

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
TO APPROPRIATE WATER NO.) **ORDER DENYING NACGUA'S RULE 711**
63-32573 IN THE NAME OF) **PETITION FOR REVIEW OF DECEMBER 1,**
M-3 EAGLE) **2008 INTERLOCUTORY ORDER**
_____)

On April 8, 2009, North Ada County Groundwater Users Association ("NACGUA") filed *NACGUA's Rule 711 Petition for Review of December 1, 2008 Interlocutory Order* ("petition for review"). The petition for review seeks an order containing the following or similar language:

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.

Myriad protests were filed against application no. 63-32573. David Head filed one protest naming himself and the North Ada County Foothills Association as the protestant. David Head was the chairman of the North Ada County Foothills Association. Most of the protests stated that David Head of the North Ada County Foothills Association or John Thornton to be the "agent" for the protestant.

On August 5, 2008, the hearing officer issued a prehearing order and scheduled a prehearing conference for September 9, 2008. At the time of issuance of the prehearing order, none of the parties were represented by counsel.

The hearing officer believes there is a legitimate legal question about whether an officer of an organization can “represent” the organization or other individual protestants. Consequently, the prehearing order established a process whereby a spokesperson could speak on behalf of other protestants.

At the September 9, 2008 prehearing conference, none of the protestants were represented by counsel. David Head, as the chairman of the North Ada County Foothills Association, agreed to be the spokesperson for some of the individual protestants and for the North Ada County Foothills Association. Many of the protestants did not want to appear at every stage of the contested matter and agreed to designate David Head as a spokesperson for them.

On September 12, 2008, the hearing officer issued an *Order Authorizing Discovery and Scheduling Order*. On the subject of party appearance and representation, the order stated the following:

. . . [A] party desiring to appoint a spokesperson as a representative in this contested case must file with the Department a document notifying the Department and the parties of the spokesperson designation. Consistent with an earlier prehearing order, dated August 5, 2008, the document must identify the spokesperson, and expressly state that “the individual protest is subsumed into the” spokesperson’s protest, and that, “by designating . . . a spokesperson, the individual protestant waives the right to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.”

. . . [A]ny protestant who did not attend the prehearing conference on September 9, 2008, and does not designate a spokesperson on or before September 16, 2008 will be served with a Notice of Pending Default Order.

The North Ada County Foothills Association assigned its protest to the North Ada county Groundwater Users Association.

On or before September 16, 2008, 35-40 protestants each signed a document stating that the “officers of the North Ada County Groundwater Users Association may represent me during all the proceedings,” the “individual protest will be subsumed into the protest of the North Ada County Groundwater Users Association,” and that the protestant waived the “right to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR.”

On October 2, 2008, Josephine Beeman, attorney at law, filed a Notice of Appearance for the North Ada County Foothills Association and the North Ada County Groundwater Users Association.

On October 7, 2008, the hearing officer issued an *Order to Consolidate Parties and Default Order*. The order state:

. . . [t]he individual protests of the protestants listed in paragraph 1 are subsumed into the protest of the North Ada County Groundwater Users Association, and Josephine Beeman shall represent the interest of these protestants as attorney for the association.

On December 1, 2008, the hearing officer issued an order requiring the individual protestants to attend depositions after receiving reasonable written notice of deposition, and confirming Beeman's representation of the association and the individual protestants who agreed to have the association be their spokesperson.

On January 27, 2009, Josephine Beeman withdrew as counsel for NACGUA.

NACGUA asserts the hearing officer's December 1, 2008 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 without any convincing argument that non-adherence to rules has caused prejudicial exposure. Whether a subpoena was issued or a notice of deposition, attendance would have been required. The notice process allowed for greater flexibility.

NACGUA also 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." Josephine P. Beeman withdrew as counsel for NACGUA. The question of her dual representation, even if the hearing officer was inclined to reconsider the issue, is not relevant because she is no longer representing the association.

ORDER

IT IS HEREBY ORDERED that *NACGUA's Rule 711 Petition for Review of December 1, 2008 Interlocutory Order* is **Denied**.

Dated this 15th day of April, 2009.



GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2009, a true and correct copy of the above and foregoing document described below was served on the following by hand delivery to the following:

Document(s) Served: **ORDER GRANTING MOTION FOR STAY, ORDER DENYING ALL MOTIONS TO COMPEL AND MOTIONS FOR SANCTIONS, AND ORDER REINSTATING PARTY**

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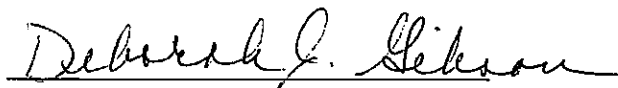
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I FURTHER CERTIFY that on this 16th day of April, 2009, a true and correct copy of the above referenced document described above was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

BILL LAWTON
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Deborah J. Gibson
Administrative Assistant
Water Management Division