BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

RECEIVED
OCT 05 2011
DEPARTMENT OF
WATER RESOURCES

North Ada County Groundwater Users Association
John Thornton / David Head
855 Stillwell Drive
Eagle, Idaho 83616
(208) 938-8508

Eagle Pines Water Users Association
Alan Smith
3135 Osprey
Eagle, Idaho 83616
Protestants
(208) 939-6575

IN THE MATTER OF APPLICATION FOR PERMIT)	**BRIEF IN SUPPORT**
NO. 63-32576, IN THE NAME OF M3 EAGLE)	**OF MOTION TO DISMISS**
ASSIGNED TO THE CITY OF EAGLE)	**REMAND PROCEEDINGS**

THE CITY OF EAGLE IS NOT AN APPLICANT

The City of Eagle cannot be brought into this case as a proper party through the assignment of an application for a future needs Municipal Provider Water Right Application that does not exist. That application has been adjudicated and denied. The City of Eagle must file an application on its own behalf. The City is not now an applicant for a municipal future needs water right based on the assignment of an application by M3.

LAW OF THE CASE

That adjudication by a quasi judicial tribunal stands as the law of the case. The Final Order and the Amended Final Order of January 25, 2010 stands as the only decision on the merits in this case. The appeal has now been dismissed with prejudice.

THE DECISION AS TO MUNICIPAL PROVIDER STATUS

The decision of the Water Resources tribunal that M3 does not qualify as a municipal provider and is not entitled to a future needs water right still stands in this case.

ASSIGNMENT OF THE APPLICATION

The only permit application allowed by the IDWR tribunal was for 3.28 cfs and that is all M3 can transfer, convey or assign to the City of Eagle. The original application for 23.18 cfs has been adjudicated and denied. It no longer exists and M3's attempt by the January 19th Agreement to assign something it does not have is a nullity. M3 is also not a co-applicant with the City of Eagle for a future needs water right because M3 does not qualify as a municipal provider. There is nothing for M3 to assign to the City of Eagle.

CONTRACTED AGREEMENT IS INVALID

The January 19th Agreement between IDWR and M3 is invalid as it was made to deal with and control substantive and procedural matters in the present case while the Appeal was pending and neither Water Resources, nor the Director had any jurisdiction.

"The Appeal when perfected divests the trial court of jurisdiction."

Dobier v Harten, 91 Idaho 141, 417 P.2d 407 (1967)
First Security Bank v Neibaur, 98 Idaho 598, 570 P. 2d 276 (1977).
Hells Canyon Excursions v Oakes, 111 Idaho 123, (app.), 721 P 2d 223 (ct app. 1986)
Lowery v Board of Com'rs of Ada County, 115 Idaho 64, (app) at 71, 764 P. 2d 431 (ct. app) (1988).

In addition to the lack of jurisdiction this contractual agreement cannot and does not void, dismiss, overturn, or destroy the judicial decision duly rendered by a quasi judicial tribunal on January 25, 2010. That Amended Final Order is the law of the case.

Furthermore, this agreement or contract between Water Resources and M3 does not give new life to an Application for a municipal future needs water right that has been adjudicated and denied by the same Water Resource Agency that now seeks to contract otherwise. There is no appellate ruling by the District Court as to the validity of the application or the assignment of it to the City of Eagle. The court simply remanded the case.

The City of Eagle is only being used as a "straw man or front man" to obtain this water right for a developer that is not a municipal provider in circumvention of Idaho Code, 42-202B(5). The developer will be the owner of this water right until portions of it are conveyed or assigned to the City of Eagle on a "phase by phase basis" as provided in Section 2.2 (c) and (e) of the Pre-Annexation Contract between M3 and the City of Eagle. M3 cannot convey or assign a water right unless it is the owner.

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 Lowery v Bd of Cty Com'rs for Ada Cty, 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 correct its decision."

Neither Water Resources nor the Director had jurisdiction herein under the Lowery decision or Hells Canyon Excursions v Oakes, supra in which 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 ...."

The Court in the Hells Canyon case went on to hold that "the lower court could not "sua sponte" reconsider the matter outside the time limits of the rule without notice to the parties or opportunity to be heard further, in advance of the reconsideration ruling."

In the present case, the Director has, one week short of a year, (Amended Order was entered on January 25, 2010 and the Settlement Agreement in which new findings are made was signed on January 19, 2011) determined to reconsider and rewrite the complete findings and render an entirely new decision. All of this took place while the appeal was pending. That appeal was not dismissed until June 30, 2011. Again, the District court did not rule on the validity of the January 19, and June 13, 2011 Agreement or Stipulation, simply remanding the case, without deciding any jurisdictional issue.

In the Hells Canyon case, supra, after the appeal had been perfected the court "sua

sponte" reconsidered its earlier decision and entered a different ruling. Post Trial motions had been filed before an appeal was filed and those motions had been denied. On Appeal, the Court determined as follows:

> "However, because the district court had already decided those motions, they were not 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 . . . ."

In the present case, the Director has "sua sponte" entered into an agreement to "revise the decision" on appeal to enter an entirely different set of findings and conclusions which are agreeable to M3. All of this is done without jurisdiction to do so.

There are several other factors which make the validity of the January 19th Agreement very doubtful. Water Resources, M3, and the Attorney General staff knew the Protestants would be litigants on Remand as they had been throughout these proceedings. That January 19th contractual agreement and the joint Stipulation of June 14, 2011 recognized that there would be a Remand. As a part of the negotiated settlement contract between Water Resources and M3 an attempt was made to enter 32 new findings that were entirely different from those of the original Final and Amended Final Order of January 25 ,2010, and to restrict the procedural and evidentiary rights of the Protestants which are assured to them by statutory law, i.e., Section 42-203A, Idaho Code.

That Agreement, provides for a reconsideration of the entire case and a re-opening of the

evidence in spite of the fact that motions for reconsideration and to re-open the evidence filed by M3 in the original case had both been denied.

> ". . . reconsideration of . . . motions on its own initiative without notice to the parties or opportunity to be heard further, in advance of the reconsideration ruling."

was found to be in error. See Hells Canyon Excursions v Oakes, supra. In the present case, since both M3 motions had already been denied in the original proceedings the Water Resources Department, without any notice or opportunity to be heard, cannot reverse its position entirely and now grant both by some contractual agreement. It should be noted that the Court in the Hells Canyon case held the reconsideration ruling by the district court was outside the time limits governing motions for reconsideration.

The Director must be mindful of the fact that he is not only the Water Resources negotiator, but also carries out quasi-judicial functions. The Director (who was the hearing officer) sat on the case as a judge.

> "When acting upon 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).

This agreement is nothing more than a contract to reconsider and reopen the entire case, change the decision and rehabilitate the case for M3 outside the time limits of the Rules of Civil Procedure.

After the Director denied the motion for reconsideration and to reopen the evidence, M3 never made any motion to amend the findings or for additional findings and the time to do so has long gone by. Nevertheless, the Settlement Agreement calls for entirely new findings and seeks to change the whole "focus of the original decision as to the sufficiency of the Pierce Gulch Sand Aquifer on which all the evidence also focused to now focus on the ground water sufficiency of a much larger area of the Treasure Valley floor and concentrating on a much broader Treasure Valley Hydrologic study as the only authority for those new findings.

These new findings all based on the TVHP study done several years ago were never relied upon or cited as authority by the Director. Under these new agreed upon findings this Treasure Valley Hydrologic Project is not only the major authority cited, it is the only authority relied on. All of the predictions and calculations of the TVHP are based on "current rates of withdrawal" and those have changed greatly because of new development and new subdivisions, since this study was done in 1996 and 2000.

Neither Water Resources nor M3 can contract away or "maneuver" around the procedural and evidentiary rights of others for private gain. Campbell v Kildew, 141 Idaho 640, 115 P.3rd 731 (2005). In that case a county law required both notices, meaningful comment and review prior to the grant of a subdivision permit. (Very similar to the public notice and protest process provided for in 42-203a, Idaho code on water right applications.) Apparently there was an exception to this requirement if there was a court decree or order of approval. The Developers engaged in a contractual arbitration process to avoid the public hearing and obtained a court

order. This arbitration was later found to be a sham when the matter was brought fully before the court on Rule 60 (B) (3): "Fraud upon the court" and 60 B (6) "any reason justifying relief from a judgment" motions.

The court found the arbitration process used by the developer to be a "sham" and a "fraud upon the court". The abutting property owners, though not parties to the arbitration, were found to have standing as they had suffered a loss to their procedural rights. The district court found as follows:

> ". . . it is certainly not a proper use of the court system to be a means to maneuver around the rights of others for private gain."

The Idaho Supreme Court upheld all of those findings of fact and conclusions of law. The district court had also found that this was all done to CIRCUMVENT THE LAW. The negotiated agreement and the stipulation in the present case, cannot and does not supersede the Idaho Statues or Rules and circumvent the law. To do so violates Idaho public policy of allowing protests and the public statutes enacted by the Idaho Legislature. See 42-203A, Idaho Code.

In the present case, the quasi judicial tribunal has, through a negotiated settlement and Stipulation, granted a reconsideration of the entire case decision and reopened the evidence one week short of a year after the final decision. It is clear under Rule 11 (a) (2) (B) and Rule 59 (d) that a court has no power to do so even on its own initiative more than (14) days after the entry of the Final Order or final judgment. The negotiated Agreement and the Stipulation are invalid See Smyth v Parke, 125 Idaho 156, 823 P.2d 760 (1991). Reconsideration must not be allowed

because it is specifically excluded when untimely. Attempting to do so by negotiation or stipulation is nothing more than an invalid effort to circumvent the law and court rules.

Aside from the one year lapse between the January 25, 2010 Amended Final Order and the January 19, 2011 and June 14, 2011 Stipulation there are several other reasons why they are invalid. This Agreement and Stipulation attempt to delete certain findings the Director is required to make under 42-203(A)(5) Idaho Code regardless of whether the case is protested or not protested.

This "Agreement" VIOLATES STATE STATUTES and allows a STATE AGENCY (WATER RESOURCES) TO BREACH ITS STATUTORY DUTIES. Idaho Code, 42-203A5 (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.

All four of those STATUTORY REQUIRIEMENTS are left out of the remand proceedings to enable this developer to slip, slide around and CIRCUMVENT the Laws of this STATE. (See Agreement, item #2, p. 4) All four (4) of the provisions of 42-203 A5 (a) (b) (d) and (e) are omitted because M3's evidence is very weak or nonexistent as to each one. This developer is particularly interested in avoiding any issue concerning the financial resources of the City of Eagle as they know very well such are weak.

Exhibits A and B

Exhibit A contains thirty-two (32) new findings most of which do not even appear in the Final Amended Order. These "findings" are to be made before any evidence is to be presented on remand apparently on the theory that no evidence can be presented on these essential points because of the severe limitation by the court order. Undoubtedly, this is what the Protestants will hear, in remand proceedings is that none of these findings can be contested because M3 has a court order limiting the issues. This is the most outrageous effort to manipulate the litigation process and to CIRCUMVENT THE LAW ONE WILL EVER SEE. It is very similar to what other developers tried in Campbell v Kildew, cited in the earlier brief. It also has the effect of voiding all the requirements of 42-203A5 (a) (b) (d) and (e) of the Idaho Code.

Exhibit B will grant the 23.18 cfs originally sought by this developer without any adjudication as to the sufficiency of the aquifer called the P.G.S.A. In fact, all the adjudication in this case is exactly the opposite as we have set forth above. The Director has found the area where M3 intends to pump is in the up-slope area of the aquifer; that the available draw down is limited in the up-slope area; water levels will decline from the draw down; that water users in the up-slope area will be impacted and up-slope wells may become unusable to some water users. (See Amended Final Order #24, p. 17; #39, p. 19; #40 d, p. 20; #16, p. 23, 24.)

Finally, whether these attempts by this developer are made by post trial motions or some

written "agreement" between the appellant and respondent one year after the January 25, 2010 Amended Final Order makes no difference. In Hells Canyon Excursion v. Oakes, supra, the court states:

> "The trial court has no power to grant the relief requested by any such motion if the motion is not timely filed, but instead is obligated to deny the motion. Wheeler v. McIntryre, 100 Idaho 286, 596 P.2nd 798 (1979). The time limitation affecting the power of the trial court to grant such motions includes action by the court on its own initiative.
>
> As previously stated, we do not believe that the trial court has power to entertain a motion, served more than 10 days after the entry of judgment, for reconsideration of a prior order denying a new trial, or denying an alteration or amendment of the judgment. Such a motion for 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 more than 10 days after the entry of judgment."

The above quoted decision from the Hells Canyon case is a very clear directive by the Idaho Supreme Court as to how the district court and Water Resources should proceed in such cases. That decision by the Idaho Supreme Court is clear precedent which must be followed by all of the lower courts and most certainly by the agencies of this state. The trial court, the administrative tribunal and any other lower court has no power or authority to grant a reconsideration of the case by negotiation nearly (1) year after its original decision under Wheeler v McIntyre or the Hells Canyon case and the hearing officer must decide the proceeding in accordance with the precedent set by the Idaho Supreme Court, Rule 415, Water Resource Rules, and the Rule of Law.

Protestants submit that the January 19th Agreement and the June 14th Stipulation which incorporates it are invalid and in violation of the law and the Rules of Procedure and the district court order made no ruling on the validity of the Agreement or the Stipulation only remanding the case back to the Water Resources Department.

Furthermore, under Rule 612 and 614 Water Resources Rules of Procedure, settlement agreements that are not unanimously accepted by all parties or that have significant implications for persons not parties are not necessarily binding and this is especially the case where not consistent with the agency's charge under the law.

This is exactly the defect as the January 19th agreement violates 42-203A5 Idaho Code, I.R.C.P. and the case law. (see Hells Canyon case, supra.)

Protestants request a hearing be set for oral argument prior to the October 18th hearing date.

Dated this 5 day of October, 2011.

John Thornton,
North Ada County Water Users Association

Alan Smith,
Eagle Pines Water Users Association, and
Individually

Norm Edwards,
Individually

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of October, 2011, a true and correct copy of the foregoing Brief in Support of Motion to Dismiss Remand Proceedings 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
Gary Spackman, Hearing Officer State of Idaho Department of Water Resources 322 E Front Street Boise, Idaho	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile
Garrick L. Baxter and John W. Homan Deputy Attorneys General, IDWR P.O. Box 83720 Boise, Idaho 83720-0098	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile
City of Eagle, Bruce Smith 950 W Bannock, Suite 520 Boise, ID 83702	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile