EAGLE PINES WATER ASSOCIATION
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32576 IN THE NAME OF M3 EAGLE LLC

REPLY BRIEF AND ARGUMENT

The "caustic" and "abrasive" attack by M3 on the Department of Water Resources continues, the focus has now changed, however, to the Interim Director. It should be noted that M3's brief was not even mailed to the Eagle Pines Protestant until 7 January, 2010 and was not received until the afternoon of 9 January.

Most, if not all of the matters raised in M3's brief were fully briefed and were presumably fully considered in the Department's Final Order. All of the matters M3 wants reconsidered are matters on which "reasonable minds could differ", are within the "discretion of the trier of fact and law" and involve the "weight to be given to that evidence". Those are all points which an appeal court will consider as well as whether any are "clearly erroneous". None are clearly erroneous solely because M3 says so. Neither is any fact or point of law conclusive or uncontradicted or established by a preponderance of the evidence because M3 says so.

A reply brief would not even be needed were it not for the fact that many of M3's arguments are so absurd that they must be challenged.

Municipal Provider

The Interim Director's Decision and Final Order on the municipal provider issue is absolutely correct. Section 42-202(2) clearly requires that the qualification as a municipal provider be established at the time of the application as the Interim Director found. This provision is not at all ambiguous. How and when an applicant must qualify is very clearly and adequately set out in 42-202 B 5 (a) (b) and (c) and the present tense language supports the Director's Conclusions of Law on that point that M3 must qualify at the time of application. It is M3's attempted broad interpretation of these statutes which "is a stretch too far", not those sound elements of the Final Order.

The Director was entirely correct in his Conclusion of Law that a "higher standard" applies when a future needs water right is sought. There is no error here as the statutes set forth above clearly show. Section 42-202 (2) states that an applicant shall establish that it qualifies as a municipal provider at the time of application. This was never done and still was lacking at the time the applicant rested its case in chief.

The Model

A vast portion of the M3's brief is devoted to the Model, its scientific accuracy, its flawlessness, and its conclusiveness. The "model domain" is stated in their brief to be artificial. It is loaded with calculations, estimations, predictions, assumptions, and conjecture. This whole

area is one where "reasonable minds might differ". It is entirely within the discretion of the Interim Director to give the M3 Model whatever "weight he sees proper" and to "make his own conclusions" about all aspects of that evidence.

Annexation

M3 rails on the point that possibilities should not be considered. However, when M3 desires the Director to go outside of the record as it existed at the close of the case and consider the possible annexation that may have been pending at that time, M3 has no problem with that.

Annexation, standing alone, does not create a municipal water supplier as the law requires. There is no integrated water system in place. There are no existing newly built homes or subdivisions which are now being supplied water, no water lines are in place, no wells supplying or to supply water needs have been drilled, no storage facilities exist, no service stubs are provided and no service area exists which is contingent to a municipality or to a municipal provider. The M3 property is still totally separate and miles away from any city or village water supply system. The Director's decision on this matter is entirely correct. Sections 42-202 B (5) (a) (b) and (c) clearly require the municipal provider to be presently supplying water where it states "that provides water", and "which does supply water" and "which supplies water". Protestants' earlier brief addressed the matter of one part of a statute qualifying another.

Draw Downs

M3's evidence regarding draw down is not uncontradicted as it suggests. The fact that the

Interim Director did not make any reference to Mr. Dittus' testimony that no "noticeable draw down in the aquifer" had occurred does not warrant M3's conclusion that it was never considered by the Director. There was, although M3 has itself ignored evidence, certainly a good deal of evidence of over 20 wells having to be replaced and public witness testimony which disputed and controverted this issue. Protestants recollection was that Mr. Dittus also testified that water levels were rising. That was disputed and controverted throughout the hearing by evidence of declining water levels. This is another area where the arguments of M3 are absurd.

Discontinuity

There is no convincing evidence one way or the other regarding other faults in the area and the resulting discontinuity. This is an area in which "reasonable minds could differ" and the "weight to be given thereto" is entirely "within the discretion" of the trier of fact and law. The Director's conclusion that a physically uncommon factor is more likely than not affecting this area under the M3 property is within his discretion.

Placement of Wells

M3 now asserts that the high capacity wells will be positioned far from the edge of the aquifer. However, M3's application states that the number and location of wells has not been determined and that all portions of the property are potential future well locations. (Exhibit 42, tab A, p. 2).

Tamarack

More absurdities. M3 demands further explanation why this is not a binding precedent. The

Director (Hearing Officer) stated during the hearing that he did not find this to be binding. He also stated at a later stage that he did not find "stare decisis" to apply. He is on very solid ground on both of these points. Protestants would suggest that counsel for M3 read the statutory requirements to qualify for a municipal water right and the cases cited in our earlier brief on the "stare decisis" issues if further explanation is needed.

Due Process

M3 claims in footnotes #18 and 24 that it has been denied "due process" after 17 days of hearings. If anyone has a due process claim it is Protestants. In a court of law this matter would have been determined on a Motion for Summary Judgement since there was only a question of law as to M3's qualification for a municipal water right and there was no questions of fact because M3 had admitted they were not a municipal provider in answers to Requests for Admissions.

Summary judgement procedure is, however, not available before an administrative agency. Moreover, M3 has continued to push on and pursue a water right claim they knew was frivolous and one on which they could not prevail. M3 has used its large pockets to overwhelm Protestants. Fundamental fairness would seem to cut the other way - in Protestant's favor. Had this claim been pursued in a court, instead of before an administrative agency, Protestants would have certainly been entitled to recover their costs and attorney's fees in protesting such a frivolous claim.

The Evidence

Counsel for M3 do not seem to grasp the fact that an adverse determination on the municipal

provider issue renders all of the evidence on aquifer sufficiency, model recharge, etc. immaterial and superfluous except insofar as it might be considered by the Interim Director when he bent over backwards to allow M3 an ordinary, standard water permit.

Departmental Powers

M3 asserts that the Interim Director has exceeded his power and authority by what it refers to as a "water budget". More absurdities - the prudent allocation of ground water and all other waters of this state is the sole purpose for the creation of the Department of Water Resources.

Apparently, counsel for M3 seek to ignore another statue. The pertinent parts of 42-231, Idaho Code will therefore be set forth for them to read, as follows:

> "It shall likewise be the duty of the director . . . to control the appropriation and use of the ground water of this state . . . and do all things reasonably necessary and appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy. . ."

The Department must prudently budget the allocation of water. The problems in the Snake River allocations confirm that. The growth in population results in increased water demands. Times have changed - the days of villages and small settlements and sparsely scattered farms and ranches are no more. The Director is entirely correct in the judicious allocation of water as public policy and the public interests dictates. The first water right applicant may no longer expect to receive all the water he wants. The Director has a statutory duty to consider the public policy and the public interest in the M3 water application and M3's railing against such has no merit whatsoever. The so called "water budget" issued by the Director to M3 is entirely within his statutory powers and is a duty imposed by statute upon him.

Conclusion

The motion for reconsideration and to reopen the hearing should be denied. If M3 does not like the next decision are we to reopen the evidence again? No court would allow such or trials would never end. M3 has had more than ample time to present its case, 17 days of hearings should be enough.

Respectfully submitted,

Alan Smith, Spokesperson for Eagle Pines and individually

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2010, the foregoing document was filed, served or copied as follows:

NOTICE OF SERVICE AND DISCOVERY

North Ada County Groundwater Users Association John Thornton 5264 N Sky High Lane Eagle, ID 83616	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile _____ E-mail
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Alan Smith