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DEPARTMENT OF WATER RESOURCES

FILED CASE

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Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

A & B IRRIGATION DISTRICT

Petitioner,

vs.

THE IDAHO DEPARTMENT OF WATER RESOURCES and GARY SPACKMAN in his official capacity as Interim Director of the Idaho Department of Water Resources,

Respondents,

and

THE IDAHO GROUND WATER APPROPRIATORS, INC., THE CITY OF POCATELLO, FREMONT MADISON IRRIGATION DISTRICT, ROBERT & SUE HUSKINSON, SUN-GLO INDUSTRIES, VAL SCHWENDIMAN FARMS, INC., DAVID SCHWENDIMAN FARMS, INC., DARRELL C. NEVILLE, SCOTT C. NEVILLE, and STAN D. NEVILLE,

Intervenors.

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A & B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUND WATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA

Subcase No.: 2009-000647

ORDER GRANTING MOTION TO ENFORCE IN PART AND DENYING MOTION TO ENFORCE IN PART

I.

FACTUAL AND PROCEDURAL BACKGROUND

1. On May 4, 2010, the Court entered a *Memorandum Decision and Order on Petition for Judicial Review* in the above-captioned matter. The *Memorandum Decision* affirmed the *Final Order* of the Director on all issues raised on judicial review save one.

2. With respect to the issue of the proper evidentiary standard to be applied to a determination in the context of a delivery call that a senior water user can get by with less water than decreed to it in the SRBA, the Court remanded the same to the Director for the following limited purpose:

The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purpose of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

Memorandum Decision, p. 49 (“*Order of Remand*”).

3. The Court subsequently entered an *Order* denying the *Petitions for Rehearing* filed in this matter, and on November 23, 2010, the Court entered a Rule 54(a) *Judgment*.

4. Between December 13, 2010 and January 3, 2011, *Notices of Appeal* were filed by the Idaho Department of Water Resources (“IDWR” or “the Department”), A&B Irrigation District (“A&B”), the City of Pocatello, and the Idaho Ground Water Appropriators, Inc. (“IGWA”). One of the issues raised on appeal is the propriety of this Court’s decision to remand the case for the limited purpose described above.

5. On January 31, 2011, A&B filed a *Motion to Enforce Orders*, requesting that the Court issue an order and/or writ compelling the Director to comply with the Court’s remand and to consider A&B’s proposed “interconnection” feasibility study in connection with the remand.

6. IDWR and IGWA timely filed *Memorandums in Opposition to Motion Enforce*.

7. A hearing on the *Motion to Enforce* was held on February 7, 2011.

II.**MATTER DEEMED FULLY SUBMITTED FOR DECISION**

Oral argument before the District Court in this matter was held on February 7, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or February 8, 2011.

III.**DISCUSSION**

In its *Motion to Enforce*, A&B requests that this Court issue an order and/or writ compelling the Director to comply with this Court's remand and apply the evidentiary standard of clear and convincing evidence to the record in this case. A&B further requests that this Court "order the Director to consider A&B's proposed 'interconnection' feasibility study in conjunction with the ordered remand." Each will be addressed in turn.

A. The notices of appeal filed in this case do not divest the Court of jurisdiction to enter an order enforcing its *Order of Remand*.

The Department contends that this Court was divested of jurisdiction to enter an order enforcing its *Order of Remand* as a result of the notices of appeal filed by it and other parties. This Court disagrees.

Idaho Appellate Rule 13(a) provides that upon the timely filing of a notice of appeal, "all proceedings and execution of all judgments or orders in a civil action in the district court, shall be automatically stayed for a period of fourteen (14) days." Once the automatic stay expires however, the district court retains those powers enumerated in Rule 13(b) notwithstanding the pendency of an appeal. The Rule 13(b) powers are reserved to the district court unless one of the parties moves for, and is granted, a discretionary stay by either the district court or the Idaho Supreme Court. I.A.R. 13(b) & (g). The ability to enforce a judgment or order is one the powers retained by a district court during the pendency of an appeal. I.A.R. 13(b)(13).

In this case, A&B's *Motion to Enforce* was filed with this Court following the expiration of the fourteen day automatic stay provided for in Rule 13(a). The record in

this case does not contain any order staying enforcement of the *Order of Remand* pending appeal, nor has the Department requested such a stay before this Court or before the Idaho Supreme Court. Since no stay has been entered, and because the automatic stay period has expired, this Court has the jurisdiction and authority under Rule 13(b)(13) to enforce its *Order of Remand*.

The Department argues that the case of *H&V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors*, 133 Idaho 646, 747 P.2d 55 (1988) ("*H&V*") precludes this Court from enforcing its *Order of Remand*. In *H&V*, the State Board of Professional Engineers and Land Surveyors ("Board") entered an order revoking the licenses of several engineers. *Id.* at 647, 747 P.2d at 56. On judicial review the district court remanded the case to the Board for additional proceedings, requiring that the Board articulate the specific standards used in imposing its discipline. *Id.* at 648, 747 P.2d at 57. The district court's decision was appealed to the Idaho Supreme Court. Meanwhile, the Board acted on remand and issued an order amending its findings. The district court subsequently considered the amended findings of the Board and affirmed the Board's discipline of the engineers. *Id.*

An issue arose regarding the district court's ability to consider and act upon the order issued by the Board on remand given the pendency of the appeal. The Idaho Supreme Court addressed the issue as follows:

Absent from the limited enunciated exceptions to Rule 13 is any provision which authorizes the district court, after remanding the case for further proceedings, to consider and act upon additional Findings of Fact from the Board where, in the interim, appeal of the remand was perfected in this court.

Id. (emphasis added). The Court held that "the district court was without jurisdiction to affirm the disciplinary order imposed by the Board after having initially ordered a remand, from which order the engineers perfected their appeal." *Id.* at 649, 747 P.2d at 58.

Contrary to the argument of the Department, the *H&V* case does not control the facts and circumstances presented here. The issue presented here is not whether this Court, in the confines of this case, can consider and act upon a final order issued by the

Director on remand in light of the pendency of an appeal.¹ The issue is whether this Court can enforce its *Order of Remand* in light of the pendency of an appeal.² The plain language of Idaho Appellate Rule 13(b)(13) answers this inquiry in the affirmative and expressly authorizes the Court to enforce its *Order of Remand* during the pendency of an appeal.

Given that this Court has the authority to enforce its *Order of Remand*, and given the fact that the Department has not requested a stay of enforcement in this matter, the Court finds that the Director shall forthwith comply with this Court's *Order of Remand*.

B. A&B's request that the Director consider its proposed "interconnection" feasibility study in conjunction with the ordered remand is beyond the scope of the remand.

Upon remand, this Court did not contemplate that the Director would take new evidence when undertaking the limited *Order of Remand*. Indeed, in the *Order of Remand* this Court determined that the case would be remanded "for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record" and instructed that "no further evidence is required." The evidence A&B seeks to introduce to the Director regarding the interconnectivity of its system is outside the scope of the *Order of Remand*. This Court does not have jurisdiction in this case, and under these circumstances, to order that an action be taken outside the scope of the *Order of Remand*.
I.A.R. 13.

The result reached here is consistent with the *Order Granting in Part Motion to Enforce Orders* issued by District Court Judge John M. Melanson in Gooding County Case CV 2008-444. *Order Granting in Part Motion to Enforce Orders*, p.4, Gooding County Case No. 2008-444 (May 11, 2010). In that case, the case was remanded to the

¹ It is apparent to this Court that in the *H&V* case no new petition for judicial review was filed seeking judicial review of the final order issued by the Board on remand. Rather, the district court improperly considered and acted upon the order issued by the Board on remand in the confines of the same case in which the remand was ordered, and in which an appeal was pending.

² This issue was not addressed in the *H&V* case. It should be noted that the Idaho Supreme Court in *H&V* did not hold that the Board erred in acting upon the order of remand during the pendency of the appeal, or that the Board erred by issuing an order on remand amending its findings during the pendency of the appeal.

Director for the limited purpose of applying the appropriate burdens of proof and evidentiary standards when considering seasonal variations as part of a material injury analysis. *Order on Petition for Judicial Review*, p.58, Gooding County Case No. CV 2008-444 (June 19, 2009). The Petitioner in that case subsequently filed a *Motion to Enforce*, arguing among other things that the Director had a duty to take and consider certain evidence on remand. The district court disagreed, finding that the evidence proposed by Petitioner was outside the scope of the remand:

The Director is not obligated to take additional evidence in order to apply the correct burdens of proof and evidentiary standards on remand. The evidence [Petitioner] seeks to introduce at the mitigation plan hearing is outside the scope of this Court's previous *Orders* on remand. This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction "to take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders*.

Order Granting in Part Motion to Enforce Orders, p.4, Gooding County Case No. CV 2008-444 (May 11, 2010). The above-quoted holding of the district court in the 2008-444 case is on point with the facts of this case.

A similar situation recently arose before this Court in Ada County Case No. CV WA 2010-19823. In that case, the Petitioner filed a *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate* ("Complaint"), requesting that this Court compel the Director "to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on [Petitioner's] water rights." The *Complaint* was filed with this Court as a result of the Director's decision to refrain from considering the evidence presented by Petitioner in the remand from the district court in the 2008-444 case. This Court denied the Petitioners' request on multiple grounds, including that the actions requested by Petitioner were outside the scope of the remand in that case. *Order Denying Petition for Peremptory Writ of Mandate*, pp.4 -5, Ada County Case No. CV WA 2010-19823 (Oct. 29, 2010).

Therefore, this Court finds that it lacks the jurisdiction to compel the Director to consider A&B's proposed "interconnection" feasibility study in conjunction with the ordered remand.

IV.
ORDER

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

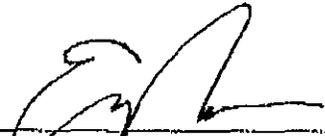
1. A&B's *Motion to Enforce Order* is hereby granted in part and denied in part.

2. A&B's request that the Department and the Director comply with this Court's *Order of Remand* is hereby granted. The Director shall forthwith comply with the remand instructions set forth in the *Memorandum Decision and Order on Petition for Judicial Review* issued by this Court in the above-captioned matter on May 4, 2010, and which provides:

The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purpose of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.

3. A&B's request that this Court compel the Director to consider its proposed "interconnection" feasibility study in conjunction with the ordered remand is hereby denied.

Dated 2 / 14 / 2011.



ERIC J. WILDMAN
District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14TH day of February, 2011, she caused a true and correct copy of the foregoing ORDER GRANTING MOTION TO ENFORCE IN PART AND DENYING MOTION TO ENFORCE IN PART on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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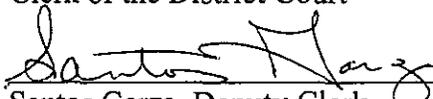
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