotiating an entirely different result as if a litigant.

The term "limited" should not have to be defined – it simply means – THAT, beyond which you may not go. Black's Law Dictionary, 8th Edition and the Winston Dictionary, Advanced Edition state:

> "Limit – that which confines, ends, bounds, restricts, circumscribes, fixes that beyond which extension is not possible."

When the case law clearly states that the quasi judicial tribunal, when named a respondent on appeal is limited to the role of defending its decision below that Departmental Tribunal has absolutely no authority to engage in negotiations to change its decision. Aside from the question of absolute judicial impropriety in active judicial involvement in negotiating is the issue of jurisdiction.

JURISDICTION

The Protestants have repeatedly raised this issue before the Department and the District Court. No determination on that mater has been made by the District Court or the Department. It was presented as an issue most recently in Protestants Motion To Dismiss The Remand Proceedings filed on October 5, 2011 with a supporting brief setting forth the rulings of the Appellate Court on this very issue.

> "The Appeal when perfected divests the trial court of jurisdiction"
> Dolberr v Harten, 91 Idaho 141, 417 P.2d 407 (1967)
> Hells Canyon Excursions v Oakes, 111 Idaho 123, (app) 721 P.2d 223, (ct. app. 1986).
> Lowery v Board of Comr's of Ada County, 115 Idaho 64, (app) et p. 71, 764 P.2d 431 (ct. app. 1988)

The same rules regarding jurisdiction apply in the case of an appeal or petition for review from an administrative agency or board as in the courts. An appeal in the Lowery case, supra was before the court when it held as follows:

> "Ordinarily, once an appeal has been filed or a petition for review granted, the lower tribunal is deprived of the jurisdiction necessary to (change) its decision." (underline and insert added)

And in the Hells Canyon case the court held:

> "The District Court therefore had no power or authority – because it lacked jurisdiction – to reconsider its earlier decision and enter a different ruling . . ."

And further stated:

> "reconsideration is in derogation of the policy of finality and should not be entertained by the court. This principle would preclude reconsideration by the court on its own initiative . . ." (underlines added).

Aside from the question of whether judicial acts or rulings by negotiations are ever proper, those cases cited above conclude that the court – lacking jurisdiction because of an appeal – has no power or authority to change its decision.

All of those cases were ignored as was the matter of jurisdiction in the October 14, 2011 Order of the Director denying the Motion To Dismiss The Remand Proceedings. Protestants again request a decision on the jurisdiction matter as it is critical to the complete change of the decision and the validity of the negotiated Agreement of January 19, 2011 and is in total conflict with all the cases cited above.

THE NEGOTIATED AGREMENT DOES NOT SUPERSEDE LAW

The Department and Director, in carrying out its judicial functions, cannot supersede the

statutes of Idaho or the Idaho Rules of Civil Procedure. Reconsideration of the M3 application and the entire M3 case by negotiated agreement nearly (1) year after the original decision is a violation by the Director, in his judicial capacity, of the Idaho Rules of Civil Procedure and Water Resources Rule 740. (See also the Hells Canyon case, supra.)

Furthermore, the negotiated agreement deletes the following findings required under 42-203(A)(5), whether the case is protested or not protested. Section 42-203(A)(5) (a) (b) (d) and (e) require the Director to determine whether:

(a) The quantity of water under existing water rights will be reduced,
(b) The water supply is insufficient,
(d) The applicant has sufficient financial resources to complete the work . . .,
(e) Granting the permit is in the public interest.

These violations of the statute – 42-203(A)(5) have been repeatedly brought to the attention of the Department and the Director and have been ignored because the violations of the statutory duties of the Department cannot be justified and defy any logical or reasonable answer otherwise. THE JANUARY 19, 2011 NEGOTIATED AGREEMENT REQUIRES THE DIRECTOR TO WILLFULLY BREACH THE JUDICIAL DUTIES OF HIS OFFICE WHICH HAVE BEEN ENTRUSTED TO HIM IN THE ADMINISTRATION OF JUSTICE AND THE EXECUTION OF THE LAW. It is therefore not a lawful or valid agreement and the Director cannot be bound to adhere to such a contract. It places the Director in danger of official misconduct and is an unseemly imposition on the Department so M3 can get what it wants.

That statute cited immediately above requires findings in any water allocation, municipal or otherwise, to include and contain findings not only as to ground water sufficiency, but also as to the financial capacity to complete the work and that granting the permit is in the public interest, and that existing water rights will not be reduced.

THE CITY OF EAGLE

The City of Eagle has annexed a vast area consisting of thousands of acres of potential

development land when it absolutely does not have the ability to provide services to what will be its service area. Furthermore, the City does not have the financial wherewithal to complete the work or manage the project.

Absolutely no evidence was presented in the Remand Hearing, which has been concluded, as to the financial capability of the City of Eagle and leaves the Director in a position where it is impossible to make any judicial finding of fact or conclusion of law that the City meets the requirements of the statute. That statutory requirement must be met in the Remand Proceedings because of the "so called assignment" and because the city financial ability was never before the court, i.e. the quasi – judicial tribunal in the prior hearings.

The performance by the City of Eagle as disclosed by the evidence in the Remand Hearing has been very unimpressive. The City has done little to develop any surface water supplies to augment municipal ground water supplies. No significant effort has been made to construct or plan any storage facilities to attenuate and reduce the peak hourly and peak daily demand factors by providing sufficient surface storage for fire suppression and control.

THE EFFORTS BY THE CITY OF EAGLE TO MONITOR WATER LEVELS AND CONDUCT TEST PUMPING AS ORDERED BY DIRECTOR TUTHILL DO NOT PASS THE SMELL TEST. On March 10, 2006 the Director entered an order requiring the pump test and notice to all Protestants as to a time for the test to be conducted. The City of Eagle apparently failed to arrange a time for the pump test with notice to the Protestants so that those persons could participate in the test. Yet, Director Tuthill was simply "dismayed that Eagle did not follow the dictates of the order". Director Tuthill meekly allowed his order to be violated and faulted the Protestants for failing to promptly complain and used that as a basis to deny a Motion in Limine by the Moyles, Mullers, Purdys, Meissner, and Howarth to "exclude the pump test results from evidence because the Protestants were not provided an opportunity to collect data from their wells while the pump test was conducted". REALLY!! How about the Department showing a little BACKBONE AND NOT ALLOWING A JUDICIAL ORDER TO BE IGNORED AND VIOLATED. How about the Director ordering a second pumping test requiring all Protestants to be notified so that their wells could be monitored and ordering IDWR

staff to also be present. That Order should have also provided that if it came to the attention of the Director that any Protestant was not notified and allowed to participate a THIRD PUMPING TEST would be ordered. Instead Director Tuthill SURMISED THAT THE PROTESTANTS WERE DISINTERESTED in participating actively in the pump test. REALLY? To SURMISE is to conjecture, guess, and speculate with insufficient evidence. Not anything a court should do. There may have been fault on the part of both the Protestants and the City of Eagle, but the failure of the City of Eagle to make even a slight attempt to comply with a Court Order was certainly something the Director should not tolerate and give tacit consent to by allowing it to pass unchallenged. If this is the best monitoring and testing of pumping impacts these Protestants can expect from M3 and the City of Eagle – GOD HELP US.

The Protestants move the Director to take official notice of the Decision of Director Tuthill of February 26, 2008 in Application of the City of Eagle Nos. 63-32089 and 63-32090 to appropriate ground water for Legacy and Eagle Field developments and in particular page 3 of the Final Order. The current Director should see that this does not happen again by enforcing Department Judicial Orders. Furthermore, a little more judicial authority and the M3 Municipal Provider Application would have never been published or set for a hearing because M3 never qualified at the very start for a future needs municipal water right and filing thereof should have been rejected.

THE CITY OF EAGLE MOTION TO STRIKE

The City attorney has filed a Motion to Strike the reports of Matthew Weaver and Dr. Reading. The mere disagreement by the City of Eagle with the process and conclusions reached by these witnesses is not sufficient reason to strike the evidence provided. It is within the discretion of this court, i.e. quasi judicial tribunal to give that evidence whatever weight the Director deems it entitled to be given. The Department has expended considerable effort to obtain an independent analysis of the population growth of Eagle and its future needs water rights and the Director can and will consider the weight it should be given. In fact, in view of what most of the witnesses described as "economic malaise" and the "over built commercial,

office and residential demands" for the City of Eagle, the projections by the Department witnesses may prove more accurate than those of the City staff.

DEPARTMENT POLICY

SETTLEMENT AGREEMENTS:

Departmental settlement policy must be adhered to by the Department regardless of how the process takes place. Although the Administrative Procedure Act and the Department's own Rules 612 and 614 address those situations where litigating parties present a proposed settlement agreement to the Department for approval, the same policy must prevail in any instance where the Department negotiates a settlement. That negotiated agreement has, nevertheless, been signed by the Director and the Department policy on that must be followed. That policy is that the Director not be bound by:

> "settlement agreements that are not unanimously accepted by all (litigating) parties or that have significant implications for persons not parties (or are) not in accordance with the law." (inserts and underline added). 614 IDWR Rules.

Another clear policy matter is covered in Rule 612 when the following appears:

> Whether the settlement has "implications for administration of the law for persons other than the affected parties . . . and whether . . . the settlement is consistent with the agency's charge under the law".

THE DEFECTS IN THE JANUARY 19TH AGREEMENT ARE CLEAR: The Department's charge under the law is a JUDICIAL CHARGE and it has no business, purpose or judicial function to be entering into negotiations with any of the litigating parties and most certainly not without a unanimously accepted agreement. Protestants assert that it is a reversible error for the Department to enter into any negotiations which violate its judicial functions in the case and this invalidates the entire January 19th Agreement, the June 14 Stipulation and the District Court Order of June 30, 2011 remanding the case for proceedings consistent with an invalid negotiated agreement.

PRECEDENT

Another area of Department Policy which must be applied is that of following court precedent. This is also required by Rule of Law and lower courts must follow precedent set by appellate state courts as well as federal precedent. Rule 415, IDWR Rules of Procedure states as follows:

> ". . . the hearing officer shall apply the precedent of the court . . . and decide the proceeding . . . in accordance with the precedent of the court . . ."

The protestants have repeatedly cited authorities that recognize the only function of an agency like Water Resources is a judicial function. Those cases have held that function is solely one of a judge and the agency is limited to the role of defending its decision when named a Respondent on appeal. The Department does not become a litigant and has no role as a negotiator as it is "neither a proponent nor opponent of the proposal at issue. That case precedent set down by the Appellate and Supreme Court must be applied in the present case and any negotiated agreement is a nullity because it oversteps the bounds of the judicial function of the Department. See Cooper, City of Burley, and Lowery cases cited above.

THE DISTRICT COURT ORDER IS UNENFORCEABLE

The District Court Amended Order dated June 30, 2011 and entered on July 5, 2011 is not enforceable as it violates several of the statutory provisions of Title 42, Idaho Code.

1. The January 19th Agreement authorizes the Director to reach a negotiated agreement and stipulation when the IDWR function is that of a court, i.e. quasi judicial tribunal and not a litigant. Title 42, I.C.

2. The District Court Order incorporates an Assignment and an Attachment

to it which allows the Development Agreement to prevail over the assignment to the City of Eagle. That Development Agreement allows a private developer that is not a municipal provider to own the water right until "conveyed, transferred, and assigned on a phase by phase basis to City" in violation of 42-202B5, Idaho Code (see Ex 2 to Amended Order, p. 1 (5) of the attachment to the assignment.) (See also, Development Agreement, p. 24 (2.2e) (Ex. 58)

3. The district Court Order allows a violation of 42-202(2) Idaho Code as the application for a "future needs municipal water right was defective and void when it was filed since M3 made no showing it was a municipal provider and it never should have been set for a hearing date or published notice made.

4. The District Court Order which incorporates the January 19th Agreement unlawfully allows certain findings the Director is required to make to be deleted. Those findings are required by Section 42-203(A)(5), Idaho Code. The Director is required by that law to make findings as to water sufficiency, financial capacity to complete the project, and whether the allocation of the ground water right is in the public interest and that existing water rights will not be reduced. (sub-sections (a) (b) (d) and (e) of 42-203(A)(5) have been set forth above).

Aside from all of these violations of the Idaho statutes which no court can allow and expect its order to be enforceable, M3 never made a valid municipal future needs water right application at the very start and never had such an application to assign. The Director's Conclusion of Law #7 in its Final Order and #9 of that same Order found that:

"M3 does not qualify as a municipal provider under Idaho Code, 42-202."

M3 cannot assign, convey, or transfer a water right application which it never had to the City of Eagle and cannot assign a water right it never owned.

THE ASSIGNMENT

The "so called" Assignment to the City of Eagle by M3 has an attachment to it which contains the provision that follows:

"If any provision of this assignment conflicts with any provision of the Development Agreement, the Development Agreement prevails." (See Dist. Ct. Amended Order of June 30, 2011).

Well, there is a conflict as the "Development Agreement" provides:

". . . all necessary water rights are secured by Developer for the water system . . ." (p. 23, 2.2c) and further provides

"Developer shall submit evidence that Developer has secured adequate surface and/or ground water rights for the water system . . ." (p. 24, 2.2e) and further

". . . Developer shall transfer, convey or assign (on a phase by phase basis) ground water right(s) to City for inclusion in City's municipal water supply system . . ." (p. 24, 2.2e) (Ex. 58)

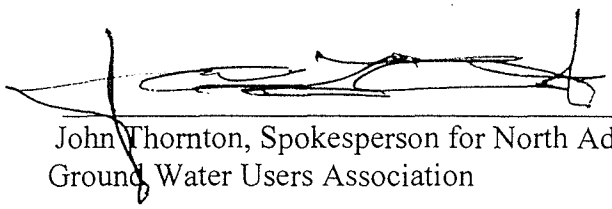
M3 cannot convey or assign a water right unless it is the owner.

It is quite clear that M3, a private developer, will be allowed to own a municipal water right when it does not qualify under Idaho law. This private developer will own that water right until it is conveyed to the City on a phase by phase basis. The "so called" assignment to the City is nothing but a "ruse" to make it all look legal. IT IS NOT!

CONCLUSION

M3's counsel knew full well that this Department Quasi Judicial Tribunal had already held in prior proceedings that M3 did not qualify as a municipal provider. Yet, an attempt has been made to slip by the Director's decision by artifice in the appeal and these Remand Proceedings to obtain ownership of a very valuable water right for an out of state non-qualifying private developer by crafty language it sought to slide by in the Assignment and the Development Agreement unnoticed by the Director and others. This borders on crossing the line. Such sharp practice and questionable ethics should not be tolerated by this tribunal or any court and that conduct, in and of itself, is a sufficient and adequate basis for the Department of Water Resources to dismiss all Remand Proceedings and allow the Amended Final Order in which the Department has already made the correct and common sense ruling to stand.

Respectfully submitted, Nov 15, 2011



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

Alan Smith

Alan Smith, Spokesperson for Eagle Pines and individually

Norman L Edwards

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of November, 2011, a true and correct copy of the foregoing Final Argument was served on the following parties as set forth below:

NOTICE OF SERVICE AND DISCOVERY

North Ada County Groundwater Users Association John Thornton / David Head 5264 N Sky High Lane Eagle, ID 83616	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile
Norman Edwards 884 W Beacon Light Road Eagle, ID 83616	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile
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