

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

**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

**MOTION TO
DISMISS**

Comes now, North Ada County Ground Water Users Association, Eagle Pines Water Users Association, by and through their designated “spokespersons” herein after undersigned, and for the individual protestants, Norman Edwards and Alan Smith move to dismiss Application for Permit No. 63-32576 in the name of M3 Eagle, LLC on the following grounds:

The Applicant has not provided IDWR with adequate financial information to merit the award of a Permit.

IDAHO ADMINISTRATIVE CODE IDAPA 37.30.08

Department of Water Resources Water Appropriation Rules

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows: (7-1-93)

i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed. (7-1-93)

This water appropriation rule of IDWR provides that the applicant shall submit a current certified financial statement or a financial commitment letter. Neither has been submitted to Water Resources as required.

The case law is so clear on the meaning of the word shall when used in a statute or a rule that extensive briefing is not necessary. Every court has held that the word shall when used in a statute or a rule places a mandatory duty on even the courts themselves.

For example trial courts have been reversed when they failed to carry out the mandatory duties required. A summary look at Rule 52(a), I.R.C.P., will suffice for our purposes here. That Rule 52(a), states: a court, sitting without a jury, shall enter written findings of fact and conclusions of law to support the court's decision.

In Angelton v Angelton, 84 Idaho 184, 370 Pacific 2d, 788. The appellate court notes the mandate of Rule 52(a) and states:

“The findings of fact and conclusions of law required by this rule constitute the trials courts decision . . .”

And in Merrill v Merrill, 83 Idaho 306, 362 Pacific 2nd 887, the appellate court states as follows:

“The purpose of requiring findings of fact and conclusions of law is to aid the

appellate court to clearly understand the basis for the decision of the trial court.”

Merrill v Merrill, 83 Idaho 306, 362 Pacific 2d 887.

Moreover, in Ramco v HR Contractors, 118 Idaho 108,794 Pacific 2d 1381 (1990), the trial court was reversed with the following statement:

“It was error for the court to fail to make . . . findings of fact and conclusions of law as required by this rule.”

The above quoted Department of Water Resources Water Appropriation Rules contain the word shall and the applicant for a water right therefore has a mandatory duty to meet the burden of an adequate financial showing by a (1) certified financial statement or (2) a financial commitment letter.

We realize that Rule 045 states:

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Rule Subsection 040.50.c. or at the time the hearing provided by Subsection Rule 040.05.c is conducted. (7-1-93)

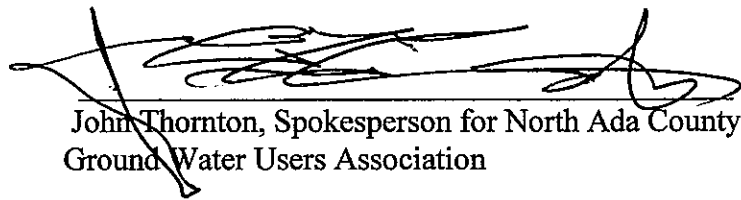
However, that financial showing at the time the hearing is conducted must be presented in the applicant’s case in chief and not as rebuttal evidence. Counsel for M3 had an opportunity to examine M3 Eagle’s President, Mr. Brownlee, about any financial matters raised by questions from Mr. Thornton and he did so. It would be improper rebuttal for M3 to now attempt to provide financial documents when they failed to do so in their case in chief and Protestants

certainly object to any effort to now present certified financial information, commitment letters or statements of lenders. They should have done this at the time the application was filed - February, 2008 - to even have their application considered for further proceedings.


M3 Eagle has ignored the Idaho Administrative Code just as it has the requirements of 42-202 B 5(a)(b) and (c) to obtain a "municipal water right."

Therefore, this Application 63-32576, should be dismissed and never should have been set for hearing in the first place as it is totally frivolous.


Respectfully submitted,



John Thornton, Spokesperson for North Ada County
Ground Water Users Association



Alan Smith, Spokesperson for Eagle Pines and
individually



Norm Edwards, Individually and as a member of
Eagle Pines Water Users Association