BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION TO APPROPRIATE WATER NO. 63-32573 IN THE NAME OF M3 EAGLE LLC.	))))	**AMENDED FINAL ORDER**

On November 21, 2006, M3 Eagle, LLC ("M3 Eagle" or "M3") filed an application to appropriate water seeking to appropriate 42.5 cubic feet per second ("cfs") from ground water for municipal purposes. On August 27, 2007, M3 Eagle filed an amended application to appropriate water. The amended application sought to appropriate 27.47 cfs from ground water for municipal purposes. On April 22, 2008, M3 Eagle filed a second amended application to appropriate water. The second amended application seeks to appropriate 23.18 cfs of ground water for municipal purposes. In addition, the application seeks a diversion to storage rate of 2.93 cfs and a diversion from storage of 1,668 acre feet of water. The application also states that 1,836 acre feet of water will be stored in ponds on the proposed development.

The applications to appropriate water were assigned water right no. 63-32573. Notice of the second amended application was published statewide on May 1 and 8, 2008. A large number of individual protestants and entities filed protests against the application.

Many of the protestants agreed to be represented at the hearing by spokespersons. The following protestants identified David Head, John Thornton, or Ann Ritter, officers in the North Ada County Groundwater Users Association ("NACGUA"), as spokespersons to speak for them in the above contested case and during the hearing for the contested case: John L. Thornton, Linda D. Burke, John Franden, Craig Tarbet, Sherri Randall, Charles Watkins, Robert H. West, Stephen Dick, Bruce Van Camp, Loring Evans, Thomas Ritter, Lorn H. Adkins, Daniel J. Glivar, Richard Lagerstrom, Vince Iazzetta, Dale Gaston, Marion D. Groothuis, Vincent J. Minkiewicz, Carol Jean Thompson and/or John Petrovsky, Barb Jekel, Robert Lyons, G. E. McDonald, George W. Keyes, Eric C. Leigh, Shelby Conrad, Morgan Masner, Jim Banducci, Jr., Steven C. Purvis, Robert S. Niccolls, Jr., David Collett, Walter H. Meyer, Jr., Michael McMurray, Lyle Jordan, Ronald R. Rapp, Bruce Richardson, and Barrett D. Jones.

The following protestants identified Bill Lawton as the spokesperson in the above contested case and during the hearing for the contested case: Robert L. Wood, M. Howard Goldman, and Timothy R. Milburn.

During prehearing procedures, some protestants were dismissed for failure to appear and participate. In a Default Order dated October 7, 2008, protestants Jonathan Seel, Jon Busack,

Yvonne Morton, Cal Gothberg, and Brent Watson for Eagle Pines Water Users Assn. were dismissed as parties for failure to appear at the time and place set for prehearing conference.

In a Default Order dated May 14, 2009, protestants Bill Lawton, Robert L. Wood, M. Howard Goldman, and Timothy R. Milburn's were dismissed as parties for failure to appear at the time and place set for hearing. The Default Order also informed the protestants Bill Lawton, Robert L. Wood, M. Howard Goldman, and Timothy R. Milburn that they could appear and testify as public witnesses.

The remaining active protestants were: David Head, John Thornton, or Ann Ritter as spokespersons for members of NACGUA, Alan Smith as spokesperson for Alan and Jason Smith and Eagle Pines Water Association, and Norman Edwards appearing individually.

Beginning in April 2009 and ending in July 2009, the interim director conducted a hearing regarding the protests. The following parties appeared at the hearing:

Jeffrey C. Fereday and Michael P. Lawrence, attorneys at law, appeared for M3 Eagle, John Thornton and David Head appeared on behalf of the North Ada County Groundwater Association and as spokespersons for multiple protestants, Alan and Jason Smith appeared for Pines Water Association and other protestants, and Norman L. Edwards represented himself.

Following the presentation of testimony, the parties submitted briefs and response briefs. The submittals were complete on October 4, 2009.

On December 21, 2009, the interim director issued a final order.

On January 4, 2010, Eagle Pines Water Association and North Ada County Groundwater Users Association filed a petition for clarification and reconsideration. On January 4, 2010, M3 Eagle filed a petition for reconsideration and a motion to reopen the record. The relief requested in the petitions is addressed below and any changes made to the final order are contained in this amended final order.

ANALYSIS OF M3 EAGLE'S PETITION FOR RECONSIDERATION

Technical Issues

Many of the issues raised by M3 Eagle relate to the interim director's focus on the Pierce Gulch Sand Aquifer ("PGSA") as the source of water for municipal providers in the area. The hearing evidence establishes that the PGSA is the target aquifer for local municipal providers and other municipalities within M3 Eagle's ground water model boundaries:

> All the major municipal supply wells and many irrigation wells in the greater Eagle-Star-M3 area are believed to derive their water from the Pierce Gulch Sand Aquifer. M3 Eagle plans to complete an estimated additional three to eleven supply wells in the Pierce Gulch Sand Aquifer beneath its property. (Exhibit 44, p. 5).

Additional support for finding that municipalities rely on the PGSA as a source of municipal water supplies is found in other M3 Eagle exhibits:

> The second contribution is to apply the new understanding that the Pierce Gulch Sand Aquifer is the regional aquifer system beneath the greater Star-Eagle-M3 area to the pumping test analyses. Geologic, hydraulic, geochemical, and geophysical data show that all the major supply and irrigation wells in the Eagle, Star, upland foothills area, and even the City of Meridian tap the same, regional-supply aquifer. (Exhibit 12, p. ii)

And more:

> The aquifer sand thickens and descends deeper beneath the land surface to the south and southwest in the Eagle-Star-Meridian area and is believed to do the same to the northwest toward Payette River. The Pierce Gulch Sand Aquifer is a very productive aquifer as evidenced by the many large bore production supply wells which are completed into it including the City of Star's wells, the City of Eagle's wells, and the public water utility wells of United Water Idaho and Eagle Water Company, all located throughout the area (see Figure 5). (Exhibit 2, p. 3).

The Goddard well #2, located in Garden City, is constructed in the PGSA. In addition, a well located near the Hewlett Packard facility west of Garden City is also constructed in the PGSA (Exhibit 45, p. 27).

The testimony of Ed Squires (Tr. 1072-1073), expert witness for M3 Eagle, established that the City of Caldwell and the City of Meridian divert water from the PGSA:

> Q. What about the cities of Caldwell and Meridian, are their municipal wells completed into the Pierce Gulch Sand Aquifer or some other aquifer?
>
> A. Some of them are.
>
> Q. Are those productive wells into the Pierce Gulch Sand Aquifer for Meridian and Caldwell?
>
> A. Some of the most productive wells we have, yes.

Based on inclusion of the Middleton area within the domain of the ground water model, the City of Middleton probably diverts ground water from the PGSA for its municipal water supply.

The PGSA is one of the deeper cold-water sedimentary aquifers in the Treasure Valley. Aquifers deeper than the PGSA are often influenced by geothermal influences and have relatively poor water quality. The PGSA is underlain by mudstone formations that do not produce water of sufficient quality for municipal use without significant treatment. (Tr. 823-825)

The deep aquifers above the geothermal ground water are the target aquifers for municipal water within the Treasure Valley because of their quality and productivity. (Exhibit 33D, pg. 24).

The December 21, 2009 final order did not clearly state that the PGSA is the target aquifer for municipal providers within much of the Treasure Valley and probably within much if not all of M3 Eagle's model boundaries. The findings of fact will be amended to clearly state the reliance of the municipalities in the Treasure Valley on the PGSA as a primary source of municipal water.

The above described deficiency in the findings of the final order may have contributed to many of the issues raised by M3 Eagle. For instance, M3 Eagle argues that the interim director mistakenly declared a ground water shortage by not considering all of the ground water resources in the Treasure Valley as being available for appropriation. Because the PGSA is the target aquifer for M3 Eagle and for other municipalities, the interim director focused on water availability and possible injury resulting from M3 Eagle's proposed appropriation from the PGSA, not from other aquifers. The interim director also discussed whether it was in the public interest to allow M3 Eagle to appropriate water for reasonably anticipated future needs to serve 30 years of development.

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.

Witnesses for M3 Eagle testified at the hearing that recharge to the PGSA was robust and that the travel time in the aquifer is rapid. The interim director relied on the technical information provided by M3 Eagle to evaluate what the terms "robust recharge" or "rapid travel time" meant. This evidence was provided by M3 Eagle's geochemical expert, Richard Glanzman, and by the scientific models developed and employed by M3 Eagle to simulate the physical characteristics of the aquifer and its responses to pumping.

Geochemical Conclusions

1. Geochemical evidence submitted by M3 Eagle established that the PGSA derives its water primarily from the ancestral Boise River and not from recharge resulting from vertical seepage from lands overlying the PGSA.

> Richard Glanzman, a geochemistry expert for M3 Eagle, testified as follows:
> Q. And that statement says "Groundwater chemistry indicates that the Pierce Gulch Sand Aquifer is a discrete aquifer recharged from the Boise River with no apparent hydraulic connection with other aquifers". And the question I have is, are you implying that in that statement that there's no hydraulic connection existing between the Pierce Gulch Sand Aquifer and any other shallower aquifers above it?"

A. This is referring to the aquifer study and the wells studied in the M3 area. It does indicate that's what it means.

Q. And so are you stating that there's no other connection with any other aquifers above, shallower aquifers above?

A. That's what I'm saying.

(Tr. 1424).

The testimony of Glanzman is supported by the testimony of Mark Utting:

Well, I did state earlier that the only place we know recharge occurs in the model area would be at the southeast boundary. (Tr. 1659-1660).

The hydraulic head in the PGSA is higher in most places than it is in overlying aquifers. If there were any vertical movement of water, the higher head in the PGSA would cause water to migrate upward out of the PGSA, not downward into the PGSA. (Tr. 806, 825-26, 940-943).

The interim director also takes note of the following conclusion that was based on modeling performed as part of the Treasure Valley Hydrologic Project and quoted in an Appendix to the M3 Eagle model report (Exhibit 16): "Simulated fluxes between model layers in the base calibration indicates a relatively small amount of water moving vertically between model layers, especially in lower layers. Based on simulation results, most recharge occurring in shallow aquifer zones does not reach lower zones." (Exhibit 33B, p. 111).

2. M3 Eagle's technical evidence established that the PGSA is old water that has not moved rapidly through the aquifer.

Glanzman concluded based on his interpretation of the data that "the aqueous geochemistry analytical results indicate that the PGSA is a distinct regional aquifer containing ground water originating from the geologically ancestral Boise River." (Exhibit 43, p. 5).

In support of its conclusion that PGSA ground water is "old," the Treasure Valley Hydrologic Project determined that "ground water in the deep deltaic aquifers beneath Boise entered the subsurface between 10,000 and 20,000 years ago." (Exhibit 33b, pg. 11).

Model Conclusions

M3 Eagle developed a ground water model to simulate the properties of the PGSA and to predict what would happen when additional water is diverted by M3 Eagle. M3 Eagle argues that the model was only developed to simulate ground water level changes resulting from M3 Eagle's proposed pumping and that the other components of the model should be ignored as being unreliable. 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 calibrated to measured outputs. In fact, M3 Eagle's evidence states the following about the accuracy of the model.

> Model calibration was performed to best available estimates of recharge, pumping, and target ground water level elevations. (Appendix A to Exhibit 16, p. 20).

Moreover, concern by the model's designers for the accuracy of the water budget is evident because they concluded that a small difference between the model inflow and the model outflow terms "supports successful model calibration." (Exhibit 16, p. 26).

In contrast to the above statement, the water budget terms for the aquifers overlying the PGSA were not considered reliable because there was no attempt to calibrate the upper layers of the model. As stated in Appendix A to the M3 Eagle modeling report (Exhibit 16) "The model (i.e. both realizations) was **not** calibrated to hydrogeologic conditions in the shallow and middle aquifer systems. Model realizations should **not** be used to simulate hydraulic responses in either system without further calibration, nor should the water budget developed for these portions of the system be construed as accurate." (emphasis added, Appendix A to Exhibit 16, p. 20).

The ground water model shows inflow to the model boundary of the PGSA (layers 5-7) at the southeast portion of the model. M3 Eagle created two versions of the model, one calibrated to aquifer transmissivities (T-Match) and one calibrated to water levels in the PGSA (H-Match). The inflow for the T-Match version of the model was 107 cfs. The inflow for the H-Match version was 115 cfs. Neither version of the model simulated direct inflow to the PGSA from shallow aquifers overlying the PGSA. The modeled inflow of 9.6 cfs from the west and north boundaries is not supported by evidence in the record and was used to force calibration of the model.

Mark Utting summarized recharge to the PGSA:

> Well, I did state earlier that the only place we know recharge occurs in the model area would be at the southeast boundary. (emphasis added, Tr. 1659-1660).

M3 Eagle argues that pumping will induce additional inflows to the PGSA, either from the Boise River or from shallower aquifers. This conclusion may or may not be true because the nature of how the Boise River recharges the PGSA is unknown. (Tr. 1143-44, 1240-41, 1661).

Additional recharge from shallower ground water zones would only occur if the current vertical hydraulic gradient (higher hydraulic head at deeper depths) reverses and the hydraulic gradient demonstrates lower head with depth. In addition, even after a gradient reversal, confining layers above the PGSA significantly impede the vertical movement of water. M3 Eagle's ground water model confirms this vertical impedance by assuming negligible flow of ground water into the PGSA from overlying aquifers.

M3 Eagle's expert witnesses testified that the PGSA is robustly recharged, and that the hearing officer must give great weight to this "all important" expert testimony. For purposes of evaluating M3 Eagle's application, and in an attempt to quantify the "robust" recharge to the

PGSA, the interim director accepts M3 Eagle's own model numbers. As additional data is gathered and further studies are completed, these numbers may change, but the interim director must rely on the evidence in the record.

Available Drawdown

M3 Eagle argues that "wells will be positioned over the PGSA sufficiently far away from the edge of the aquifer boundary to allow a reasonable depth of the well and the available drawdown to the well." (Tr. p. 1124, Squires).

Despite the above testimony, M3 Eagle's application proposes construction of wells scattered throughout the M3 property. Locations of existing wells proposed as points of diversion in the water right application are also scattered throughout the property. As the PGSA inclines upward to the northeast, the available drawdown decreases and water level declines are more likely to cause up-slope wells to be unusable.

Municipal providers generally attempt to distribute wells within the service area. Concentration of wells at one end of the development requires larger delivery pipelines leading from the concentrated wells. More electrical energy must be expended to raise the pressure in the delivery lines to overcome friction losses in the delivery. Spacing of wells throughout the service area minimizes drawdown increases from intersecting cones of depression, reduces energy costs caused by friction losses in long delivery pipes, reduces the size of piping needed to deliver water, and more evenly distributes necessary pressure throughout the integrated system. It is likely that M3 Eagle would attempt to construct and use existing wells both in the upslope and downslope areas of the PGSA underlying the M3 Eagle property despite the testimony of Ed Squires.

Water Supply Analysis

M3 Eagle argues that the interim director's water supply analysis is not supported by the record and offers four reasons why.

1. M3 Eagle argues the interim director didn't consider the entire recharge in M3 Eagle's model water budget. The response to this argument is explained earlier in the text. The argument that all ground water recharge must be considered by the interim director is inconsistent with and belies M3 Eagle's testimony and evidence about recharge to the PGSA and is inconsistent with the recharge inputs to the PGSA assumed by the model.

2. M3 Eagle argues the interim director cannot ignore the 9.6 cfs shown as recharge on the west and north of its model boundary. M3 Eagle established that the hydraulic gradient in the PGSA is from the southeast to the west and to the northwest, and adopted this gradient direction in its conceptual model. The interim director accepts M3 Eagle's conceptual model and rejects the assumption of inflow to the PGSA from the west and north. The numerical model inflows from the north and west of 9.6 cfs were forced by M3 Eagle's modeler because the calibration to measured water well depths could not be matched without the use of these arbitrary inflow boundaries that are inconsistent with the conceptual model and unsupported by evidence in the record.

3. M3 Eagle argues that 900 cfs of the "total presumed total inflow would remain." Although M3 Eagle's computation to derive the 900 cfs is not contained in its brief, the interim director concludes that 900 cfs is derived by the broad assumption that all the ground water is available for appropriation and use rather than focusing on the PGSA, the target aquifer for municipal use. As discussed earlier, by its own evidence, M3 Eagle established the inflows to and characteristics of the PGSA.

4. M3 Eagle argues that the interim director used an average number of 10 cfs rather than 9.03 cfs to calculate the recharge remaining in the PGSA of 13-21 cfs. This amended final order reflects an average diversion of 9.03 cfs, which will increase the range of remaining water in the PGSA from 14 to 22 cfs. This computation has little consequence to the determinations of the amended final order. M3 Eagle seeks an appropriation of over 23 cfs. M3 Eagle would divert a much higher flow rate than 9.03 cfs during the irrigation season. Presently, there are annual fluctuations in the water levels of wells monitored in the PGSA, with declines in the summertime resulting from irrigation pumping at nearby "pumping centers." (Exhibit 42, p. 20.). The peak pumping and effects from the pumping have the potential to further stress a possible limited supply of water.

Director's Opinions and Assertion of Assumption of Facts not in the Record

M3 Eagle asserts the interim director assumed or considered evidence not in the record and that the interim director "resorts to his own opinions."

As discussed earlier in this analysis, the interim director relied on the evidence presented by M3 Eagle to determine the limitations of the PGSA. The reason the interim director concentrated on layers 5-7 (three layers, not two) is partly because the water budget for the model did not show inflows to the PGSA from any other layers. Furthermore, M3 Eagle's documentation about the model stated that the water budget for the upper layers was not reliable. Lastly, M3 Eagle's evidence also established that the recharge to the PGSA is Boise River water from the south and east (Tr. 1658-1659) and that there is no hydraulic connection between the PGSA and overlying aquifers (Tr. 1424). Many of M3 Eagle's arguments in this section promote the same broad assumptions about recharge to the entire ground water resource without focusing on the PGSA and ignoring evidence presented by M3 Eagle about specific recharge to the PGSA.

M3 Eagle apparently argues that the interim director cannot rely on the expertise of the agency in finding facts and reaching conclusions from the evidence in the record. This argument is contrary to the accepted tenets of administrative law.

Faulting Near the M3 Eagle Proposed Development

M3 Eagle argues that the hearing officer incorrectly found there is a fault in the southwest portion of the M3 Eagle property. The interim director's findings were intended to determine that the evidence presented did not conclusively establish the existence or nonexistence of a fault, but that there were sufficient indications of an impediment to flow that a

fault could exist and the existence of a fault could further limit the ability of M3 Eagle to obtain water at full development.

Legal Issues

Prior to a detailed discussion of the legal issues raised by M3 Eagle, the relationship between the technical findings of fact and the legal determinations by the interim director must be established. The evidence establishes that M3 Eagle may appropriate water within the standard statutory five year development period. The above analysis of the technical information and the technical findings of fact in the final order were included, based on evidence presented in the record, to show why there is sound public policy for the interim director's strict application of the statutory standards and also to show that it is not in the local public interest to allow the large appropriation for a 30-year period that likely would restrict the ability of existing municipalities to grow and to promote economic development within the existing communities.

Qualification as a Municipal Provider

Idaho Code § 42-202 states, in pertinent part:

> An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish **that the applicant qualifies as a municipal provider** and that the reasonably anticipated future needs, the service area, and the planning horizon are consistent with the definitions and requirements specified in this chapter.

M3 Eagle argues that the verb "qualifies" is ambiguous. M3 Eagle argues evidence that an applicant is "ready, willing, and able to be a municipal provider once the permit is issued" is sufficient information and documentation to show that an applicant qualifies as a municipal provider.

Idaho Code § 42-202B(5) defines the term municipal provider:

> (5) "Municipal Provider" means:
> (a) A municipality that provides water for municipal purposes to its residents and other users within its service area;
> (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; or
> (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" as described in section 39-103(12), Idaho Code.

M3 Eagle seeks to be a municipal provider under subsection (c) above as a "corporation . . . 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."

Idaho Code § 42-202B(5) establishes the requirements for being a municipal provider. M3 Eagle argues that the applicant does not need to be supplying water for municipal water through a water system and does not need to be regulated by the state of Idaho as a public water supply to qualify. In other words, M3 Eagle argues that if a person or entity presents an application to appropriate water for municipal use and seeks to reserve 30 years of development water for reasonably anticipated future needs, the test of qualification is satisfied if the applicant is ready, willing, and able to be a municipal provider sometime after the permit is issued, because M3 Eagle will not be a municipal provider for the service area sought "at the time the permit is issued."

M3 Eagle's proposed standard for qualification is that the applicant wants to be a municipal provider in the future. The interim director rejects this interpretation of the verb "qualifies." The interim director interprets the verb to mean that the applicant must be a municipal provider as defined by Idaho Code § 42-202B(5) at the time the application is considered by the Department. There is sound public policy for this and other requirements discussed later in this analysis. M3 Eagle did not qualify as a municipal provider when the Department considered the application.

Reasonably Anticipated Future Needs Water Rights for Municipalities

Idaho Code § 42-202B(8) defines the term reasonably anticipated future needs:

> (8) "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required **within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality.** (Emphasis added).

M3 Eagle argues that counties are municipalities, the M3 Eagle property was within Ada County at the time the Department considered the application, and the M3 Eagle property has been annexed into the City of Eagle.

As a preliminary matter, the assertion that the M3 Eagle property has been annexed into the City of Eagle is not reflected in the record. By its argument, M3 Eagle suggests that the interim director consider evidence not in the record. The hearing officer cannot consider the asserted information in his decision.

The interim director concedes that a county can qualify as a municipal provider. Nonetheless, there was no population, planning data, or planning horizon information for Ada County presented at the hearing. Furthermore, Ada County has no direct interest in providing water to its residents. M3 Eagle's focus at the hearing was a future annexation of its development property into the City of Eagle. M3 Eagle offered as evidence the Comprehensive Plan for the City of Eagle. To argue that there was a continuum of municipalities within the service area ignores the requirement that the application be based on "population and other planning data . . . reasonably expected to be required within the planning horizon of each

municipality within the service area . . .." If the City of Eagle was the municipality M3 Eagle intended to serve within its proposed area, the City of Eagle needed to be within the service area at the time the Department considered the application. The M3 Eagle property was not annexed into the City of Eagle at the time the Department considered the application.

M3 Eagle argues that Idaho Code § 42-202B(8) only requires review of the "planning horizon of each municipality within the service area" when there is more than one municipality within the service area to insure that the proposal is not "inconsistent with comprehensive land use plans approved by each municipality." The statute requires that the proposal for reasonably anticipated future needs be based on the planning horizon, population projections, and other planning data of the municipalities within the service area, and then requires that the proposal not be inconsistent when there are dual or multiple sets of planning data of more than one municipality within the proposed service area.

The interim director affirms his conclusions of law that M3 Eagle must, at the time the Department considers the application for appropriation of water for reasonably anticipated future needs:

(1) satisfy the test of being a municipal provider;
(2) show there is a municipality within the proposed service area that will be served with municipal water; and
(3) present evidence about the planning horizon, population projections, and other planning data of the municipality or municipalities to be served to establish the quantity of water that can be appropriated.

At the time the Department considered M3 Eagle's application, none of the above three requirements were satisfied.

M3 Eagle suggests that it was acting as the agent of the City of Eagle in pursuing the application. The only document establishing a binding relationship with the City of Eagle is the very general and broad preannexation and development agreement between the city and M3 Eagle. This document does not establish agency.

The Evidence Supports the Conclusions of Law

M3 Eagle proposes the dedication of a significant portion of the ground water in a target aquifer for many municipalities for possible use sometime within the next 30 years. The proposed development has not begun. There has been almost no construction of infrastructure. There is no municipal water system in place.

In contrast, the several municipalities relying on the PGSA as a water source have constructed integrated water systems within their boundaries. The municipalities can be expected to grow in the future and likely will have needs for additional water supplies diverted from the PGSA. It is not in the public interest that the orderly expansions of these existing systems should be limited by the dedication of ground water for future anticipated needs of a development that is not within the boundaries of these municipalities, and does not incorporate into its proposal the planning information for any of these communities.

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.

At the end of the hearing, the interim director also discussed with the parties his concerns about whether M3 Eagle could obtain a water right for reasonably anticipated future needs and asked the parties to brief the legal issue. M3 Eagle has had two opportunities to address these legal issues before the Department, once in a post hearing brief and once in its petition for reconsideration.

M3 Eagle's petition to reopen the record should be denied.

EAGLE PINES WATER ASSOCIATION'S AND NORTH ADA COUNTY GROUNDWATER USERS ASSOCIATION'S PETITION FOR CLARIFICATION AND RECONSIDERATION

Eagle Pines Water Association and North Ada County Groundwater Users Association ("Association Protestants") requested that the interim director require the M3 Eagle, or its successors and assigns to "submit a comprehensive mitigation plan, including curtailment, in connection with the monitoring plan to be approved by the Department to mitigate damages to any pre-existing water rights in accordance with its assurances in its application."

The interim director determined in the final order and determines in this amended final order that a standard appropriation of ground water by M3 Eagle for a significantly reduced flow rate, excluding a water right for reasonably anticipated future needs, will not injure other water rights. As a result, the condition requested by the Association Protestants is not needed, and the petition for clarification and reconsideration should be denied.

FINDINGS OF FACT

1. Application to appropriate water no. 63-32573, filed by M3 Eagle, proposes the following:

Flow Rate:	23.18 cubic feet per second ("cfs") 2.93 cfs diversion to municipal storage 1,836 acre feet stored in ponds on the proposed development. 1,668 acre feet diversion from storage
Source of Water:	Ground water
Period of Use:	Year-round
Priority Date:	November 21, 2006
Place of Use:	Municipal within the boundaries of the M3 Eagle development
Volume:	6,535 acre feet
Points of Diversion:	
Township 5 North, Range 1 West, Section 13,	SENW
Section 15 (Potential Municipal)	SWSW
Section 21 (Potential Municipal)	SESE
Section 22 (Potential Municipal)	NENE, NESE
Section 23	NESW, SESW
Section 23 (Potential Municipal)	SWNE, NENW, NESW, SESW, NESE
Section 24	NWNE, NENW
Section 24 (Potential Municipal)	NESW
Section 27 (Potential Municipal)	NENE, SENW
Section 28	SWSE, SESE(2)
Section 28 (Potential Municipal)	SWNE, SESE
Section 33	NENE, NWNW(2)
Section 33 (Potential Municipal)	NWNE
Township 5 North, Range 1 East, Section 19	SWNE

2. M3 Eagle proposes to develop 6,005 acres of real estate located approximately five to ten miles northwest of the city center of Eagle, Idaho. The M3 Eagle property is located in the foothills of northwest Ada County. The parcel of property is approximately seven miles long in an east – west direction and approximately four miles wide in a north – south direction. Portions of the drainages of Big Gulch and Little Gulch are within the proposed M3 Eagle development. The parcel is bounded by Willow Creek Road on the east, Highway 16 on the west, BLM property on the south, and additional undeveloped land to the north.

3. The property is presently raw land and has been used in the past for dry grazing. There is no concentrated residential development within the property. There are no water lines nor is there any municipal system providing municipal water to any users within the property boundaries.

4. The BLM property located south of the M3 Eagle property is an approximate one mile wide buffer zone between the M3 Eagle property and scattered residential/ranchette development and agricultural lands at the base of the foothills as they transition south into the Boise River Valley. Any water lines from the City of Eagle and its integrated system are located several miles from the proposed development.

5. On December 27, 2007, M3 Eagle and the City of Eagle executed a Preannexation and Development Agreement. The agreement contemplates that the M3 Eagle property will be annexed into the City of Eagle in the future.

6. M3 Eagle and the City of Eagle also agreed that the water system constructed within the M3 Eagle development will be conveyed to the City of Eagle in the future and become part of the city's municipal water system. M3 Eagle will convey portions of the water system to the City of Eagle as phases of the M3 Eagle development are completed.

7. At the time the record closed for this contested case, annexation into the City of Eagle was not possible because the M3 Eagle property was not contiguous with any City of Eagle boundary.

8. The M3 Eagle development will be a planned unit development/planned community. The M3 Eagle developers are planning for homes, schools, and a commercial district within the development. Presently, M3 Eagle plans to develop 7,153 dwelling units. At build-out, M3 Eagle projects a population within the development of approximately 21,000 people. In addition, M3 Eagle plans to develop 245 acres of commercial, office, and mixed use.

9. Within the development, M3 Eagle projects the construction of three elementary schools, one middle school, and one high school. In addition there will be one or more golf courses.

10. Approximately twenty to forty percent of the development will be open space.

11. Because of the size of the proposed M3 Eagle development, M3 Eagle asserts that it must presently secure a water supply for the entire development to obtain the necessary financing and to build the core water system and other infrastructure for the entire development. M3 Eagle projects that build-out will span a thirty-year time period. An expert economist predicted growth based on both a twenty-year planning horizon (Exhibit 40) and a thirty-year planning horizon (Exhibit 60). The economist predicted that growth in the area of 7,153 housing units and an increase in population of approximately 21,000 additional residents is not unreasonable given the historical growth in and the demographics of the Treasure Valley. With a 30-year development period, the number of housing units predicted during the first five years is 1,011. The economist concluded that, even given the cyclical nature of development and of current recessionary effects on development, a 30-year period of time is a reasonable period to complete the development.

12. The Comprehensive Plan for the City of Eagle projects population growth through the year 2025. *See* Exhibit 57, page 9. The City of Eagle projections were made in 2007 prior to the present economic downturn. The supporting information for projections of population

growth in the City of Eagle's Comprehensive Plan was not provided as part of the plan. There is no nexus between the population projections in the comprehensive plan and the population projections for the M3 Eagle development presented at the hearing.

13. The City of Eagle Comprehensive Plan generally discusses development in the foothills but does not specifically address the proposed M3 Eagle development.

14. Despite the number of proposed points of diversion identified in the application, M3 Eagle predicts the total number of points of diversion will probably be between five and seven wells. M3 Eagle applied for a larger number of proposed points of diversion to allow flexibility in location and to allow additional wells to be drilled depending on the productivity of wells as they are completed.

15. Testimony at the hearing established that state of the art conservation measures will be employed through system design, monitoring, and reuse of waste water for ponds and irrigation. M3 Eagle plans to install an independent waste water treatment facility and will treat the water to drinking water quality standards.

16. The proposed points of diversion for the M3 Eagle development are located in an area of complex hydrogeology. Significant testing and analysis by M3 Eagle established that the water underlying the M3 Eagle property is located in a sand aquifer characterized by M3 Eagle as the Pierce Gulch Sand Aquifer ("PGSA").

17. The geological formation of the PGSA was created by an ancient, receding lake. When the lake was full of water, tributary streams deposited sand at the edges of the lake as outwash from the uplands. As the lake receded, these tributary streams washed the deposited sand out into the lake area. These sands were deposited in the lake bed over a long period of time. Coarser sands were deposited near the boundaries of the foothills and the finer sands were suspended as the stream emptied into the receding lake where the finer sands finally dropped out of suspension.

18. Subsequent to the deposition of the material comprising the PGSA, other lakes formed on top of the outwash. During the life of these later-in-time lakes, fine grained sediments were deposited on top of the coarser sand, creating clay layers. These clay layers form impervious aquitards that impede the vertical migration of water into and out of the PGSA. Because of these overlying confining layers, the PGSA throughout much of its extent is under pressure and exhibits artesian conditions. The artesian pressure in the PGSA is higher than the pressure in the overlying layers, creating an upward vertical gradient. This upward vertical gradient inhibits vertical down migration of ground water into the PGSA from overlying aquifers.

19. A fault runs through the M3 Eagle property in a southeast to northwest diagonal direction, splitting the northeast one quarter of the M3 property from the southwestern three quarters of the property. The fault is known as the West Boise-Eagle Fault. *See* Exhibit 2, Figure 6. This fault prevents the horizontal movement of water across the fault boundary.

20. The PGSA is not completely horizontal, but is tilted downward from the northeast to the southwest, sloping approximately one to two degrees in declination.

21. If extended upslope, the base of the PGSA would intersect the ground surface on the portion of the M3 Eagle property that is on the southwest side of the West Boise-Eagle fault line. In geologic terms, daylighting of the aquifer material with ground surface is called the outcrop of the formation and the strike is the intersection of the formation with a horizontal plane. The line of intersection at the outcrop, referred to herein as the "strike line", intersects the West Boise-Eagle fault in the southeast corner of the M3 Eagle property and follows a west-northwest orientation, nearly bisecting the M3 Eagle property in half. *See* Exhibit 2, Figure 6. The exposure of the PGSA to land surface results is an additional physical separation between PGSA water on the southwest side of strike line with shallow ground water in aquifers northeast of the strike line.

22. At the strike line, there is no ground water in the PGSA formation. As the PGSA dips downward to the southwest, the formation reaches sufficient depth that it becomes saturated with PGSA ground water. PGSA ground water near the strike line is not under artesian pressure because there are no overlying fine grained sediments, also characterized as an aquitard, to confine the aquifer. As the PGSA dips further downward to the southwest, the aquifer is confined by impervious formations above the PGSA.

23. The PGSA underlies approximately the lower southwest half of the M3 Eagle property.

24. The M3 Eagle property overlies a portion of the northeastern edge of the PGSA. The portion of the PGSA underlying the M3 Eagle property is on the upslope edge of the PGSA. Wells completed in the downslope areas of the PGSA in the Boise River Valley will encounter water at greater depths and at greater pressures than at its location under the M3 Eagle property. If the PGSA is significantly stressed in the future, the reliability of the water supply as water levels decline would be first affected in the upslope areas of the aquifer under the M3 Eagle property.

25. PGSA ground water underlying the M3 Eagle property has a gradient, or flow direction, of west in the Boise River Valley and also northwest toward the lower Payette River Valley.

26. In areal extent, the PGSA is a large hydrogeologic formation. Although the boundaries have yet to be defined, M3 Eagle estimates that the PGSA extends to the south towards Meridian, to the east into Garden City, to the west in the Boise River Valley toward the Snake River, and northwest toward the Payette River Valley.

27. The nearby cities of Eagle and Star and the municipal providers supplying municipal water to these cities rely on the PGSA for their municipal water supplies. In addition, the cities of Garden City, Boise, Meridian, Caldwell, and Middleton also rely on the PGSA for their municipal water supplies.

28. Several expert witnesses for M3 Eagle testified that there were no signs or indications of faulting that would compartmentalize the PGSA in the area of the proposed M3 Eagle development. Department witnesses raised questions about the data that might indicate some limitation on the availability of water from the larger PGSA. Department staff referred to several M3 Eagle exhibits that identify a possible fault running diagonally from the southeast to the northwest in the southwest portion of the M3 Eagle property (See Exhibit 12, page 10) that was identified and mapped by M3 Eagle expert witnesses. This fault is located northeast of the M3 Eagle test well no. 1 and also northeast of Kling well. The fault line separates test well no. 1 and the Kling well from other M3 Eagle wells located in the Big Gulch Drainage northeast of the fault line. M3 Eagle used a Theis analysis that incorporated the existence of a fault at this location.

29. Figure 46 of Exhibit 44 depicts much greater seasonal ground water level drawdowns in the Kling well and test well no. 1 as a result from of pumping from the PGSA than in the M3 Eagle wells located farther up Big Gulch. These large differences in drawdowns could be caused by a horizontal flow impediment that restricts ground water communication between the PGSA underlying the M3 Eagle property and the larger PGSA underlying the Boise River Valley floor.

30. In addition, the slight downward trend of ground water levels for the PGSA wells in Big Gulch plotted on Figure 46 is inconsistent with testimony regarding stable or rising water levels exhibited by PGSA wells in the Boise River Valley floor.

31. Significant differences in comparative ground water level drawdowns and differences in water level trends are indications of discontinuity, possibly caused by faulting, in the PGSA underlying the M3 Eagle property. This discontinuity could limit the supply of available ground water for appropriation proposed by M3 Eagle.

32. M3 Eagle conducted geochemical tests of the water in the PGSA, both inside and outside of the M3 Eagle property. *See* Exhibit 43. The geochemical analysis established that the source of the PGSA ground water underlying the M3 Eagle property is the ancestral Boise River. This means that the water in the PGSA is derived primarily from the Boise River and the water presently being pumped is hundreds to thousands of years old. The chemistry of the water in the PGSA underlying the M3 Eagle property does not exhibit chemical characteristics of water from surficial recharge.

33. Evidence at the hearing established that the "groundwater in the PGSA originates as recharge in the east and south Boise regions augmented by leakage of canals south and east of Meridian." PGSA recharge is from the Boise River in the Boise area. *See* Exhibit 2 Page 5. The PGSA does not directly contact the Boise River for recharge. The flow path and water travel time from the Boise River to the PGSA is unknown.

34. M3 Eagle developed a numerical ground water model to simulate the effects of withdrawals from the M3 Eagle development at full build-out. The area within the model, defined as the model domain, encompasses 520 square miles. The model boundaries are approximately: Cole Road in Boise on the east extended to the north and south, the Payette River on the north, New Plymouth on the west extended to the north and south, and Lake Hazel

Road in Boise on the south extended to the west and east. The model domain includes the municipalities of Eagle, Star, Middleton, Nampa, Caldwell, Emmett, Meridian, and portions of Boise and Garden City.

35. The model was constructed with seven separate lithologic layers. Layers 5-7 represent the PGSA. The model assumes little or no inflow to the PGSA from surficial recharge. The inflow estimate into the PGSA, layers 5-7, through the southeast boundary of the model is 107 - 115 cfs. This assumption is consistent with M3 Eagle's determination that the Boise River in the Boise area is the major contributing source of water to the PGSA.

36. Despite testimony at the hearing about the direction of ground water flow in the PGSA to the west – northwest, the model shows inflows to the model boundary of layers 5-7 on the north and west of 9.6 cfs. This modeling assumption conflicts with the conceptual model of flow from the Boise Valley into the Payette Valley and is not supported by the record.

37. The M3 Eagle model estimates existing pumping of ground water from the PGSA within the model domain of 84 cfs and another 9.03 cfs for the M3 Eagle property at the time of build-out. M3 Eagle assumed these values recognizing it didn't know the volume of water diverted from the PGSA. Despite these uncertainties, the model assumed a total pumping of approximately 93 cfs.

38. The interim director determines that water will not inflow across a model boundary in a direction opposite from the direction of the ground water gradient, and will ignore the 9.6 cfs of simulated model inflow to the PGSA at the northwest and west boundaries. Both of these boundaries are referred to as outflows to the PGSA (Exhibit 16). Assuming a total withdrawal of 93 cfs and a total inflow of 107 - 115 cfs, only 14 - 22 cfs would remain of the total inflow for other future uses within the model domain from the PGSA.

39. M3 Eagle seeks an appropriation of over 23 cfs. M3 Eagle would divert a much higher flow rate than 9.03 cfs during the irrigation season. Presently, there are annual fluctuations in the water levels of wells monitored in the PGSA, with declines in the summertime resulting from irrigation pumping at nearby "pumping centers." (Exhibit 42, p. 20). The peak pumping and effects from the pumping has the potential to further stress a possible limited supply of water.

40. The numerical determinations of recharge to and remaining ground water in the PGSA contained in these findings of fact are not absolute. There may or may not be more recharge induced from additional pumping. As additional data is collected, the determination of the quantity of water in the aquifer may need to be readjusted. Nonetheless, for purposes of this decision, the interim director must rely on the scientific evidence contained in the record. The following are facts that the interim director incorporates into his decision in determining only 14 – 22 cfs remains available for appropriation:

(a) The flow path of recharge, and the various geologic formations through which the water from the Boise River must pass to reach the PGSA are unknown. As a result, additional pumping may not induce additional recharge from the Boise River.

(b) The hydraulic head in the PGSA is greater than in overlying aquifers. The upward vertical gradient prevents vertical recharge into the PGSA from overlying aquifers.

(c) Even if pumping reduces pressures in the PGSA enough to reverse the vertical gradient, fine-grained sediments overly the PGSA and impede the hydraulic communication between the PGSA and overlying aquifers.

(d) The characterization of the PGSA as "geologically ancestral Boise River water" establishes that the recharge of water into the PGSA from the Boise River is limited.

41. Most of the communities within the model boundary have expanding growth areas near their perimeters. The flow of 14 - 22 cfs determined to remain as unpumped water in the PGSA may be needed for future use by the communities within the model boundary. In addition, not all of the ground water in the PGSA is available for withdrawal under the M3 Eagle property. Some component of ground water should be dedicated to underflow and to buffer the estimates used in the ground water flow model unless M3 Eagle proposes an overdraft that would reverse the direction of the flow gradient.

42. The amount of undeveloped land within the model domain that logically could be developed by the existing municipalities as they expand could easily require diversion flow rates in excess of 14-22 cfs for these future uses.

43. M3 Eagle owns the property planned for development almost without debt. M3 Eagle owes a debt of $15,000,000 to the Dallas Police and Fireman's Pension Fund.

44. M3 Eagle does not have any financial reserves to complete the development. M3 Eagle was instrumental in the passage of legislation during the 2009 legislative session authorizing formation of a community infrastructure district. By forming a community infrastructure district, the district can sell tax exempt bonds to finance the development. M3 Eagle is capable of forming a district and selling the tax exempt bonds for financing. Expert witnesses testified that the possibility of obtaining such financing is good.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

> 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.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-202B(5) defines the term municipal provider:

(5) "Municipal Provider" means:
(a) A municipality that provides water for municipal purposes to its residents and other users within its service area;
(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; or
(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" as described in section 39-103(12), Idaho Code.

4. Idaho Code § 42-202B(6) defines how a water right can be used for municipal purposes:

(6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

5. M3 Eagle is not yet a municipal provider under any of the three definitions contained in Idaho Code § 42-202B(5). M3 Eagle stated that it intends to become a municipal provider under Idaho Code § 42-202B(5)(c), defined as 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."

6. M3 Eagle's prospective plans to become a municipal provider in the future do not prevent it from obtaining a water right for municipal purposes. The procedure for obtaining a water right in the state of Idaho is an application, permit, and license process. A person or entity seeking a water right often proposes a use of the water for which the person or entity may not have previously used water for in the past. One of the purposes of the application-permit-license

process is to authorize a prospective water user to develop the proposed use over a period of five years, and file proof of beneficial use at the expiration of the development period.

7. For issuance of a standard water right, the determination of whether a permit holder is a municipal provider should be made at the time proof of beneficial use is filed and a beneficial use exam is conducted for purposes of licensing.

8. Idaho Code § 42-202(2) states:

> (2) An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish **that the applicant qualifies as a municipal provider** and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made. (Emphasis added).

9. Idaho Code § 42-202B(8) defines the term reasonably anticipated future needs:

> (8) "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required **within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality.** (Emphasis added).

10. While a person or entity not currently a municipal provider can obtain a water right permit to develop a municipal use, obtaining a permit for municipal use that includes a component for reasonably anticipated future needs requires a higher standard. One of those standards is the requirement in Idaho Code § 42-202 that the municipal provider "qualifies" as a municipal provider at the time the application is filed. In the instant case, M3 has not constructed any of the water services that it proposes. The wells needed for diversion have not been constructed. None of the water lines are in place, service stubs are not provided for the anticipated residential development. None of the other water related infrastructure has been constructed. M3 Eagle does not qualify as a municipal provider under Idaho Code § 42-202.

11. M3 Eagle argues that relying on the tense of the verb in Idaho Code § 42-202 is not sufficient justification to deny the water right for reasonably anticipated future needs. M3 Eagle argues that the interim director should consider the broader intent of the statute. However, the requirement that the qualification be established at the time of the application is clear from the statutory language.

12. The quoted language above in Idaho Code § 42-202B(8) establishes that, in order to obtain a municipal water right for a reasonably anticipated future need, the municipal provider must have a service area that includes a municipality within the service area, and that the projections of population and other planning data are reasonably expected to be required in the planning horizon of each of the municipalities within the service area. M3 Eagle executed a preannexation agreement with the City of Eagle. At the time the record closed, the M3 Eagle property was not annexed into the City of Eagle. The development agreement establishes that, at some future date when the system is built and homes are in place, the water system will be conveyed to the City of Eagle, but, at present, there is no water system, it is not owned by the City of Eagle, and the proposed development is not part of the City of Eagle.

13. Finally, the population and other planning data presented at the hearing was not population and planning data for the City of Eagle. The population and other planning data related solely to M3 Eagle's projections of what its development might be in the future.

14. M3 Eagle would have the interim director broadly interpret the municipal act to allow any prospective municipal provider to obtain a water right for a lengthy period of time without any development in place. The interim director's reading of the statutory language leads him to conclude that the legislature wanted to allow existing communities, and more specifically, existing municipalities within which an established integrated water system was in place, to protect future water supplies by allowing these entities or municipal providers to these entities to obtain a water right for future anticipated needs that would extend beyond the normal permit development period. The logical support for this reasoning would be that these integrated systems are in place, that the orderly extension of these systems as the municipalities grow would be more cost effective and would be more orderly than to allow fragmented developments or developments that could preclude these existing systems from expanding.

15. The M3 Eagle development is, by its nature, the very type of development that the legislature did not recognize as qualifying to appropriate a water right for reasonably anticipated future needs. M3 Eagle proposes a large appropriation of water for a purpose that is not yet established. The possible result of this protection could limit the future ability of the existing municipalities in the area to extend and expand their currently existing integrated systems. This possible limitation could dampen economic growth of the communities relying on the PGSA as a source of municipal water. The interim director determines this was not the purpose of the 1996 municipal act which authorized the appropriation of water for reasonably anticipated future needs.

16. This reasoning is particularly supported by the distance of the M3 Eagle development from the cores of the existing communities and by the location of the M3 Eagle property at the boundaries of the PGSA. As additional demands are made on the PGSA in the Treasure Valley floor, these demands and withdrawals of water could impact the availability of water in the up-gradient area of M3 Eagle. If the water levels or pressures in the PGSA decline significantly, the water users that potentially would be the first to be impacted by these declines will be those drawing water from the up-slope

areas of the aquifer where there is limited available drawdown. Consequently, M3 Eagle has the ability, if these proposed future anticipated needs are recognized, to hold the future development of water in the Treasure Valley floor for the existing communities hostage to its future anticipated needs that are distant and not yet developed. This further statement of the public interest supports the decision of the interim director.

17. It is not in the public interest to grant a water right to M3 Eagle for 23.18 cfs for anticipated future needs from the PGSA over a span of 30 years when the reservation of this water could likely preclude the orderly expansion of existing municipal water systems that also rely on the PGSA as a source of water, and would likely preclude the economic growth associated with the expansions of the existing municipal systems.

18. Based on the evidence presented at the hearing, M3 Eagle should be granted a permit for the proportional flow rate it would be able to develop over a period of five years. M3 Eagle projects there will be 1,011 homes served by the end of five years. The five-year period in the M3 Eagle projections is from the date construction begins, not from the date the permit is issued. Therefore, it is recognized that the projected construction of 1,011 housing units is on the upper end of development projection. The proportion of 1,011 housing units divided by the total number of 7,153 housing units is 0.1413. The product of 23.18 multiplied by 0.1413 is 3.28 cfs. A permit should be issued for 3.28 cfs to M3 Eagle.

19. The water supply is sufficient to provide an appropriation of 3.28 cfs.

20. The applicant has sufficient financial resources to develop a first phase of the project within five years at a flow rate of 3.28 cfs.

21. An appropriation of 3.28 cfs from the PGSA underlying the M3 Eagle property will not injure other water rights.

22. A comparable quantity of annual volume for the municipal use is 0.1413 times 6,535 acre-feet, or 923 acre-feet.

23. To accommodate flexibility, M3 Eagle may divert 2.93 cfs of the 3.28 cfs to storage, but cannot exceed the rate of 3.28 cfs. Diversion from storage for uses shall be limited to 923 acre-feet of water. To allow construction of ponds and retention of water, M3 Eagle may store up to 923 acre-feet of water in ponds on the proposed development that is diverted directly from ground water. Storage in ponds is limited to 1,836 acre feet. The total diversion from ground water is limited to 923 acre-feet.

24. M3 Eagle will employ measures of conservation to conserve the waters of the state of Idaho. At an appropriation of 3.28 cfs, the proposed application is in the public interest.

ORDER

IT IS HEREBY ORDERED that M3 Eagle's Petition for Reconsideration is **Granted,** and has been addressed by the preceding analysis, findings of fact, conclusions of law, and the following order.

IT IS FURTHER ORDERED that M3 Eagle's motion to reopen the hearing record is **Denied.**

IT IS FURTHER ORDERED that the Association Protestants' Motion for Clarification and/or Reconsideration is **Denied**.

IT IS FURTHER ORDERED that application to appropriate water no. 63-32573 is **APPROVED** for the appropriation of the following quantities:

Flow rate:	3.28 cfs
Flow rate diverted to storage:	2.93 cfs
Total flow rate:	3.28 cfs

Annual volume diverted:	923 acre feet
Annual volume diverted from storage:	923 acre feet
Volume of storage:	923 acre feet
Total annual volume authorized	923 acre feet

IT IS FURTHER ORDERED that a map depicting the place of use boundary for this water right at the time of this approval will be attached to the permit approval document for illustration purposes.

IT IS FURTHER ORDERED that permit no. 63-32573 is subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before February 1, 2015.

Subject to all prior water rights.

Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code, and applicable Well Construction Rules of the Department.

The total flow rate diverted under this right shall not exceed 3.28 cfs.

The total annual volume diverted under this right shall not exceed 923 acre feet.

Prior to the diversion and use of water under this approval, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion, in accordance with Department specifications.

Prior to the diversion of water in connection with this right, the right holder shall provide the Department with a plan for monitoring ground water levels in the vicinity of the place of use for this water right. The monitoring should occur in parallel with development and production and should include identification of non-producing wells and timelines for measuring and reporting. The right holder shall not divert water in connection with this right until the monitoring plan is approved by the Department. Failure to comply with the monitoring plan once it is accepted shall be cause for the Department to cancel or revoke this right.

Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the Department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.

Place of use is within the area served by the public water supply system of M3 Eagle LLC. The place of use is generally located within Sections 7, 15, 17, 18, 19, 20, 21, 22, Township 5 North, Range 1 East, and Sections 10, 11, 12, 13, 14, 15, 21, 23, 24, 26, 27, 28, and 33, Township 5 North, Range 1 West.

The right holder shall fully utilize treated waste water for irrigation purposes on all common areas, including parks, playgrounds, golf courses and other similar areas, prior to applying any water under this right to such common area parcels. This condition shall not apply to small isolated common area parcels for which connection to the waste water reuse system is not feasible. The right holder shall provide the Department with a schematic of the waste water reuse system identifying any small isolated common area parcels for which the right holder requests this condition not apply.

Water shall not be diverted for fire protection use under this right except to fight or repel an existing fire. Any amount of water used to fight a fire will not count against the annual volume limit for this right.

Dated this 25th day January, 2010.

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2010, a true and correct copy of the documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: AMENDED FINAL ORDER and Explanatory Information to Accompany a Final Order

Name	Address	City	State	Postal Code
JEFFREY C FEREDAY GIVENS PURSLEY LLP	601 W BANNOCK ST PO BOX 2720	BOISE	ID	83701
M3 EAGLE LLC	533 E RIVERSIDE DR STE 110	EAGLE	ID	83616
ALAN SMITH	3135 OSPREY RD	EAGLE	ID	83616
EAGLE PINES WATER USERS ASSN	3135 N OSPREY RD	EAGLE	ID	83616
JOHN THORNTON	5264 N SKY HIGH LN	EAGLE	ID	83616
NORTH ADA COUNTY FOOTHILLS ASSN ATTN: DAVID HEAD	855 STILLWELL DR	EAGLE	ID	83616
NORMAN L EDWARDS	884 W BEACON LIGHT RD	EAGLE	ID	83616
LINDA D BURKE	C/O 855 STILLWELL DR	EAGLE	ID	83616
JOHN FRANDEN	C/O 855 STILLWELL DR	EAGLE	ID	83616
CRAIG TARBET	C/O 855 STILLWELL DR	EAGLE	ID	83616
SHERRI RANDALL	C/O 855 STILLWELL DR	EAGLE	ID	83616
CHARLES WATKINS	C/O 855 STILLWELL DR	EAGLE	ID	83616
ROBERT H WEST	C/O 855 STILLWELL DR	EAGLE	ID	83616
STEPHEN DICK	C/O 855 STILLWELL DR	EAGLE	ID	83616
BRUCE VAN CAMP	C/O 855 STILLWELL DR	EAGLE	ID	83616
LORING EVANS	C/O 855 STILLWELL DR	EAGLE	ID	83616
THOMAS RITTER	C/O 855 STILLWELL DR	EAGLE	ID	83616
LORN H ADKINS	C/O 855 STILLWELL DR	EAGLE	ID	83616
DANIEL J GLIVAR	C/O 855 STILLWELL DR	EAGLE	ID	83616
RICHARD LAGERSTROM	C/O 855 STILLWELL DR	EAGLE	ID	83616
VINCE IAZZETTA	C/O 855 STILLWELL DR	EAGLE	ID	83616
DALE GASTON	C/O 855 STILLWELL DR	EAGLE	ID	83616
MARION D GROOTHUIS	C/O 855 STILLWELL DR	EAGLE	ID	83616
VINCENT J MINKIEWICZ	C/O 855 STILLWELL DR	EAGLE	ID	83616
CAROL JEAN THOMPSON	C/O 855 STILLWELL DR	EAGLE	ID	83616
BARB JEKEL	C/O 855 STILLWELL DR	EAGLE	ID	83616
ROBERT LYONS	C/O 855 STILLWELL DR	EAGLE	ID	83616
G E MC DONALD	C/O 855 STILLWELL DR	EAGLE	ID	83616
GEORGE W KEYES	C/O 855 STILLWELL DR	EAGLE	ID	83616
ERIC C LEIGH	C/O 855 STILLWELL DR	EAGLE	ID	83616

Name	Address	City	State	Postal Code
SHELBY CONRAD	C/O 855 STILLWELL DR	EAGLE	ID	83616
MORGAN MASNER	C/O 855 STILLWELL DR	EAGLE	ID	83616
JIM BANDUCCI JR	C/O 855 STILLWELL DR	EAGLE	ID	83616
STEVEN C PURVIS	C/O 855 STILLWELL DR	EAGLE	ID	83616
ROBERT S NICCOLLS JR	C/O 855 STILLWELL DR	EAGLE	ID	83616
DAVID COLLETT	C/O 855 STILLWELL DR	EAGLE	ID	83616
WALTER H MEYER JR	C/O 855 STILLWELL DR	EAGLE	ID	83616
MICHAEL MC MURRAY	C/O 855 STILLWELL DR	EAGLE	ID	83616
LYLE JORDAN	C/O 855 STILLWELL DR	EAGLE	ID	83616
RONALD R RAPP	C/O 855 STILLWELL DR	EAGLE	ID	83616
BRUCE RICHARDSON	C/O 855 STILLWELL DR	EAGLE	ID	83616
BARRETT D JONES	C/O 855 STILLWELL DR	EAGLE	ID	83616

Deborah J. Gibson
Administrative Assistant
Water Management Division