

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

IN THE MATTER OF APPLICATION FOR PERMIT )	RENEWED MOTION
NO. 63-32576 IN THE NAME OF M3 EAGLE, LLC )	TO DISMISS
ASSIGNED TO THE CITY OF EAGLE, )	REMAND PROCEEDINGS
_____ )	

**Department Role is as a Judge**

The Department Role in both the original Hearings and on the Appeal is that of a Judge not a litigant. When the Department is named as a Respondent on Appeal it does not become a litigant or a proponent or opponent.

“When named as a Respondent on Appeal the government boards’ role is limited to defending its decision below. (underline added)

Lowry v Board of County Commissioners for Ada Cty, 115 Idaho  
64 (App.), 764 P.2d431 (ct. att., 1988). (underline added)

When acting upon a quasi-judicial matter the (Department) is neither a proponent nor an opponent . . . but sits in the seat of a judge”.

Cooper v Board of County Commissioners of Ada County, 101  
Idaho 407, 614 P.2d 949, (1980).

City of Burley v McCaslin Lumber, 107, Idaho 909, 693 P.2d  
1408 (ct. app. 1984)

Lowery v Board of County Commissioners for Ada County,  
(supra. at p. 71)

What can be more clear than this. The Idaho Supreme Court has repeatedly held that the Administrative Agency sits as a judge and its role on appeal is to defend its decision. It does not become a litigant except in that clearly stated role to defend its quasi judicial decision.

The Department, the Director, the Attorney Generals, and the District Court fail to see this distinction and M3's counsel do not want to see it. I can guarantee you the Idaho Supreme Court sees it and has repeatedly said so in the cases cited above.

### **Judicial Acts Negotiated**

The negotiated agreement of January 19, 2011 involves certain judicial acts that have been carried out by negotiation. Those have become improper limitations and restrictions on the procedural and evidentiary rights of others by "judicial fiat". Those restrictions and limitations are the three (3) limitations of the October 3, 2011 Order limiting evidence and are as follows:

1. Evidence establishing that the M3 Eagle Project has been annexed by the City of Eagle.
2. Evidence related to the City of Eagle's planning horizon and reasonable anticipated future municipal needs for the City of Eagle's service area, including M3 Eagle Project, based on the City of Eagle's current water rights portfolio and planning information.
3. Information on the quantity of water appropriate for permit 63-32573 appurtenant to the M3 Project in relationship to the water needs of the City's service area.

These Judicial acts done by negotiation cannot and will not stand on appeal. These Judicial acts are in violation of the Idaho Rules of Civil Procedure, case law and are in derogation of the "doctrine of finality". They were also done one year later when the Rules and the case law only allow days.

The lower tribunal cannot, one year later, decide to "reconsider its decision", "reopen the evidence" and place "limitations and restrictions on the procedural and evidentiary rights of

others” by some “written agreement”.

“... reconsideration is in derogation of the policy of finality and should not be entertained by the court. This principle would preclude reconsideration by the court on its own initiative . . .” Hells Canyon Excursions v Oakes, 111 Idaho 123, (app) 721 P.2d 223 (ct. app. 1986)

These negotiated “Judicial Acts” are not valid, nor is the January 19<sup>th</sup> Agreement which derogates the effect of the District Court Order.

After 3 ½ years of playing this game we are right back where we started with a private developer demanding ownership of a municipal water right whether legal or not. That water right is amazingly about to thrive and flourish from an already decided case of a non-municipal water right of 3.28 cfs into a 23.18 cfs municipal water right in just a little over 1 year.

### **The Assignment**

The “so called” Assignment to the City of Eagle by M3 has an attachment to it which contains the provision that follows:

“If any provision of this assignment conflicts with any provision of the Development Agreement, the Development Agreement prevails.”

Well, there is a conflict as the “Development Agreement” provides:

“ . . . all necessary water rights are secured by Developer for the water system . . . (p. 23, 2.2 c) and further provides

“Developer shall submit evidence that Developer has secured adequate surface and/or ground water rights for the water system . . . “ (p. 24, 2.2 e) and further

. . . Developer shall transfer, convey or assign (on a phase by phase basis) ground water right(s) to City for inclusion in City's municipal water supply system . . . (p. 24, 2.2 e)

M3 cannot convey or assign a water right unless it is the owner.

It is quite clear that M3, a private developer, will be allowed to own a municipal water right when it does not qualify under Idaho law. This private developer will own that water right until it is conveyed to the City on a phase by phase basis. The "so called" assignment to the City is nothing but a "ruse" to make it all look legal. IT IS NOT.

The Director's Order of October 14<sup>th</sup> did not address two critical issues. Those are as follows:

1. The negotiated Agreement, Stipulation, and the District Court Order do not supersede the Statutes of Idaho or the Idaho Rules of Civil Procedure.
2. Neither the Department, nor the Director had any jurisdiction to proceed with Judicial Acts by negotiation while the appeal was pending.

Both were ignored in the October 14<sup>th</sup> Order and therefore Protestants re-assert those matters herein for decision.

Respectfully submitted this 17 day of October, 2011.

  
\_\_\_\_\_  
Alan Smith, Protestant,  
Eagle Pines Water Users Association

must be of good quality. Exhibits identified at hearing are subject to appropriate and timely objection before the close of proceedings. Exhibits to which no objection is made are automatically admitted into evidence without motion of the sponsoring party. Neither motion pictures, slides, opaque projections, videotapes, audiotapes nor other materials not capable of duplication by still photograph or reproduction on paper shall be presented as exhibits without approval of the presiding officer prior to the hearing. (7-1-93)

607. -- 609. (RESERVED).

**610. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (RULE 610).**

Settlement negotiations in a contested case are confidential, unless all participants to the negotiation agree to the contrary in writing. Facts disclosed, offers made and all other aspects of negotiation (except agreements reached) in settlement negotiations in a contested case are not part of the record. (7-1-93)

**611. SUGGESTION FOR OR INQUIRY ABOUT SETTLEMENTS (RULE 611).**

Through notice or order or on the record at prehearing conference or hearing, the presiding officer may inquire of the parties in any proceeding whether settlement negotiations are in progress or are contemplated or may invite settlement of an entire proceeding or certain issues. (7-1-93)

**612. CONSIDERATION OF SETTLEMENTS (RULE 612).**

Settlements must be reviewed under this rule. When a settlement is presented to the presiding officer, the presiding officer will prescribe procedures appropriate to the nature of the settlement to consider the settlement. For example, the presiding officer could summarily accept settlement of essentially private disputes that have no significant implications for administration of the law for persons other than the affected parties. On the other hand, when one (1) or more parties to a proceeding is not party to the settlement or when the settlement presents issues of significant implication for other persons, the presiding officer may convene an evidentiary hearing to consider the reasonableness of the settlement and whether acceptance of the settlement is consistent with the agency's charge under the law. (7-1-93)

**613. BURDENS OF PROOF (RULE 613).**

Proponents of a proposed settlement carry the burden of showing that the settlement is in accordance with the law. The presiding officer may require the development of an appropriate record in support of or opposition to a proposed settlement as a condition of accepting or rejecting the settlement. (7-1-93)

**614. SETTLEMENT NOT BINDING (RULE 614).**

The presiding officer is not bound by settlement agreements that are not unanimously accepted by all parties or that have significant implications for persons not parties. In these instances, the presiding officer will independently review any proposed settlement to determine whether the settlement is in accordance with the law. (7-1-93)

615. -- 649. (RESERVED).

**650. RECORD FOR DECISION (RULE 650)**

**01. Official Record.** The agency shall maintain an official record for each contested case and (unless statute provides otherwise) base its decision in a contested case on the official record for the case. (7-1-93)

**02. Contents of Record.** The record for a contested case shall include: (7-1-93)

a. All notices of proceedings; (7-1-93)

b. All applications or claims or appeals, petitions, complaints, protests, motions, and answers filed in the proceeding; (7-1-93)

c. All intermediate or interlocutory rulings of hearing officers or the agency head; (7-1-93)

d. All evidence received or considered (including all transcripts or recordings of hearings and all exhibits offered or identified at hearing); (7-1-93)

Uncertainty about possible faulting and development of the PGSA at its boundaries that could affect the ability of the several municipalities relying on the PGSA to appropriate water supplies in the future is additional public interest support for requiring strict adherence by M3 Eagle to the requirements of the law for appropriating water for anticipated future needs.

### **Miscellaneous Arguments**

M3 Eagle argues that the interim director's calculation of the quantity approved for appropriation by dividing the proposed appropriated by six (five years times six is 30 years) is not based on the record. The interim director agrees the record contains better evidence to compute the quantity. The interim director will take the development predicted by M3 Eagle's economist during the first five years of the 30 year projection, and, based on the proportion of the five-year development to the 30 year development, determine the quantity of water that can be appropriated under a standard water right.

M3 Eagle argues that the interim director must issue a water right for reasonably anticipated future use because of earlier issuance of a similar water right for the Tamarack Resort recreational development in Valley County. The issues raised in this contested case were not raised when the Department issued the Tamarack permit. The Department is not bound in a subsequent water right determination by the issuance of the Tamarack permit.

### **M3 EAGLE'S MOTION TO REOPEN THE RECORD**

M3 Eagle moved to reopen the record for the purpose of taking "testimony and documentary evidence on the facts and legal conclusions raised or identified for the first time by the Interim Director in his Order and, to the extent necessary for reconsideration, to address other points described herein." M3 Eagle further argues that the "Order contains several instances of the Interim Director taking official notice without notifying the parties or giving them an opportunity to rebut his new facts and opinions," and that the interim director must "afford the parties a timely and meaningful opportunity to contest and rebut the facts so noticed."

In the original final order and, as explained in the preceding analysis, the interim director relied on the evidence presented by M3 Eagle and other evidence in the record to determine the limitations of the PGSA and to write the final order. The interim director did not take notice of or gather additional evidence in writing a decision.

After sixteen days of hearing and the submittal of volumes of evidence, M3 Eagle proposes to reopen the record, either to recharacterize or rehabilitate the evidence that was presented, or to perhaps present additional evidence about the dynamic nature of the M3 Eagle development as it evolves. M3 Eagle pushed for expediency in holding the hearing, the hearing was held. M3 Eagle had a full and lengthy opportunity to present its information, and all the parties and the Department should have the reasonable expectation of finality without the possibility of an iterative process where an applicant can present additional information in an attempt to finally satisfy its burden and obtain exactly what it applied for.

issue certificates of occupancy for any phase prior to adequate on-site roads being constructed to the capacity required for full build-out of that phase.

(g) **Private Roads.** All private roads and/or rights-of-way within the Property shall be constructed by Developer to ACHD and/or ITD, as applicable, standards and maintained by Developer and/or an Owners' Association; provided, however, in certain areas, Developer may seek approval on a phase by phase basis from City to install private roads which are not to ACHD standards or are not paved to preserve a rural character. Developer reserves the right to seek approval to limit access through access control structures, to private roads within the Property, and to determine the location of curb cuts, provided a qualified engineer determines that their location does not present a significant hazard. Developer shall have the right to retain ownership of private roads and/or rights-of-way. Some or all of private roads and/or rights-of-way may be conveyed to one or more Owners' Associations. Developer may seek City approval to install access control structures within the medians of the private roads and/or rights-of-way at any portion of the Property. Developer shall grant to the appropriate service providers license for police, fire, ambulance, garbage collection, water or sewer line installation and repair, and other similar public purposes, over such private roads and/or rights-of-way. Application for private streets shall be made to City as allowed under Eagle City Code Titles 8 and 9 at the same time as a preliminary plat application is filed which includes one or more private road(s).

(h) **Fiber Optics Easement.** Developer shall reserve, prior to dedication to ACHD and/or ITD, as applicable, in any public street on the Property, a non-exclusive Fiber Optics Easement reasonably acceptable to Developer and ACHD and/or ITD as applicable. Such facilities may connect to facilities external to the Property. Developer shall have the exclusive right to select providers of fiber optics and telecommunications services in connection with the Project.

## 2.2 Water.

(a) **Water Provider.** As provided in paragraph 2.2(c), an addition to City's Municipal Water System, hereinafter referred to as the Water System, shall be constructed by Developer sufficient to serve the Project. The Water System shall include all water rights necessary to serve the Project as it is being developed. As provided further herein, City shall be responsible for the operation and maintenance of the Water System. City shall provide water service to the Property from the Water System on the same basis as City provides water to other residents and businesses in the City of Eagle under ordinances in place at the time of this Agreement.

(b) **Regional Hydrogeologic Study; Master Water Plan.** Developer is conducting a Regional Hydrogeologic Study to determine the extent and sustainability of water sources that may be used to serve the Property. The Regional Hydrogeologic Study is intended to provide a basis for a Master Water Plan. The Master Water Plan will identify the various components of the Water System and all water rights necessary for and to be used to provide water service to the Property through the Water System. As provided further herein, Developer will develop water conservation criteria for landscaping and irrigation and the criteria will be included in the Design Guidelines.

(c) **Water System.** Prior to annexation, Developer may and, following annexation, Developer shall design, engineer, construct, install, permit and then convey the Water System to City in accordance with the terms of this Agreement, the Master Water Plan and any necessary Planning Unit Master Water Plans and applicable federal, state and local laws. In designing and constructing the Water System, Developer shall consult regularly with City and, construct the Water System to City's standards. Developer and City shall cooperate to the greatest extent practicable to ensure that all necessary water rights are secured by Developer for the Water System, and that the Water System can be permitted and operated in conjunction with existing and planned water facilities of City. Wherever feasible, Developer and City agree to cooperate as appropriate on development and operation of facilities such as storage reservoirs, emergency back-up power generators, and similar facilities. The phasing of the Project's development shall dictate the location and construction of the Water System components. City shall not issue any building permits for any phase prior to Developer's completion of the components of the Water System sufficient to provide fire protection for that phase of the Project. City shall not issue any certificates

of occupancy for any phase prior to Developer's completion of the Water System and irrigation facilities for service of that phase. As part of the conveyance of any phase or portion of the Water System to City, Developer shall provide City with all applicable as-built drawings, operation and maintenance manuals, operation records, and water right records and other necessary information.

(d) **Planning Unit Master Water Plan.** A detailed analysis of the Water System for each Planning Unit shall be completed and submitted to City.

(e) **Assured Water Supply.** For each Planning Unit Master Water Plan, Developer shall submit evidence that Developer has secured adequate surface and/or ground water right(s) for the Water System, sufficient for all irrigation, aesthetic, amenity, potable and/or recreational use in connection with the development of each Planning Unit (unless Developer is entitled to a waiver as provided by City Code). As part of the construction of the Water System and conveyance to City, Developer shall transfer, convey or assign (on a phase by phase basis) ground water right(s) to City for inclusion in City's municipal water supply system; provided however, Developer shall not convey or assign more ground water right(s) than necessary to serve the Project as it is being developed and City shall not use any of the water transferred under such rights to serve any other properties unless City demonstrates to Developer that City has obtained adequate water rights to serve the Project and such other properties. City shall cooperate with Developer, at no cost to City, to assist Developer in Developer's obtaining all permit(s) and licenses for water rights sufficient to serve the Property as the Property is developed in accordance with this Agreement. If any transfer, amendment or other proceedings are required under Idaho Code or IDWR rule or policy for the water rights necessary to serve the Project, City shall cooperate with developer in Developer's efforts to obtain all necessary permits and approvals from IDWR, including, without limitation, approvals in connection with Mitigation that may be required. Developer shall have the right to file for a municipal water right prior to the annexation. As set forth in this Agreement, it is City's and Developer's intent to have City be the water service provider and not have a PUC regulated provider serve the Property.

(f) **Reimbursement.** If Developer, at Developer's cost and expense, develops major water facilities, such as major production wells, water storage tanks or reservoirs (but excluding local service and distribution lines) for the Project, which reasonably has been determined by City to benefit properties other than the Property, or if City requires Developer to develop a portion of the Water System in excess of that necessary to serve the Project so as to allow City to serve other properties, City and Developer shall, in good faith, enter into an agreement to the effect that the portion of the costs in connection with such development of the Water System for properties other than the Property shall be reimbursed to Developer from the service connection charges collected from such other benefited property owners who otherwise have not paid or contributed their proportionate share toward development of the Water System ("**Water Reimbursement Agreement**"). Such Water Reimbursement Agreement shall have a duration of sufficient time following completion of the portion of the Water System for which reimbursement is sought with such time to be mutually agreed between Developer and City but in no event less than ten (10) years. Such Water Reimbursement Agreement shall provide, in part, that: (i) interest be paid to Developer at the then applicable municipal bond rate; (ii) City shall charge an administrative fee for handling the accounting, auditing, and payment of the reimbursement payments to be made to Developer; (iii) the Water Reimbursement Agreement shall be binding on Developer and City and their respective successors and assigns; and (iv) the Water Reimbursement Agreement may be recorded as an encumbrance against the benefited property(ies).

(g) **Water User Charges.** Upon development and conveyance of the Water System to City of the Water System and compliance with **paragraph 2.2(c)** above, City shall provide water service to the Property in quantity and quality sufficient to satisfy the potable water needs of the Project as and when required in connection with the development of the Property, subject to any water disruption or degradation of water quality or quantity that is outside the control of City and further subject to City's reasonably enacted and imposed standard terms and conditions of delivery. All water service using the Water System shall be metered. City shall receive no fee for water service until, and only if, City accepts ownership of and operational responsibility for the Water System, after which time City shall be entitled to collect such fees for water service.

RECEIVED

10/09

JUN 13 2011

DEPARTMENT OF WATER RESOURCES STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

\$25 fee per permit

For Office Use Only

Receipt Amt \$ 25

Receipt No. 6099326

Date: 6/13/2011

SR7

ASSIGNMENT OF APPLICATION AND PERMIT

To change the ownership of an application and a permit

I, M3 Eagle, LLC, hereby assign to City of Eagle, a municipal corporation,  
Current Owner(s) New Owner(s)  
of, 660 E. Civic Lane, Eagle, Idaho 83616 (208) 939-6813  
Full address including city, state and ZIP Phone

All my right, title, and interest in and to Permit No(s). \_\_\_\_\_ to appropriate the public waters of the State of Idaho.

OR (for partial assignments)

The following described portion of my right, title, and interest in and to Application and Permit Number(s): 63-32573, to appropriate the public waters of the State of Idaho.

Describe in detail the portion of the permit and application assigned, listing the number of acres in each 40 acre subdivision, point of diversion location, and amount of the water in cubic feet per second.

See attachment.

Does the new permit and application holder own the property at the:

Point of Diversion?  Yes  No

Place of Use?  Yes  No

If no, describe the arrangement enabling the new owner to access the point of diversion and/or the place of use: See attachment.

Made this \_\_\_\_\_ day of June, 2011.

[Signature] Member  
Signature of Permit and Title (if applicable) Signature of Permit Holder Title (if applicable)  
Application Holder

State of Idaho )  
County of Ada )ss

On this 13<sup>th</sup> day of June, 2011, personally appeared before me the signer(s) of the above instrument, who duly acknowledged to me that he/she/they executed the same.

SEAL

JoAnn C. Butler  
Notary Public

My commission expires: 9/24/14



EXHIBIT  
2

ATTACHMENT TO ASSIGNMENTS OF APPLICATION AND PERMIT FOR PERMIT 63-32573  
FILED BY M3 EAGLE, LLC

Part 1

By these Assignments of Application and Permit M3 Eagle LLC ("M3 Eagle") assigns to the City of Eagle ("City") the following:

1. Except as provided herein, M3 Eagle assigns to City all of its interest in Permit No. 63-32573 as approved in the January 25, 2010 Amended Final Order ("2010 Order") issued by the Idaho Department of Water Resources ("IDWR") and as such 2010 Order may be amended through the anticipated proceedings upon remand to IDWR by the Ada County District Court ("District Court") in Case No. CV-OC-1003180 ("Remand Proceedings") provided for in the IDWR/M3 Eagle Settlement dated January 19, 2011 ("IDWR/M3 Eagle Settlement") (the "Permit").

2. Except as provided herein, M3 Eagle assigns to City all of its interest in Application for Permit No. 63-32573 ("Application") such that City shall be deemed an applicant under the Application for purposes of the Remand Proceedings.

3. M3 Eagle agrees to hold harmless and indemnify City from any and all claims, costs, damages and attorneys fees which may be incurred by or asserted against City by any person or entity as a result of City's cooperation and/or participation with M3 Eagle in the Remand Proceedings and City's designation as an applicant or assignee of the Permit through the Remand Proceedings. A Pre-Annexation and Development Agreement was entered into between M3 Eagle and City and recorded in the real property records of Ada County, Idaho, on December 27, 2007, as Instrument No. 107170114 ("Development Agreement"). M3 Eagle agrees to pay the costs associated with any monitoring or mitigation resulting from the issuance or exercise of the Permit prior to conveyance to City of the Water System, as defined in the Development Agreement, and as may be addressed between M3 Eagle and City in connection with the Master Water Plan required under the Development Agreement, or as may be otherwise addressed between M3 Eagle and City.

4. M3 Eagle hereby reserves sufficient ownership interest in the Application and the Permit to allow M3 Eagle's full participation as a party to any judicial or administrative proceedings pertaining to the Permit, the Application and the Remand Proceedings, including the right to appeal, and to full participation in any appeal of, any final order issued pursuant to such proceeding. Any remaining ownership interest retained by M3 Eagle shall terminate and pass to City once the Remand Proceeding before the Department is complete, a final order is issued and any subsequent appeals are final.

5. This Assignment shall not be deemed nor interpreted such that it conflicts with any provision of the Development Agreement. If any provision of this Assignment conflicts with any provision of the Development Agreement, the Development Agreement prevails. This

Assignment shall be deemed to run with the land and shall be binding on any existing and future owner, developer, member, heir, successor in interest, employee, agent or assign of M3 Eagle.

6. Pursuant to M3 Eagle's request and City's status as an applicant for the Permit, City shall have the right to take any and all actions, in City's sole discretion, necessary to protect or assert City's rights and interests in connection with the Development Agreement and/or Stipulation and Order defined in the IDWR/M3 Eagle Settlement ("**Stipulation and Order**") approved by the District Court and M3 Eagle hereby waives any and all claims against City related to such action(s) so long as City's actions are not in conflict with the Development Agreement.

7. M3 Eagle agrees to cooperate with City in City's subsequent application(s) for permits for water rights and M3 Eagle agrees to take no actions contrary to such application(s) to the extent that City's subsequent application(s) do not conflict with the Development Agreement.

8. Nothing herein waives or shall be deemed to waive any rights of City or M3 Eagle as set forth in the Development Agreement.

9. This Assignment shall be effective upon IDWR's satisfaction with the City's RAFN analysis as described in ¶ 1(A)(i) of the IDWR/M3 Eagle Settlement and the District Court's approval of the Stipulation and Order.

10. Nothing in this Assignment shall be interpreted as an assertion or conclusion that IDWR maintains jurisdiction to enforce contract or indemnification provisions between City and M3 Eagle.

11. Nothing in this Assignment shall be interpreted as an assertion or conclusion that City approved or is a party to the IDWR/M3 Eagle Settlement.

## Part 2

1. M3 Eagle authorizes City to access the place of use and points of diversion in accordance with the Development Agreement referenced to in paragraph 3 herein between M3 Eagle and City.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17 day of October, 2011, a true and correct copy of the foregoing Renewed Motion to Dismiss Remand Proceedings was served on the following parties as set forth below:



**NOTICE OF SERVICE AND DISCOVERY**

North Ada County Groundwater Users Association  
John Thornton / David Head  
5264 N Sky High Lane  
Eagle, ID 83616

U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile

Norman Edwards  
884 W Beacon Light Road  
Eagle, ID 83616

U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile

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

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

City of Eagle, Bruce Smith  
950 W Bannock, Suite 520  
Boise, Idaho 83702

U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Facsimile