

EAGLE PINES WATER ASSOCIATION
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PROTESTANTS
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RECEIVED

MAY 29 2009

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

**MOTION FOR
RECONSIDERATION**

Protestants moved to dismiss Application #63-32573 for a "municipal water right" filed by M3 Eagle, LLC on February 1, 2008 under Rule 413, IDWR Rules of Procedure at the close of the Applicants case in chief.

Oral argument was presented by Protestants on May 11, 2009 before the designated Hearing Officer. The motion was denied during the hearing.

Oral argument was also presented at the same hearing requesting the Department to issue a Declaratory Ruling under Rule 400, IDWR, Rules of Procedure, that a planned community such as M3 Eagle does not qualify as a municipality or a municipal provider under 42-202B(5) (a), (b), or (c), Idaho Code.

The Hearing Officer did not rule on the Motion for a Declaratory Ruling under Rule 400. Oral argument was presented in support of the Motion to Dismiss at the hearing as follows:

WRITTEN ARGUMENT

Protestants orally requested the Application be dismissed because the Applicant had not made a “prima facie” showing that it was entitled to a “municipal water right” under IC 42-202B (5) (a), (b), or (c).

Mr. Brownlee, President of M3 Eagle, LLC testified on cross-examination by Mr. Thornton, spokesperson for North Ada County Groundwater Users Association, that M3 Eagle was not a municipal corporation. Moreover, **no evidence was presented that it provides water for municipal purpose to users within its service area.**

M3 has admitted that it is not a municipality that provides water for municipal purposes in response to Request for Admissions #3 filed with the Department on or about November 24, 2008.

Further argument concerning sections 42-202B (5) (b) and (c) was founded on grounds of **basic statutory construction.**

- (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the State of Idaho authorized to supply water for municipal purposes **and which does supply water for municipal purposes** to users within its service area.

Protestants orally argued that the statutory language “**and does supply water for municipal purposes**” was stated in the “**conjunctive**” sense and not in the “**disjunctive**” sense. Because

“and” was used and not “or”, and to qualify under basic statutory construction, M3 would have to be a corporation or association holding a franchise “which does supply water” presently as the statute wording was in the present tense.

Moreover, no evidence had been presented by the Applicant, M3, to show it does presently supply water for municipal purposes. M3 has also admitted in response to Request for Admissions #2, that it does not qualify under 42-202B(5)(b) since it does not supply water for municipal purposes at the present time.

(5)(c) A corporation or association which supplies water for municipal purposes through a water system regulated by the State of Idaho as a “public water supply.”

Again, Protestants orally argued that the statute is worded in the present tense and M3 does not presently supply water for municipal purposes. The words “which supplies water for municipal purposes” requires that a corporation or association such as Eagle Water, United Water, or Boise Water Corporation be presently supplying water for municipal purposes in order to qualify under the clear statutory definition, M3, Eagle does not. Furthermore it does not own, control or operate a water system regulated by the State of Idaho as a “public water supply”. See 39-103(12), I.C.

Furthermore, M3 has admitted in response to Request for Admissions #1 that it does not qualify under 42-202B(5) (c) since it does not currently supply water for municipal purposes.

A planned community such as M3, Eagle does not qualify for a “municipal water right” and is not entitled to lock up a water right for “reasonable anticipated future needs” for 20 or 30 years as M3 seeks to do; M3 can apply for a water right, like everyone else, with a 5 year window

in which to establish a “beneficial use”. Once it has done so and has homes built on the property in sufficient number to qualify as a municipal provider, it can then apply for a municipal water right.

CONCLUSION

Protestants respectfully request that the Hearing Officer reconsider its ruling on the Motion to Dismiss, enter written findings of fact and conclusions of law on each issue raised in Protestant’s Motion to Dismiss, and that the Department of Water Resources issue a Declaratory Ruling under IDWR Rule 400 to the effect that planned communities do not per se qualify for a “municipal water right”.

Protestants have reviewed Section 42-219 and all other subsequent provisions of 42-201, et. seq. and do not believe that any other provisions of said statute overcome the standards set for qualifying as a “municipality” or a “municipal provider” under 42-202B(5) (a), (b), or (c).

Regardless of whether planned communities that are not municipalities or municipal providers have previously obtained municipal water rights when they should not have - no binding precedent has been set. The erroneous opening of “Pandora’s Box” should now be closed by IDWR as the issue has been raised in this proceeding and is properly before the Department for a corrected ruling. Any prior decisions allowing municipal water rights when they should not have been granted are not only wrong, they are totally wrong and should now be corrected and clarified under Rule 400 and Rule 770, IDWR.

BURDEN OF PROOF


Finally, Protestants would assert that Applicants have not shown that the application was made in good faith since they knew or should have known they did not qualify for a “municipal

water right”. M3’s evidence establishes that there will be damage to “existing senior water rights.” M3 has not shown by a preponderance of the evidence that the water supply is sufficient or that the aquifer will not be “mined”. M3 failed to meet its burden of proof.

Idaho Code, 42-219(1) places a **statutory duty** on the **Director and on the Department to carefully examine the final proof that the law has been fully complied with and requires the Director to determine the definitions and requirements specified in this chapter are otherwise satisfied.**

Wherefore, Protestants, North Ada County Ground Water Users Association, Eagle Pines Ground Water Users Association, and all individual Protestants, hereby request dismissal of all further proceedings herein.

Respectfully submitted,



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



Alan Smith, Spokesperson for Eagle Pines and
individually



Norm Edwards

United Water Idaho, and the City of Eagle; and d) field observations by the authors and by Dr. Spencer Wood. All of the referenced documents are posted to the Department's North Ada website.

Request for Production No. 19: Please produce all documents, exhibits, and/or other items of tangible evidence which you expect to introduce or use, or may use, at the hearing in this matter. If such documents, exhibits, and/or other items of tangible evidence have been produced in response to Request for Production Nos. 1 through 18, please identify the documents, exhibits, and/or other items of tangible evidence which you expect to introduce or use, or may use, at the hearing in this matter but do not produce the documents, exhibits, and/or other items of tangible evidence twice.

Response to Request for Production No. 19: See Response to Request for Production No. 2.

Request for Production No. 20: To the extent not produced in response to Request for Production Nos. 1 through 19, please produce all documents that you relied on to respond to these Discovery Requests.

Response to Request for Production No. 20: See Response to Request for Production No. 1.

REQUESTS FOR ADMISSION

Request for Admission No. 1: Please admit that M3 Eagle LLC is not "a corporation or association which supplies water for municipal purposes through a water system regulated by the State of Idaho as a 'public water supply' as described in Section 39-103(12), Idaho Code."

Response to Request for Admission No. 1: Admit.

Interrogatory No. 8: If the answer to RFA #1 is anything other than an unqualified admission, please describe the basis for your answer and identify each document which supports, contradicts, or in any way pertains to such answer.

Response to Interrogatory No. 8: N/A.

Request for Admission No. 2: Please admit that M3 Eagle LLC is not “a corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the State of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area.”

Response to Request for Admission No. 2: Admit.

Interrogatory No. 9: If the answer to RFA #2 is anything other than an unqualified admission, please describe the basis for your answer and identify each document which supports, contradicts, or in any way pertains to such answer.

Response to Interrogatory No. 9: N/A.

Request for Admission No. 3: Please admit that M3 Eagle LLC is not “a municipality that provides water for municipal purposes to its residents and other users within its service area.”

Response to Request for Admission No. 3: Admit.

Interrogatory No. 10: If the answer to RFA #3 is anything other than an unqualified admission, please describe the basis for your answer and identify each document which supports, contradicts, or in any way pertains to such answer.

Response to Interrogatory No. 10: N/A.