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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 RESPONSE TO PROTESTANTS' MOTION TO DISMISS REMAND PROCEEDINGS**

Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby submits this response to Protestants' October 5, 2011 *Motion to Dismiss Remand Proceedings* ("Motion to Dismiss"). The Motion to Dismiss should be denied. It is without merit.

Protestants' arguments set forth in the Motion to Dismiss fall into two general categories: (1) arguments concerning the stipulated settlement ("Stipulation")[1] entered between M3 Eagle and the Idaho Department of Water Resources ("IDWR" or "Department") in Ada County District Court case no. CV-OC-2010-3180 (the "Judicial Review Case"); and (2) arguments concerning the assignment ("Assignment") of Application for Permit No. 63-32573 ("Application") to the City of Eagle ("City"). However, there is nothing invalid or unlawful about the Stipulation or the Assignment, and no basis for dismissing these proceedings.

[1] In this memorandum, the Stipulation includes the June 13, 2011 *Joint Stipulation and Motion for Remand with Directions* filed in the Judicial Review Case, including its Exhibit 1, the January 19, 2011 *Agreement* between M3 Eagle LLC and IDWR ("January 19 Agreement"), Exhibit 2 (the June 13, 2011 Assignment of Application and Permit to City of Eagle), Exhibit A (stipulated findings), and Exhibit B (stipulated permit conditions).

I. THE STIPULATION IS VALID AND LAWFUL.

Protestants argue that IDWR did not have authority to enter into the Stipulation, and that the Stipulation's Exhibit A is an untimely "reconsideration" of the Application that violates Protestants' rights, departs from the rules of procedure, and is intended to circumvent the law. These arguments are meritless.

A. As a party to a lawsuit, the Department was entitled to negotiate a settlement in the Judicial Review Case.

To begin with, Protestants erroneously assert that the Department, as a party to the Judicial Review Case, was not entitled to negotiate a settlement. But of course it is so entitled, just as any litigant to a court case in Idaho is entitled. There are too many examples of governmental agencies negotiating settlements in the context of litigation to list here. Suffice to say, it happens all the time.

A famous example is the 1984 Swan Falls Agreement. There, the State of Idaho and the Department negotiated a settlement of lawsuits brought against them by Idaho Power Company. *See Idaho Power Company v. State of Idaho*, Ada County Civil Case No. 62237 (1977) *and Idaho Power Company v. Idaho Department of Water Resources*, Ada County Civil Case No. 81375 (1983). As demonstrated there, the Department has full authority to settle a lawsuit in which it is a litigant.

Protestants' position has no support in the law, and Protestants cite no authority suggesting it does. In short, like any party that wishes to forego the risk or expense of litigating to an uncertain outcome, a government agency is entitled to settle a case. As IDWR did here.

The cases cited by Protestants are not applicable. *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977), *Hells Canyon Excursions, Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (1986), *Syth v. Parke*, 121 Idaho 162, 823 P.2d 766 (1991), and *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979), address the general rule that a district court loses

jurisdiction to rule on certain motions after an appeal is perfected to a higher court. These cases do not address the situation here, where a state agency that sat in a quasi-judicial role becomes a litigant in district court, as provided for through the Idaho Administrative Procedure Act, where a party sues for judicial review of the agency's decision. This should not require briefing to explain.

In another case cited by Protestants, *Lowery v. Board of County Commissioners for Ada County*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988), the court noted that "[a]lthough named as a respondent on appeal the government board's role is limited to defending its decision below." *Id.* at 71, 764 P.2d at 438. In other words, the government body's role is as a litigant responding to an appeal of its decision. The agency no longer sits in a quasi-judicial capacity and, instead, is a typical defendant. Here, like any other defendant in a lawsuit, the Department was entitled to decide whether to litigate before the District Court or negotiate a settlement.

There simply is no support for the contrary position advanced by Protestants.

B. The Stipulation and remand proceedings do not violate rules of procedure or injure Protestants' rights.

Protestants assert that the Stipulation and these remand proceedings somehow violate rules of procedure and their right to notice and an opportunity to be heard. They are wrong.

First, the Stipulation did not "give new life" to the Application, Motion to Dismiss at 3, because the Application never died. Obviously, the Application's final disposition could not be known until all appeal and remand proceedings were concluded. M3 Eagle's timely petition commencing the Judicial Review Case prevented the January 25, 2010 *Amended Final Order* ("Amended Final Order") from becoming the law of the case. The law of the case has arisen

through the final and binding order of the District Court remanding this matter to the agency pursuant to specific conditions.[2]

As part of the Stipulation, IDWR has agreed to issue a Second Amended Order that will "completely replace and supersede the Amended Final Order," and issue a new permit that will "completely replace and supersede the permit issued in connection with the Amended Final Order." Stipulation at 5 ¶ 8. The District Court approved the Stipulation and ordered that remand proceedings be held "consistent with the terms and conditions set forth in the Stipulation." *Amended Order* at 2 (June 30, 2011) (Judicial Review Case). IDWR could not comply with this directive if the Application were void. Obviously, it is not.

Second, the Stipulation and its Exhibit A findings neither constituted an untimely "reconsideration" of the Amended Final Order nor denied Protestants proper notice or opportunity to be heard. Motion to Dismiss at 4. The Stipulation, including its Exhibit A, represent a compromise reached by the parties in settling the Judicial Review Case. In making that compromise, M3 Eagle and IDWR agreed that the issues before the District Court concerning water supply could and would be resolved in the Stipulation based on the record already developed in the Application's contested case proceedings before the agency (the "Hearing Record"). Stipulation at 3 ¶ D.

At the same time, M3 Eagle and IDWR agreed to remand the Application back to IDWR to take additional evidence on specific and narrow points related to the City of Eagle's role as the

[2] The law of the case doctrine has long been the rule in Idaho. *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985). According to the doctrine, when a case is remanded from an appellate court, the case "must be tried in the light of and in consonance with the rules of law as announced by the appellate court in that particular case." *Creem v. Northwestern Mut. Fire Ass'n,* 58 Idaho 349, 352, 74 P.2d 702, 703 (1937). The Ada County District Court served in an appellate capacity in the Judicial Review Case. *In re City of Shelley*, 2011 WL 2150189, 6 (Idaho, 2011) ("On a petition for judicial review, the district court is sitting in an appellate capacity."). Accordingly, the District Court's *Amended Order* in the Judicial Review Case requiring that M3 Eagle's water right application "be remanded to IDWR for proceedings consistent with the terms and conditions set forth in the Stipulation" is the law of the case governing the remand proceedings.

municipal provider named in the Application. Stipulation at 4 ¶ 3; January 19 Agreement at 2 ¶ G. None of this violates rules of procedure or Protestants' rights—they had a full and fair opportunity to present evidence contained in the Hearing Record upon which Exhibit A is based, and they will have a full and fair opportunity to present evidence in these remand proceedings on the City of Eagle's role as the municipal provider. *Order Acknowledging Party Status of Protestants and Denying Motion to Alter and Amend Findings* (Aug. 2, 2011).

The Protestants chose not to become parties to the Judicial Review Case, and therefore had no legal standing to negotiate or affect the Stipulation or its exhibits. One of the Protestants asked for and was granted amicus status in the District Court proceeding (without objection from M3 Eagle), and was heard by that Court. In any event, the Stipulation is final and has been incorporated into the District Court's order of remand.[3] Nothing in this has in any way impaired Protestants' rights.[4]

C. The Stipulation and Exhibit A do not circumvent the law.

Contrary to Protestants' assertions (Motion to Dismiss at 7-12), M3 Eagle and IDWR are fully within the law by entering the Stipulation and agreeing to the attached findings in Exhibit A and the conditions in Exhibit B. These parties to the Judicial Review Case are fully within their

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[3] Because of the District Court's *Amended Order*, the Stipulation is "not simply a contract entered into between private parties seeking to effectuate parochial concerns but is a judicial act." 46 Am.Jur. 2d Judgments § 183 (2006) (footnotes and citations omitted).

> A consent judgment is a conclusive adjudication with the same force and effect as any other judicially enforceable decree . . . . In the absence of fraud or mistake, or unconscionable advantage, a consent judgment, with the approval of the court, binds parties and their privies as fully as any other judgment.

Id. § 198 (footnotes and citations omitted).

[4] Department Rules of Procedure 612 and 614 cited by Protestants, Motion to Dismiss at 12, are not applicable to the Stipulation. The Department Rules of Procedure "govern contested case proceedings before the Department of Water Resources and the Water Resource Board of the State of Idaho." IDAPA 37.01.01.001.02. The Stipulation was entered, and approved by the District Court, in the Judicial Review Case, which was not a contested case proceeding governed by Department's Rules of Procedure.

rights to agree that the remand proceedings would be limited in scope. The Court has ordered that result.

Protestants want the Department, on remand, to take evidence on all matters listed under I.C. § 42-203A(5). Motion to Dismiss at 9. This position asks the Department both to ignore the Stipulation and violate the District Court's *Amended Order*. Pursuant to the Stipulation, these remand proceedings are limited to taking evidence on the City's role as municipal provider because the Hearing Record does not already contain the evidence necessary to satisfy the Department's concerns about such issues.

There is nothing "sham" about the Judicial Review Case, the Stipulation negotiated and entered between M3 Eagle and IDWR, or these remand proceedings. This is not a case like *Campbell v. Kildew*, 141 Idaho 640, 115 P.3d 731 (2005), where the litigants were found to be in collusion and using the judicial process solely to maneuver around a regulatory process. M3 Eagle and IDWR were adversaries in the Judicial Review Case who negotiated long and hard for the resolution memorialized in the Stipulation, and who were prepared to fully litigate the case if a settlement had not been reached. The fact that Protestants—who elected not to become parties—do not like the Stipulation does not make it infirm, let alone a "fraud upon the court."

II. M3 EAGLE'S ASSIGNMENT TO CITY IS VALID AND LAWFUL.

The assignment of a water right application is a common occurrence that results in the assignee becoming the applicant. Protestants nevertheless argue that M3 Eagle's assignment of the Application does not make that City an applicant for the future needs municipal water right requested in the Application. Motion to Dismiss at 1.

Protestants mistakenly assert that the Assignment is void because "[t]he original application for 23.18 cfs has been adjudicated and denied. It no longer exists." *Id.* at 2. As discussed, the Application does exist because M3 Eagle timely commenced the Judicial Review

Case, and the matter has been remanded back to IDWR "for proceedings consistent with the terms and conditions set forth in the Stipulation." *Amended Order* at 2 (June 30, 2011) (Judicial Review Case).

Protestants simply are wrong that City is a "straw man or front man" for M3 Eagle, and that M3 Eagle will continue to "hold all the attributes of ownership including full management and control when not a municipal provider." Motion to Dismiss at 2 ¶ 10. This argument also is baseless. The Pre-Annexation and Development Agreement between City and M3 Eagle, Hearing Record Ex. 58 § 2.2, makes it a matter of contract that the City will be the ultimate water right holder and municipal water service provider to the M3 Eagle planned community portion of the City. M3 Eagle assigned the Application to City now because, as part of settling the Judicial Review Case, IDWR required that City be the municipal provider named in the Application to overcome the "Municipal Provider Issues" described in the January 19 Agreement at 1 ¶ B. M3 Eagle acceded to IDWR's position in this regard in the Stipulation. It was another part of the settlement which has been memorialized by the Court. Under the Assignment, the City of Eagle now is an owner of the Application, it will own the water right and the supply system. M3 Eagle will not. That was the deal from the start, it has been furthered by the Assignment, and Protestants can cite no fact or law to the contrary.

In summary, M3 Eagle assigned the Application to City at the behest of IDWR in order to satisfy IDWR's concerns over the "Municipal Provider Issues." The Application was at issue in the Judicial Review Case, and still is at issue in these remand proceedings, for determination of the limited issues specified by the Stipulation, the District Court's *Amended Order* remanding the Application, and several orders from the Department.

DATED this 12TH day of October, 2011.

Respectfully submitted,

GIVENS PURSLEY LLP

By _____

Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12TH day of October, 2011, the foregoing was filed, served, or copied as follows:

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