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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

PROTESTANTS' REBUTTAL BRIEF

The Rebuttal Brief will, in fact, be very brief.

The (81 page) Brief on The Merits by the applicant contains page after page of a "rehash" of the testimony. We see no point in going over and over and over all of the testimony that has already come before the Hearing Officer. The Hearing Officer can give all that testimony, documentation, and evidence whatever weight he determines to be appropriate and draw his own conclusions. It is our recollection that the Hearing Officer stated, in essence, that he did not want a rehash of all the facts and wanted, instead, points of law.

Protestant Witnesses and Staff Witnesses

It should also be noted that a large volume of the 81 page M3 brief on the Merits is

devoted to a scathing and ferocious attack on all witnesses who questioned the findings and conclusions of the experts for M3. (Dr. Dale Ralston, Staff witnesses - Dennis Owsley, Sean Vincent, and Mike McVay.) (See p. 14 - 39 of Applicant's Brief.) (Jason Smith - see p. 43 - 45, Applicants Brief.) It is very apparent that anyone who questions any part of M3's case is stepping into "shark infested water." These witnesses for Protestants and Staff witnesses should be held in regard for their courage and respected for their efforts, not castigated.

The Staff witnesses are faulted and discredited for failing to conduct independent scientific studies or inquiry (see footnotes #27 and #29, p. 25 of Applicant's Brief). Mr Owsley is discredited because he admitted that the Staff of IDWR had only "expressed (its) views of Hydro Logic's work." Mr Vincent is also called to task for stating that the Staff's effort consisted of "observations of the work done by Hydro Logic." M3 ignores as it has throughout these proceedings, anything that does not serve their purpose. It has ignored the "municipal provider" provisions of the statute, the "financial information" required by IDWR, and now it ignores the Hearing Officer's Order of 8, December, 2008 which stated as follows:

> ". . . the Hearing Officer invites Department staff to review and analyze the technical information submitted . . .
>
> 1. A full analysis of the methods of gathering data, the data presented and results of the aquifer tests or other tests or modeling contained in information submitted by the parties. . . .
>
> 4. Conclusions about the impacts on other water users and aquifers caused by pumping of ground water . . . (under) . . . water no. 63-32573."

The IDWR staff did exactly what was requested by the Hearing Officer's 8, December, 2008 order. It should be noted that a staff memorandum was to be delivered to the Hearing

Officer and all parties by 23, January, 2009. Hardly time to conduct independent studies and further data gathering. The argument by counsel on behalf of M3 is ludicrous.

The expertise of Owsley, Vincent, and McVay is also severely discounted in footnote #27 on p. 25 as is the lay testimony of Jason Smith "whose testimony established nothing" beyond "several old wells in unspecified aquifers" being replaced "for unspecified reasons." Mr. Smith talked to well over 20 well owners and has some first hand practical information and knowledge of water level declines in the area. I would invite counsel for M3 to do the same rather than relying on a lot of theories, predictions, assumptions, and expert opinions. (See p. 43 - 45, Applicant's Brief.)

At this point it should be noted that M3's Brief does not even mention the lay testimony of other well owners who testified as "public witnesses" - Tom Sorge, Bill Lawton, Greg Taylor, Chuck Roberts, Patricia Minkiewicz, Rick Katucki, and several others who have expressed their concerns and/or already suffered declining water levels.

Mr. Vincent's "five nonconclusive lines of evidence" are attacked as being "without scientific foundation". (See footnote #26, p. 24 and also p. 31. Applicant's Brief.)

Protestants submit that the Hearing Officer should take official notice (judicial type notice) of the weather records from the www.wunderground.com which shows 90+ weather as follows in the Eagle area for 2009:

May	3 days		
June	4 days		
July	20 days	100+	3 days
August	16 days		
September	4 days to date		
	47 days 90 +		3 days 100+

50 days of over 90 degree weather at up to 20 tanks per day equals 1000 of the tanks shown on Protestant's Opening Brief, page 6.

Experts

This case has become a classic battle of the experts. An extensive rebuttal to the Staff Memo (Exhibit #50) is contained in Exhibit #45 asserting the Staff conclusions about declining water level trends are incorrect, misleading, with significant errors and not even unbiased. (See p. 30, Exhibit #45).

M3 asserts that there is uncontroverted evidence that the water supply is sufficient for the M3 appropriation. This, of course, ignores all of the testimony by public witnesses; the twenty (20) replacement wells (some in shallow aquifers) shown on Exhibit 424 (map); and the Staff Memo concluding that the sustainability of the aquifer is not unlimited (see Exhibit #50 at p. 20 and 25). (See also the 20 items set forth in our original brief with the pertinent exhibit numbers).

M3 asserts that it has fully met its burden of proof and that Protestants' expert opinions are based only on conjecture citing Bromley v Garey, 132 Idaho 807, 979 P.2d 1165 (1999), and others. And yet their entire case is laden with expert assumptions, presumptions, calculations, estimations, predictions, conjecture, speculation, and subjective conclusions about critical issues. Their amply paid experts all tend to support each other, but leave many uncertainties and unknowns which they can not resolve. The Protestants' expert and IDWR Staff do not believe that the evidence is sufficient to conclude that the ground water supply is sufficient. The burden of proof does not fall on the Protestants, but on the Applicant to establish the sufficiency of the water supply. 42-203A(5)(b), Idaho Code.

Applicant asserts that the aquifer is capable of providing the vast withdrawal by M3 with only minimal affects on other water rights. We again call the attention of the Hearing Officer to the following:

> ". . . the actual extent of any future impacts (to other well owners) can not be truly known until actual pumping wells are in place (on the M3 site)." (See Exhibit 42, Tab 4, p.7)

Sufficiency of Water Supply

M3 asserts in one of its many footnotes to its brief that because no (big important) commercial or industrial entities; or cities of Star, Meridian, and Eagle; nor United Water; nor Eagle Water protested, one can conclude there is sufficient water to serve M3. Furthermore all of the Protestants are domestic and small irrigation ground water right holders that produce not from the PGSA, but from shallow overlaying aquifers (see footnote #8. P. 12). That is false! Many of the domestic wells are in the PGSA. Their own expert (Squires) acknowledges that the Eagle Pines Well is in the PGSA, (see Exhibit #45 at p. 38) at a depth of only 208 feet. Protestants would also point out as follows;

> ". . . pumping from a deeper zone ultimately affects the shallower zones . . . pumping a shallower zone ultimately affects deeper zones." (Exhibit #12, p. 7)

Moreover, a review of the nearly 50 "well questionnaires" in Exhibit #76 shows about half of the domestic wells are in the PGSA: half in shallower zones, and 10 of unknown depth. These domestic well owners believe their domestic water supply is just as "important" as the vast water supply M3 asks for homes not even built at this time.

M3 asserts that the Payette flow theory is "not central to the statutory question of

sufficiency", and while that is true it was certainly used as a ruse to convince any concerned well owners they would not be affected.

The IDWR Staff's questions about sustainability of the aquifer are only theoretical concerns not of any importance as M3 sees it, and there will not be any unreasonable draw downs. Again, M3 claims that the twenty (20) wells replaced (see Exhibit #424) are not of any significance and ignores testimony of all the public witnesses. (Applicant's Brief, p. 35 and 36.) And again, M3 returns to its predictions and projected withdrawals, estimations of average pumping draw downs at a diversion rate of 9.03 cfs annual average.

As Protestants pointed out during the hearing, it is during the hot summer months when M3 is pumping its high capacity wells in the 20 cfs range when the impacts on nearby domestic well owners will be most profound. This is when water problems will occur and also when the demand for domestic use will be greatest and most needed.

Recharge

There is only speculative evidence as to this critical issue. There is little evidence as to recharge and "where it occurs or how it happens" according to Dr. Ralston. This same expert (Dr. Ralston) opined that there was insufficient evidence to establish the recharge locations and mechanisms. It is therefore impossible to determine what the effects are.

Nevertheless, M3 repeatedly refers to a "reasonably anticipated average rate of future natural recharge" as the standard to be applied. Such a subjective and evasive standard should never be used. It is not the standard set forth in 42-203A(5), Idaho Code. We already have enough "reasonably anticipated future" language in the statute. Do we need more? Protestants

hardly think so. Applicant already contends that the "reasonably anticipated future" language means whatever M3 says it means and qualifies them as a "municipal provider" contrary to the clear language of the statute. Such "reasonably anticipated future" language as to "recharge" would only make the law more uncertain and difficult for IDWR to apply. Perhaps, M3 believes that the Shokal standard of "take a risk" and "take a chance" discussed on financial issues should also be applied to determine recharge and aquifer sufficiency - another journey into the Snake River Plain problems (see Shokal v Dunn, 109 Idaho 330 at 336).

Protestants agree with Mr. Vincent that the terms "geologically ancestral water" and "robust recharge" are very inconsistent. Mr. Glansman did not appear to dispute that.

Financial

Here, we have another poorly defined and very subjective standard used in the statute and rules. (Rule 45, I.D.A.P.A., 42-203A(5)(d), Idaho Code.) This "reasonably probable" standard is vague. One could conclude that "anything goes". In Shokal v. Dunn, 109 Idaho 330, 707 P.2d.441 (1985) the Court discussed a take a risk and take a chance element of the reasonably probable standard used by Water Resources, should not mean that a permit issues only when the applicant has secured all necessary financing. However, the Court stated:

> ". . . Applicant must make a showing that it is reasonably probable . . . necessary financing will be (obtained) within five years".

The applicability of the Shokal decision is very doubtful since the enactment of the 1996 Municipal Water Right Act. Would the Court still go along with such a lax standard and allow IDWR and the State of Idaho to take a risk or a chance under the "future needs" 20 to 30 years

provision of the current law? Do we need another Avimor or Tamarack? What economic benefit did the State of Idaho receive from those two collapses? Full development of water resources and full economic benefits under Baker v Ore-Ida, 95 Idaho 575, 513P.2d627 (1973) and the City of Eagle case in which a balancing concept was used are also considered in Chisholm v IDWR, 142 Idaho 159, 125 P3d515 (2005) when the Court held "both the benefits and detriments must be considered." The Court noted as follows:

> "the local public interest has many elements and the determination of which local public interests are impacted and balancing those impacts is left to the discretion of IDWR."

The likely detriment to nearly 2,000 well owners in the "North Eagle area" can not be ignored.

M3 does appear to have a financial partner it can look to - Dallas Police and Fire Pension System, however, it appears to Protestants that financial partner can "pull out" on rather short notice. We would call the Hearing Officer's attention to p. 61 of Applicant's Brief which states as follows:

> "DPFPS can and likely will contribute more to the project in the future."

M3 obviously recognizes further contributions are tenuous as is the whole CID concept.

Water Conservation

M3 contends it will rely on only a handful of municipal wells. (See p. 61, Applicant's Brief) However, we heard during the hearing that there could be 4 to 15 high capacity wells in addition to the 12 existing wells. (See Exhibit #42, Permit Application.) Actual well locations, number of wells, and apparently well capacity have not been determined, (Exhibit #42, Tab 4, p.

8.) Hardly only a handful of wells.

Pending Applications

M3 wants IDWR to "close its eyes" to pending water applications. They rely on secondary authorities, Wells A. Hutchins, and two Colorado cases, Pagosa Water v Trout Unlimited, 170P.3d307, (Colo. 2007) and County of Aprahoe v U.S., 891P2d952 (1995). We strongly disagree with those authorities because they will lead IDWR into exactly the same over-allocation problems we now have in the Snake River Plain and a horde of law suits. This is not in the public interest set forth in out statue as follows:

> "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the "public water resources." (Section 42-202B(3), Idaho Code.)

Should IDWR follow the Arapahoe case and refuse to consider pending applications when "evaluating the availability of unappropriated water" over-allocation will undoubtedly occur. (See also, 42-203A(5)(e).

This whole "reasonably anticipated future needs" concept has placed a monumental burden on IDWR. Tracking these permits which may or may not ripen into a license over a 20 or 30 year period will be a tedious task. One only need to look to the Tamarack bankruptcy and the Avimor collapse to see that. The Snake River adjudication process was another example.

Nevertheless, the prudent allocation of water rights when there is a lack of clear and convincing evidence of the sufficiency of the water supply to withstand the long term pumping by high capacity wells and the ever increasing cone of depression and water level declines does not amount to a preemptive denial or withholding of a water right based on some presumed or

projected injury as M3 asserts.

We would urge the Hearing Officer to exercise caution and prudence in deciding this matter before IDWR.

Respectfully submitted this 2nd day of October, 2009.

John Thornton / David Head, Spokespersons for North Ada County Ground Water Users Association

Alan Smith, Spokesperson for Eagle Pines and individually

Norm Edwards