

NOV 23 2011

Closing Statement for
North Ada County Groundwater Users Association – Eagle Pines Water Users
Association and Norman Edwards

DEPARTMENT OF
WATER RESOURCES

Mr. Hearing Officer:

The water rights hearings and district court proceedings for the M3 and now City of Eagle Water Right Application #63-32573 has and continues to be a long process full of twist and turns and more recently, disturbing transactions.

Original water rights protests were filed in May of 2008, objecting to the request for 23.18 cfs of water being requested by M3 Eagle. Several months prior to the formal water rights hearings began in April of 2009, the NAGUA Protestants thru their attorney, Ms Joe Beaman formally identified to IDWR's Interim Director that M3 Eagle was not a qualified municipal provider and therefore their application should be dismissed. M3 Eagle even stated they were not a municipal provider. This allegation was ignored by the Interim Director and eventually the formal water rights hearings began. Why was it more than 10 days into the formal hearings when Mr. Allan Smith re-stated this same fact that the hearing officer/interim director finally took note of this obvious deficiency in M3's application?

If it wasn't for the Protestants efforts, IDWR would have granted a RAFN to a non-municipality but then again perhaps they have as only the name of the City of Eagle is on the application as Mr. Bill Brownlee's assignment to the city of Eagle stipulates that M3 Eagle will assign "on a phase by phase basis", the 23.18 cfs based on completion of certain aspects of M3's development per their pre-annexation and development agreement with the city of Eagle.

This brings up two disturbing questions: 1) How can M3, a non-municipal water provider, and therefore illegal to have a RAFN water right, assign a RAFN water right permit to the city of Eagle? and 2) How can M3, a non-municipal water provider assign a RAFN water right permit to the city of Eagle in phases, which could be over a 30 year window?

Following numerous days of formal hearings a Final Order was issued on December, 21, 2009 for 4.0 cfs. Following an appeal by M3, an Amended Final Order was issued on January 25, 2010 for 3.28 cfs. Identified in this Amended Final Order are numerous findings and statements by the IDWR Interim Director regarding the concerns with the scientific studies conducted by M3 and the sustainability of the aquifer such as:

Page 4 - **Limitations of the PGSA:** "M3 Eagle argues that the interim director announced "severely limited ground water supplies" in the Treasure Valley. This statement is a mischaracterization. The final order focused on the PGSA, not the entire ground water resource in the Treasure Valley."

Page 5 - **Model Conclusions:** "M3 Eagle encourages the interim director to subscribe to the following maxim: Believe the results of a scientific study even though the data and input are unreliable. This suggestion is untenable. A reliable and believable model should be built by inputting accurate and believable

information into the model, and the inputs and the results should be acceptable after being measured to calibrated outputs.”

Page 7 - **Available Drawdown:** “As the PGSA inclines upwards to the northeast, the available drawdown decreases and water level declines are more likely to cause up-slope wells to be unusable.”

Page 8 - **Water Supply Analysis:** “The peak pumping and effects from pumping have the potential to further stress a possible limited supply of water.”

Page 19 - **Findings of Fact #40:** “The following are facts that the interim director incorporates into his decision in determining only 14 – 22 cfs remains available for appropriation:”

In early 2010, M3 Eagle then went to District Court vs. IDWR to litigate the Amended Final Order. M3 Eagle quickly put the litigation on hold to work out a “Settlement Agreement” with the IDWR. Almost a year later, even though the aquifer’s properties have not changed during this time period and the aquifer does not care if the requested withdrawal is from a private corporation such as M3 or from a municipal provider such as the City of Eagle, however, the interim director found in the “M3 Eagle and IDWR Settlement Agreement” signed on January 19, 2011 and states in just one sentence:

Page 6 **IDWR’s Order on Remand** – “the aquifer is part of the deep regional flow system identified in the Treasure Valley Hydrologic Project model and reports (TVHP - Exhibit # 33). *The water supply in the aquifer is sufficient for the purpose it was sought to be appropriated as identified in the M3 application.*”

What is going on?!

Exhibit A of this Settlement Agreement which was to provide the rationale for the sufficiency of the granting the full 23.18 cfs was not even developed. Exhibit A took nearly four additional months to complete and be agreed to between M3 and the IDWR. Doesn’t common sense state that Exhibit A should have been developed prior to the interim director stating the aquifer is sufficient for the entire 23.18 cfs. Is this not a classic example of “putting the cart in front of the horse”?

Shortly after M3 and IDWR started their “settlement negotiations” the Protestants were contacted by two Deputy Attorneys General, Mr. John Homan and Mr. Garrick Baxter in mid 2010 regarding the settlement negotiations. They informed us that Mr. Spackman (hearing officer and interim director) knew the effort and interest of the Protestants and wanted to have us involved in these settlement negotiations via our review and comments on the various draft versions of the settlement negotiations. We were excited and appreciative of this offer to be involved in the review of the draft settlement negotiations. As the weeks and months moved on with no draft settlement agreements for our review we contacted Mr. Homan and Mr. Baxter for a status meeting. The Protestants were requested to submit our settlement points in which we quickly provided nine settlement conditions. These nine settlement points to this day have never received a response. At another meeting late in 2010 between the Protestants and Mr. Homan and Mr. Baxter the Protestants were told again that we would be involved and able to comment on the draft settlement agreement and it was taking time for IDWR and M3 to work out various aspects of the Settlement Agreement. Once again, following a District Court Status Hearing in early January 2011 were told the same thing by Mr.

Homan and Mr. Baxter only to find out that the Settlement Agreement was signed three days later without any attempt to include the Protestants.

To add insult to injury, Mr. Homan and Mr. Baxter then offered to have the Protestants provide comments and edits to the development of Exhibit A of the M3 and IDWR Settlement Agreement. We provided several comments and edits for Exhibit A only to have Mr. Homan and Mr. Baxter discard them stating that the interim director would only accept comments and edits that supported the full 23.18 cfs. The majority of our submitted comments were quotes from various project record exhibits including many from Exhibit #33 (TVHP) with some of them identified below:

1) Exhibit #33 TVHP Chapter: Executive Summary (authors Petrich) page 24 “Answers to Project Questions #3: Where and to what degree are ground water levels declining? ...Additional ground water level declines were observed in individual wells in other areas, including the area between Eagle, west Boise, Meridian, and Kuna.”

2) Exhibit #33 TVHP Chapter: Water Budget for the Treasure Valley Aquifer System (authors -Urban and IDWR) page iii. “Primary withdrawal areas and primary recharge areas do not coincide throughout the valley. The primary recharge areas are those with extensive canals and/or flood irrigation, while the greatest withdrawals occur in areas that are not flood irrigated. For example, agricultural irrigation withdrawals (non-supplemental) are concentrated in areas where surface water is unavailable, and municipal withdrawals are concentrated near the urban areas of Boise, Nampa, Caldwell, and Meridian. As a result, withdrawals may exceed recharge in local areas within the Treasure Valley, resulting in local water level declines”. Is this not the same situation as in the areas surrounding the city of Eagle, especially in the northern area, far away from the surface supplemental irrigation and now facing a large municipal withdrawal?

3) Exhibit #33 TVHP Chapter: Simulation of Increased Ground Water Withdrawals in the Lower Boise River Basin (author Petrich) page 34. “Conclusions and Recommendations – “Results from the simulation of these unprocessed non-supplemental ground water right applications in the Treasure Valley aquifer system suggest that:

Aquifer level declines may occur if all of these currently unprocessed, non-supplemental ground water permits were granted.”

4) The Department of Water Resource’s own technical experts have testified that there is a line of evidence that suggests there may presently be a declining water table as identified in the IDWR Staff Report, Exhibit # 50.

At this same meeting the Protestants asked Mr. Homan and Mr. Baxter what portions of the project record they had read or reviewed. To the Protestants dismay, they said they had not read one single page, not even IDWR’s own Staff expert reports!! The Protestants asked Mr. Homan and Mr. Baxter if Mr. Ed Squires or Mr. Jeff Fereday were the primary authors drafting Exhibit A as it was very selectively written, cherry picking supportive statements from several of the chapters in the TVHP report which was identified as Exhibit #33 in the official water rights project record. They stated it was an IDWR report. We pressed again by asking directly, “who by name, in IDWR was drafting Exhibit A”. Mr. Homan responded that, “he was drafting Exhibit A”. How was this possible when just a few minutes earlier, Mr. Homan stated that he had not even read one page of the record?

M3 has met more than 20 times with IDWR on developing a negotiated settlement. The Protestants, realizing they were not truly being included in the settlement negotiations and not having the financial resources for their own attorney, tried to get to the table as either a pro se intervener or submit an amicus curiae brief. Contrary to Mr. Fereday's statement that John Thornton did not attempt to be an intervener. Mr. John Thornton's attempt to intervene on February 4, 2011 was objected to by M3's attorneys and denied by the Court on March 22, 2011. The main obstacle inhibiting Mr. John Thornton's intervening was a requirement by IDWR prior to the beginning of the formal hearings to sign a waiver that stated among other things:

"I am knowingly waving my right to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any decision by IDWR".

This waiver was a required condition in order for both Mr. John Thornton and Mr. David Head to serve as spokespersons for the NACGUA Protestants during the formal water right hearings. Looking back, we wonder if this waiver is even legal. Where is this requirement identified in State Statutes? Why was this waiver not a requirement for the Eagle Pines Water Users Association spokesperson? We wonder how this apparently unprecedented requirement will hold up under potential future appeals. Are M3 and the IDWR apprehensive about the full truth and scientific assessment of the sustainability of the aquifer? Mr. Alan Smith was successful in becoming a "friend of the court" and provided an appropriate written and oral brief.

The remand proceedings developed and agreed to by both M3 and IDWR specifically limited presentation of evidence at the supplemental "remand" hearing to the following three areas of limited scope of evidence:

- 1) Was the M3 Project area annexed by the city of Eagle?
- 2) Development of the city of Eagle's RAFN for the city of Eagle's service area, including the M3 Eagle Project, based on the city of Eagle's current water rights portfolio and planning information.
- 3) Information on the quantity of water appropriated for permit 63-32573 appurtenant to the M3 Project in relationship to the water needs of the City's service area.

In fact, this represents a severe limited scope of evidence! Where is the detailed and exhaustive analysis of their being enough water in the aquifer for the entire 23.18 cfs about to be granted by IDWR? Why were the Protestants not allowed to participate in this process? Days and weeks and months and now over a year have been spent on determining these seemingly uncomplicated and uncontroversial aspects of the water right application. We the Protestants wonder and speculate, why is this the case?

The three areas identified as the limited scope of evidence are troubling. The Protestants never were concerned with legitimacy of the annexation by the city of Eagle. The Protestants find it amusing while at the same time disconcerting so much time and money (tens of thousands of dollars) would be thrown at defending the difference between the findings by IDWR, M3 and the city of Eagle over a minute difference of 0.76 cfs for the RAFN. Why wasn't this type of effort and analysis used to determine the sustainability of the aquifer providing 23.18 cfs? Regarding # 3 above, no one seemed to be able to describe how the M3 existing water rights were included in the analysis of the RAFN needs. Will M3 use their existing water rights on the M3 Project or will they

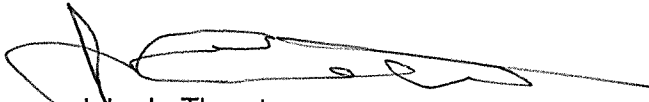
perhaps sell them or transfer them to be used on another project such as the Legacy Development?

Another unfulfilled requirement is the analyses associated with the financial feasibility for the city of Eagle to put the RAFN water right to beneficial use. To date the city of Eagle has not provided any financial information that is required of an applicant attempting to obtain a RAFN water right as stated in Idaho Code Section 42-203A. We believe the intent of this statute in this case is to put the burden of proof on the applicant, city of Eagle, to show the State of Idaho and the IDWR Interim Director that they have financial resources, financial commitments and capability to successfully finance, develop and put to beneficial use the ground water owned by the State of Idaho.

During their testimony, the city of Eagle has provided virtually no documentation demonstrating the estimated cost to construct the infrastructure required for the municipal water system (so far removed from their current water system) or their financial wherewithal to undertake such an effort and therefore is completely lacking in satisfying this important burden of proof. The economy, capital markets in general and real estate markets in particular have dramatically and negatively changed since M3 originally filed its application in 2006 and may stay impaired for some time. IDWR and interested parties have no idea how these conditions may have or will impact the city of Eagle's financial capabilities. The city of Eagle's financial viability, financing sources, capability, and contingency plans and how each may be impacted by continued stressed economic conditions should be thoroughly understood.

We appreciate the important and difficult responsibility you have in both the protection of, and the provision of water rights for the citizens of this great state. We appreciate your patience with our pro-se protest.

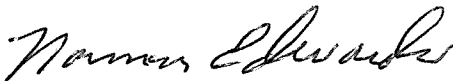
We thank you Mr. Hearing Officer and IDWR Interim Director.



John L. Thornton
North Ada County Groundwater Users Association



Alan Smith
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Norman Edwards
Private Water Rights Owner