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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 FOR RECONSIDERATION AND CLARIFICATION**

Co-Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of Givens Pursley LLP, hereby submits this response ("Response") to Protestants' March 21, 2012 *Motion for Reconsideration and Clarification* ("Motion" or "Motion for Reconsideration") and supporting brief ("Brief"). The Interim Director should deny Protestants' Motion. It makes no valid argument that would warrant reconsideration or clarification of the March 9, 2012 *Second Amended Final Order* ("Order").[1]

I. DISCUSSION

M3 Eagle previously briefed, and the Interim Director already rejected, arguments Protestants assert again in their Motion. Contrary to Protestants arguments, M3 Eagle's assignment of the application to the City of Eagle ("Assignment") is valid and consistent with the Pre-Annexation and Development Agreement between M3 Eagle and the City of Eagle

[1] Indeed, the Protestants' Motion is so frivolous that M3 Eagle considered not responding at all. However, M3 Eagle believes it is obligated to respond because of its obligation under the Development Agreement to obtain sufficient water rights for the Spring Valley project and convey those rights to the City. Indeed, in its Assignment to the City, M3 Eagle retained a "sufficient ownership interest in the Application" for this very reason.

("Development Agreement") and with the rules of the Idaho Department of Water Resources ("Department"). The administrative hearing process for the future needs municipal water right granted in the Order was complete and thorough, and it afforded Protestants due process. Protestants chose not to become parties to the Judicial Review Case, the negotiated settlement of which was approved by the District Court. The Department fully complied with the District Court's remand order and conducted an additional hearing to which Protestants were parties. Protestants have made their points several times, and, for the most part, reprise them in their motion.

Rather than briefing these issues again, M3 Eagle hereby incorporates by reference its earlier briefing in this matter including, without limitation, its November 23, 2011 *Post-Hearing Brief, Including Response to Protestants' Motion Challenging Remand Proceedings and City of Eagle's Motion to Strike* and its December 7, 2011 *Response to Protestants' and City of Eagle's Post-Hearing Statements*. The Interim Director should follow his prior orders rejecting Protestants' arguments including, without limitation, his August 2, 2011 *Order Acknowledging Party Status of Protestants and Denying Motion to Alter or Amend Findings*, and his October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings*.

Protestants' Motion raises four new questions but, like their prior arguments, none has merit. These are:

1. Did the Assignment require the Application to re-published?
2. Should the Department, rather than M3 Eagle or the City, be obligated to perform the monitoring and reporting required by the Monitoring Plan?
3. Did the City lack authority to enter the Development Agreement?
4. Did the Department improperly fail to rule on the Protestants' October 18, 2011 *Renewed Motion to Dismiss Remand Proceedings* ("Renewed Motion")?

The answer to each of these questions plainly is: no.

A. The Assignment to City did not require the Application's re-publication.

An application for permit is personal property that may be assigned to another party. IDAPA 37.03.08.035.02.d ("An applicant's interest in an application for permit to appropriate water is personal property"). The only condition for an assignment of applicant's interest is that the Department must determine that "the application was not filed for speculative purposes." *Id.* In this case, the Interim Director found that "[t]he application is made in good faith, and the application is not filed in bad faith or for speculative purposes." Order at 15 ¶ 17. Thus, the Assignment from M3 Eagle to the City clearly was valid.

Protestants ask the Department to republish the Application—that is, take this matter back to square one and begin anew the entire application, protest, and hearing process. Brief at 5-6. Protestants cite no authority under which this might be done. Nothing in Idaho's statutes or in the Department's Water Appropriation Rules, IDAPA 37.03.08, requires re-publication upon assignment. Every element of the water right sought in the original Application (which contemplated assignment to the City in any event) remains as it was. Taking the application back to a pre-publication state would conflict with the District Court's Remand Order, would depart from Idaho law, and would prejudice the City and M3 Eagle.[2]

The Department's Rules expressly require re-publication only where an application is amended so that "the total rate of diversion or total volume of storage requested is increased." IDAPA 37.03.08.035.04.e. The Rules state that applications "shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of

[2] Moreover, Protestants lack standing to complain about any alleged failure to re-publish notice. Even if re-publication were required (which it is not), the lack of re-publication could not prejudice Protestants because they already were, and remain, parties to the contested case before the Department.

diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended." IDAPA 37.03.08.035.04.a.

> An application shall be amended if the proposed change will result in a greater rate of diversion or depletion (see Subsection 035.04.c.), if the point of diversion, place of use, or point of discharge of the return flow are to be altered, if the period of the year that water will be used is to be changed, or if the nature of the use is to be changed.

Id. Here, the Assignment involved no change in any applied-for element. It involved no increase—no change whatsoever—in any potential effect on any other water right or on any person as compared to the Application solely in M3 Eagle's name. It simply added the City as an applicant, reserving to M3 Eagle a sufficient ownership interest to remain as a co-party through the end of any appeal in this matter.

Because the Assignment makes no such change, re-publication under the Department's Rules was not required. The Department obviously already has reached this conclusion, and its decision fully comports with the law and its own rules. Not to mention common sense. It would hardly promote sound or cost-effective administrative practice for the agency to require a substantively unchanged application—much less one that has completed the hearing process and full Department review—to be essentially cancelled by declaring that the application process must start over due to the addition of an applicant. Indeed, doing that would prejudice the City and M3 Eagle, thwart the entire hearing process that has been concluded, and increase costs and delay for the parties and the Department. There is no merit to Protestants' argument.

B. The Department is within its authority to incorporate monitoring and reporting obligations in permit conditions.

The Department's Rules state:

> The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and

> to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

IDAPA 37.03.08.050.01. The Department has authority to require a permit holder to measure and report its diversions, I.C. § 42-701, and it regularly does so. Nowadays many permits are conditioned to require the appropriator to monitor pumping and ground water levels. Here, as a condition of using water under this permit, the Interim Director has required the permittee to undertake an "extensive ground water monitoring program" which has been approved by Department staff. Order at 12 ¶ 53. The Department will be provided the data and reports produced under the Monitoring Plan, and is fully capable of evaluating this information, all of which will be public. There is no basis for insisting that the Department should recast this permit condition as imposing an obligation on its budget, shoulder the expense of monitoring, and collect the data and draft the reports itself.

C. The City had authority to enter the Development Agreement.

Although they introduced no evidence on this assertion at the remand hearing or the initial hearing, Protestants in their Motion now suggest that the City somehow lacked authority to enter into the Development Agreement. Brief at 6-7. This is a frivolous assertion. The Department—presiding over a contested water right case—does not have jurisdiction to determine the validity of the Development Agreement (or the authority to interpret it differently than the parties who executed it). But even if it did, there simply is no doubt that the Development Agreement is valid and the Protestants' assertions to the contrary are baseless.

Development agreements between municipalities and landowners are commonplace. As described in more detail below, the practice has been in place for decades—as a function of a

municipality's general powers.[3] Indeed, the Legislature has empowered cities to "contract and be contracted with" and to "exercise all powers and perform all functions of local self-government in city affairs" that are "not specifically prohibited" by Idaho law. Idaho Code § 50-301. In other words, the Idaho code expressly vests cities with the power to contract. There is no statute prohibiting contracts such as development agreements between cities and landowners.

In fact, development agreements are expressly authorized by statute. In the 1991 amendments to the Local Land Use Planning Act, the Legislature specifically authorized local governments to condition rezone determinations by using the mechanism of "development agreements" between a city and an affected landowner. I.C. § 67-6511A. Section 67-6511A codified the long-standing practice of entering into development agreements, established a remedy for non-compliance with a development agreement, and set particular requirements—such as an implementing local government ordinance—in the context of rezones.[4] In other words, both the Legislature and the Idaho courts have recognized that local governments have broad authority to enter into development agreements and similar contracts with landowners.

In complete accord with section 67-6511A , the City of Eagle has adopted an implementing ordinance. Title 8, Chapter 10 of the Eagle City Code, entitled "Development Agreements" expressly establishes the City's authority to require or permit, as a condition of

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[3] *See, e.g., Sprenger, Grubb & Associates v. Hailey*, 127 Idaho 576, 903 P.2d 741 (1995) (involving a development agreement signed in 1973). A city's general power to contract has been recognized for over a century. *See Woodward v. City of Grangeville*, 92 P. 840, 841 (1907) (recognizing authority of the city council, not the mayor, to approve and ratify city contracts). The Legislature has expressly confirmed the contracting power of cities, Idaho Code § 50-301, and counties, Idaho Code § 31-604.

[4] Cities and counties also can require and enforce development agreements regardless of whether there is a zoning change and regardless of whether section 67-6511A is invoked. For example, in *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 148 P.3d 1247 (2006), the project did not involve a rezone, but the court upheld the county's development agreement requirement. Also, court decisions before and after Section 67-6511A's enactment in 1991 have upheld development agreements involving annexations and rezoning. *See, e.g., Sprenger, Grubb & Associates v. Hailey*, 127 Idaho 576, 903 P.2d 741 (1995) (development agreement involving annexation and rezoning in place since 1973); *Wylie v. State*, 151 Idaho 26, 253 P.3d 700 (2011) (development agreement involving annexation and rezone was entered into pursuant to I.C. § 67-6511A and was binding on landowner).

rezoning, an owner or developer to enter a development agreement concerning the development of property.

And, consistent with the City's implementing ordinance and the statutory and common law of development agreements, the Development Agreement between the City and M3 Eagle was entered to govern the annexation and rezone of the M3 Eagle property. Development Agreement, Ex. 58 at 7-8. The City specifically approved the Development Agreement through findings and legal conclusions. *Findings of Fact and Conclusions of Law, In the Matter of a Zoning Ordinance Amendment, an Application for Annexation and Rezone from RR (Rural Residential) and RP (Rural Preservation) to R-1-DA (Residential with a Pre-Annexation and Development Agreement for M3 Eagle*, Case No. ZOA-3-06/A-14-06/RZ-19-06 (Eagle City Council, December 18, 2007) (copy on file with City of Eagle).

The City has followed the legal process. It is frivolous for Protestants to suggest otherwise, or to contend, as they do here, that the City of Eagle somehow lacked authority to enter the Development Agreement with M3 Eagle. Protestants' bald assertion that the Development Agreement is, in effect, *ultra vires* because it is "with a private developer [and] city property is not involved" is completely meritless.[5] The request for reconsideration should be summarily rejected.

D. The Order effectively denies Protestants' Renewed Motion.

Protestants' Renewed Motion—which Protestants' complain was ignored by the Hearing Officer, Motion for Reconsideration at 3—makes arguments the Hearing Officer has considered

[5] Protestants' mention of "city property" likewise makes no sense when discussing development agreements between a landowner and a city because the assertion suggests a city would have to make an agreement with itself to impose conditions on the use of City-owned property. If, rather, Protestants' intended "city property" to mean "inside city limits," their argument still has no merit because development agreements regularly are entered before annexation to govern zoning and development of property after annexation occurs. *See Sprenger*, 127 Idaho 576, 903 P.2d 741 (1995) (addressing development agreement governing annexation and rezoning).

and rejected before. As its name suggests, it reiterates the same arguments made in Protestants' October 5, 2011 *Motion to Dismiss Remand Proceedings*. M3 Eagle responded to those arguments in its October 12, 2011 and November 23, 2011 briefs, and the Hearing Officer expressly rejected them in his October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings.* The Hearing Officer's Order granting the applied-for water right obviously represents a denial of the Protestants' Renewed Motion. Although it would serve no purpose but to further waste time and resources, the Hearing Officer could resolve Protestants apparent confusion by issuing a summary denial of their Renewed Motion.

To the extent any arguments raised in Protestants' Renewed Motion still are at issue, M3 Eagle hereby incorporates by this reference the arguments set forth in its prior briefing.

II. CONCLUSION

Most of the arguments raised in Protestants' Motion for Reconsideration already have been rejected by the Hearing Officer. The others are frivolous, without any foundation in law or fact, and serve no purpose other than to harass, cause delay, and needlessly increase the cost of litigation for M3 Eagle and the City of Eagle.[6] For the reasons described herein and in M3 Eagle's and the City's prior briefing, the Hearing Officer should deny Protestants' Motion for Reconsideration.

DATED this 5th day of April, 2012.

Respectfully submitted,

GIVENS PURSLEY LLP

By Jeffrey C. Fereday

Jeffrey C. Fereday
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[6] Indeed, if this were a district court proceeding, the type of frivolous strategies pursued by Protestants might well be grounds for sanctions under I.R.C.P. 11.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April, 2012, the foregoing was filed, served, or copied as follows:

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