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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS TO APPROPRIATE WATER NOS. 63-32089 AND 63-32090 IN THE NAME OF THE CITY OF EAGLE	PROTESTANT MOYLE'S BRIEF IN REPLY TO CITY OF EAGLE'S BRIEF PURSUANT TO IDWR ORDER DATED MARCH 25, 2008

COMES NOW Protestants Joseph, Lynn and Michael Moyle (hereinafter "Moyle"), by and through their counsel of record, Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, and hereby submit this Brief in reply to the Applicant City of Eagle's (hereinafter "City" or "Eagle") Brief filed on April 18, 2008 in the above-captioned matter. This Brief is supported by the record herein.

ARGUMENT

The City makes two arguments in its most recent brief: first, the City argues that its "intent" was to always appropriate 8.91 cfs of groundwater for Municipal purposes, and that somehow, the City's "intent" should trump the evidence at trial establishing that it was planning to use 6.68 cfs of

the total 8.91 cfs sought for Fire Protection purposes. Second, the City makes a preemptive strike at the issue of the application of the Groundwater Act's "reasonable pumping levels" to water rights appropriated before its enactment by arguing that Idaho law does not protect artesian pressures of any cold water right to any extent. The first of these arguments contradicts the facts that the City presented at the hearing of this case, and the second clearly deviates from Idaho law. They both should be rejected by the Director.

I. The City's Permit Must be Limited to the Purposes for Which it Will be Used

In its Findings of Fact the *Final Order* finds that the "applications propose delivery of water" for 2,000 homes in a construction project, that the "peak one-hour demand for in-house use in 2,000 residential units is 2.23 cfs" and that 6.68 cfs of the projected 8.9cfs total instantaneous demand sought by the City is for fire protection purposes. *Final Order*, p. 17, ¶11. Thus, the 8.9 cfs total sought under the permit applications was approved based on the fact that 6.68 cfs is required for fire protection. The necessity for limiting the permit to its actual proposed use is obvious: without such limitation, the "municipal" purposes for which the water right is sought may permit the entire quantity to be used on a year-round basis for "residential, commercial, industrial, irrigation of parks and open space, and related purposes." *See* I.C. §42-202B(6). As "fire protection" use of a water only occurs either during a fire, or while filling a water storage facility to be used for "fire protection" purposes, the potential for abuse and overuse of the permitted water right for other purposes under the "municipal" label is great without such limiting language.

Eagle's argument appears to be premised upon the fact that it never "intended" to seek 6.68 cfs of the water right for fire protection purposes, and that it always "clearly intended" to seek the

entire 8.9 cfs for municipal purposes. Unfortunately for the City, the record in this case is very clear that, in fact, it was seeking 6.68 cfs for fire protection purposes and that without the "fire protection" water, it was only seeking 2.23 cfs to serve its residents with a municipal flow. Accordingly, the Director properly limited the City's permit to the purposes shown at hearing to be those for which the water right is to be appropriated. There is simply no factual or legal basis for reversing that decision. The City's "intent", without any legal argument as to why that intent should matter, is likewise no basis for a reversal.

II. Reasonable Pumping Levels are Not Applicable to Pre-1953 Groundwater Rights

The City argues that "artesian pressure is not a protected element of a water right" and that therefore, "there can be no injury" to a water right as a result of a reduction in pressures. On its face, this is simply a ridiculous argument. Taking the argument to its logical conclusion, the City is stating that even if pressure levels dropped far below the bottom of a deep well from which the water rights are diverted, those water rights cannot sustain an injury. This makes no sense whatsoever under any understanding of Idaho law.

Beyond the ridiculous nature of the argument however, the City makes exactly the same error as does IDWR in its Final Order. That is, the City completely fails to address the language of I.C. §42-226 providing as follows:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as

herein provided. . . . *This act shall not affect the rights to the use of ground water in this state acquired before its enactment.* (Emphasis added).

Instead, the City moves directly into a legislative history analysis by citing various statements by staff and members of the public related to artesian pressures of low-temperature geothermal water rights. The City then points out that I.C. §42-226 was amended to provide for protection of artesian pressures for low-temperature geothermal rights. However, the City completely fails to address the inapplicability of the statute to pre-enactment water rights. In fact, the argument made by the City is completely consistent with the application of reasonable pumping levels prospectively - that is after enactment of the Ground Water Act. The statute simply provides that the Director is now authorized to impose reasonable pumping levels on low-temperature geothermal rights that, in his discretion, protect the public interest. The statute simply cannot be twisted and changed as the City desires, to mean that reasonable pumping levels can be imposed on all cold water rights.

The simple fact is that the language of the statute says what it says: that it is not impact ground water rights "acquired before its enactment." As discussed in Moyle's prior briefing, Idaho law confirms this statutory directive. *See Musser v. Higginson*, 125 Idaho 392, 396 (1994). Moreover, the City's twisted statutory interpretation analysis (if that is what it is) fails to follow the rules of interpretation and construction set forth by the Idaho Supreme Court. Statutory interpretation starts with the plain meaning of the statute. *State v. United States*, 134 Idaho 940, 944 (2000). If the statutory language is clear and unambiguous, courts should apply the statute without engaging in any statutory interpretation. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732 (1997). Unless the result is palpably absurd, a court must assume that the legislature meant what is clearly stated in the statute. *In re Permit No. 36-7200*, 121 Idaho 819, 822, 828 (1992). If the

language of I.C. §42-226 is analyzed as provided by the Supreme Court, the result sought by the City (and set forth by the Director) is impossible.

CONCLUSION

The City's arguments regarding the "fire protection" limitation imposed by the Director on its permit carry no weight whatsoever given the evidence presented by the City at hearing. There is simply no evidence with which the Director can find, as the City desires, that the entire 8.9 cfs will be used for "municipal" purposes. The City's arguments regarding reasonable pumping limitations on Moyle's wells carry the problem that they do not comport with the statutory directive already provided by the Supreme Court, and do not comport with the direction regarding statutory interpretation given by the Supreme Court. Accordingly, both arguments should be rejected, and the Director should issue a decision confirming that 6.68 cfs of the permit is for "fire protection" purposes, and holding that Moyle's pre-Ground Water Act water rights are not subject to that Act's reasonable pumping level limitations.

Respectfully submitted this 2nd day of May, 2008.

RINGERT CLARK CHARTERED

By _____
Charles L. Honsinger
Attorneys for Protestants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2008, the above and foregoing document 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:

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