Kathy Grotto

From: James Speck <jim@speckandaanestad.com>
Sent: Monday, August 9, 2021 5:40 PM
To: Tim Graves
Cc: Jonathan Neeley; John Gaeddert; Charles G. Brockway (charles.g.brockway@brockwayeng.com); Kathy Grotto
Subject: Re: Lateral 75 Ranch Subdivision
Attachments: Elgee decision.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Tim,

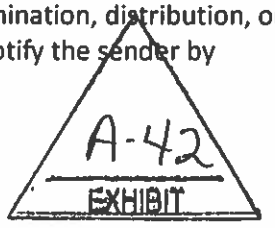
I represent Flying Squirrel Productions LLC, the applicant for this Subdivision. The planning office is proposing to make the following proposal to the County Commissioners:

"The Board may wish to consider additional measures associated with irrigation of the property (in addition to those provisions recommended by the Commission), including whether the applicant should be required to utilize the existing water rights -- which allow up to 57.4 acres of irrigation -- for all of the lots, rather than utilizing [additional] domestic rights."

Judge Elgee in 2008 ruled that the County did not have the authority to require an Eagle Creek landowner to fill in ponds that were used to store water for irrigation under another exemption from getting a specific water right, i.e. the right to store water in a pond does NOT require a license or decree as long as it is sized to hold only the volume of water produced by the 24 hour flow of the irrigation water right. The County was "preempted" from imposing this requirement on a water right. The same applies to this case - the County is preempted from preventing the new lot owners from using their wells to irrigate up to 1/2A, a key element of the domestic water right under Idaho Code 42-111(a). A copy of this decision is attached. Please let me know right away if you disagree with my analysis.

Jim

James P. Speck
SPECK & AANESTAD
A Professional Corporation
120 East Avenue North
P.O. Box 987
Ketchum, ID 83340
208.726.4421
208.726.0752 (fax)
jim@speckandaanestad.com



IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR BLAINE COUNTY

EAGLE CREEK PARTNERS, LLC, a Washington Limited Liability Corporation, Petitioner, vs. BLAINE COUNTY, a political subdivision of the State of Idaho, Respondent	Case No.: CR-2007-670 DECISION ON JUDICIAL REVIEW

PROCEDURAL HISTORY

The above-entitled matter came before this Court on March 26, 2008 as an appeal filed by Petitioner Eagle Creek Partners, (Eagle Creek) from a condition placed on an approved subdivision application by the Blaine County Board of County Commissioners. Present at the judicial review hearing were Fritz Haemmerle, who appeared on behalf of Eagle Creek, and Tim Graves, who appeared on behalf of Blaine County. Following oral argument on the matter, the Court took the case under advisement. The Court has thoroughly reviewed and considered the briefs and arguments submitted by both sides. For the reasons that follow the Court overturns the Blaine County Board of Commissioner's requirement that Eagle Creek comply with Condition 1 as a condition of approval of Eagle Creek's subdivision application.

FACTS

On July 13, 2006, Eagle Creek submitted a Short Plat Subdivision Application with the Blaine County Planning and Zoning Department. The property which Eagle Creek owns consists of 37.11 acres of real property located 6.5 miles north of the City of Ketchum. As part of its subdivision application, Eagle Creek sought to have the property developed into four residential lots and one common parcel ranging in size from 1.7 acres to 11.1 acres.

This property is located within the service area of the Eagle Creek Irrigation Company (Company) which is a mutual company that holds a water right to Eagle Creek (water right 37-863E recommended in the Snake River Basin Adjudication) with a priority date of October 6, 1902. The Company has individual members who share in the water right which is held in trust by the Company. The Company is the only entity with the right to divert and use the waters of Eagle Creek for distribution to its shareholders. There are no minimum stream flows for Eagle Creek.

Petitioner Eagle Creek owns 36 shares in the Company. This entitles them to about 1 c.f.s., which has historically been delivered to the property through an existing High Ditch where water has been diverted to gravity or flood irrigate the property. As part of the subdivision which Eagle Creek envisioned, the water use concept was that each lot would receive its proportionate share of the irrigation water and would operate individual diversions and distribution systems from the High Ditch. In preparation to carry out this concept, prior to the submission of the subdivision application, Eagle Creek began construction on five irrigation storage ponds. According to the Petitioner, the five irrigation ponds were necessary to gain a higher discharge for sprinkler irrigation systems on the property; without the ponds the resulting flow would be too low.

The ponds were approved by the Company, which required that Eagle Creek meet certain concerns regarding the installing and maintaining of diversion gates and water monitoring devices, the lining of ditches and ponds, and the construction of an overflow system to return overflow water to the High Ditch or the Creek. Subsequently, on April 18, 2007, the Company notified the County that the Company had reviewed the Preliminary Plat and determined that the irrigations ponds were built as proposed and that the Company approved the irrigation plan for the Property.

Importantly, the ponds were sized small enough so that a storage permit issued by Idaho Department of Water Resources ("IDWR") was not required. In making this administrative determination whether or not a storage permit is required, IDWR compares the size of the impoundment (the pond or reservoir) to the rate of diversion into the impoundment, to see whether the diverted water is "stored" in excess of 24 hours. If it is, it is treated as "stored water" and a permit from IDWR is required. In fact, IDWR reviewed the ponds and the irrigation plan and determined that the ponds were sized small enough to be considered part of the natural flow distribution system requiring no permit. This also negated any need to have the Army Corps of Engineers or the Idaho Department of Environmental Quality involved in the process.

Public hearings were held on Eagle Creek's subdivision application on April 10, May 1, May 22, and June 19, 2007 during which the main controversy surrounded the irrigation ponds. The County ultimately approved the subdivision application on the Condition that the "ponds and associated ditches shall be restored to natural grade prior to recordation of plat." (R., Folder 1 of 3, p. 69). Counsel agreed at oral argument this meant the ponds, which had already been put in place, were required to be filled in with dirt. Petitioner Eagle Creek challenges the authority of the County to impose this

condition in the first instance. Secondly, Eagle Creek asserts the imposition of Condition 1 is not supported by substantial evidence in the record. According to the Petitioner, the only evidence the County relied upon to require this condition were two separate letters which "raised concerns": one was from the Idaho Department of Fish and Game, and another was from the Forest Service, (Ketchum District Ranger Kurt Nelson).

The County noted that evidence was presented during the hearings that the water stored in the ponds would far exceed the water necessary to irrigate the proposed subdivision. The County also notes that the property is "once flat pasture land" that was historically watered using flood irrigation. In its Decision, the County determined the proposed ponds did not further the goals of the Comprehensive Plan in that they demonstrated no public benefit to the general community, would have a negative effect on wildlife, and did not preserve the natural features on the property as required by county ordinance. The County also concluded ..."that the proposed ponds, standing alone, are an inefficient design for delivering irrigation water to the proposed subdivision", that the current irrigation system would result in a wasteful design and that... "the Board is confident that the Applicant can design a more efficient delivery system and utilize the additional water saved for other purposes. Therefore as required by I.C. 31-3805(1)(b)(iii) the Board does not approve the irrigation delivery system..."

ISSUES PRESENTED

At oral argument the County characterized the issue before the Court as one of land use planning/planning and zoning, involving the County's power to review and approve subdivision applications, which necessarily involve the authority to ensure that new developments are designed so that water is incorporated efficiently within the development project. Conversely, Eagle Creek asserts that the County's actions directly

interfere with its vested water right and its ability to determine the manner in which it chooses to put its water right to a beneficial use. Eagle Creek maintains that, once diverted, it is up to the water user to determine the manner and method by which water will be distributed upon the land and applied to the ground, and that the County has no business trying to determine whether its application is efficient, or could be made more efficient. The County responds that, while that proposition might be true in general, once a subdivision application is sought, the County does have the authority to determine the most efficient water delivery system and require it for subdivision purposes. Thus the issues before this Court on judicial review necessarily implicate a clash between Idaho water law and the Local Land Use Planning Act ("LLUPA"). The Court will address the following issues on judicial review:

1.) Whether the County has authority to impose Condition No. 1?

2.) Whether the findings made by the County are supported by substantial competent evidence?

3.) Whether the action of the County denied Eagle Creek a substantial right?

4.) Whether Eagle Creek is entitled to attorney's fees and costs?

STANDARD OF REVIEW

The standard of review for a court's review of a county zoning decision is governed by the Idaho Administrative Procedures Act (IDAPA) and requires the following:

> The court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. Here, the Board is treated as an administrative agency for purposes of judicial review... The Court may overturn the Board's

> decision where the Board's findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in I.C. § 67-5279(3), and then that a substantial right has been prejudiced. If the Board's action is not affirmed, "it shall be set aside... and remanded for further proceedings as necessary."

Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (citations omitted).

ANALYSIS

1.) Whether the County has authority to impose Condition No. 1?

Eagle Creek contends that the County has no authority to impose Condition No 1 because: (1) it violates the Idaho Constitution and state water law statutes, (2) the Idaho Legislature has preempted the management of water in Idaho, and (3) Condition No. 1 violates Idaho Code § 67-6537. The County contends that in imposing Condition No. 1, it is following the mandates of the LLUPA contained in Idaho Code § 67-6502 by protecting environmental features, maintaining the physical characteristics of the land, protecting fish and wildlife, and avoiding undue water and air pollution. Additionally, the County asserts that Idaho Code § 31-3805 expressly requires that the County approve of a subdivision applicant's water delivery system, and that they are in no way violating § 67-6537 because they are not requiring Eagle Creek to use groundwater to irrigate; instead, they are asking them to come up with a better delivery plan for surface water delivery. The County also points to the Blaine County Comprehensive Plan as authority for imposing Condition No. 1.

The Idaho Constitution, states that "the right to divert and appropriate the un-appropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Art. XV, Sections 3 and 4. Further, Idaho Code § 42-101 declares all the waters of the state to be

the property of *the state*, "whose duty it shall be to supervise their appropriation and allotment. Idaho Code § 42-201(4)... "delegates to the department of water resources *exclusive authority* over the appropriation of the public surface and ground waters of the state. *No other* agency, department, ***county***, city, municipal corporation, or other instrumentality or political subdivision of the state *shall enact any rule or ordinance or take any other action to prohibit, restrict, or regulate the appropriation of the public surface or ground waters of this state, and any such action shall be null and void."* (Emphasis added)

Thus, the first question is whether the County's action, in requiring Condition 1, constitutes a restriction or regulation on Eagle Creek's appropriation. The Court concludes that it does. Although the County argues that they are not restricting Eagle Creek's *appropriation* (Eagle Creek may still divert all the water it is entitled to), but are only seeking to *manage the delivery of the water, or its application to the ground, in a more efficient manner*, this is a distinction without a difference. Once Eagle Creek (Petitioner) diverts water from Eagle Creek (the source), it is up to them, not the County, to determine how the water is applied to the ground, or is used upon the land. The water, after all, belongs to the user, not the County. Eagle Creek is entitled to use all the water it diverts, efficiently or not, so long as it is applied to a beneficial use. In fact, as any educated water user knows, as soon as its water is not applied to a beneficial use, the right ceases. *See* I.C. 42-104. Eagle Creek is compelled to make use of all the water it is entitled to divert, under pain of losing that water. Making a determination that Eagle Creek could come up with a more efficient system is no different than telling Eagle Creek it has too much water, or does not need the water it has, or there are other beneficial uses that the water should be applied to. While those things may all be true, without some

specific, express grant of authority from the state to make any such determination, *the County has no authority whatever to make that call.*[1] The Court concludes the state of Idaho has pre-empted this field and prohibited the counties from exercising their authority in this area.

The Court also concludes the County cannot measure or regulate *efficiency of water use;* only the state, the owner of the water right, or perhaps a downstream water user has such authority (e.g.-if claims of waste are established). The County claims it has both the ability and the authority to create excess water, or engage in a policy that creates excess water.[2] Although this is a worthy objective, the Court disagrees. Regulating or managing efficiency is measuring or restricting or regulating beneficial use and the process of applying water to its beneficial use-*a uniquely state function*. The County is barred by the state from such activity. Moreover, it is the water user's prerogative, not the County's, to determine whether excess water exists and/or what should be done with it. In short, it is an impermissible encroachment upon the state's exclusive authority to regulate water, and an impermissible encroachment upon Eagle Creek's water right, for the County to tell Eagle Creek they are free to *divert* all the water they are entitled to, but they may not *use* all of that water as they see fit, or they must use it more efficiently.

Blaine County recognizes they are prohibited *in general* from interfering with a water user's appropriation. However, the County points to Idaho Code § 31-3805(1)(b)(iii) as a specific grant of authority from the state enabling it, *even requiring it*,

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[1] Even if the County were allowed to determine the *efficiency* of Eagle Creek's water delivery system, a question would arise as to why the County's action in this regard would not constitute some sort of "taking" of Eagle Creek's water right. Forcing Eagle Creek to be more efficient with their water, in order to return more of their water to the stream, would seem to be a requirement imposed upon Eagle Creek for a public benefit.

[2] Again, the question of a "taking" arises.

to approve a subdivision applicant's water delivery system. In general terms, I.C. 31-3805 provides that for any subdivision proposed within the boundaries of an existing irrigation district...or like irrigation water delivery entity...no subdivision plat will be accepted or approved unless the person or entity filing the plat

> "has provided for underground tile or other like satisfactory underground conduit for lots of one(1) acre or less, *or a suitable system* for lots of more than one (1) acre which will deliver water to those landowners within the subdivision who are also within the irrigation entity, with the following appropriate approvals:
> (iii) For proposed subdivisions located outside an area of city impact in counties with a zoning ordinance, the delivery system must be approved by the appropriate county zoning authority, and the county commission, with the advice of the irrigation entity charged with the delivery of water to said lands."

Subsection (2)(a) of 31-3805 provides that if the above provisions are not complied with, the assessments of the irrigation district shall not be affected, but that the person offering such lots for sale shall advise the purchaser in writing prior to sale that suitable water deliveries have not been provided, and the purchaser is still obligated to pay the assessments, which are a lien upon the land.

Counsel for Eagle Creek characterizes this statute as a consumer protection statute, designed to insure a buyer of land in an irrigation district (under a proposed subdivision) either gets the water he is entitled to from the water provider, or receives notice that he is still liable for assessments for that water. The Court agrees with that characterization. This code section, particularly the portions of this section that provide a remedy in the event of non-compliance, cannot be read as a grant of authority to the County to approve or deny a subdivision application *based on the efficiency of its water delivery system.* While the County appears to be empowered to determine if the proposed

system *is suitable* to deliver the irrigation district's water to its owner or customer or shareholder, nothing in the statute gives the County absolute authority to regulate or design the irrigation district's proposed water delivery system. Instead, it appears the County can either determine the water system *is suitable* to deliver the water, or it is not. To be sure, the County must consult with the irrigation entity; however, if the County disapproves entirely of the proposed water delivery system (determines it is *not suitable)*, that puts an end to the County's inquiry. The statute does not go on to provide the County the authority to approve or deny the subdivision on that basis, or to require modifications acceptable to the County; rather, the statute requires the proposed seller advise prospective purchasers that they may not get all the water they might otherwise be entitled to, and that they might be paying for.

The Court concludes Idaho Code 31-3805 does not give Blaine County the authority to impose Condition 1.[3] In view of the Court's conclusion the County has no authority granted by state law to require Condition 1; the Court need not address arguments as to whether the Blaine County Comprehensive Plan provides the County with such authority. Without a specific grant of authority *from the state*, the County cannot claim authority to regulate or restrict water rights in any capacity.

2.) Whether the findings made by the County are supported by substantial competent evidence.

[3] One of the arguments raised by the County is whether an applicant is required to "leave the property alone" while an application is pending pursuant to BCC 10-4-1(F), or whether Eagle Creek's activity in changing its water application to or upon the ground constituted "unlawful site alteration". Eagle Creek's Reply Brief at pg. 3 suggests that at least two of the Commissioners acknowledged Eagle Creek could legally construct the ponds as part of the irrigation system if no application had been submitted, or if the Application had not included the ponds and instead constructed the ponds after approval of the subdivision. While the Court recognizes a conflict exists between this ordinance and a water user's ability to determine how to apply its water to ground, that issue is not before the Court for decision. The only issue raised by Eagle Creek in this judicial review proceeding is whether Condition 1could be required by the County.

Petitioner contends that the County did not rely on substantial competent evidence in imposing Condition No. 1. In support, Petitioner notes that it was the only party that submitted expert hydrological evidence to show that its proposed plan would deliver more water to downstream water users and decrease the number of water pollutants being discharged by Eagle Creek. Despite the above evidence, Petitioner asserts that the County only considered its own experience, and two letters "raising concerns" from the Idaho Department of Fish and Game and the Ketchum District Ranger.

The County contends that it relied upon the Blaine County Comprehensive Plan (and other sections of the Blaine County Code) which require, among other things, that developments protect the natural resources of Blaine County, including natural features, water quality and quantity, wildlife habitat, rivers, and streams. The County states that these provisions of the Blaine County Code, coupled with concerns raised by the Idaho Fish and Game, as well as the Board's own experience with pond-created wildlife conflicts in other areas is substantial and competent evidence to justify the Board's decision.

In view of the Court's determinations that the County cannot require Condition 1, it is unnecessary for the Court to weigh or consider whether the following particular determinations and findings by the County constitute substantial and competent evidence:

> Idaho Dept of Fish and Game's statement that the area is significant to wildlife and artificial ponds are an attractive nuisance to wildlife. (Eagle Creek asserts there is nothing in Fish and Game's letter on this topic.)
>
> Alleged Golden Eagle violations where wildlife was harassed by homeowners in violation of Idaho Code.

That being said, the Court can affirmatively state that some of the findings set forth in the County's brief **do not and cannot** rise to the level of substantial and

competent evidence. The Court makes these observations primarily for future guidance. The following particular determinations and findings, (taken from the County's brief at pg 19, or Eagle Creek's Reply Brief at pg 24-25, do not constitute evidence that could be relied upon by the County:

> The Idaho Fish and Game **raised concerns** whether the local hydrology is sufficient to support five ponds without impacting aquatic resources in Eagle Creek. Furthermore, the agency **raised concerns** regarding ponds changing the temperature and chemistry of the system, as well as fish entrapment, barriers to fish migration, and fish stocking.
>
> Both agencies (Fish and Game and Ketchum Ranger Kurt Nelson's letters) **stated concerns** about the negative impacts to the species (Wood River sculpin) as a result of this design feature (the ponds).

The fact that an interested party may raise concerns does not rise to the level of substantial and competent evidence. All it means is they have unresolved questions. Because such questions may exist, or may even remain unresolved, is no substitute for facts or answers to those questions. If answers are necessary, presumably they can be obtained, but an unresolved "concern" cannot be transformed into a finding or supposition that these concerns might be well founded or justified, and therefore can be relied upon or substituted for facts. "Concerns" are limitless, and constitute speculation.

One other observation appears in order. It is clear Blaine County is not empowered to restrict or regulate the quantity of Eagle Creek's lawful diversion of water onto its land. (Such is a state, not County function.) Consequently, it may well be, (as asserted by the water company), that at times it has the right and the ability to divert the whole of Eagle Creek to its beneficial use. Petitioner Eagle Creek also asserts there is no minimum stream flow for (the source) Eagle Creek. If those two things be true, it is questionable whether Blaine County (or, for that matter, Fish and Game, or the Forest

Service) have any ability whatever to question or raise concerns about the impacts of such diversion on wildlife, Wood River sculpin, aquifers, standing water, drowning hazards, etc. The right to divert and appropriate water in Idaho to its beneficial use appears almost sacred, and all else secondary.

Because the conclusions reached by the Court above make resolution of issues involving both the quantum and quality of evidence unnecessary, the Court will refrain from entering any orders in that regard.

3.) Whether the action of the County denied Eagle Creek a substantial right?

Petitioner contends that the County, in imposing Condition No. 1, denied it a substantial right to divert water in contravention of both the Idaho Constitution and Idaho Statutory law, which constitutes a constitutional taking. *See* Idaho Const. Art XV, §§ 3, 4, and 5; Idaho Code § 42-101. The County contends that there has been no taking because Eagle Creek still has its water right and that the imposition of Condition No. 1 merely requires that Eagle Creek utilize a more efficient design for delivering water to the proposed subdivision in a manner that preserves the natural condition of the land, protects fish and wildlife, and ensures environmental quality.

Although, as noted earlier, there might well be a "taking" if the County was allowed to regulate the efficiency of Eagle Creek's water system, the Court has determined the County lacks the authority to do so. This issue breaks down into more precise questions. First, if the County was successful in its attempt to "create excess water" would Eagle Creek be deprived of a substantial right? The Court determines that a forced deprivation of *any* of it allotted water right would deprive Eagle Creek of a substantial right. Second, if the County was successful in its effort to require Eagle Creek to abandon its ponds (thereby enabling the County to determine the most

"efficient" manner in which water should be applied to the ground), would Eagle Creek be deprived of a substantial right, *even if they were allowed to keep and use all their allotted water?* The Court determines the right of the water user to decide the manner and method by which water is applied to the ground is a substantial and valuable right.

4.) Whether Eagle Creek is entitled to attorney's fees and costs?

The Idaho Appellate Rules apply to the District Court when it sits as an appellate court to an administrative proceeding. *Eacret v. Bonner County* 139 Idaho 780, 788-9, 86 P.3d 494, 502,3 (2000). Idaho Appellate Rule 41(c) requires the appellate court in its decision on appeal to include its determination of a claimed right to attorney fees. Petitioner Eagle Creek has requested an award of fees in its first brief on appeal.

Petitioner contends that the County clearly exceeded its authority in imposing Condition No. 1 and that accordingly, Eagle Creek is entitled to its attorney's fees and costs under Idaho Code § 12-117 and IAR 41. Conversely, the County contends that in imposing Condition No. 1, it was making a land use decision, and it was properly acting under Idaho Code § 31-3505 which requires that the County approve subdivision applicants water delivery systems. This, the County contends, shows that the County was making a reasonable attempt to interpret the statues in question in asserting the authority to impose Condition No. 1.

The Idaho Supreme Court has stated that "where an agency has no authority to take a particular action, it acts without a reasonable basis in fact or law." *Fisher v. City of Ketchum,* 141 Idaho 349, 356 (2005)(citing to *Moosman v. Idaho Horse Racing Commission,* 117 Idaho 949, 954 (1990). However, if the agency's actions are based upon a reasonable, but erroneous interpretation of an ambiguous statute, then attorney's

fees should not be awarded. *Ralph Naylor Farms, LLC v. Latah County,* -- P.3d --, 2007 WL 4125461 (Nov. 21, 2007).

The Court has been pointed to no demonstrated ambiguity in any of Idaho's statutes. The state of Idaho's prohibition against any political subdivision enacting "any rule or ordinance or take any other action to prohibit, restrict, or regulate the appropriation of the...waters of this state" contained in I.C.42-201(4) is absolute and unambiguous. The County's argument that it is not attempting to regulate or restrict *the appropriation* by attempting to create "excess water" is disingenuous; attempting to regulate or enforce or command the amount of water leaving the property is no different than attempting to regulate the appropriation. That amounts, quite simply, to telling the holder of a water right they have a right to divert all the water they are entitled to, they just can't use it, or can only use what the County determines is appropriate. That action constitutes regulating or restricting the appropriation.

The other issue raised by the County, (that I.C. § 31-3805 constitutes an express grant of authority to the County to do what Section § 42-201(4) commands it must not do) likewise fails to implicate an ambiguous statute. I.C. § 31-3805(b)(iii) does in fact give to the County the authority to "approve" a water system. If § 31-3805 ended there, the County would have a good argument that an ambiguity existed in the law, or that § 31-3805 expressly empowered it to *approve the particulars* of any water system. "Approval", in that context, would have a broad meaning. *However, § 31-3805 sets forth its own remedy.* It spells out what happens if the water system is not approved, or if § 31-3805(a) or (b) are not complied with in any respect; what non-compliance under § 31-3805 triggers is detailed specific notice to the water user. There is nothing in the statute that remotely suggests the County gets the authority to determine the efficiency, or, for

that matter, any of the particulars of the water system. The County can approve the proposed water system as "suitable", or not, but its authority ends there.

The Court cannot find these statutes ambiguous. The Court is compelled to conclude the County has no authority to take this specific action, and therefore it acted without a reasonable basis in fact or law. Under these circumstances, an award of attorney fees is not discretionary, but is required. *Rincover v. State Dept of Finance,* 132 Idaho 547, 549, 976 P.2d 473, 475 (1999); *Fischer v. City of Ketchum* 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). Petitioner may make an application for fees pursuant to I.R.C.P.

CONCLUSION

For the aforementioned reasons, Condition No. 1, which provides that "ponds and associated ditches shall be restored to natural grade prior to recordation of plat," is void. The County has no authority to regulate or restrict the appropriation of water in Idaho. The County's attempt to create excess water, or to oversee the efficiency of Eagle Creek's water delivery system, exceeds the County's authority. The County has no authority under I.C. 31-3805 to regulate or oversee the efficiency of Eagle Creek's water delivery system; although it does have the authority to "approve" the system, that authority does not extend beyond approval or disapproval.

IT IS SO ORDERED.
Dated this 5 day of May, 2008.

Robert J. Elgee
District Judge