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DEPARTMENT OF
WATER RESOURCES

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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 REPLY TO MR. SMITH'S
SEPTEMBER 15 OBJECTION AND
SEPTEMBER 26 RESPONSE**

Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby replies to Protestants Eagle Pines Water Users Association's and Alan Smith's (together, "Mr. Smith") September 15, 2011 *Objection to Prehearing Order* ("Objection") and September 26, 2011 *Response to M3 Objections and Motion to Exclude Protestants' Witnesses* ("Response") (together, "Mr. Smith's Objections"). Mr. Smith has not cured the problems with the September 8, 2011 *Protestants' List of Potential Witnesses* ("Protestants' Disclosure"), as described in M3 Eagle's September 13, 2011 *Objection and Motion in Limine to Exclude Protestants' Proposed Witnesses*. Mr. Smith's Objections flout the requirements in the Hearing Officer's September 8, 2011 *Prehearing Order* ("Prehearing Order") and other orders governing these remand proceedings, and generally are without merit.

Mr. Smith misrepresents the January 19, 2011 Agreement and June 14, 2011 Stipulation between M3 Eagle and IDWR as “leav[ing] ‘water supply issues and pumping effects’ an open issue for the hearing record.” Objection ¶ 6; *see also* Response ¶ 3 (“‘water supply issues’ and ‘pumping effects’ was left open for later determination in the January 19th Agreement”). They did no such thing. The January 19 Agreement actually says that M3 and IDWR would “seek agreement on additional findings more particularly addressing Water Supply Issues and pumping effects” and include any agreed-upon findings as Exhibits to the then-anticipated stipulation. This is what happened—the June 14 Stipulation’s Exhibit A included such findings. As the Hearing Officer has made clear several times in his orders and at the September 2 Prehearing Conference, issues related to those findings are not within the scope of the remand proceedings. There is no basis for Smith’s assertion that the findings in the Stipulation’s Exhibit A are “‘negotiation points’ . . . subject to rebuttal in the remand proceedings.” Objection ¶ 7.

Mr. Smith also is incorrect that the Hearing Officer “never requested any of the Litigants to prepare proposed hearing orders for his consideration.” Objection ¶ 1. At the September 2 Prehearing Conference, the Hearing Officer asked M3 Eagle to prepare a proposed order and serve it on all parties, which is precisely what happened. The Hearing Officer’s Prehearing Order that followed required the parties 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.” Mr. Smith failed to do this in his September 8, 2011 *Protestants’ List of Potential Witnesses* (“Protestants’ Disclosure”), and he apparently still refuses to comply.

In his Response, Mr. Smith states:

You will be supplied with the addresses and phone numbers of our witnesses once you have assured us that the discovery process will not be used to annoy, harass, or intimidate the witnesses.

Response ¶ 4 (emphasis added).¹ Nothing in the Prehearing Order can be interpreted to require M3 Eagle to make assurances as a prerequisite to Mr. Smith disclosing proposed witnesses' contact information or descriptions of their expected testimony.

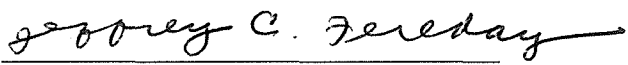
Mr. Smith has had nearly three weeks to comply with the Prehearing Order, but he refuses to do so. We are now three weeks away from the October 18-20 hearing, and just over two weeks away from the deadline to complete written discovery and depositions. Mr. Smith's failure to properly disclose witnesses does not allow M3 Eagle to adequately conduct discovery or to prepare for the hearing, and is unfairly prejudicial to M3 Eagle. Accordingly, M3 Eagle requests the Hearing Officer immediately issue an order excluding from these remand proceedings all witnesses listed in Protestants' Disclosure.

M3 Eagle also requests the Hearing Officer order that Protestants Norman Edwards and North Ada County Groundwater Users Association ("NACGUA") be prohibited from calling any witnesses during these remand proceedings because they have not disclosed any witnesses.

DATED this 27th day of September, 2011.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Jeffrey C. Fereday
Michael P. Lawrence

¹ Mr. Smith provides the following basis for his demand that he be "assured":

Outrageous questions similar to the questions asked of Mr. Thornton and Mr. Head about "how much money they made" and "threatening them with sanctions" when they refused to answer is an abuse of the deposition process and you are aware of this fact.

Response ¶ 4 (emphasis added). There is no merit to this allegation. As shown in the portion of deposition transcript attached hereto as Attachment A, Mr. Thornton was not asked about his personal income and was not inappropriately threatened with sanctions. M3 Eagle could not locate any discussion of "money" or "sanctions" in Mr. Head's deposition transcript.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2011, the foregoing was filed, served, or copied as follows:

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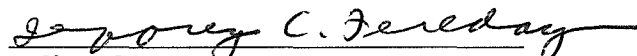
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Jeffrey C. Fereday
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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-32573 IN)
THE NAME OF M3 EAGLE LLC)
_____) VOLUME I

DEPOSITION OF JOHN L. THORNTON
DECEMBER 2, 2008

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

Attachment A

1 Head did call all of the -- or left messages with
2 all the protestants. So I did not do that.

3 Q. Do you have a list of the members of
4 NACGUA?

5 A. I do. Not with me.

6 Q. Could you make that available to us?

7 A. Yeah. You don't have that right now?
8 I thought you had that when we signed up in terms
9 of with the Hearing Officer and we turned all that
10 information in. So it seems redundant that you
11 would need that from me.

12 Q. Is the list of NACGUA members exactly
13 the same as the member protestants who we have
14 listed in the various pleadings in this case?

15 A. I believe that it is.

16 Q. Does NACGUA solicit funds from anybody
17 outside of those individuals?

18 A. We have -- the answer to that would be
19 yes, we have asked for contributions, not only of
20 NACGUA, but to the larger NACFA group.

21 Q. What amount of money have you been
22 able to raise through that effort?

23 A. I don't think that's relevant to this
24 case.

25 Q. Well, I'm asking you to answer that



1 question. I think it is relevant. And it doesn't
2 have to be relevant. It just has to potentially
3 lead to relevant admissible evidence. So that's
4 why I'm asking.

5 A. Yeah.

6 Q. So are you refusing to answer this
7 question, John?

8 A. Yes, I am.

9 Q. Are you aware that refusing to answer
10 a deposition question that's within admissibility
11 is potentially grounds for sanctions?

12 A. That, I'm not at all aware of that.
13 But I do not understand the relevancy, so I
14 disagree that it's relevant. And I do believe you
15 probably already have information on some of the
16 amounts that we've already collected through
17 information that has been out anyway. So when you
18 send it out to, you know, groups and people,
19 e-mails get turned in. But for the amount, I
20 don't think it's relevant. I won't answer.

21 Q. Would you agree that someone
22 contributing to this effort might have information
23 that would be relevant or could lead to relevant
24 evidence pertaining to the application or the
25 opposition to it?

1 A. I didn't understand your question. If
2 you could repeat it.

3 Q. Do you agree that it's a possibility
4 that someone who is making a contribution holds a
5 position that we would like to know about or could
6 be relevant to understanding the general
7 opposition to the application?

8 A. No, I don't.

9 Q. You don't believe that to be the case?

10 A. No, I don't.

11 Q. Do you believe yourself at all
12 qualified to testify on behalf of NACGUA at the
13 hearing in this case?

14 A. At the upcoming hearing?

15 Q. Correct.

16 A. Yeah, not today, but at the upcoming
17 hearing.

18 Q. You don't feel yourself qualified
19 today to testify on behalf of NACGUA?

20 A. No, because I wasn't deposed as
21 NACGUA. I was deposed as John Thornton, private
22 citizen.

23 Q. But you are, in fact, John Thornton,
24 vice president of NACGUA; correct?

25 A. Correct. But I'm not speaking for