EAGLE PINES WATER ASSOCIATION
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PROTESTANTS
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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

BRIEF

The Applicant brief deals only with two main points; (1) the order denying the Motion to Dismiss is an interlocutory order not reviewable at this stage of the proceedings except by the Hearing Officer issuing it, and (2) the Protestants' Petition for Review by the Director or his designee is premature at this point in the proceedings.

It was our view that the Motion for Reconsideration (of the ruling on the Motion to Dismiss) was denied when the Presiding Officer ruled that the legislative intent was broad enough to permit a planned community to obtain a municipal water right. The Hearing Officer also invited the parties to submit briefs on the intent of Idaho Code 42-202b5(a), (b), and (c).

Apparently, there is some confusion over what the Hearing Officer's determination was in this matter. A Motion for Clarification of this order would therefore appear appropriate under Rule 770 which states:

"Any party or persons affected by an order may petition to clarify any order whether interlocutory . . . or final . . . A petition for clarification may be combined with a petition for reconsideration or stated in the alternative as a petition for clarification and/or reconsideration."

It is our view that a petition for reconsideration is tantamount to a motion for clarification anyway and especially so, when we have requested findings of fact and conclusions of law in our motion for reconsideration.

We believe we are affected by the prior order on our motion to dismiss and, in fact, adversely affected as the Protestants are being required to spend more of their time and money to defend an application for a water right that has no merit.

Furthermore, the order on our Motion to Dismiss is:

". . . an order that determines the legal rights or interests of one (1) or more parties (and) must be in writing and shall include the following:

01. Findings of Fact and Conclusions of Law.

02. . . . An order shall contain a statement of . . . applicable time limits for seeking reconsideration or other administrative relief." See I.D.W.R. Rule 112,

It is also our contention that Rule 413(c) applies in this matter as the ruling of the Hearing Officer is on a dispositive motion upon completion of the applicant's case in chief and is therefore a final order. Rule 413(c) states as follows:

". . . rule on dispositive motions upon completion of the applicant's case in chief."

"Dispositive" can only be said to mean a final resolution of the case. M3 has failed to show by any preponderance of the evidence that it qualifies for a municipal water right. In fact, the record is totally devoid of any evidence to show they are entitled to such. Rule 413(d) gives the Hearing Officer the authority to enter:

> . . . "findings of fact, conclusions of law . . . following the submission of evidence through . . . exhibits, or hearing testimony."

M3 had a full opportunity to provide evidence to show they are entitled to a "municipal water right" in their case in chief, but did not do so because they have none.

No statutory constructionist would place undue weight, emphasis or force on the terms "reasonably anticipated future needs" or "planning horizon" or "service area". Each and every one of those terms as used in the statute refer right back to the term "municipal provider". See 42-202B-7, 8, and 9. M3 Eagle, is a planned community or an unincorporated planned community which is not entitled to lock up a large municipal water right for 30 years.

Such an overly broad interpretation and application of 42-202B-7, 8, and 9 is neither warranted nor wise. Moreover, 42-202B-9 states as follows:

> "For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve . . ."

M3 Eagle was not, at the time it filed this water right application, and is not now, authorized or obligated to serve water for municipal purposes to any area, planned or otherwise. The requirements for a service area for a municipality are where "the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits." See 42-202B-9, Idaho Code.

This statutory language, standing alone, clearly establishes that there is no legislative intent to allow a planned community, totally separated and miles away from any municipality or municipal water delivery system to be entitled to a municipal water right. The statute, never once, refers to a planned community municipal "wanabe" as entitled to a municipal water right.

M3 Eagle has only addressed procedural issues (1) the order and ruling is interlocutory, and (2) the petition for reconsideration is premature. They have not addressed the substantive issues because they can not.

Protestants' request the motion be granted .

As to the Petition for Review - whether the Director sees fit to review such immediately or after conclusion of the case - that motion has been filed and must be considered at whatever time the Director determines is appropriate. To require Protestants to again file the same motion at the conclusion of the case seems superfluous and redundant.

Respectfully submitted,

John Thornton by Alan Smith

John Thornton, Spokesperson for North Ada County Ground Water Users Association verbally authorized to sign for him

Alan Smith

Alan Smith, Spokesperson for Eagle Pines and individually

Norman L Edwards

Norm Edwards, Individually and as a member of Eagle Pines Water Users Association.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June, 2009, the foregoing 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
Norman Edwards 884 W Beacon Light Road Eagle, ID 83616	_____ U.S. Mail __X__ Hand Delivered _____ Overnight Mail _____ Facsimile _____ E-mail
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