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DEPARTMENT OF
WATER RESOURCES

Jeffrey C. Fereday [ISB No. 2719]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for M3 Eagle LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-32573 IN THE
NAME OF M3 EAGLE ASSIGNED
TO THE CITY OF EAGLE

**M3 EAGLE'S OBJECTION AND MOTION
IN LIMINE TO EXCLUDE PROTESTANTS'
PROPOSED WITNESSES**

MOTIONS

Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby objects to Protestants' September 8, 2011 *List of Potential Witnesses* ("Protestants' Disclosure")¹ and moves the Hearing Officer for an order prohibiting Protestants from calling as witnesses the persons listed therein, from soliciting such persons' testimony, and/or offering evidence attributable to such persons during these remand proceedings on grounds that Protestants' Disclosure is not in compliance with the Hearing Officer's September 8, 2011 *Prehearing Order* ("Prehearing Order").

¹ Protestants' Disclosure was served by Protestant Alan Smith on behalf of himself as an individual Protestant, and on behalf of Protestant Eagle Pines Water Users Association (for whom he is the official representative in these proceedings). M3 Eagle has not received the required witness disclosure from the other Protestants and hereby objects to any subsequently received disclosure on grounds that any such untimely disclosure would be unfairly prejudicial to M3 Eagle. M3 Eagle reserves the right to object to any witness disclosures Protestants may file, should any such late filing be allowed.

ARGUMENT

The Prehearing Order required each party on or before September 9, 2011, to “disclose to the other parties the identities of their respective expert and lay witnesses, including their names, addresses, telephone numbers, and summaries of the matters to which they are expected to testify.” Protestants’ Disclosure, however, disclosed only the names of twelve individuals without providing their addresses or telephone numbers, stating whether they are expected to testify as lay or expert witnesses, or providing summaries of their expected testimony. Given these inadequacies, neither M3 Eagle nor the City of Eagle (“City”) is able to adequately conduct discovery or to prepare for the October 18-20 hearing. This is prejudicial to M3 Eagle and the City.

Furthermore, it is apparent that some of the individuals listed in Protestants’ Disclosure do not possess knowledge or information germane to the limited matters at issue in this remand proceeding, namely questions concerning the City’s annexation of the M3 Eagle project area; the City’s reasonably anticipated future needs (“RAFN”), service area, and planning horizon; and the quantity of water requested in the M3 Eagle application in relationship to the water needs of the rest of the City’s service area. Protestants’ proposed witnesses Dennis Owsley, Sean Vincent, and Mike McVay are IDWR employees with credentials in hydrogeology who testified about hydrogeological issues during the original hearings in 2009. Such matters are outside the scope of these remand proceedings, as made abundantly clear in the District Court’s *Amended Order* and in the Hearing Officers’ recent orders including his Prehearing Order (“The parties shall not conduct discovery or offer evidence at the hearing concerning other matters such as technical water supply issues, hydrogeology, and potential injury from pumping.”) There is no indication that these IDWR employees have any knowledge or information to which they could testify as lay or expert witnesses on the limited annexation and RAFN issues presented in this remand

proceeding. Accordingly, M3 Eagle objects to allowing them to testify at the hearing, and requests the Hearing Officer issue an order excluding them from testifying or offering any other evidence during these remand proceedings.

M3 Eagle also objects to Protestants' listing of John Homan, Garrick Baxter, and Gary Spackman on grounds that these individuals are, respectively, legal counsel to IDWR and the Hearing Officer presiding over these remand proceedings. Even if these individuals possessed expertise, knowledge or information that might be relevant to the remand proceedings, it would be inappropriate for IDWR's attorneys to testify at a hearing or for a Hearing Officer to testify at a hearing over which he is presiding.²

To the extent any other individual listed in Protestants' Disclosure is named for purposes of testifying about hydrogeologic or water supply issues, or any other issue not specifically within the scope of issues on remand, M3 Eagle makes this a continuing objection and requests that he or she be excluded from offering testimony or evidence. If the Hearing Officer allows Protestants to call any witnesses at the hearing (including those listed in Protestants' Disclosure), M3 Eagle requests that Protestants be required to immediately provide all information required by the Prehearing Order for such individuals.

Protestants consistent failure to conform to the Hearing Officer's orders during these remand proceedings has caused M3 Eagle and presumably the City and IDWR to expend additional resources, and it threatens delay. Such conduct also is frivolous, and warrants sanctions and penalties. Because Protestants have failed to conform to either the Hearing Officer's or the District Court's orders in this matter, and indeed continue to seek to enlarge the

² It is evident that Protestants, or at least Mr. Smith, increasingly is seeing the upcoming hearing as an opportunity to attack the Interim Director, and the Department itself, for having negotiated in good faith and settled the litigation in District Court that led to this remand. Such a motive obviously cannot restructure the settlement or rewrite the orders of the court and the Department.

scope of the remand hearing in direct contravention of these mandates, M3 Eagle respectfully requests that the Hearing Officer issue an order prohibiting Protestants from calling witnesses in this proceeding.

DATED this 13th day of September, 2011.

Respectfully submitted,

GIVENS PURSLEY LLP

By *Jeffrey C. Fereday*
Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th of September, 2011, the foregoing was filed, served, or copied as follows:

FILED

Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

SERVICE

City of Eagle
Bruce M. Smith, Susan Buxton
Moore, Smith, Buxton & Turcke, Chtd.
950 W. Bannock Street, Suite 520
Boise, ID 83702

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

North Ada County Groundwater Users Association
c/o David Head
855 Stillwell Drive
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

North Ada County Groundwater Users Association
c/o John Thornton
5264 N. Sky High Lane
Eagle, ID 83616

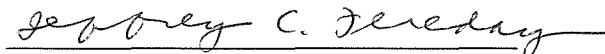
U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Norman Edwards
884 W. Beacon Light Road
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Alan Smith
3135 N. Osprey Road
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail



Jeffrey C. Fereday
Michael P. Lawrence