

cfs to 3.28 cfs. An appeal was filed by M3 becoming Case No. CVOC 2010-03180, with M3 as Petitioner and Water Resources and the Director, Gary Spackman, as Respondents. While that appeal was pending for over a year, the Department of Water Resources entered into negotiations with M3.

One week short of a full year after the Amended Final Order of January 25, 2010 an Agreement was signed by the Director and M3. The most significant indication, affiant asserts, of bias and prejudice, is the unfair provision in that agreement that the Director and the Department enter totally new findings only to which M3 would agree and to severely limit the evidence on reopening on Remand.

Furthermore, Protestants were told by the legal representatives of the Director and the Department, to wit: Mr. Homan and Mr. Baxter, Attorney General's staff, that we would have an opportunity to review a draft of the agreement. However, when we received a copy of the January 19, 2011 Agreement it had already been signed by the Director and M3. Your affiant was present at the time of that conversation which occurred after a status conference before the district court and has personal knowledge thereof. This again is indicative of the lack of fairness and bias and prejudice of the Department and the Director. (See Homan email of January 28, 2011).

The Protestants were allowed to appear at a few so called negotiation conferences, but those were limited to meetings only with the Attorney General staff, Mr. Homan and Mr. Baxter. This affiant was present at all of those conferences and has personal knowledge of all matters stated herein.

At one of those meetings Protestants were presented a document containing 32 new findings. When questions were raised by the Protestants as to whether those findings had been

drafted by counsel for M3, Mr. Homan became very defensive and did not answer. When pressed further as to who had reviewed the record and cited all the exhibit numbers to support each new finding Mr. Homan stated that “We do not have time to read all of the exhibit documents”. We were also told by Mr. Homan that they (the Attorney General staff) “would only consider matters that supported the January 19th decision and agreement”. These are, of course, the legal representatives of the Director.

At these negotiating conferences the Protestants presented in writing some 9 negotiation points. Approximately 6 weeks later, on October 11, 2010 a response was received from M3 ignoring and summarily refusing to consider any of them. On or about November 11th, Protestants informed the Attorney General’s representatives of the Director that we did not believe M3 really intended to negotiate. This again was ignored.

The Amended Final Order of January 25, 2010 was supported by 41 well reasoned and logical Findings of Fact and 22 Conclusions of Law. That decision, which is the only decision on the merits, has now been abandoned, ignored, and treated by the Director and Water Resources as though it does not and never did exist. Affiant asserts and alleges on information and belief that certain outside influences partially brought about the totally new 32 findings contained in Exhibit A to the January 19, 2011 Agreement signed by the Director.

Affiant asserts that this complete change from the Amended Final Order of January 25, 2010 as shown by the January 19th Agreement and the 32 new findings favoring the M3 Application for a Water Right (Exhibit A) without any fair and open hearing lack fundamental fairness and result in bias and prejudice favoring the M3 applicant, and are not without politics.

Furthermore, Affiant has knowledge, information and belief that all of the 32 new findings accepted and adopted by the Director in Exhibit (A) to the January 19th Agreement and

the June 14, 2011 Stipulation have been cherry picked from the Hearing Record to favor the M3 application and all matters in the Hearing Record which do not favor the M3 application have been intentionally deleted demonstrating the bias and prejudice of the Director and presiding officer.

Affiant further asserts on either knowledge, information and belief that there have been communications with the Director, directly or indirectly through the Department Attorney General staff, or both, with M3 or its legal representatives, or both, in violation of Rule 417, Water Resource Rules and Section 67-5253, Idaho Code. Such are further justification for removal of the Director as a presiding officer on Remand.


All matters stated herein are either from personal knowledge, information, or belief of the Affiant.

Wherefore, Affiant asserts and contends that the Director and presiding officer cannot sit as a judge or presiding officer in the present case and should be removed for cause.



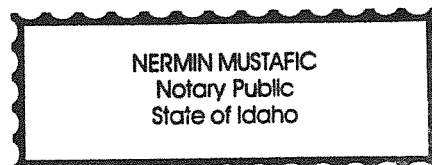
Alan Smith,

Personally appeared before me this 5th day of August, know or proved to me to be the person executing this Affidavit and having signed this Affidavit in my presence.



Notary Public for the State of Idaho

My commission expires on July 10, 2012.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2011, a true and correct copy of the foregoing Motion For Disqualification For Cause was served on the following parties as set forth below:

NOTICE OF SERVICE AND DISCOVERY

North Ada County Groundwater Users Association	<u> </u>	U.S. Mail
John Thornton / David Head	<u> X </u>	Hand Delivered
5264 N Sky High Lane	<u> </u>	Overnight Mail
Eagle, ID 83616	<u> </u>	Facsimile

Norman Edwards	<u> </u>	U.S. Mail
884 W Beacon Light Road	<u> X </u>	Hand Delivered
Eagle, ID 83616	<u> </u>	Overnight Mail
	<u> </u>	Facsimile

Jeffrey C. Fereday	<u> </u>	U.S. Mail
GIVENS PURSLEY LLP	<u> X </u>	Hand Delivered
601 West Bannock Street	<u> </u>	Overnight Mail
PO Box 2720	<u> </u>	Facsimile
Boise, ID 83701-2720		

Gary Spackman, Hearing Officer	<u> </u>	U.S. Mail
State of Idaho	<u> X </u>	Hand Delivered
Department of Water Resources	<u> </u>	Overnight Mail
322 E Front Street	<u> </u>	Facsimile
Boise, Idaho		

Garrick L. Baxter and John W. Homan	<u> </u>	U.S. Mail
Deputy Attorneys General, IDWR	<u> X </u>	Hand Delivered
P.O. Box 83720	<u> </u>	Overnight Mail
Boise, Idaho 83720-0098	<u> </u>	Facsimile

City of Eagle	<u> </u>	U.S. Mail
660 E Civic Drive	<u> X </u>	Hand Delivered
Eagle, ID 83616	<u> </u>	Overnight Mail
	<u> </u>	Facsimile

Schedule

From: **Homan, John** (John.Homan@idwr.idaho.gov)
Sent: Fri 1/28/11 5:19 PM
To: head@thorsonid.com; spurvis66@msn.com; jlthornton@f.s.fed; nmedwards@q.com
Cc: Baxter, Garrick (Garrick.Baxter@idwr.idaho.gov)

Gentlemen:

At our meeting on Wednesday January 26, 2011, I promised that I would send out a schedule that would provide a date when IDWR would be in a position to distribute proposed findings and proposed permit conditions to the Protestants for comment. I am concentrating exclusively on the findings initially as the findings provide the basis for any conditions to be added to the permit. I expect that IDWR will be in a position to distribute draft findings to the Protestants by February 5, 2011. If IDWR finishes earlier, the draft findings will be distributed earlier. Upon your review of the draft findings, IDWR will set up a meeting for you to advocate for any changes to the findings to protect your interests. The draft findings will also be shared with M3 Eagle and the City of Eagle as we progress. I expect the same in regards to the permit conditions once we get a head start on the findings.

I also want to take this opportunity to apologize for any miscommunications that may taken place. During our brief visit after the status conference, I do recall describing that the draft agreement contemplates an opportunity for the Protestants to provide comments about findings and conditions. To the extent the confusion may have been generated from the interpretation of my description as an opportunity to comment on the actual draft agreement, I apologize for my role in the confusion. The intent has always been to involve the Protestants in the development of findings and conditions going forward.

John Homan

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

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)	MEMORANDUM REGARDING
FOR PERMIT NO. 63-32576)	THE PETITION TO
IN THE NAME OF M3 EAGLE, LLC)	DISQUALIFY FOR CAUSE
AND THE CITY OF EAGLE,)	
<u>ASSIGNEE OF PERMIT NO. 63-32576</u>)	

On July 25, 2011 Petitioners filed a Petition to Disqualify the Interim Director without cause under Rules 411 and 412, Department of Water Resource Rules of Procedure, Sections 59-704 and 67-5252(4) Idaho Code and Rule 40 (d) (1) and 40 (d) (1) A, Idaho Rules of Civil Procedure.

The Protestants also asserted a right to a blanket disqualification for cause of all employees, staff, or agents of the Water Resources Department under Section 67-5252 (2) (b), Idaho Code. This blanket disqualification was for the reason that the Agreement of January 19, 2011 signed by the Director and the June 13, 2011 Stipulation also signed by the Director through his legal representative, counsel for the Water Resources Department, will undoubtedly be considered a directive order to all the Water Resource hearing officers, staff, and employees

of the Department and will control their decisions, orders and rulings on evidentiary and procedural matters during the remand proceedings.

Protestants assert that "such motion for disqualification, if timely, shall be granted" under Rule 40 (d) (1) (A), I.R.C.P. As of the date hereof no order or other response has been received. Protestants assert that this Remand is akin to a new trial under 40 (d) (1) (F), as there are multiple new issues that were never before the Department in the original trial and a new party, the City of Eagle, is entering the proceedings.

Protestants realize there is a rather involved process when disqualifying an appointed or employed state public official under 59-704 (3), Idaho Code, however, Protestants do not intend to allow the disqualification process to be delayed and ignored as seems to be the pattern in this case not only on the part of M3, but also the State Attorney General staff.

Protestants are therefore also filing this petition to disqualify the Director for cause because of the January 19, 2011 and June 14, 2011 Agreement and Stipulation pre-determining and pre-judged findings made a part of those documents as well as communications which have taken place between M3 and the Director in reaching the Agreement and Stipulation, either directly or indirectly through his legal representatives, i.e. the State Attorney General staff, all in violation of 67-5253 Idaho Code.

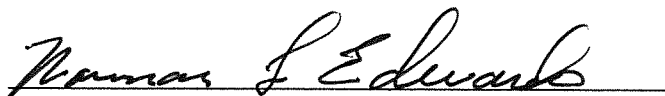
Respectively submitted this 5th day of August, 2011.



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 5th day of August, 2011, a true and correct copy of the foregoing Memorandum Regarding The Petition to Disqualify For Cause was served on the following parties as set forth below:

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U.S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile

Gary Spackman, Hearing Officer
State of Idaho
Department of Water Resources
322 E Front Street
Boise, Idaho

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