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DEPARTMENT OF  
WATER RESOURCES

**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 SUBMISSION OF  
DEPOSITION TRANSCRIPTS AND  
SUPPLEMENTAL BRIEF RELEVANT TO  
MOTION IN LIMINE**

Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby provides its *Submission of Deposition Transcripts and Supplemental Brief Relevant to Motion in Limine* in support of M3 Eagle's October 4, 2011 *Second Objection and Motion in Limine to Exclude Three of Protestants' Four Proposed Witnesses* ("Motion in Limine"). The Motion in Limine is based on Protestants' statement in their October 4, 2011 Revised Witness List that all three of their proposed witnesses—Mike Moyle, Mary Taylor, and Charles Meissner—will testify to "damage and injury they have already endured as a result of the pumping of groundwater," a subject outside the scope of the hearing. The attached deposition transcripts<sup>1</sup> confirm that these proposed witnesses indeed seek to testify about alleged injury to their ground water rights they believe they may have suffered.

<sup>1</sup> The transcripts ("Tr.") are attached to the Affidavit of Michael P. Lawrence submitted herewith.

Furthermore, the Transcripts confirm these individuals have no information, or nothing beyond impermissible lay opinions, about the three matters at issue: 1) annexation of the M3 Eagle project area; 2) the planning horizon and reasonably anticipated future water needs for the City of Eagle, including the M3 Eagle portion; and 3) the quantity of water appropriated for the M3 Eagle area in relationship to water needs in the overall City service area. For example, proposed Witness Charles Meissner testified as follows in his deposition:

Q. .... Do you see item one, evidence establishing that the M3 Eagle project has been annexed by the City of Eagle?

A. Yes.

Q. Do you have any information, any facts that you know, that relate to that, that you would testify to at this hearing?

A. No, I don't.

Q. How about No. 2, "Evidence related to the City of Eagle's planning horizon and the reasonably anticipated future municipal needs for the City of Eagle's service area, including [the] M3 Eagle project based on the City of Eagle's current water rights portfolio and planning information." Have you got any facts, or do you know of any information that you would testify to at the hearing that relates to item 2?

A. No.

Q. What about item 3, sir, "Information on the quantity of water appropriated for permit No. 63-32573 appurtenant to the M3 project in relationship to water needs for the City's service area." Do you know anything about that, or have any information that you would testify to at the hearing, relative to that point?

A. No, I don't.

Meissner Tr. at 13-14. Mr. Meissner then stated that "The scope of my testimony would be on the damage that was done to my well." Meissner Tr. at 16.<sup>2</sup> Mr. Meissner should be excluded from the hearing.

Proposed witnesses Mike Moyle and Mary Taylor both confirmed their intention to testify about alleged well interference. Mr. Moyle contended that the hearing is not really limited: "It's my understanding, that as I look at those three questions, that they are broad enough where they ought to go in regards to current damage from existing water rights and

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<sup>2</sup> Mr. Meissner had to replace his 20-year-old well when it became impacted with sand. Meissner Tr. at 14 and 19. The water levels in his well now "are fine" and "are doing okay." Meissner Tr. at 9.

future damages.” Moyle Tr. at 19. Ms. Taylor was asked, “with regard to the anticipated future water right needs for the M3 Eagle as part of the City, do you have any facts about that? What water would be needed for that area?” Her answer: “No, I do not.” Taylor Tr. at 17. But she went on to state, repeatedly, that she has concerns about the quantity of water sought for the M3 Eagle project “damaging the wells.” *Id.*

The September 8, 2011 Prehearing Order states that the parties “shall not . . . offer evidence at the hearing concerning other matters such as technical water supply issues, hydrogeology, and potential injury from pumping.” Despite these clear orders, it appears Protestants have focused on the word “potential” in this admonition, and now are asserting that they are completely free to reopen the subject of water supply and hydrogeology because they propose to offer evidence of “actual” injury from pumping, as opposed to mere “potential” injury.

By this parsed and disingenuous reading of the Prehearing Order, Protestants evidently are saying that the Hearing Officer’s orders actually allow them to put on evidence that, by its very nature, concerns hydrogeology, technical water supply issues, and potential injury. In other words, suggest Protestants, the Hearing Officer did not mean what he said; for them, just the opposite is true. However, the Stipulation, the Hearing Officer’s repeated orders, and the District Court’s Amended Order each put all questions of injury to water rights off the table in this remand.

Even applying their own remarkable approach to the language in the Prehearing Order, any contention Protestants might make as to this subject would be just that—a contention of injury. That is, an issue of “potential injury.” One would have to prove one’s way past “potential” to get to “actual.” Protestants’ suggestion that the Hearing Officer now expand the

hearing's scope does not even comport with their own strained reading of these words, much less the unmistakable intent of the governing documents.

Beyond that, M3 Eagle is aware of no proof whatsoever, in the existing record of this case or otherwise, of any injury to any ground water right in the Eagle area. Questions about the effects of pumping to supply the M3 Eagle planned community already have been thoroughly covered in this case, and at length, and with Protestants participating. The entire subject matter in which the legal question of injury to a water right arises now has been settled by a binding agreement and an order from the District Court. It is no accident that M3 Eagle has not named an expert in hydrogeology as a witness in this remand. It is because of the limited scope of the remand and the settlement of these very issues, based on a thorough record, after a year of negotiation. Any such testimony now would prejudice M3 Eagle and the City, and would blatantly contradict the Stipulation, the Prehearing Order, and the District Court's Amended Order.

Contrary to the Protestants' misreading of plain language, the fact is that the Hearing Officer's choice of words establishes the broadest possible scope as to the subject matter upon which there may be no testimony on this remand: subjects "such as" those listed are out of bounds. In particular, the subject of alleged injury to water rights—whether one might call it actual, potential, possible, or imagined—is simply outside the scope. The idea that they might offer evidence of "actual" injury because the Hearing Officer referred to subjects such as "potential injury" is simply unsupportable under any analysis. We respectfully request that the Hearing Officer put a stop to Protestants' attempts to circumvent the now-repeated mandates limiting the scope of the hearing.

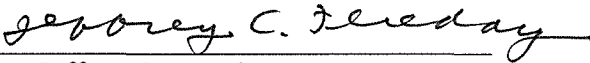
M3 Eagle respectfully requests the Hearing Officer grant its Motion in Limine or, in the alternative, strictly admonish each of Protestants' witnesses, and their representatives, that

testimony about alleged pumping effects, injury, water supply, or hydrogeological subjects will not be allowed in the hearing, and that the remand will be restricted to the matters stated.

DATED this 14<sup>th</sup> 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 14<sup>th</sup> day of October, 2011, the foregoing was filed, served, or copied as follows:

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