BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

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DEPARTMENT OF WATER RESOURCES

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

1. The entire judicial process undertaken by this tribunal since the conclusion of the contested case and the entry of the judgment on the merits of January 25, 2010 has been in derogation of and violation of the "due process" rights of the Petitioner/Protestants.

2. The "deal" made between this tribunal of a State Agency and M3 to completely change the scope and focus of this contested case from what was presented during the hearings is in violation of the Petitioner / Protestants due process, is not in accord with the settled course of appropriate judicial proceedings and fails to protect the private rights and individual rights of these Protestants.

3. The "negotiated deal" to enter 32 new and different findings from what was before this tribunal in the contested case without any input from these protestant litigants and without notice or any opportunity to be present does not afford "due process" to the Petitioners.

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MAR 23 2012

4. Conducting and transecting over 20 meetings between this "Department Tribunal and M3 and its representatives" at those meetings which totally changed the scope and focus from "upslope pumping on the M3 property to water sufficiency issues on the valley floor" is violative of Petitioners' due process. The TVHP identifies many primary withdrawal areas and primary recharge areas as not coinciding throughout the valley. The primary recharge areas are those with extensive canals and/or flood irrigation, while the greatest withdrawals occur in the areas that are not flood irrigated. For example, municipal withdrawals that are concentrated in areas without supplemental recharge may exceed recharge in those areas resulting in water level declines, e.g., the Eagle foothills areas. This shows the fallacy of using the TVHP to project ground water supply issues into an upslope water use area.

5. The protesting litigants are entitled, as a matter of due process, to rely on the judgment on the merits which resulted from the contested case. Such a judgment on the merits 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. Rule 61, I.R.C.P.

6. Under Rule 712, I.D.W.R. Rules, "findings of fact must be based exclusively on the evidence in the record of the contested case and the Second Amended Final Order Supersedes and Replaces the Amended Final Order of January 25, 2010 as the result of a negotiated deal providing for 32 new findings which are for the most part, incorporated into the Second Amended Final Order of March 9, 2012 and completely supersedes and destroys most of the 41 Findings of Fact and 22 Conclusions of Law entered in the contested case that was fully litigated and received full due process.

7. The contested case was only allowed to proceed as "an application to develop a water right permit for a municipal use" after the Protestants' motion to dismiss the future needs municipal provider application under 42-202 and 42-202B5, Idaho Code. In the Amended Final Order of January 25, 2010 the Director concluded as follows:

> "While a person or entity not currently a municipal provider can obtain a water right permit to develop a municipal use, obtaining a permit for municipal use that includes a component for reasonably anticipated future needs requires a higher standard. One of those standards is the requirement in Idaho Code, 42-202 that the municipal provider "qualifies" as a municipal provider at the time the application is filed . . . M3 Eagle does not qualify as a municipal provider under Idaho Code 42-202." (Amended Final Order, Conclusion of Law #10, p. 22) (underlines added).
> ". . . the requirement that the qualification be established at the time of the application is clear from the statutory language." (Amended Final Order, Conclusion of Law #11, p. 22)

The Director further concluded:

> "The M3 Eagle development is, by its nature, the very type of development that the legislature did not recognize as qualifying to appropriate a water right for reasonably anticipated future needs." (Amended Final Order, Conclusion of Law, #15, p. 23)

> "It is not in the public interest to grant a water right to M3 Eagle for 23.18 cfs for anticipated future needs . . ." (Amended Final Order, Conclusion of Law #17, p. 24)

Accordingly, the permit and the application were not granted for a reasonably anticipated future need, but only for a standard water right of 3.28 cfs for municipal use. The court concluded as follows:

> "A permit should be issued for 3.28 cfs to M3 Eagle." (Amended Final Order, Conclusion of Law #18, p. 24)

8. Setting aside and superseding this judgment on the merits after a full and fair hearing in a contested case and replacing it with some 32 new findings as a result of this "negotiated deal" with most of those 32 findings now contained in the SECOND AMENDED FINAL ORDER is a total denial of DUE PROCESS. All of those 32 new findings were already signed and made without any input by Protestants. Those new "findings" change the scope and focus of the entire case from "pumping in an upslope area on the M3 property to the valley floor and the TVHP." Those were not the primary material issues during the hearing. In fact, when Protestants made reference during the hearing to the TVHP, M3's counsel asserted that the TVHP was an old and unreliable study and their study of the PGSA was what the court should follow.

9. This entire "negotiated deal" on which the SECOND AMENDED FINAL ORDER is based was done WITHOUT 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, infra, 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, infra 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 JUDICIAL FUNCTION OF BOTH IDWR AND THE DIRECTOR AND THE JUDICIAL STATUS ASSIGNED TO AN ADMINISTRATIVE AGENCY BY STATUTORY LAW. THAT AGREEMENT IS NOT VALID.

Due Process Rights of the Petitioners.

10. Moreover, the Attorney Generals assigned to IDWR have not only failed to defend the Director's decision and the judgment, but have abandoned that decision to take part in judicially improper negotiations although the case law clearly set forth what their proper function is.

> "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).
>
> 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 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).

The case law set forth above has been repeatedly cited in this case as recently as in the Protestants' briefs of November 15, 2011 and December 7, 2011, but have been ignored.

11. The SECOND AMENDED FINAL ORDER of March 9, 2012 appears to grant an outright water right to the City. The assignment by M3 is never mentioned therein. THE "ASSIGNMENT PROCESS" HAS APPARENTLY NOW BEEN DROPPED BECAUSE IT WAS SO LADEN WITH PROBLEMS OF LEGALITY WHICH WERE POINTED OUT BY THE PROTESTANTS.

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.

The assignment process violated 42-202(2) and 42-205 B(5), Idaho Code. However, the Second Amended Final Order states:

> "It is in the public interest to grant a water right to the City for 23.18 cfs for anticipated future needs . . . to serve the M3 Eagle planned development."

Without the troublesome assignment, a future needs water right is being outright granted to the City of Eagle, an entity which has never applied for that water right. This is not a cure-all. Idaho Code, 42-203(A) is only activated by filing an application. That section states:

> "42-203(A) Notice upon receipt of Application – Protest – Hearing and Findings – Appeals – (1) upon receipt of an application to appropriate water of this state, the Department of Water Resources shall prepare a notice. . . The Department shall also state in said

> notice that any protest . . . shall be filed with the Department within ten (10) days from the last date of the publication of such notice."

It is clear that an application must be filed, the Department must publish notice and allow ten (10) days for protests to be filed. The due process is clear here – any interested party or protesting water users must be allowed to protest. To summarily grant a water right as the Second Amended Final Order, without following the statutory process of 42-203(A), is a nullity. MORE DUE PROCESS VIOLATIONS.

CONCLUSION

This case has more mistakes than a broken calculator.

(1) The M3 Application should have never been accepted or published as there was no documentation or information submitted to establish a "future needs municipal water right" under 42-202(2), Idaho Code.

(2) Absolutely no evidence was presented in M3's "case in chief" to show it was a qualified municipal provider.

(3) The case was only allowed to proceed as an application for a standard water right for municipal uses. The Protestants' motion to dismiss was denied with the Department amending the application for M3 to avoid a dismissal, but did not require M3's counsel to amend or face dismissal.

(4) Only a standard water right permit for 3.28 cfs was issued for municipal uses.

(5) None of the City boundaries were contiguous to the M3 property.

(6) At some point after the appeal this "standard water right of 3.28 cfs" mysteriously matured back into a "future needs municipal water application for 23.18 cfs" which M3 intended to assign to the City of Eagle in phases.

(7) Under the SECOND AMENDED FINAL ORDER the water right of 23.18 cfs is granted to the City of Eagle, however, when it comes to the financial capacity to do the project it falls on M3 Eagle. We therefore have a "joint venture" arising out of a Development Agreement signed at a time when the city boundaries were miles away and the city had no statutory authority that has been found

granting a municipality authority to enter into such a contract with a private developer when city property is not involved.

(8) The Second Amended Final Order finds that pumping is expected to have limited impact on water levels in the upper most aquifers, or even a negative impact. However, that Order finds "there is a possibility that the diversion of water may negatively impact other water users because a distinct separation of the aquifers is not present at some locations". This is because there are various thicknesses in the confining clay and silt layers that separate the aquifers causing a distinct separation of the aquifers to be spatially variable. It all sounds like a lot of guess work to this water user. (See findings #23, 42, 49, and 53, Second Amended Final Order). The Snake River Plain all over again.

Finally, these water users strenuously object to monitoring solely by M3 and/or the City of Eagle. This large water allocation requires monitoring be done by Department Hydrogeology staff. We have seen no indication of anything but greed and nothing that would call for our trust.

Under the circumstances of the present case, EITHER WAY THIS WATER RIGHT IS GRANTED, THE LAW IS VIOLATED, (1) BY ASSIGNMENT, M3 A PRIVATE DEVELOPER THAT DOES NOT QUALIFY AS A MUNICIPAL PROVIDER OWNS AND CONTROLS THE WATER RIGHT FOR MANY YEARS IN VIOLATION OF 42-205B, (2) BY OUTRIGHT GRANT TO THE CITY, A WATER RIGHT IS GRANTED WITHOUT ANY NOTICE OR PUBLICATION, IN VIOLATION OF 42-203A IDAHO CODE AND WITHOUT ANY CITY APPLICATION EVER BEING FILED.

Respectfully submitted this 21st day of March, 2012.

John Thornton,
North Ada County Water Users Association

3-21-12
Date

Alan Smith,
Eagle Pines Water Users Association, and
Individually

3-21-12
Date

Norman Edwards,
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(208) 939-6796

3-21-12
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of March, 2012, a true and correct copy of the foregoing Brief in Support of Motion for Reconsideration and Clarification 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
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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City of Eagle, Bruce Smith 950 W Bannock, Suite 520 Boise, Idaho 83702	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile

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