North Ada County Groundwater Users Association

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	**NACGUA'S RULE 711 PETITION**
FOR PERMIT NO. 63-32573,)	**FOR REVIEW OF DECEMBER 1, 2008**
IN THE NAME OF M3 EAGLE, LLC)	**INTERLOCUTORY ORDER; AND**
_____)	**MEMORANDUM IN SUPPORT**

RULE 711 PETITION FOR REVIEW:

North Ada County Groundwater Users Association (NACGUA) hereby petitions Idaho Department of Water Resources (IDWR) Hearing Officer Gary Spackman to review his Interlocutory Order of December 1, 2008, *Order Denying Request to Designate Individual Depositions Under Rule 30(b)(6); and Denying Motion for Order Compelling Attendance at Depositions* (December 1 Order). NACGUA acknowledges that the December 1 Order is binding and will honor it accordingly, but, pursuant to rule 711 of the IDWR Rules of Procedure, petitions Mr. Spackman to rescind, alter, or amend the December 1 Order. The Petition is supported by *NACGUA's Memorandum in Support of Rule 711 Petition for Review*, infra.

The issues upon review are:

1. Whether the individual members of NACGUA remained parties to the administrative proceeding after they provided written notice to the Department and the parties, in compliance with the Hearing Officer's August 5th and September 12, 2008 Orders, that their protests were subsumed into NACGUA's protest, that each individual protestant waived the right to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.

2. Whether the protests of individual members of NACGUA existed independently and separate from NACGUA's protest after the individual members' protests were subsumed into NACGUA's protest such that the Hearing Officer could order dismissal of an individual member's protest after the individual member's protest had been subsumed within NACGUA's protest.

3. Whether the language in the October 7 Order to Consolidate Parties providing that Josephine P. Beeman would "represent the interests of [the] protestants as attorney for the association"[1] mandated that Josephine P. Beeman represented the members of NACGUA individually, as well as NACGUA, where the October 1, 2008 Notice of Appearance was filed solely on behalf of NACGUA and not on behalf of any of NACGUA's individual members.

4. Whether, in the absence of a subpoena, a notice of deposition was sufficient to require the attendance of the individual members of NACGUA at depositions, where the notice was not directed to the individual member in a representative capacity, and where the individual member was neither an officer, director, nor managing agent of NACGUA.

Through this Petition, NACGUA seeks an order from the Hearing Officer, Gary Spackman, that:

1. The individual members of NACGUA ceased to be parties to the contested case after they provided written notice to the Department and the parties that their protests were subsumed into NACGUA's protest, and that each individual protestant waived the right to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.

2. The protests of the individual members of NACGUA did not exist independently and separate from NACGUA's protest after the individual members' protests were subsumed into NACGUA's protest, therefore, an individual member's protest could not be dismissed after it had been subsumed into NACGUA's protest.

3. The language in the October 7, 2008 Order to Consolidate Parties did not and could not, as a matter of law, mandate that Josephine P. Beeman represented the individual members of NACGUA in addition to NACGUA.

4. Without a subpoena, a notice of deposition was not sufficient to require the attendance of the individual members of NACGUA at depositions where the notice of deposition was not directed to the individual member in a representative capacity and where the individual member was neither an officer, director, nor managing agent of NACGUA.

[1] Order to Consolidate Parties and Default Order at 2, *In re Application to Appropriate Water No. 63-32573 in the Name of M3 Eagle* (Oct. 7, 2008).

NACGUA'S MEMORANDUM IN SUPPORT OF RULE 711 PETITION FOR REVIEW

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STATEMENT OF FACTS:

More than 40 protests were filed to M3 Eagle LLC's water right Application No. 63-32573.[2] One of the protestants is the North Ada County Groundwater Users Association (NACGUA).[3] In order to minimize the number of represented parties and to allow the Application to proceed in a timely manner,[4] 38 of the protestants became members of NACGUA, each stating in writing that NACGUA "may represent me during all the proceedings regarding this application."[5] The protests of these individuals were subsumed into the NACGUA protest, and these individuals also waived (by notice and order) their rights to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any

[2] *See, e.g.,* Certificate of Service for Order Appointing Hearing Officer at 2-3, *In re Application No. 63-32573* (June 23, 2008)(listing the names of the protestants to Application for Permit No. 63-62573 who were served with notice as required by IDWR Rules of Procedure).

[3] "The North Ada County Foothills Association assigned its protest against application no. 63-32573 to the North Ada County Groundwater Users Association on August 26, 2008." Order to Consolidate Parties and Default Order at 2 (October 7, 2008).

[4] *See* Letter from David Head to Gary Spackman Re: In the Matter of Application for Permit No. 63-62573 at 1 (received by IDWR on September 5, 2008)("It is the intention that with the participation of the North Ada County Groundwater Users Association the issues will be simplified, the number of represented parties will be minimized and it will allow the petition to proceed in a timely manner."); *see also* Prehearing Order and Notice of Prehearing Conference at 1 (Aug. 5, 2008)("The hearing officer assumes that the protestants have designated a spokesperson because they independently do not have unique evidence to present in the contested case. As a result, their independent participation in the hearing would generate repetitive evidence."); *see also* M3 Eagle's Motion and Memorandum for Order Authorizing Discovery, Confirming Rules as to Appearances and Representation, and Scheduling Prehearing Conference at 2-3 (June 25, 2008)(acknowledging that "due to the large number of Protestants, ... there could be significant delays...," and that the protestants as a "group evidently [hold] the same or similar positions"); *see also* Gary Spackman's Email to Jo Beeman and Jeffrey Fereday (November 25, 2008)(stating that through consolidation, "the protestants' voices could be channeled through a single conduit, and each individual protestant would not have to personally appear at each scheduled proceeding. The applicant could deal with a reduced number of active parties, and the dealing between parties would probably be more professional.").

[5] *See* NACGUA Designation Documents (filed with IDWR on September 16, 2008)(wherein each individual member affirmed that he or she was a member of NACGUA, that the officers of NACGUA "may represent me during all the proceedings regarding this application," and that "[m]y individual protest will be subsumed into the protest of the North Ada County Groundwater Users Association").

decision by IDWR.[6] On October 1, 2008, Josephine P. Beeman of Beeman & Associates, P.C. filed a Notice of Appearance for NACGUA[7] and became the attorney of record for NACGUA.[8]

Consolidation was intended to avoid unnecessary and duplicative factual examinations and expedite the discovery process by minimizing the number of active parties.[9] Early in the proceeding, the Applicant acknowledged that there could be delays due to the large number of protestants[10] and that the group of protestants represented by NACGUA had the same or similar positions, making common representation appropriate.[11] The Applicant also acknowledged that the individual protestants, by subsuming their protests into NACGUA's protest, intended their individual protests to be seen jointly as the protest of NACGUA,[12] and that the individual members did not intend to participate individually in this matter.[13] The Applicant did not object

[6] Order to Consolidate Parties and Default Order at 2 (October 7, 2008)("It is further ordered that the individual protests of the protestants listed in paragraph 1 are subsumed into the protest of the North Ada County Groundwater Users Association.... The individual protestants waive their right to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.").

[7] Notice of Appearance at 1, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (October 1, 2008).

[8] Order to Consolidate Parties and Default Order at 2 ("It is hereby ordered that Josephine P. Beeman shall be the attorney of record [for] North Ada County Groundwater Users Association.").

[9] Letter from David Head to Gary Spackman at 1, *supra* note 3; Prehearing Order and Notice of Prehearing Conference at 1, *supra* note 3.

[10] M3 Eagle's Motion and Memorandum for Order Authorizing Discovery at 2-3, *supra* note 3 ("Indeed, due to the large number of individual Protestants, it is conceivable that without an order from the Hearing Officer, there could be significant delays even in getting this matter to pre-hearing conference.").

[11] *Id.* at 2-3 ("Because of the large number of Protestants, it is possible that a suitable date will be difficult to nail down. This, indeed, is one of the reasons why legal representation, particularly of a group evidently holding the same or similar positions, would be appropriate.").

[12] M3 Eagle LLC's Motion, Response, and Statement for Prehearing Conference at 4, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (September 9, 2008)("M3 Eagle understands that the Association Protestants intend their individual protests to be seen jointly as the protest of NACGWUA").

[13] *Id.* at 3 ("M3 Eagle understands the Association Protestants' position to be as follows: ... In filing their protests, the Association Protestants intended that their protests be seen jointly..., and further intended that they would not participate individually in this matter because Mr. Head... would be their spokesman and representative.").

to the individual protestants banding together,[14] and even went so far as to seek an order prohibiting any individual protestant from pressing both an individual protest and proceeding under NACGUA's representation.[15]

Despite the above facts, and the Applicant's express concern for efficiency,[16] the Applicant has argued that the individual members of NACGUA be treated as independently represented parties to the proceeding, even after the members' individual protests were subsumed into NACGUA's protest.[17] Directly contrary to statements made in its earlier pleadings,[18] the Applicant now maintains that each of the members of NACGUA is both an individual protestant in the proceeding and part of NACGUA's group protest.[19] Although the Applicant directed its written discovery requests to NACGUA,[20] the Applicant did not attempt to

[14] *Id.* at 4 ("M3 Eagle does not object to the Association Protestants banding together as contemplated in the August 5 Order").

[15] *Id.* at 4 ("M3 Eagle also seeks an order prohibiting any individual Protestant from pressing both an individual protest and proceeding under NACGUWA's representation.").

[16] *Id.* at 2 ("Discovery is the most efficient way for the parties to determine the substance of the other's positions, and it should begin without delay. In the interests of moving this case forward as efficiently as possible, M3 Eagle respectfully requests that the Hearing Officer authorize discovery to begin immediately.").

[17] M3 Eagle's Motion for Order Compelling Parties to Attend Scheduled Depositions, or for Issuance of Subpoenas at 4, 5, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (November 24, 2008)("Unlike expert witnesses or other non-party witnesses, the proposed deponents are parties.").

[18] M3 Eagle LLC's Motion, Response, and Statement for Prehearing Conference at 2-4, *supra* notes 12-16.

[19] M3 Eagle's Motion to Compel Discovery Responses, Memorandum in Support, and Request for Sanctions at 4, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (November 14, 2008)("It is extremely difficult to believe that NACGUA and its members, each of whom is an individual protestant in this matter..."; "M3 Eagle is entitled to information known to or in the possession of NACGUA and the individual protestants who now claim to be NACGUA members...").

[20] Notice of Service of M3 Eagle's First Set of Interrogatories, Requests for Admission, and Requests for Production to North Ada County Groundwater Users Association, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (October 1, 2008).

depose NACGUA and instead directed deposition notices to the individual members of NACGUA.[21]

In response and as objection to these deposition notices, NACGUA filed the following documents:

- **NACGUA'S MOTION TO DESIGNATE THE DEPOSITIONS SCHEDULED FOR DAVID HEAD, JOHN THORNTON, AND ANNE RITTER, AS IRCP 30(B)(6) DEPOSITIONS OF NACGUA and REQUEST FOR HEARING** (filed November 26, 2008 to allow NACGUA to function in its intended representative capacity); and

- **NACGUA'S CONTINUING OBJECTION FOR THE RECORD IN EACH OF M3 EAGLE'S SCHEDULED DEPOSITIONS OF 17 INDIVIDUAL NACGUA MEMBERS, BEGINNING WITH TIMOTHY MILBURN** (filed December 1, 2008 . to make a record that the testimony of individual NACGUA members cannot be binding on NACGUA).

- **NACGUA'S RESPONSE TO M3 EAGLE'S November 14 MOTION TO COMPEL DISCOVERY RESPONSES AND REQUEST FOR SANCTIONS AGAINST NACGUA AND ITS MEMBER PROTESTANTS** (filed December 1, 2008

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In the December 1 Order, the Hearing Officer stated that Josephine Beeman represented NACGUA and also the members of NACGUA who were individual protestants.[22] The December 1 Order also stated that the individual member-protestants agreed to this dual representation and that, because the relationship between the individual member-protestants created an advantage for the protesting parties, the relationship should impose a responsibility on both NACGUA and the member-protestants to jointly participate in the contested case process.[23] The December 1 Order also provided that a notice of deposition should be sufficient to require

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[21] *See, e.g.,* Notice of Deposition of Anne Ritter, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (November 12, 2008); *see also* M3 Eagle's Motion to Compel Discovery Responses, Memorandum in Support, and Request for Sanctions at 5 ("[w]ith the exception of each individual's deposition notice, M3 Eagle has not been serving documents on the individual Protestants associated with NACGUA…").

[22] December 1 Order at 2.

[23] *Id.*

attendance at the deposition by the individual member-protestants.[24] Finally, the December 1 Order stated that non-attendance and issuance of a subpoena to require an individual member-protestant's attendance at a deposition would be grounds for dismissal of an individual protest.[25]

ARGUMENT:

A. Introduction

Because the December 1 Order does not adequately protect the rights guaranteed to NACGUA and its members under the Idaho Rules of Civil Procedure (IRCP) and the IDWR Rules of Procedure, NACGUA respectfully requests that the Hearing Officer review and reconsider his December 1 Order in light of the following arguments.

It is unfair and a violation of the IRCP and the IDWR Rules of Procedure to treat the individual members of NACGUA as independent party-protestants because the individual members of NACGUA forfeited important rights guaranteed to all parties under the IRCP and IDWR Rules of Procedure when their individual protests were subsumed into NACGUA's protest. Everyone involved with the present contested case, including the Applicant, were benefited by the consolidation of the numerous individual protests into a group protest under NACGUA. The Applicant's ability to conduct ordinary discovery and develop evidence for presentation at the hearing was not harmed by the consolidation because the individual protests were based on the same or similar grounds, i.e., that there was an insufficient water source for the application.[26] The Applicant was able to access information necessary to defend its

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[24] *Id.*

[25] *Id.*

[26] The NACGUA protest and the protests of the NACGUA members reference Idaho Code 42-203A(5)b), "that the water supply itself is insufficient for the purpose for which it is sought to be appropriated ... ." At the current time, there is insufficient hydrological data or evidence to determine whether M3's proposed groundwater diversion adversely affects the local economy of the watershed within which the source of water for the proposed use originates.

application by submitting discovery requests to NACGUA; if the Applicant wanted information solely in the hands of an individual member, the Applicant merely needed to issue a subpoena along with its request.

The consolidation was intended to benefit all of the remaining parties by avoiding the duplicative discovery and repetitive hearing evidence that would have inevitably resulted from addressing each individual protestant and protest separately. Once NACGUA and its members executed the consolidation, it was both unfair and counter to the IRCP and IDWR Rules of Procedure to treat the individual members as parties without affording them the protections given to parties by law.

In addition, NACGUA asserts that it was error for the Hearing Officer to hold in his December 1 Order that Josephine P. Beeman jointly represented both NACGUA and its individual members in the current proceeding. Although an attorney hired by, and appearing on behalf of, an association may represent the interests of the individual members through her representation of the association, she does not, as a matter of law, also represent the individual members. The individual members of NACGUA did not hire Ms. Beeman, nor did she appear on their behalf. Furthermore, it was error for the Hearing Officer to hold in the December 1 Order that no conflicts existed to prevent Ms. Beeman from jointly representing NACGUA and its individual members.

For all the foregoing reasons, NACGUA respectfully requests that the Hearing Officer rescind, alter, or amend his December 1 Order.

B. The individual members of NACGUA ceased to be parties and became "public witnesses" when each member waived his or her rights to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.

It is counter to IDWR's Rules of Procedure to treat NACGUA's individual members as parties to the current contested case because the members' status as parties was effectively extinguished when, pursuant to the Prehearing Order and Notice of Prehearing Conference, each member waived his or her rights to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.[27] By surrendering these rights, the individual members of NACGUA ceased to be parties as defined by the IDWR Rules of Procedure and became instead "public witnesses."

Persons who oppose an application or claim and who have a statutory right to contest the right, license, award or authority sought by an applicant are called "protestants,"[28] and are generally considered parties.[29] All parties to a proceeding have a right of discovery of all other parties to a proceeding.[30] All parties may appear at hearing or argument, introduce evidence, examine witnesses, make and argue motions, state positions, and otherwise fully participate in hearings or arguments.[31] Any party aggrieved by a final order of an agency in a contested case may appeal to the district court.[32] Persons not parties and not called by a party who testify at hearing are called "public witnesses."[33] Public witnesses do not have parties' rights to examine

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[27] Prehearing Order and Notice of Prehearing Conference at 2, *supra* note 3 (ordering the protestants who wished to join NACFA and appoint David Head as his or her spokesperson to first sign a document stating that the person's individual protest would be subsumed into NACFA's protest and that by designating David Head as spokesperson, the individual protestant waived the right to independently participate in discovery, etc.).

[28] IDWR Rule of Procedure 155 (entitled "Protestants).

[29] IDWR Rule of Procedure 158 (entitled "Persons Not Parties").

[30] IDWR Rule of Procedure 522 (entitled "Rights to Discovery Reciprocal").

[31] IDWR Rule of Procedure 157 (entitled "Rights of Parties and of Agency Staff").

[32] IDWR Rule of Procedure 790 (entitled "Persons Who May Appeal").

[33] IDWR Rule of Procedure 355 (entitled "Public Witnesses").

witnesses or otherwise participate in the proceedings as parties.[34] Persons not parties who have an interest in a proceeding are called "interested persons." Interested persons may participate in a proceeding as "public witnesses."[35]

The individual members of NACGUA, whose protests were subsumed into the NACGUA protest, were ordered to waive their rights to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.[36] Whether the result was intended or not,[37] the order commanding the individual protestants to forfeit these rights as a condition of consolidation effectively transformed the individual protestants from "parties" into "public witnesses" because the order stripped the individual protestants of important protections given to parties by law under the IDWR Rules. Indeed, the ordering language of the Order to Consolidate Parties seems to make the point clear when it states that "the individual protestants shall have the right to appear at the hearing and testify as public witnesses."[38]

It is appropriate for the individual members of NACGUA to be considered public witnesses despite the fact that the members began the proceedings as individual protestants and may be called to testify at the hearing by a party. IDWR Rule of Procedure 355 defines public witnesses as "persons not parties and not called by a party who testify at hearing;" however, the Rule goes on to say that "[p]ublic witnesses do not have parties' rights to examine witnesses or

[34] *Id.*

[35] IDWR R. of Proc. 158.

[36] Order to Consolidate Parties and Default Order at 2.

[37] However, in view of the fact that consolidation was aimed at reducing the number of active parties in the litigation, and because the Hearing Officer assumed that the individual protestants' independent participation in the hearing would be duplicative and generate repetitive evidence, it seems clear the effect was contemplated, if not specifically intended.

[38] Order to Consolidate Parties at 2, ¶s 6 & 7.

otherwise participate in the proceedings as parties." In this case, the individual members of NACGUA may be called by a party to testify at hearing[39] but they do not have parties' rights to examine witnesses or otherwise participate in the proceedings as parties.[40] Therefore, after weighing the equities, it is more fair to treat the individual members of NACGUA as public witnesses despite the fact that they may be called to testify by a party, instead of treating the individual members as parties without affording them the protections given to parties under the IDWR Rules.

For all the foregoing reasons, NACGUA respectfully petitions the Hearing Officer to reconsider his December 1 Order and find that the individual members of NACGUA ceased to be parties to the current contested case when their protests were subsumed into NACGUA's protest.

a. The parties' interests in efficiency and fair play are best served by treating the individual members of NACGUA as "public witnesses" instead of parties because treating the individual members of NACGUA as "public witnesses" is consistent with the IDWR Rules of Procedure and does not impede the Applicant's good faith efforts to conduct ordinary discovery.

The Applicant's ability to conduct normal discovery and defend its application is not thwarted by treating NACGUA's members as public witnesses instead of parties.[41] Contrary to

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[39] *See* NACGUA's Responses to Applicant M3 Eagle's First Discovery at 14 (Nov. 10, 2008)(entered into the record at page 15 of Exhibit B in Affidavit of Michael P. Lawrence in Support of Motion to Compel (Nov. 24, 2008))("NACGUA reserves the right to call any of the members of NACGUA as lay witnesses who will present testimony on their diversion and use of water..."); *see also* M3 Eagle's Responses to NACGUA's Interrogatories at 6-7 (Nov. 24, 2008)(entered into the record at pages 1-2 of Exhibit B in Affidavit of Jeffrey C. Fereday in Support of M3 Eagle's Response to NACGUA's 30(b)(6) Motion (Nov. 28, 2008))("M3 Eagle anticipates calling...each NACGUA member").

[40] Order to Consolidate Parties, *supra* note 5; IDWR R. of Proc. 522; IDWR R. of Proc. 157; IDWR R. of Proc. 790.

[41] This is contrary to M3 Eagle's assertion in its Motion for Order Compelling Parties to Attend Scheduled Depositions at 5 (stating that "[i]n agreeing to the individual Protestants banding together under spokespeople and for purposes of service of documents, M3 Eagle did not agree to the creation of a structure that would thwart its efforts to conduct ordinary discovery or develop evidence for presentation at the hearing"); *see also*, M3 Eagle's Response to NACGUA's Motion to Designate 30(b)(6) Deponents at 7 ("forming an association... should not be allowed to thwart M3 Eagle's legitimate efforts to determine facts with which to defend against the protests").

the Applicant's frequent and unfounded accusations, NACGUA has at no time sought to shield, block, or protect its members from being deposed by the Applicant.[42] Rather, NACGUA has merely sought to ensure that the Applicant conducted its discovery lawfully pursuant to the applicable Rules of Procedure.[43]

As stated previously, consolidation was intended to serve the parties' interest in efficiency by avoiding duplicative discovery and repetitive hearing evidence.[44] Neither the Applicant nor the Hearing Officer contemplated that the individual members of NACGUA would participate in discovery after consolidation; in fact, the Hearing Officer's orders expressly denied NACGUA's members the right to independently participate in discovery.[45] Treating NACGUA's members as public witnesses instead of parties is consistent with the Hearing Officer's orders and the IDWR Rules of Procedure because public witnesses, unlike parties, do not have a right of discovery or the right to examine witnesses.[46] This does not mean, however, that the members of NACGUA, as public witnesses, would be immune from depositions or other discovery related requests.

On the contrary, if, in spite of the risk of generating repetitive evidence, the Applicant decided to depose or request information from individual members, the Applicant could do so simply by issuing its requests with subpoenas.[47] The most pertinent information to the

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[42] M3 Eagle levied many such accusations at NACGUA, *see, e.g.*, M3 Eagle's Response to NACGUA's Motion to Designate 30(b)(6) Deponents at 2 ("[t]the Deposition Motion is of a piece with previous efforts of NACGUA's counsel over the last week to block depositions").

[43] [insert reference to NACGUA's Continuing Objection or similar source here]

[44] *See* note 3, *supra*.

[45] *Id.*; Order to Consolidate Parties at 2, *supra* note 5.

[46] IDWR R. of Proc. 522; IDWR R. of Proc. 157; IDWR R. of Proc. 790.

[47] As provided for in the IRCP, see section C, *infra*.

Applicant's defense, however, would be available without a subpoena through discovery of NACGUA (to the extent that the members' protests were based on similar allegations of an insufficient water supply) because the individual members' protests were subsumed into NACGUA's protest. Therefore, it is more consistent with the intent of the consolidation, i.e., avoiding duplicative discovery, and the IDWR Rules of Procedure to treat NACGUA's members as public witnesses instead of parties, and doing so would not thwart the Applicant's legitimate efforts to determine facts.

b. The protests of the individual members of NACGUA ceased to exist independently and separate from NACGUA's protest when the individual members' protests were subsumed into NACGUA's protest; therefore, an individual member's protest could not be dismissed after it had been subsumed into NACGUA's protest.

C. Deposition notices without subpoenas were not sufficient to require the attendance of NACGUA's members at depositions because the deposition notices were not directed to the individual members in a representative capacity.

It was counter to the IRCP for the Hearing Officer to hold that a notice of deposition, without a subpoena, was sufficient to require the attendance of NACGUA's members at depositions.[48] The Applicant did not follow either of the two methods provided for deposing an organization under the Idaho Rules of Civil Procedure. As a result, NACGUA was not required to produce the individual members of its organization for depositions without subpoenas, nor should the individual members' deposition testimony be attributed to NACGUA.

[48] *See* December 1 Order at 2.

Contrary to the Applicant's assertion, the fact that the individual members of NACGUA formed an association to represent them did change the applicable discovery rules[49] because NACGUA took the place of the individual members as parties to the contested case.[50] As it is not possible to literally depose an organization[51], information sought from an organizational entity must be obtained from natural persons who can speak for the organization.[52] There are two proper ways to take the deposition of a corporation, association, or other organizational entity according to the Idaho Rules of Civil Procedure. The first method is provided for in IRCP 30(b)(6).[53] According to this method, the party seeking discovery may simply name the organization as the deponent in the notice.[54] The organization then has an affirmative duty to name one or more persons who consent to testify on the organization's behalf and the designated

[49] *See* M3 Eagle's Response to NACGUA's Motion to Designate 30(b)(6) Deponents at 7 (Nov. 28, 2008)("forming an association does not change the discovery rules or the scope of M3 Eagle's discovery...").

[50] *See* discussion of this point in section B, *supra*.

[51] Although much of the literature and case law cited in the following discussion refers specifically to corporations, it applies equally to an association such as NACGUA. *See* Prehearing Order and Notice of Prehearing Conference at 1 (Aug. 5, 2008)("Chapter 7, Title 53 of the Idaho Code recognizes nonprofit associations as legal entities having many of the same authorities and privileges as a corporation. ... While Rule 202 does not expressly state that an association can be represented by an officer, allowing representation by an officer of a corporation and excluding representation by an officer of an association would be inconsistent treatment of somewhat similar organizations. According to Rule 202, an officer of an association may represent the association.")

[52] 8A Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2103 (hereinafter 8A *FPP Civ. 2d* § 2103).

[53] IRCP 30(b)(6):

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) of this rule does not preclude taking a deposition by any other procedure authorized in these rules.

[54] *Id.*; 8A *FPP Civ. 2d* § 2103 ("[I]f the corporation or other organization is a party to the lawsuit...[t]he notice alone is enough to compel the corporation to comply.").

person(s) must testify as to matters known or reasonably available to the corporation or organization.[55]

If a party, chooses not to use the procedure provided for in Rule 30(b)(6), he or she may still obtain information from an organizational party by taking the deposition of a specific individual associated with the corporation or organization under Rule 30(b)(1), which sets out the general notice requirements for oral depositions.[56] In order to ensure that the testimony will be attributed to the organizational entity, however, the named deponent must be an officer, director, or managing agent, and the notice should indicate that the person named is expected to testify on behalf of the organization.[57] In other words, a party who wishes to take the deposition of a specific officer or agent of a corporation is not required to allow the corporation or organization to decide for itself whose testimony the other party may have.[58] However, there is a critical distinction between a mere corporate employee (or member of an association), and a person who may be regarded as speaking for the corporation or organization.[59] According to Wright & Miller,

> "Except where the employee has been designated by the corporation under Rule 30(b)(6), an employee is treated in the same way as any other witness. His or her presence must be obtained by subpoena rather than by notice, sanctions cannot be imposed against the corporation if he or she fails to appear, and the deposition is not considered to be that of the

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[55] 8A *FPP Civ. 2d* § 2103.

[56] IRCP 30(b)(6)(subdivision (b)(6) of this rule does not preclude taking a deposition by any other procedure authorized in these rules); 7 *Moore's Federal Practice* § 30.20, §30.25 (Matthew Bender 3d ed.); *Operative Plasterer's & Cement Masons' Int'l Ass'n v. Benjamin*, 144 F.R.D. 87, 90 (N.D. Ind. 1992)(Each deposition notice should clearly indicate that the deposition is being taken of the organization through the named official or representative.); 8A *FPP Civ. 2d* § 2103.

[57] 7 *Moore's Federal Practice* § 30.20.

[58] *See* Advisory Committee Note to the 1970 amendment to Rule 30(b)(6)("This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed.").

[59] 8A *FPP Civ. 2d* § 2103 (citing *Cleveland v. Palmby*, 75 F.R.D. 654, 656 (W.D. Okla. 1977)("A distinction must be drawn between a mere corporate employee and those who may be regarded as speaking for the corporation.").

> corporation and is usable only under the same circumstances as that of any other nonparty witness.[60]

Thus, an individual designated by the procedure set out in Rule 30(b)(6) is treated as a corporate party under Rule 37(d), but the other employees or members of the organization are treated as non-parties for the purposes of depositions.[61] Because a Rule 30(b)(6) designee testifies on behalf of the organization, the designee's testimony is binding on the organization (although the testimony of a Rule 30(b)(6) deponent does not absolutely bind the organization in the sense of a judicial admission, but is only evidence that can be contradicted and used for impeachment like any other deposition testimony).[62]

If, however, a listed deponent is not an officer, director, or managing agent capable of speaking for the organization under 30(b)(6), his or her testimony cannot be attributed to the corporation or organization that is a party.[63] If the listed deponent is neither an officer nor a party to the litigation, the deponent's presence can only be secured by a subpoena.[64]

At this point in the litigation, M3 Eagle has not provided a notice of deposition to NACGUA, so the 30(b)(6) designation procedure was not initiated. In fact, M3 Eagle has only issued notices of deposition to the members of NACGUA in their individual capacities, without

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[60] *Id.*; *see also Cleveland v. Palmby*, 75 F.R.D. at 656.

[61] *Id.*; *see also W.R. Grace & Co. v. Pullman Inc.*, 74 F.R.D. 80, 83 (W.D. Okla. 1977)("An individual designated by a corporate party pursuant to Rule 30(b)(6) is treated as a corporate party in Rule 37(d). Other corporate representatives or employees are treated as non-parties for the purposes of depositions.").

[62] 7 *Moore's Federal Practice* § 30.25; *see also* IRCP 32(a)(2)(which allows the introduction into evidence by an adverse party the deposition of "anyone who at the time of taking of the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association").

[63] 7 *Moore's Federal Practice* § 30.25 (citing FRCP 32(a)(2)("The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.").

[64] 8A *FPP Civ. 2d* § 2103, § 2106; *see also Cleveland v. Palmby*, 75 F.R.D. 654, 656 (W.D. Okla. 1977)(Where a deponent is not a party to the action, he can be compelled to appear at a deposition only by issuance of a subpoena.).

indicating that any deponent was expected to testify in a representative capacity.[65] Therefore, if the individual members of NACGUA are indeed not parties to the contested case because they surrendered their rights as parties during the consolidation process, it was error for the Hearing Officer to hold that deposition notices were sufficient to require the members' presence at depositions.[66] For the same reasons, it was also counter to the IRCP[67] for the Hearing Officer to state that non-attendance and issuance of a subpoena would be grounds for dismissal of a member's individual protest.[68]

D. The October 7, 2008 Order to Consolidate Parties did not and could not, as a matter of law, mandate that Josephine P. Beeman represented the individual members of NACGUA in addition to NACGUA.

A concurrent conflict of interest would exist if Ms. Beeman were to represent NACGUA as well as its members because there is a significant risk that Ms. Beeman's representation of the individual members would be materially limited by her responsibilities to NACGUA and vice versa. Because NACGUA and its individual members neither contemplated nor consented to common representation under Ms. Beeman, such a common representation would be in violation of the Idaho Rules of Professional Conduct.

According to the Idaho Rules of Professional Conduct, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.[69] A concurrent conflict of

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[65] *See, e.g.*, Notice of Deposition of Anne Ritter, *In the Matter of Application for Permit No. 63-32573, in the Name of M-3 Eagle LLC* (November 12, 2008); *see also* M3 Eagle's Motion to Compel Discovery Responses, Memorandum in Support, and Request for Sanctions at 5 ("[w]ith the exception of each individual's deposition notice, M3 Eagle has not been serving documents on the individual Protestants associated with NACGUA...").

[66] *See* December 1 Order at 2.

[67] See 8A *FPP Civ. 2d* § 2103, *supra* note 60 ("[e]xcept where the employee has been designated by the corporation under Rule 30(b)(6),... sanctions cannot be imposed against the corporation if he or she fails to appear").

[68] *See* December 1 Order at 2.

[69] Idaho R. of Prof'l Conduct R. 1.7(a) (Conflict of Interest: Current Clients).

interest exists when there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.[70] Notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if, among other things, the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, and each affected client gives informed consent in writing.[71] The critical questions involved in determining whether or not disclosure and consent is required are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[72]

In this contested case, the Hearing Officer's December 1st Order found there was "no apparent conflict" for Ms. Beeman to represent NACGUA and each of its individual members.[73] This finding does not address the significant risk that Ms. Beeman's representation of the individual members would be materially limited by her responsibilities to NACGUA (and vice versa) because the individual members of NACGUA are bound by the group's decisions regarding the litigation and do not have the right to administratively or judicially appeal any decision by IDWR.[74] In other words, if an individual member were to disagree with the way NACGUA decided to conduct the litigation, that member would nonetheless be bound by

[70] Idaho R. of Prof'l Conduct R. 1.7(a)(2).

[71] Idaho R. of Prof'l Conduct R. 1.7(b).
[72] Idaho R. of Prof'l Conduct R. 1.7 cmt. 8.

[73] December 1 Order at 2 ("there is no apparent conflict in the contested case between the association and the individual member protestants").

[74] Order to Consolidate Parties at 2, supra note 6; *see also* M3 Eagle's Response to NACGUA's Motion to Designate 30(b)(6) Deponents at 7, *In re Application No. 63-32573* (Nov. 28, 2008)(The Hearing Officer's orders confirm that... the individual member Protestants [are] bound by the group's decisions.).

NACGUA's decisions and would have no individual recourse at IDWR or in the District Court. The individual member could conceivably request advice from Ms. Beeman, but the individual member could not be assured of Ms. Beeman's loyalty if Ms. Beeman also represented NACGUA's interests.

Indeed, there is a high likelihood that differences in interests will eventuate due to the ongoing settlement negotiations between NACGUA and M3 Eagle.[75] To illustrate, NACGUA has the power to negotiate a settlement with M3 Eagle despite the objections of one of the individual members who wishes to continue litigation, and who may have differing interests than the organization. It is unreasonable to believe that Ms. Beeman could remain impartial and competently and diligently represent both NACGUA and a dissenting member in such a case.

Therefore, because Ms. Beeman does not believe that she would be able to provide competent and diligent representation to each affected client were a conflict to occur, and because the affected clients have patently not consented to the inherent conflict,[76] it would be improper and a violation of the Idaho Rules of Professional Conduct for Ms. Beeman to act as counsel for both NACGUA and the individual members at the same time.[77] If a conflict were to arise during Ms. Beeman's common representation of both NACGUA and its members, Ms. Beeman would likely be forced to withdraw from representing all of the clients.[78] Such a

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[75] *See* Idaho R. of Prof'l Conduct R. 1.7 cmt. 29 (In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.)

[76] No individual members consented to the inherent conflict. Furthermore, the Engagement letter drafted between NACGUA and Ms. Beeman specifically provided that Ms. Beeman was not to serve as the counsel for the individual members.

[77] Idaho R. of Prof'l Conduct 7.1 cmt. 29 (because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained).

[78] *Id.* (Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.).

withdrawal would result in additional cost, delay, and recrimination for all persons involved, including the Applicant.[79]

For all the foregoing reasons, NACGUA respectfully petitions the Hearing Officer to reconsider his December 1st Order and find that Ms. Beeman does not and cannot serve as counsel for the individual members of NACGUA.

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.[80]

Due to the contradictory and ambiguous language used to describe the members of NACGUA and their status with respect to the litigation, there has been much confusion as to whether or not the individual members are properly parties in the matter before the court.

Even if the individual members of NACGUA had agreed to be represented by Ms. Beeman, the representation would not be permitted under Rule 1.7, which permits the representation only if the lawyer reasonably believed his or her relationship to the individual member would not be adversely affected, and the member and the client organization each consented after consultation.[81]

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[79] *Id.* (In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination.).

[80] Idaho R. of Prof'l Conduct R. 1.13 (entitled "Organization as Client").

[81] ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 92-365 (1992)(dicussing trade associations as clients).

DATED this 8th day of April 2009.

By _____/s/_____
David J.Head

By_____/s/_____
John L. Thornton

CERTIFICATE OF SERVICE

I certify that on this 8th day of April 2009, I caused to be served a true and correct copy of the foregoing document on the following by the method indicated.

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