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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 ASSIGNED TO THE CITY OF EAGLE	**REPLY MEMORANDUM OF THE CITY OF EAGLE**

COMES NOW the City of Eagle, by and through its counsel of record, Bruce M. Smith of the firm Moore Smith Buxton & Turcke, Chtd. and submits its Reply Memorandum to the Final Closing Statements by the Protestants, North Ada County Groundwater Users Assn., Eagle Pines Water Users Association, Norman Edwards[1], and the Closing Statement of M3 Eagle.

I. Reply to Closing Statement of Protestants.

As noted in the City's Closing Memorandum, the Director ordered that only certain limited evidence would be allowed at the Remand Hearing. Many of the arguments raised by the Protestants are directed at issues related to earlier proceedings in the processing of Application for Permit No. 63-32573 ("Permit"), the Department of Water Resources' involvement with the

[1] Because the Closing Statement arguments of all Protestants closely overlay one another, the City submits its reply addressing the arguments of the Protestants collectively.

Protestants during the negotiations between M3 Eagle and the IDWR, and the limitations imposed on the Remand Hearing by the Director. While the City acknowledges the long on-going dispute among the Protestants, the Director/Idaho Department of Water Resources ("Director" or "IDWR"), and M3 Eagle, the City's role in the Remand Hearing was limited, so the City cannot address those issues which arose prior to the City's involvement in this matter. However, the City can address and clarify the record as to certain issues asserted by the Protestants related to the assignment of the permit and the financial aspects of the development of the system that will serve the M3 Eagle project.

M3 Eagle and the IDWR, acting through the Director, entered into a Settlement Agreement ("Agreement") dated January 19, 2011. The City is not a signator nor a party to that Agreement. This Agreement contemplated, among other things, the assignment of Permit No. 63-32573 to the City and the submission by the City of its Reasonably Anticipated Future Needs ("RAFN") analysis. The RAFN analysis was required by the Director since the original application filed by M3 Eagle was for a RAFN water right. Notwithstanding the Protestants' arguments about M3 Eagle being the "true" holder of the permit, the permit was assigned to the City on June 13, 2011. That assignment was made under strict conditions as set forth in the attachment to the assignment document included in the City's exhibits, was assigned at the direction of the Director, and was approved by the Director. The permit is now the City's permit. M3 Eagle, per paragraph 4 of the assignment, retained a minor interest sufficient only to allow it to participate in the Remand Hearing and other proceedings should they occur. The City now holds Permit No. 63-32573 save for that miniscule interest retained by M3 Eagle. M3 Eagle's

very limited interest terminates once a final order is issued and any appeals are final per the explicit language of paragraph 4 of the assignment.

Protestants also raise as an issue that the City, as part of its limited role at the Remand Hearing, did not present proof of the City's financial ability to finance construction of the system necessary to serve the M3 Eagle project. First, such evidence was not allowed by the Director's order limiting the evidence that could be presented at the Remand Hearing. Second, although not relevant to the Remand Hearing procedure, the cost of building the system is, per the Development Agreement between the City and M3 Eagle, solely the responsibility of M3 Eagle. M3 Eagle is required to construct and pay for the system which will be conveyed to the City. The City is not required to pay for any of the construction or other costs. If M3 Eagle does not construct and pay for the system and turn it over to the City, that is a matter between the City and M3 Eagle pursuant to the Development Agreement. However, if it is of any consolation to the Protestants, pursuant to the Development Agreement the City will only provide water to the M3 Eagle project pursuant to Permit No. 63-32573. If Permit No. 63-32573, as issued or as developed, is ultimately inadequate for the water needs of the M3 Eagle project, M3 Eagle must secure additional water rights to serve the project. The City is not obligated to provide any other water right or supply to the M3 Eagle project.

Finally, as noted, Protestants raise concerns over the nature of the proceedings, including the Protestants' concerns as to negotiations between the IDWR/Director and M3 Eagle and the representations to the Protestants by the attorneys for the IDWR. The City, from its early role as an interested observer in the proceedings to its submission of its RAFN analysis, acknowledges that the procedures in this matter were unorthodox at best. However, the City was not a party to

the early proceedings, not privy to commitments and discussions between the Protestants and IDWR, and not a party to the subsequent appeal filed by M3 Eagle.

However, the fact is that Permit No. 63-32573, at the direction and approval of the Director, is now held by the City of Eagle. The Permit is supported by the City's RAFN analysis which the Director directed the City to provide in order to obtain the permit and which must be approved by the Director as part of this proceeding.

On the issue of the City's Motion to Strike the IDWR staff RAFN report, the Protestants argue that the IDWR staff report/protocol/memorandum, or whatever it is called, is simply a "disagreement" between the IDWR and the City of Eagle. Although the Protestants do not state whether they concur with or oppose the City's Motion to Strike, their characterization of the IDWR RAFN report/protocol/memorandum as a disagreement fails to address the City's arguments as set forth in its motion and Closing Statement. The City pointed out the document is illegal, violates the LLUPA, contradicts the Director's direction to staff, is not supported by the record, and is not credible. The document is based on pure speculation, its use is in all likelihood a violation of the Administrative Procedure Act ("APA") rulemaking requirements, and it represents little more than the ruminations of individuals with no expertise in the subject matter of the report, in particular the issues related to determining the City of Eagle's future population based on its Comprehensive Plan. Further, similar to the Protestants' arguments about the adjudicatory role of the Director, the creation, consideration, and use of the document represents an administrative function by the IDWR/Director. It does not lend itself to a determination pursuant to the adjudicatory role of the Director in the Remand Hearing.

II. Reply to Closing Statement of M3 Eagle[2].

In its Closing Statement, M3 Eagle addresses the long history of this matter, the evidence submitted at the Remand Hearing, the Protestants' Motion to Dismiss, and the City's Objection and Motion to Strike the IDWR RAFN report.

With regard to the prior proceedings, as the City has noted, it became involved only at the Remand Hearing stage. Therefore, the City is not in a position to respond to the history or details of the earlier proceedings. Further, the City was not involved in the discussions between the Protestants and the IDWR/Director, so the City need not address these aspects of M3 Eagle's statements.

However, as to substantive matters related to the Remand Hearing, M3 Eagle's comments acknowledge that the City has now annexed the M3 Eagle project area into the City. M3 Eagle also acknowledges that the City's RAFN analysis clearly establishes the City's future needs, that the City's methodology was appropriate, and that the analysis supports issuance of the full amount of 23.18 cfs for Permit No. 63-32573 so that the City can serve the M3 Eagle project. The one area where M3 Eagle errs is with regard to the approval of the City's RAFN analysis as part of this proceeding.

When notified of the settlement between the IDWR/Director and M3 Eagle, the City reviewed the Settlement Agreement. The City noted the document called for the City to submit a

[2] The Protestants and M3 Eagle refer to their closing arguments differently. Because the Director indicated these documents were to be the closing arguments/ statements by the parties, the City generally refers to all the documents as Closing Statements.

RAFN analysis to support the application as originally filed by M3 Eagle.[3] Because the City determined it could submit a RAFN analysis as called for by the Settlement Agreement and the City could get its RAFN analysis approved as part of this proceeding, the City decided to develop its analysis.[4] The Settlement Agreement also required assignment of the permit to the City and the City's holding of the permit as a RAFN water right. As the record in the Remand Hearing reflects, Permit No. 63-32573 has been assigned to the City, save for a miniscule interest retained by M3 Eagle so it could participate in this proceeding.

M3 Eagle, in attempting to address certain differences between the IDWR RAFN report and the City's RAFN analysis, suggests that the differences are not material to determining this matter. M3 Eagle further suggests that a determination as to how much additional water the City needs is to be determined at a later date. Both suggestions are incorrect. The City's RAFN analysis as submitted in the Remand Hearing is the City's determination of its future needs. The City's RAFN analysis must be approved in this proceeding, not some future undertaking. M3 Eagle's suggestions that the City's RAFN analysis need not be approved flies in the face of the record in this matter as well as the very Settlement Agreement signed by M3 Eagle.

The Settlement Agreement entered into by M3 Eagle requires the City's submission of its RAFN analysis and its approval by the Director. The City RAFN analysis was the critical step in

[3] The original Application for Permit No. 63-32573 was filed by M3 Eagle without any involvement by the City. Thus the City had no role in, nor input into, the application as originally filed.

[4] The City pointed out to M3 Eagle several problems with the Settlement Agreement. For instance, the timeframe for submission of the City's RAFN analysis was not realistic. Second, the City noted that certain paragraphs, *e.g.* 3, 4(ii), 5.B., contained provisions that violated the Development Agreement between the City and M3 Eagle. Third, the City pointed out that the development of its RAFN analysis was exclusively within the authority of the City, not M3 Eagle or the IDWR.

the City's being able to hold Permit No. 63-32573 as a RAFN water right and to serve the M3 Eagle project over its development period. Contrary to M3 Eagle's suggestions, the Director, under the Settlement Agreement or otherwise, cannot "kind of" or "sort of" or "maybe" approve the City's RAFN analysis or make findings around the analysis. The Director either approves it or he doesn't. Since the City's RAFN analysis was prepared consistent with the City's Comprehensive Plan and the City's planning authorities under the LLUPA, the RAFN must be approved *based on the record* in this case as established in the Remand Hearing. The City's RAFN analysis should not be "kind of" approved or "sort of" approved, or otherwise limited in any obscure fashion. There is only one supportable conclusion as to the City's RAFN analysis, and that is that it is approved. It is not a matter for some future proceeding unless the City determines the analysis should be modified.

M3 Eagle offers no basis for its suggestion that the Director can simply conclude the City needs more water, yet not approve the City's RAFN analysis. The only possible explanation for such a statement is perhaps M3 Eagle's reticence or hesitation to question the underlying basis for the IDWR RAFN memorandum. However, this fails to explain the disconnect between M3 Eagle's suggestion and the Settlement Agreement. For example, under the Settlement Agreement, paragraph 1.A.i.(i), provides that the City's RAFN analysis is to be based on "credible demographic information." The City's evidence, through both its testimony and its RAFN analysis, clearly established that the City's information was credible. In contrast, the IDWR RAFN report was anything but credible. M3 Eagle's own witness, Dr. John Church,

pointed out the lack of credibility in the IDWR RAFN report, especially as to the population determination and the planning horizon for M3 Eagle's buildout.[5]

The IDWR RAFN report also included information (and a reduced City future population) based on the staff's and the consultant's consideration of "the service area of other municipal providers which are located within the City limits or in the City's comprehensive planning area." The Settlement Agreement specifically required that such information not be included. *See* Settlement Agreement, p. 3, par. 1.A.i.(iv)("The City RAFN Information [sic] *shall not include* information regarding the service areas of other municipal providers which are located within either the City limits or in the City's service area.")(emphasis added.)

M3 Eagle's suggestion that the City's RAFN does not have to approved or can be ignored is without merit, is inconsistent with the Settlement Agreement, and potentially damages the City's future applications for water rights. Unquestionably, the suggestion potentially undermines M3 Eagle's own interests in that if there is no approved RAFN analysis, the intent of the Settlement Agreement cannot be accomplished.[6] There is only one credible, statutory-compliant RAFN analysis *in the record*, and that is the City of Eagle's. In order to allow the City

[5] In its comments on the City's Motion to Strike the IDWR RAFN report, M3 Eagle concurs with all the arguments by the City to support striking the report. Although M3 Eagle does not say the Motion should be granted, that is the logical conclusion from M3 Eagle's comments. M3 Eagle does not offer any basis for not granting the motion.

[6] To the extent necessary, if the Director determines to make a finding other than to approve the City's RAFN analysis, the City hereby reserves its rights to withdraw the RAFN analysis in order to protect the City's interests should that be necessary.

to hold Permit No. 63-32573 as a RAFN water right and serve the M3 Eagle project using that permit, the City's RAFN analysis must be approved.[7]

Just as the IDWR staff and the Director do not have the authority to substitute their judgment for that of the City with regard to preparation of its RAFN analysis, neither does M3 Eagle. In fact, M3 Eagle has no authority under the Development Agreement, the Settlement Agreement, or per statute to make any determination as to the City's RAFN analysis. That is exclusively a matter for the City pursuant to the LLUPA. Therefore, M3 Eagle is estopped from even arguing that the City's RAFN does not need to be approved.

Finally, the City would note that M3 Eagle's suggestion that the City's RAFN analysis need not be approved undermines the very finality sought through the Remand Hearing and the Settlement Agreement. The Settlement Agreement and the Director's order limiting the evidence that would be submitted at the Remand Hearing all support an attempt to complete the processing of Application for Permit No. 63-32573. Not approving the City's RAFN analysis, thus jeopardizing the City's ability to serve the M3 Eagle project, carries with it the high probability of further litigation, not finality.

While it is conceivable that a different result could arise in other proceedings, in this case, because of the actions of the Director/IDWR and M3 Eagle and the terms under which the City

[7]To the extent the Director does not approve the City's RAFN analysis, M3 Eagle still has the right under the Development Agreement to secure additional water rights. Notwithstanding such right, the existing Permit No. 63-32573 for 3.28 cfs belongs to the City.

provided the RAFN analysis, an approved City RAFN analysis is a precedent to issuance of Permit No. 63-32573 as a RAFN water right.[8]

CONCLUSION

The Remand Hearing was limited in scope. The parties were allowed to submit evidence only as to certain matters. Lengthy discussion of previous hearing matters are not necessary to address the issues in the Remand Hearing. In the Remand Hearing, the record reflects conclusively that the City presented evidence that: (1) the M3 Eagle project area has been annexed into the City, (2) the City's RAFN analysis establishes the future needs of the City, and (3) the 23.18 cfs under Permit No. 63-32573 is necessary to serve the M3 Eagle project.

Neither the Protestants nor M3 Eagle offered any evidence to the contrary, and M3 Eagle's evidence fully supported the City's determinations, proof of annexation, and water needs determination. Based on the record established in the Remand Hearing, the Director should APPROVE the City's RAFN analysis and APPROVE Application for Permit No. 63-32573 for 23.18 cfs of municipal right.

Respectfully Submitted this 7th day of December, 2011.

MOORE SMITH BUXTON & TURCKE, CHTD.

Bruce M. Smith
Attorney for the City of Eagle

[8] Obviously, if Permit No. 63-32573 is not authorized as a 23.18 cfs RAFN water right by the Director, M3 Eagle would still be entitled to secure other water rights, including requesting a RAFN or other municipal water right through the City, to serve its project.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of December, 2011, I caused to be served a true and correct copy of the foregoing **REPLY MEMORANDUM OF THE CITY OF EAGLE** via prepaid, U.S. Mail, to the following:

FILED:

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

- ✓ via U.S. Mail
- ✓ via Facsimile
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SERVED:

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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

December 12, 2011

Salubria Cemetery
Attn: Kaye York
P.O. Box 33
Cambridge, Idaho 83610

Kaye,

Thanks for letting us sample the ground water from your irrigation well as part of the Statewide Ground Water Quality Monitoring Program. Enclosed are the results from 2011, and from the previous years of sampling. In 2011, all of the constituents tested except **Arsenic** had concentrations less than the EPA's Maximum Contaminant Levels and the State of Idaho's drinking water standards. The Arsenic concentration was 13.6 micrograms per Liter (ug/L); the MCL for arsenic if 10 ug/L. If the water were used for human consumption, it could be of some health concern.

Also enclosed is a copy of the well driller's report. If you have any questions, please call me at 208-287-4852, or email me at ken.neely@idwr.idaho.gov.

Sincerely,

Kenneth Neely
Technical Hydrogeologist