

EAGLE PINES WATER ASSOCIATION  
ALAN SMITH  
3135 OSPREY  
EAGLE, IDAHO 83616-2725  
PROTESTANTS  
(208) 939-6575

NORTH ADA COUNTY GROUNDWATER  
USERS ASSOCIATION  
JOHN THORNTON / DAVID HEAD  
855 STILLWELL DRIVE  
EAGLE, IDAHO 83616  
(208) 938-8508

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DEPARTMENT OF  
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES**  
**OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION  
FOR PERMIT NO. 63-32576 IN THE  
NAME OF M3 EAGLE LLC

**BRIEF  
AND  
WRITTEN ARGUMENT**

**PREFACE**

This brief is intended to be written as an aid to the Department of Water Resources and the Hearing Officer and not as just an “advocate”, although I am sure some advocacy will creep in from time to time.

So many times, attorneys provide the one who has to decide the case with briefs that only contain a lot of written argument, which they can make sound pretty good, without any real “authorities” or “case law” to back up those arguments. Lawyers that will not put out the time and effort and work involved to help the court only provide briefs that are not very helpful and are often nearly worthless. This author will provide whatever case law can be found to aid the trier of fact and law. There may, however, be instances where no authorities are available.

This author will also attempt to cover all of the issues on which the Hearing Officer requested briefing. Most of these issues involve statutory language and the meanings used therein. Some involve hydrology, geology, and perhaps even geochemistry of the aquifer and those are areas where this writer has no expertise.

Accordingly, if this writer makes any erroneous or inaccurate statements or conclusions please do not think that I am attempting to obfuscate, obscure, or mislead - take your own recollection of the evidence and conclusions to be drawn therefrom and disregard mine.

### **THE EVIDENCE**

This is a very complex case. The amount of exhibits, documents and paper work is overwhelming. The data, spread sheets, maps, logs, charts, and diagrams could and likely will require endless hours of study.

There is also a vast amount of conflicting evidence. The assumptions, presumptions, calculations, estimations, predictions, conjecture, and speculation and the subjective conclusions drawn therefrom must be reviewed with caution. Even the more objective data is questionable in some instances. All of the data, computer modeling, studies, test wells, and draw down projections still leave more "unknowns" than "knowns" about the sustainability of the aquifer, the impacts to other wells, recharge of the aquifer, water levels of ground water, and ground water flow.

This writer will attempt to set forth some of the conflicts and inconsistencies with references to the exhibit and page numbers so that the Hearing Officer won't have to read through numerous documents to find them.

## Sufficiency of the Water Supply and Impacts to the Aquifer

1. “Ground water to be withdrawn by M3 Eagle . . . will be from subsurface flow that has already departed the Boise Basin on it’s way to the Payette Basin so the impacts to existing water users . . . near Eagle **are predicted** to be small.”  
(Exhibit 42, Tab 4, p. 1)
2. Several other hydrologists do not believe there is sufficient data to support the **Payette flow theory**.  
Newton, Petrich, Urban  
(Exhibit 42, Tab 4, p. 6, 3<sup>rd</sup> paragraph)  
Ralston  
(Exhibit 47, p. 9., 1<sup>st</sup> two sentences)  
(Exhibit 47, p. 13, 2 a, 1<sup>st</sup> paragraph, last sentence)  
Owlsey & Vincent Memo  
(Exhibit 50, p. 15 - 17)
3. “Water levels would likely be lowered in some of the domestic wells under long term pumping.”  
(Exhibit 42, Tab 4, p.10)
4. “Wells closer to the M3 site would be impacted to a larger extent.”  
(Exhibit 42, Tab 4, p. 10)
5. “PGSA water levels appear stable at the **current level of ground water withdrawal** in the Eagle area.”  
(Exhibit 42, Tab 4, p. 14)
6. “. . . the actual extent of any future impacts can not be truly known until actual pumping wells are in place . . .”  
(Exhibit 42, Tab 4, p. 7)
7. “Increased withdrawal coupled with decreased replenishment will eventually lead to water level declines.”  
Squires, Wood, Osiensky  
(Exhibit 68, p. 62)
8. “The Boise aquifer system is limited in areal extent and depth.”  
Squires, Wood, Osiensky  
(Exhibit 68, p. 76)

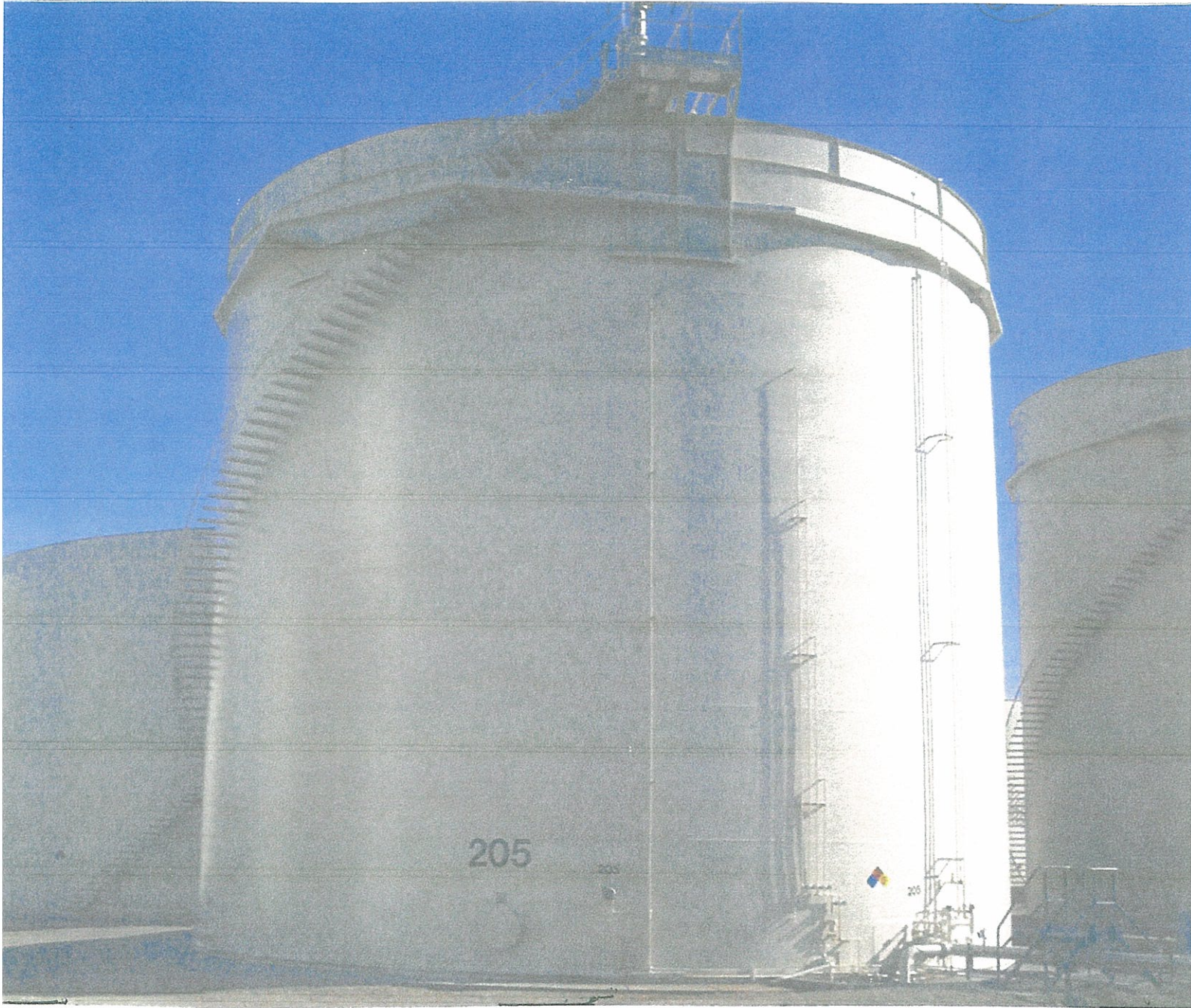
9. "Reduction of recharge, coupled with increased pumpage will result in lowered water levels in wells."  
Squires, Wood, Osiensky  
(Exhibit 68, p. IV)
10. "All wells classified as undifferentiated or Pierce Gulch display negative water levels trends . . ."  
(Exhibit 906, p 4, McVey Memo)  
(See also Exhibit 50, p. 4, Conclusion #2, McVey Memo)
11. "Some wells will have to be deepened or replaced." (HLI - 2008)  
(Exhibit 12, p. 241, item #19)
12. "These high capacity wells will cause drawdowns that will affect other wells." (HLI - 2008)  
(Exhibit 12, p. 241, item #19)
13. "Artesian wells may cease to flow." (HLI - 2008)  
(Exhibit 12, p, 241, item #19)
14. ". . . Pumping from a deeper zone ultimately affects the shallower portions of the aquifer. Similarly, pumping a shallower zone ultimately affects deeper zones."  
(Exhibit 12, p. 7) (16 aquifer tests)
15. "In our opinion, the possibility of limited long-term sustainability for the PGSA also cannot be discounted based upon currently available data."  
(Exhibit 50, p. 12, Staff Memo)
16. "recharge rates to the deeper regional aquifers are limited" - "most recharge occurring in shallow aquifer zones does not reach lower zones."  
(Exhibit 50, p. 17, Staff Memo)  
(Quoting from Petrich 2004, pgs. 19 and 21)
17. "contemporary seepage from rivers and/or irrigation diversions is not the primary source of recharge for most deeper regional aquifers."  
(Exhibit 50, p. 18. Staff Memo)  
(Quoting from Hutchings & Petrich, 2002, p. 58)  
(See also Exhibit 33G - Hutchings & Petrich, 2002, p. 58)

18. “This finding indicates that ground water in the deeper aquifers entered the flow regime prior to atmospheric testing.”  
(Exhibit 50, p. 18, Staff Memo)  
(Quoting from Hutchings & Petrich, 2002, p. 58)
19. “Residence time estimates in the regional aquifer system ranged from thousands to tens of thousands of years. The youngest waters entered the subsurface a few thousand years ago . . .”  
(Exhibit 50, p. 18, Staff Memo)  
(Quoting from Petrich 2004, p. 19)  
(See also Exhibit 33G, p. IV)
20. . . . “the PGSA ground water originated almost exclusively from geologically ancestral Boise River surface water.”  
(Exhibit 43, Glansman & Squires, p. 5, 3<sup>rd</sup> paragraph) (p. 4, 3<sup>rd</sup> paragraph)  
(Exhibit 33G - Hutchings & Petrich, p. IV)

### **Impacts and Injury to Existing Wells**

It is very apparent from the above set forth points that M3 Eagle very well knows that they are going to damage many area well owners, both domestic and irrigation, who have **senior water rights**. Their own expert hydrologists acknowledge that area wells will have to be deepened or replaced, water levels will decline, artesian flows will be eliminated, and large drawdowns will eventually occur when these high capacity wells are pumping on the M3 site. This is one of the areas the Hearing Officer requested be briefed and Protestants feel we have very adequately done so by setting out the above **20** items of concern. A review of the drawdown map contained in the IDWR Staff Memo (Exhibit 50, p. 22) further bears out the damaging effects that will occur at only a pumping rate of 10 cfs. (Figure 3). M3 Eagle seeks more than **twice** that amount during **peak capacity pumping** in hot weather. A temperature of 90+ degrees for a **20** day period results in **400 tanks** at 20 tanks per day (Exhibit 414, shown

below) pumped from the aquifer. A 30 day period of hot weather results in 600 tanks or the equivalency thereof being pumped from the ground water supply.



This will undoubtedly stress the aquifer and the impacts to it and to other water users will

be profound. Such a **vast withdrawal** of ground water by only **one applicant** cannot be justified unless there is **clear and convincing evidence** that the aquifer will not be **mined** and that the **recharge** is more than sufficient to meet not only the needs of this applicant but of **all the other water users that are affected or could be adversely affected**. **Such evidence is not present herein.**

“... water levels in the PGSA near M3 are declining and suggest that current aquifer discharge rates exceed current recharge rates.”  
(Ralston, Exhibit 49, p. 2)

“Pumping in the PGSA is likely to eventually impact the majority of area well owners.”  
(Owsley & Vincent, Exhibit 50, p. 24)

The full impacts on other water users, many with senior water rights, is clearly not known. This is further supported by the conclusions of Ralston Hydrologic Services stating as follows:

“Long term water-level decline would occur if the consumptive withdrawal of groundwater is greater than the annual rate of recharge. I conclude that the characterization of the target aquifer . . . has not been complete enough to support an analysis of impacts from full project development.”  
(Ralston, Exhibit 46, p. 5)

“Continued operation of the wells would result in an ever increasing cone of depression (area of water level decline) . . .”  
(Ralston, Exhibit 46, p. 5)

The effects of long term pumping by high capacity wells is not known. M3 Eagle can not dispute this when their own hydrologic experts recognize that - **“The actual effects of any future impacts can not be truly known until actual pumping wells are in place.”** (See Exhibit 42, Tab 4, p.7).

#### **Location of M3 Site in Relation to Position of Aquifer**

This is an area of concern mentioned by the Hearing Officer. This matter was address by

Dr. Ralston in Exhibit #47, where it is stated as follows:

“I conclude that there is insufficient evidence to support the assumption that the Pierce Gulch Sand Aquifer is laterally continuous from the Boise River Valley to the Payette River Valley.”

(See Exhibit 47, p. 9)

“. . . no hydrogeologic data are present to support the boundary of the Pierce Gulch Sand Aquifer **more than about one mile northwest** of the M3 Eagle site . . .”

(See Exhibit 47, p. 8, last paragraph)

“No data have been presented that show the continuation of the Pierce Gulch Sand Aquifer to and/or under the Payette River Valley.”

(Exhibit 47, p. 8 - 9)

“No hydrogeologic data are presented to support the hypothesis that the aquifer continues from the M3Eagle area to the Payette River Valley.”

(Exhibit 47, p.12)

“I do not believe that the water-level data provided by M3Eagle are sufficient to support the presumption of a ground-water flow system from the Boise River drainage to the Payette River drainage.”

(Exhibit 47, p. 13)

It is clear from the above quotes that Dr. Ralston is of a strong opinion that the north and northwest boundaries of the PGSA are along the northern boundary of the M3 site. IDWR Staff hydrologists, Mr. Owsley and Mr. Vincent appear to agree with the above quoted conclusions of Dr. Ralston. (See Exhibit 50, p. 15 - 17)

These expert opinions are further supported by well driller’s reports from replacement wells drilled to the north of the M3 site. These two wells in the Firebird and Chaparral Road area were drilled to depths of 565’ and 340’. These replacement wells are shown on Protestant’s Exhibit #424, map of replaced wells.

These are the Blackhorse Construction well and the Robert Steele well. The Blackhorse

well did not encounter the first water until a depth of 296 feet. It was drilled to a total depth of 340'. It produced only 60 gallons/minute at a depth of 325'.

The Robert Steel well encountered first water at 252' and again at 380'. This well is only producing 6 gallons/minute at a pumping level of 540' with a total well depth of 565'. This information is taken from the well driller's reports which have been admitted into evidence. (See Exhibit 429 - 2007A and 2007F)

It is obvious these two wells were drilled much deeper, 340' and 565' respectively in an attempt to find a more adequate water supply - to no avail.

This would seem to discount the hypothesis that the Pierce Gulch Aquifer is continuous to the Payette Valley and the ground water flow to the Payette Valley theory. These two well driller's reports are from wells to the north of the M3 site and support the conclusion of Ralston, Vincent, and Owsley that the Pierce Gulch Aquifer boundary is just north of the M3 site.

### **Other Prior Water Right Applications**

We believe that the Hearing Officer and the Department should also be looking at the amount of other water right applications and their cumulative cfs in queue before the decision on the M3 Eagle water right application is rendered. Our experts, Norm Young and Paul Drury, determined that **there was over 90 cfs applied for in the Boise Valley in front of the M3 Eagle application (Exhibit 821)**. And this did not include a single domestic well! In an interagency report by the U.S. Bureau of Reclamation and the Idaho Department of Water Resources Planning Bureau dated **January 2008**, titled "A Distributed Parameter of Water Budget Data Base for The Lower Boise Valley" (Exhibit 217) on page 94, identifies the following: "over the course

of an average year in the Boise Valley as a whole, there is an aquifer storage deficit of about 73 kaf" (73,000 acre feet). This document goes on to state on page 95 that net groundwater recharge-discharge balance in areas associated with municipal supply wells where groundwater discharge is concentrated in urban centers results in large net ground water losses. Even without accounting for the combined withdrawals of all new residential wells that will come on line with natural growth rates, we could have fully appropriated basin with no room for additional growth of existing cities or other planned communities in the future if much of the current queue along with M3 Eagle is approved.

#### **Reasonable (Historic) Pumping Levels**

We are concerned that with the large groundwater withdrawals needed to supply the M3 Eagle Planned Community there will be draw down effects on the existing aquifer which may harm a number of existing well owners. And while the Idaho code provides some remedy for a senior water right owner that is harmed by a junior pumper, our concern lies in the unpredictable and non-objective nature of the "reasonable pumping level" language that is employed in contested dry well circumstances. This becomes critical when a large group of citizens with private wells find themselves in the impact area of high capacity wells like M3 Eagle, and each case is based on a subjective process that is open to such a wide range of interpretations. With the potential risk that a number of wells will be affected by the M3 Eagle water right we would submit that the Department should create a more objective standard with language that creates some certainty and protection to the individual well owner in the impact area whose property value and quality of life may be severely impacted. See Parker v Wallentine, 103 Idaho 506, 650

P. 2d648 (1982).

### **Shallow Aquifer**

As identified in exhibit #16, pages 32 and 33; prepared by Hydro Logic, Inc. on 11/26/2008 titled Modeling Of Ground-Water Flow In The Pierce Gulch Sand Aquifer: Five Models: History, Updates, And Predictions Of Impacts Caused By Pumping At The M3 Eagle Planned Residential Community Ada County, Idaho states in section M3 Model: Prediction of Impacts: “Because the model was not directly calibrated to the shallow aquifer these draw down predictions can only be considered an approximation.” “These predictions can only serve as guidelines until long term monitoring is implemented.” “Direct monitoring of the shallow aquifer (currently in process) will likely be a much better indication of how the shallow aquifer responds to pumping from the Pierce Gulch Sand Aquifer.” Continuing on Page 33 in the Section titled M3 Model: Overview Of Results. “However, because the M3 model was not calibrated to aquifers other than the Pierce Sand Gulch Aquifer, it cannot be used to accurately predict aquifer response from pumping in any aquifer besides the Pierce Gulch Sand Aquifer.”

### **Statutory Duties of the Water Resource Department**

Title 42, Idaho Code, places heavy statutory duties on the Department of Water Resources.

... “the Director of the Department of Water Resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.”

See 42 - 203 A 5, Idaho Code.

“A license may be issued to a **municipal provider** . . . provided that the Director determines that the amount is reasonably necessary to provide for . . . reasonably anticipated future needs . . . and otherwise satisfies the **definitions and requirements specified in this chapter** . . .”

42 - 219, (1), Idaho Code

Section 42-222, Idaho Code, concerns, among other things, a change in the nature of the use to municipal purposes. It is being set forth herein, in pertinent part, to show that section of the statute also refers back to the **qualifications clearly stated in 42-202B-(5) (a) (b) and (c) as do the other “quoted sections” stated above**. Idaho code 42-222, states as follows:

“When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a **municipal provider** to serve reasonably anticipated future needs, the **municipal provider shall provide to the Department sufficient information and documentation to establish that the applicant qualifies as a municipal provider** . . .”

Section 42-231, Idaho Code, expounds further on the duties of the Department wherein it states as follows:

“In addition to other duties prescribed by law . . . It shall likewise be the duty of the Director . . . to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.”

These statutory duties place a heavy burden on the Department of Water Resources to protect and conscientiously administer the appropriation and use of a vital and critical resource. Accordingly, the Director is empowered under Section 42-223 b, Idaho Code, to declare “critical ground water areas” or “ground water management areas”. In those situations the Director must determine that **sufficient water is available** and that other **prior water rights will not be injured**

before granting any new permits.

In Barron v Idaho Department of Water Resources, 135 Idaho 414, 18 P. 3d219 (2001) the Idaho Supreme Court discussed at length the statutory duties of the Department and affirmed the Department's decision finding that the Director had complied with his statutory responsibility under 42-222 (1), Idaho Code. This case involved an application to transfer the point of use.

The Court noted as follows:

“. . . the Director is instructed to examine all the evidence and available information; and to approve the change in whole or in part if ‘no other water rights are injured thereby’, . . . and (the change) is (in) the local public interest . . .”

The Court concluded as follows:

. . . “there is substantial and competent evidence supporting the Director’s determination that Barron failed to provide sufficient information to make a **prima facie showing**.”  
(See also Chisholm v IDWR, 142 Idaho 159, at 162, 164, 125 P. 3d515) (2005).

Title 42, Idaho Code commands and requires the Department and the Director to carry out those statutory duties **whether an application is protested or not protested**. An excerpt of 42-203A(5) is set forth as follows:

“. . . In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the Director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the State of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water

originates; the Director of the Department of Water Resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for or may grant a permit upon conditions.”

### **Statutory Wording**

Title 42, Idaho Code repeatedly refers to the terms “qualifies”, “definitions”, “requirements”, “municipal provider” and “public interest”.

Section 42-202 B Definitions: specifically defines “local public interest”, “municipality”, and what is meant by the term “municipal provider”.

Section 42-219, Idaho Code, refers to a “municipal provider” as having to meet all the “definitions” and “requirements” specified in this chapter. (Title 42)

Section 42-222, Idaho Code, deals with a change in the nature of the use to municipal purposes and provides that the Department must have received documentation establishing that the applicant “qualifies as a municipal provider”.

These terms and their ordinary meaning in relation to a municipal provider are set forth below:

#### **Qualify:**

limits or restricts  
a restriction of terms from a broader interpretation.  
an authoritative formal demand  
(Black’s Law Dictionary, 8<sup>th</sup> Ed., p1275)

to limit or restrict by certain conditions or exceptions  
to restrict or limit  
(Britanica World Language Dictionary)

to have a legal right to do some act  
to empower legally  
to restrict or limit  
(Webster’s 3<sup>rd</sup> International Dictionary, Merriam - Webster)  
to reduce from a general, undefined or comprehensive to a particular restricted form.

a word or word group that qualifies or restricts another word or word group.

(Webster's Third Dictionary)

(Encyclopedia Britannica 1993)

to limit, restrict; Thus, it is said that one section of a statute qualifies another.

(Black's Law Dictionary, 6<sup>th</sup> Edition, p. 1241)

### Definition:

to make definite, to clarify or make distinct

to set distinct limits

to fix or mark the limits of a statement of the meaning of a word or group of words

(Webster's 3<sup>rd</sup> International Dictionary)

### Requirement:

to insist upon or demand

to call for as essential as a condition necessary and required

to demand authoritatively

to dictate or demand as imperative, indispensable

to claim by right

(Webster's 3<sup>rd</sup> International Dictionary)

to exact, demand, insist upon by authority

(Winston's Dictionary - Advanced Edition)

something called for or demanded as an essential condition

to insist upon authoritatively or imperatively

### Public Interest:

"Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the "public water resources".

(Section 42-202 B (3), Idaho Code)

The general welfare of the public that warrants recognition and protection.

Something in which the public as a whole has a stake, especially an interest that justifies governmental regulation.

(Black's Law Dictionary, 8<sup>th</sup> Ed.)

Without getting any further into semantics than we already have, Protestants assert that none of these terms or word groups change the clear meaning of Title 42, Idaho Code. There certainly is no logical basis for the broad interpretation of the four words, “reasonably anticipated future needs” as M3 Eagle advocates.

### **Legislative Intent**

The “scrivener” or “scriveners” of Title 42, Idaho Code intended to make this statute conclusive and exclusive. Any person, firm, or entity that does not meet the “statutory definitions and requirements” is **excluded by operation of law**. The statutory language and intent are so clear that no one needs to construe or draw inferences from some obscure meaning.

The legislative “**Statement of Purpose**” is set forth in full at this point by providing the Hearing Officer with a true and correct copy thereof:

This “**Statement of Purpose**” shows that the statute was drafted to place appropriate controls on the concept of municipal providers holding water rights for reasonably anticipated future needs. This legislative statement of purpose states as follows:

“The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs. . .”  
(See Statement of Purpose, Senate Bill 1535)  
(Which became Title 42, Idaho Code.)

That purpose is stated and restated throughout Title 42, Idaho Code. See 42-202 B 5 (a) (b) and (c); 42-219; 42-222, Idaho Code. Legislative intent simply means you must look to the clear language of the statute. This legislation accomplishes the exact purpose of appropriately controlling the municipal provider concept.

## STATEMENT OF PURPOSE

RS 06104

The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled. The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes. The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights. Municipalities would be required to provide information to describe their service area, to establish a reasonable planning horizon, and to show that the water rights are necessary for reasonably anticipated future needs.

## FISCAL IMPACT

This legislation will reduce costs to municipalities by reducing paperwork and the costs associated with additional findings. Costs to the state will be reduced by having fewer applications to change water rights and by the simplified recording and notice that will result from using the less complex descriptions for the authorized place of use. Most importantly, municipalities will be able to develop and retain at lower cost, water rights needed for expected growth.

### Contact

Name: Norm Young

Agency: Department of Water Resources

Phone: 327-7900

### **Statutory Construction**

M3 Eagle relies on four words, “reasonably anticipated future needs” to support its assertion that it qualifies as a municipal provider. That assertion is at odds with the rest of the statute.

“Because the best guide to legislative intent is the words of the statute itself, the interpretation of a statute must begin with the literal words of the statute.”

Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute.

State v Yzaguirre, 144 Idaho 471, (underlining added)

“In construing a statute, this court . . . will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein . . .”

Baker v Sullivan, 132 Idaho at 750 (underlining added)

“In construing legislative acts it is (court’s) duty to ascertain, if possible from reading of the whole act, and amendments thereto, the purpose and intent of legislature and give force and effect thereto.”

Watkins Family v Messenger, 118 Idaho 537, 797 P. 2d 1385 (1990)

Statutes must be construed as a whole without separating one provision from another.

Watkins Family v Messenger, supra.

“In interpreting a statute, court is guided by the general principles of statutory construction and a common sense appraisal of what the legislature intended.”

State v Paciorek, 137 Idaho 628 (app) 51 P. 2d 441 (2002)

“Supreme Court is required to give effect to every word, clause and sentence of the statute.”

Watkins Family v Messenger, supra.

For other cases holding that the courts must view the statute as a whole, see:

State v Payne, 146 Idaho 548

Mercy Medical Center v Ada County, 143 Idaho 899, 155 p. 3d 700, (2007).

### **Burden of Proof**

M3 Eagle has not carried its burden of proof. Absolutely no evidence was presented in

their case in chief to show that M3 was qualified as a municipal provider or that the applicant had adequate financial resources. The financial information was improperly presented as rebuttal evidence after the Protestants raised issues about that matter under IDAPA 37.03.08 and 42-203 A (5) (d), Idaho Code. Even then, it seems that the evidence regarding the formation of a Community Infrastructure District is, at best, based on speculation and conjecture about the formation thereof, annexation by the City of Eagle, and the marketing of tax free municipal bonds.

We believe the intent of this statute in this case is to put the burden of proof on the applicant M3 Eagle to show the State of Idaho and the Hearing Officer that they have financial resources, financial commitments, and capability to successfully finance, develop and put to beneficial use the groundwater owned by the State of Idaho. M3 has provided virtually no documentation demonstrating financial wherewithal and is completely lacking in satisfying this important burden of proof. IDWR should not grant any water right to M3 Eagle for a term longer than M3's ability to demonstrate financial capacity by providing written irrevocable financing commitments from reputable financial institutions in an amount and for a term adequate to complete whatever portion, if any, of the requested water right IDWR may determine to grant.

#### **Effect of Admissions**

A copy of M3's "answers to requests for admissions" is attached to this brief and made a part hereof. M3 Eagle has admitted that it does not qualify as a "municipal provider" under any of the definitions of 42-202 B (5) (a) (b) or (c). See M3 response 1, 2, and 3 filed in November, 2008.

Rule 36 (b), I.R.C.P. provides as follows:

"Any matter admitted under this rule is conclusively established . . ."

“An admission . . . cannot be . . . ignored by the district court . . .”  
Quiring v Quiring, 130 Idaho 560, 944 p. 2d 695 (1997). Rule 36 (b), I.R.C.P.

Moreover, there were admissions in testimony made by M3 through William Brownlee that M3 Eagle, LLC, was not a municipality; that it did not hold a franchise to supply water for municipal purposes; that M3 was not a political subdivision of the State of Idaho; that it did not own, control, or operate a public water supply regulated by the State of Idaho.

### **Municipal Provider**

This issue was first raised by Attorney Beeman in the October 24, 2008 discovery requests by North Ada County Ground Water Users Association. M3 admitted in its responses on November 24, 2008 that M3 was not a municipal provider under the statute. (See attached admissions.)

The Protestants filed a Motion to Dismiss on May 11, 2009 at the conclusion of M3's case in chief and presented oral argument on that motion at that time. A Motion for Reconsideration was filed on or about May 29, 2009 re-asserting that same Motion to Dismiss on the grounds M3 Eagle was not qualified as a municipal provider under Section 42-202 B (5) (a) (b) or (c), Idaho Code.

Absolutely no evidence was presented by M3 to establish it was a municipal provider in M3's case in chief or at any time during the entire proceedings.

In the interest of brevity (if Protestants have not already gone way beyond that) the May 11<sup>th</sup> Motion to Dismiss and May 29<sup>th</sup>, 2009 Motion for Reconsideration, the authorities and written argument regarding statutory construction are attached hereto and made a part hereof.

Conclusion

This issue regarding the failure of M3 Eagle to qualify under the statute as a municipal provider has been properly raised and is properly before the department. The record is totally devoid of any evidence establishing otherwise, The assertion by M3 that it meets the qualifications of the statute is absurd.

In Barron v IDWR, supra, the Court held as follows:

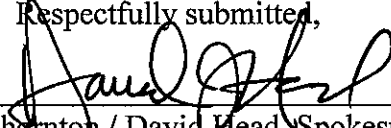
“vague and imprecise assertions did not make a “prima facie” showing on the issues and there was substantial and competent evidence supporting the Director’s determination.”

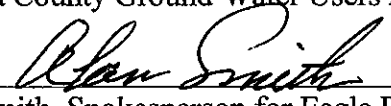
“Substantial evidence is less than a preponderance of evidence, but more than a mere scintilla.”

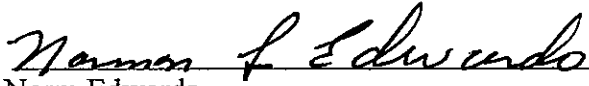
Chisholm v Idaho Department of Water Resources, 142 Idaho 159, 164; 125 P 3d 515 (2005)

In the present case, there is not even a scintilla of evidence to establish that M3 Eagle qualifies as a municipal provider. The application for a municipal water right must be denied.

Respectfully submitted,

  
\_\_\_\_\_  
John Thornton / David Head, Spokespersons for North  
Ada County Ground Water Users Association

  
\_\_\_\_\_  
Alan Smith, Spokesperson for Eagle Pines and  
individually

  
\_\_\_\_\_  
Norm Edwards

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11<sup>th</sup> day of September, 2009, a true and correct copy of the foregoing brief and written argument and attachments were served on the following parties as set forth below:

**NOTICE OF SERVICE AND DISCOVERY**

North Ada County Groundwater Users Association  
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

Jeffrey C. Fereday  
GIVENS PURSLEY LLP  
601 West Bannock Street  
PO Box 2720  
Boise, ID 83701-2720

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

John Westra  
Western Regional Office  
Idaho Department of Water Resources  
2735 Airport Way  
Boise, Idaho 83705-8052

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

Gary Spackman, Hearing Officer  
State of Idaho  
Department of Water Resources  
322 E Front Street  
Boise, Idaho

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

