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FEB 03 2010

DEPARTMENT OF  
WATER RESOURCES

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*Attorneys for M3 Eagle LLC*

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION  
FOR PERMIT NO. 63-32573 IN THE  
NAME OF M3 EAGLE LLC

**M3 EAGLE'S REQUEST FOR EXTRA-  
RECORD INFORMATION IN IDWR'S  
POSSESSION**

M3 Eagle LLC ("M3 Eagle") through its counsel, Jeffrey C. Fereday and Michael P. Lawrence of Givens Pursley LLP, hereby requests the Interim Director provide M3 Eagle with all public records (defined below) in the Department's possession that are not contained in the official record for this matter but that in any way relate to this matter.

**BACKGROUND**

On December 21, 2009, the Interim Director of IDWR issued his Final Order in this matter. M3 Eagle timely filed its *Petition for Reconsideration of the December 21, 2009 Final Order, Motion to Reopen the Record, and Brief in Support* ("Petition for Reconsideration") on January 4, 2010. In part, the Petition for Reconsideration requested that the Interim Director reopen the record to take testimony and documentary evidence on the facts and legal conclusions raised or identified for the first time in the Final Order. The request to reopen the record was

made under IDAPA 37.01.01.740.02.a (which M3 Eagle believes implicitly authorizes taking additional evidence in aid of reconsideration), Idaho Code § 67-5248(2) and IDAPA 37.01.01.712.01 (both of which state that “Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding”), and Idaho Code § 67-5251(4) and IDAPA 37.01.01.602,<sup>1</sup> which require the Interim Director to notify the parties of the specific facts or material, and sources thereof, of which the Interim Director takes official notice, and to afford the parties a timely and meaningful opportunity to contest and rebut the facts so noticed. M3 Eagle requested reopening of the record in part because it appears from the findings and conclusions regarding the M3 Model’s water budget in paragraphs 33 through 39 of the Final Order that the Interim Director received or took official notice of (alleged) facts and opinions without notifying the parties or providing an opportunity to rebut them.

On January 25, 2010, the Interim Director issued his Amended Final Order in which he denied M3 Eagle’s request to reopen the hearing because, he states, “[t]he interim director did not take notice of or gather additional evidence in writing a decision.” Amended Final Order at 12. However, the Amended Final Order contains essentially the same water budget analysis as the Final Order. Again, the parties did not receive notice of or have the opportunity to rebut this water budget analysis.

On January 27, 2010, M3 Eagle filed a public records request with the Interim Director pursuant to Idaho Code § 9-338 seeking:

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<sup>1</sup> In one instance, on page 2, the Petition for Reconsideration incorrectly cited IDAPA 37.01.01.712.01 instead of IDAPA 37.01.01.602 for the requirements described in the text. However, this is of no consequence because Idaho Code § 67-5251(4), which also was cited, provides authority for M3 Eagle’s request.

each public record constituting or relating in any way to work product or communications of any sort by, among, or between IDWR employees (including but not limited to Gary Spackman, Sean Vincent, Dennis Owsley, Michael McVay, Craig Tesch, Rick Raymondi, and Allan Wylie), IDWR consultants, IDWR independent contractors, and/or third parties (i.e. any person outside IDWR) relating to any knowledge, understanding, opinion, analysis, position, or other interest in connection with the water right proceeding denoted as “IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573 IN THE NAME OF M3 EAGLE LLC.”

A copy of this public records request is attached hereto as Exhibit A (“Public Records Request”).

By letter dated February 1, 2010 from IDWR legal counsel Deputy Attorney General John Homan, the Department denied the Public Records Request on the ground that Idaho Code § 9-343 provides that public record requests are “not available ‘to supplement, augment, substitute or supplant discovery procedures in any federal, civil or administrative proceedings.’”

A copy of the Department’s February 1 letter is attached hereto as Exhibit B.

M3 Eagle’s attorneys discussed the Public Records Request denial with Mr. Homan at IDWR headquarters on February 2, 2010. Based on this discussion, M3 Eagle understands that the Department is willing and able to provide all of the information requested in the Public Records Request, and would do so if M3 Eagle filed a pleading in this matter requesting the information that is served on all parties. Accordingly, M3 Eagle is filing this Request for Extra-Record Information in IDWR’s Possession (“Request”) as a pleading in this matter.

#### **SCOPE OF REQUEST**

By this Request, M3 Eagle seeks to examine and obtain copies of the public records of the State of Idaho held by IDWR constituting or relating in any way to work product or communications of any sort by, among, or between IDWR employees (including but not limited to Gary Spackman, Sean Vincent, Dennis Owsley, Michael McVay, Craig Tesch, Rick Raymondi, and Allan Wylie), IDWR consultants, IDWR independent contractors, and/or third

parties (i.e. any person outside IDWR) relating to any knowledge, understanding, opinion, analysis, position, or other interest in connection with the water right proceeding denoted as “IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573 IN THE NAME OF M3 EAGLE LLC.”

In this Request, the term “public record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by IDWR, including its agents and employees, regardless of physical form or characteristics. I.C. § 9-337(13). The term “writing” in the previous sentence includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents. I.C. § 9-337(15). This Request includes all public records and writings created, transmitted or stored electronically, including e-mails.

This Request does not include, and M3 Eagle does not wish to be provided with, any exhibits or transcripts contained in the official record of this matter unless such an exhibit or transcript contains annotations or other markings not included in the original.

This Request is intended to be equal in scope and to include all public records requested in the Public Records Request. Nothing requested herein is exempt from disclosure under Idaho or federal law. If the Department believes any requested public record is exempt from disclosure, M3 Eagle requests the Department identify and describe each public record that has been withheld and state the exemption or other reason for withholding it.

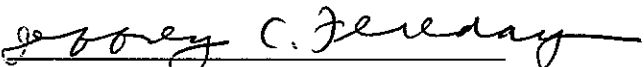
In filing this Request, M3 Eagle does not waive any of M3 Eagle's rights related to the Public Records Request.

M3 Eagle respectfully requests advance notice of any copying or duplication charges before such charges are incurred.

Due to looming deadlines for filing petitions for reconsideration and petitions for judicial review of the Amended Final Order, timing is of the essence. Accordingly, M3 Eagle respectfully requests the Interim Director's prompt attention to this Request.

Respectfully submitted this 3d day of February, 2010.

GIVENS PURSLEY LLP

By   
Jeffrey C. Fereday

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3d day of February, 2010, the foregoing was filed, served, or copied as follows:

**FILED**

Idaho Department of Water Resources  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

**SERVICE**

North Ada County Groundwater Users Association  
c/o David Head  
855 Stillwell Drive  
Eagle, ID 83616

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

North Ada County Groundwater Users Association  
c/o John Thornton  
5264 N. Sky High Lane  
Eagle, ID 83616

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

Norman Edwards  
884 W. Beacon Light Road  
Eagle, ID 83616

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

Alan Smith  
Eagle Pines Water Users Association  
3135 N. Osprey Road  
Eagle, ID 83616

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

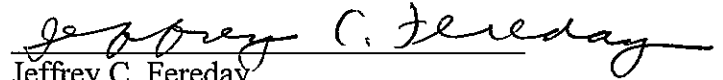
**COURTESY COPIES**

Gary L. Spackman  
Administrator  
Idaho Department of Water Resources  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

John Westra  
Manager, Western Regional Office  
Idaho Department of Water Resources  
2735 Airport Way  
Boise, ID 83705-5082

U. S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 E-mail

  
Jeffrey C. Fereday

# GIVENS PURSLEY LLP

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Cynthia A. Mellillo  
Christopher H. Meyer  
L. Edward Miller  
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Judson B. Montgomery  
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W. Hugh O'Riordan, LL.M.  
Angela M. Reed  
Justin A. Steiner  
Conley E. Ward  
Robert B. White

RETIRED  
Kenneth L. Pursley  
James A. McClure  
Raymond D. Givens (1917-2008)

January 27, 2010

*Via Hand Delivery*

Mr. Gary Spackman, Interim Director  
Idaho Department of Water Resources, State Office  
The Idaho Water Center  
322 E. Front Street  
Boise, Idaho 83720-0098

**Re: Public Records Request**

Dear Mr. Spackman:

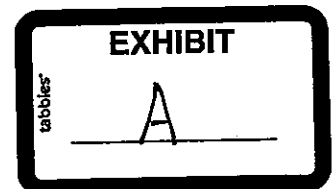
Pursuant to Idaho Code § 9-338, this letter serves as a formal request to examine and obtain copies of the public records of the State of Idaho held by the Idaho Department of Water Resources (IDWR).

Definition of public record

In this letter, the term "public record" includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by IDWR, including its agents and employees, regardless of physical form or characteristics. I.C. § 9-337(13). The term "writing" includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents. I.C. § 9-337(15). This request includes all public records and writings created, transmitted or stored electronically, including e-mails.

Scope of request

I hereby request each public record constituting or relating in any way to work product or communications of any sort by, among, or between IDWR employees (including but not limited



Mr. Gary Spackman  
January 27, 2010  
Page 2

to Gary Spackman, Sean Vincent, Dennis Owsley, Michael McVay, Craig Tesch, Rick Raymondi, and Allan Wylie), IDWR consultants, IDWR independent contractors, and/or third parties (i.e. any person outside IDWR) relating to any knowledge, understanding, opinion, analysis, position, or other interest in connection with the water right proceeding denoted as "IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573 IN THE NAME OF M3 EAGLE LLC."

This request does not include, and I do not wish to be provided with, any exhibits or transcripts contained in the official record of the aforementioned matter unless such an exhibit or transcript contains annotations or other markings not included in the original.

This request does not fall within any of the categories listed in Idaho Code § 9-338(4) that would allow IDWR to inquire about the request. No public record requested herein is exempt from disclosure under Idaho or federal law. If IDWR believes any requested public record is exempt from disclosure, please identify and describe each public record that has been withheld and state the exemption or other reason for withholding it. Please notify me of any appeal procedures available under law.

Please notify me of any copying or duplication charges before such charges are incurred.

Please contact me at 208-388-1294 or [mpl@givenspursley.com](mailto:mpl@givenspursley.com) to make arrangements for examination or delivery of the requested public records or if you have any questions regarding this request.

I appreciate your prompt attention to this request.

Sincerely,



Michael P. Lawrence

cc: William Brownlee (via e-mail)  
Phillip Rassier (via hand delivery)  
Clive Strong (via hand delivery)

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RECEIVED

FEB 07 2010

Givens Pursley, LLP

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN  
February 1, 2010

Mr. Michael P. Lawrence  
Givens Pursley LLP  
P.O. Box 2720  
Boise, ID 83701

VIA EMAIL  
AND U.S. MAIL

RE: Public Records Request

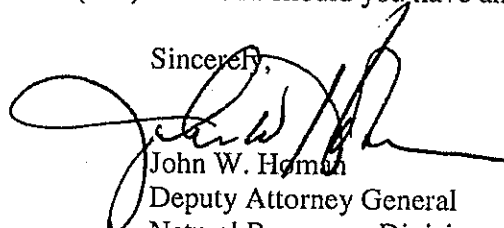
Dear Mr. Lawrence:

The Idaho Department of Water Resources (IDWR or Department) received your letter dated January 27, 2010 requesting certain information and asked that I respond to your request. Your letter requests public records relating to any work product or communications that might exist among and between certain IDWR employees and others outside of IDWR relating to any knowledge, understanding, opinion, analysis, position or other interest in connection with the water right proceeding denoted as "IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573 IN THE NAME OF M3 EAGLE LLC."

Your request is denied for the following reason. Idaho Code § 9-343 provides that Idaho Code §§ 9-335 through 9-348 are not available "to supplement, augment, substitute or supplant discovery procedures in any federal, civil or administrative proceedings. Because your firm represents M3 Eagle LLC., which remains a party in the administrative matter before the Department *IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-32573 IN THE NAME OF M3 EAGLE LLC*, and the materials you requested are subject to the discovery procedures in that administrative proceeding, you must make any request for documents within that proceeding to ensure notice to all parties.

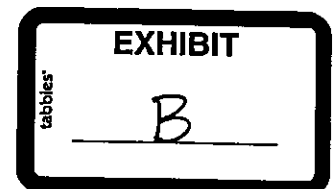
Please do not hesitate to contact me at (208) 287-4812 should you have any questions.

Sincerely,

  
John W. Homan  
Deputy Attorney General  
Natural Resources Division

c. Gary Spackman  
Service List

Natural Resources Division - Water Resources Section  
P.O. Box 83720 Boise, Idaho 83720-0098  
Telephone: (208) 287-4801; Legal FAX: (208) 287-6700



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of January, 2010, a true and correct copy of the document described below 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:

Document Served:    **ORDER DESIGNATING OFFICIAL TRANSCRIPT**

Name	Address	City	State	Postal Code
JEFFREY C FEREDAY GIVENS PURSLEY LLP	601 W BANNOCK ST PO BOX 2720	BOISE	ID	83701
M3 EAGLE LLC	533 E RIVERSIDE DR STE 110	EAGLE	ID	83616
ALAN SMITH	3135 OSPREY RD	EAGLE	ID	83616
EAGLE PINES WATER USERS ASSN	3135 N OSPREY RD	EAGLE	ID	83616
JOHN THORNTON NORTH ADA COUNTY FOOTHILLS ASSN ATTN: DAVID HEAD	5264 N SKY HIGH LN  855 STILLWELL DR	EAGLE  EAGLE	ID  ID	83616  83616
NORMAN L EDWARDS	884 W BEACON LIGHT RD	EAGLE	ID	83616
LINDA D BURKE	C/O 855 STILLWELL DR	EAGLE	ID	83616
JOHN FRANDEN	C/O 855 STILLWELL DR	EAGLE	ID	83616
CRAIG TARBET	C/O 855 STILLWELL DR	EAGLE	ID	83616
SHERRI RANDALL	C/O 855 STILLWELL DR	EAGLE	ID	83616
CHARLES WATKINS	C/O 855 STILLWELL DR	EAGLE	ID	83616
ROBERT H WEST	C/O 855 STILLWELL DR	EAGLE	ID	83616
STEPHEN DICK	C/O 855 STILLWELL DR	EAGLE	ID	83616
BRUCE VAN CAMP	C/O 855 STILLWELL DR	EAGLE	ID	83616
LORING EVANS	C/O 855 STILLWELL DR	EAGLE	ID	83616
THOMAS RITTER	C/O 855 STILLWELL DR	EAGLE	ID	83616
LORN H ADKINS	C/O 855 STILLWELL DR	EAGLE	ID	83616
DANIEL J GLIVAR	C/O 855 STILLWELL DR	EAGLE	ID	83616
RICHARD LAGERSTROM	C/O 855 STILLWELL DR	EAGLE	ID	83616
VINCE IAZZETTA	C/O 855 STILLWELL DR	EAGLE	ID	83616
DALE GASTON	C/O 855 STILLWELL DR	EAGLE	ID	83616
MARION D GROOTHUIS	C/O 855 STILLWELL DR	EAGLE	ID	83616
VINCENT J MINKIEWICZ	C/O 855 STILLWELL DR	EAGLE	ID	83616
CAROL JEAN THOMPSON	C/O 855 STILLWELL DR	EAGLE	ID	83616
BARB JEKEL	C/O 855 STILLWELL DR	EAGLE	ID	83616
ROBERT LYONS	C/O 855 STILLWELL DR	EAGLE	ID	83616
G E MC DONALD	C/O 855 STILLWELL DR	EAGLE	ID	83616
GEORGE W KEYES	C/O 855 STILLWELL DR	EAGLE	ID	83616
ERIC C LEIGH	C/O 855 STILLWELL DR	EAGLE	ID	83616