BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

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IN THE MATTER OF APPLICATION FOR PERMIT) NO. 63-32573, IN THE NAME OF M3 EAGLE) ASSIGNED TO THE CITY OF EAGLE)	**REBUTTAL BRIEF TO M3 RESPONSE**

Protestants agree that some of these points of law have been made several times. THEY HAVE BEEN REPEATEDLY IGNORED. The contention by counsel for M3 that the Protestants "have received due process in these proceedings is outrageous and repugnant to the principles of justice and fairness.

Those legal points, all of which have been ignored time and again, are:

1. Lack of jurisdiction in this tribunal of Water Resources to negotiate a "deal" while the case was on appeal which totally changed the nature, scope and focus of the case and changed its decision. Substantial Idaho case precedent has been repeatedly cited, but ignored.

2. Judicial impropriety, transcending judicial principles by being "directly involved in settlement negotiations" for the past year. (See August 9th Order, p. 4) Those negotiations were without all the litigants notified or present in disregard of the fact that protestants had been present in all of the original hearings and the Applicant and Director knew the case was to be remanded under that "negotiated deal" and Protestants were entitled to be present on remand. Nevertheless, 32 new findings were "cherry picked" from the record, all favorable to M3 and the evidence on remand was limited to "only what was favorable to M3", not the least of which was the augmentation and supplementation of the record through this "deal" to establish the M3 property as contiguous to city boundaries which was not the case at the time the original hearing concluded.
3. Due Process Violations. M3's counsel makes the bold assertion that "Protestants have been afforded due process", however, that brief totally ignores items 1 and 2 mentioned above. This has been the pattern throughout this case by both M3's counsel and Water Resources. Anything for which they have no answer and on which either might have to concede that Protestants have valid legal points must be ignored. This is especially so when Protestants have cited Idaho statutory authority and Idaho case precedent to support any legal point. (See Brief of March 21, in support of Reconsideration Motion).

Protestants concede that they were afforded "due process" in the original 16 hearing days between April and July, 2009 which resulted in the judgment on the merits on January 25, 2010. It is the entire judicial process since then that has violated the "due process" rights of Protestants. That is quite clearly based on the judicial impropriety and absence of jurisdiction points set forth in items 1 and 2 above. Neither of those items are addressed in counsel's Responsive Brief of April 5th because they have no answer. The only response is that those are "frivolous, without

merit and without any foundation in law or fact."

Partial "due process" simply won't work and does not satisfy the law or supreme law of the land. Anything that is less than full "due process" amounts to irregularities in proceedings before the agency and will be the basis of appeal.

Moreover, these protesting litigants are entitled, as a matter of due process to rely on the judgment on the merits of the contested case which received full due process.

> "A judgment should not be vacated or disturbed unless refusal to take such action appears to the court inconsistent with substantial justice. Rule 61, I.R.C.P.

This tribunal has held that a "future needs municipal application must meet a higher standard" as required by Idaho Code 42-202 - that the municipal provider "qualifies" as such at the time the application is filed.

> "M3 Eagle does not qualify as a municipal provider under Idaho Code 42-202". (Conclusion of Law #10, p. 22, Amended Final Order).
>
> ". . . the requirement that the qualification be established at the time of the application is clear from the statutory language." (Conclusion of Law, #11, p. 22, Amended Final Order.)

Even though M3 never qualified at the time the application was filed and never did qualify throughout months of hearings, M3 still contends it is a co-applicant. There is no merit to this assertion – M3 never qualified. The contested case was only allowed to proceed as "an application to develop a water right permit for a municipal use" after the Protestants' motion to dismiss the future needs municipal provider application under 42-202 and 42-202B5, Idaho Code. Accordingly, the permit and the application were not granted for a reasonably anticipated

future need, but only for a standard water right of 3.28 cfs for municipal use. The court concluded as follows:

> "A permit should be issued for 3.28 cfs to M3 Eagle." (Amended Final Order, Conclusion of Law #18, p. 24.)
>
> "It is not in the public interest to grant a water right to M3 Eagle for 23.18 cfs for anticipated future needs . . ." (Amended Final Order, Conclusion of Law #17, p. 24.)

No future needs municipal water right was ever granted to M3. M3 cannot assign or convey something it does not have. When that application is denied, as it was in this case, the applicant's interest never materialized into a personal property right that could be assigned. Nothing is cited to the contrary in counsel's brief. This is merely another attempt to "muddy the water." M3 has no 23.18 cfs water right to assign. The 3.28 cfs is all that can be assigned as that is all M3 owns.

The grant of a 23.18 cfs water right to the City of Eagle is most certainly "an increase to a greater rate of diversion". To say there is "no increase – no change whatsoever – in any potential effect on any other water right" is ludicrous. The change is from 3.28 cfs to 23.18 cfs.

It is clear that M3 retains an ownership interest and considers its entity as the owner of the entire water right. (See M3's Responsive Brief, p. 1 and p. 4.) M3 did not qualify for the 23.18 cfs and it has now been awarded to an applicant that never ever applied – the City of Eagle.

As stated in our prior brief, at some unknown point after the appeal this standard water right of 3.28 cfs mysteriously matured back into a future needs municipal water application for 23.18 cfs which M3 intended to assign to the City of Eagle in phases.

Protestants fully realize that the statutory authority of the City of Eagle is an aside from the water issues and do not expect the Water Resources tribunal to decide that matter. It is an issue

which cannot be raised for the first time on judicial review. It is a point of law that the Protestants addressed in earlier proceedings. It may or may not be raised on appeal.

CONCLUSION

The conclusion of the M3 brief contains reprehensory and scathing remarks as follows:

> "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."

All of this from a litigant that has pursued a frivolous case for nearly four (4) years. Perhaps hot shot water lawyers need to read and follow the water law in which they are experts.

Perhaps, the major portion of the delay and costs were caused by the very litigant, M3 Eagle, that is now castigating and railing against Protestants, such as follows:

1. Filing a water right application when it knew or should have known it did not legally qualify.
2. Failing to present documentation or information that it was a qualified municipal provider as required by statutory law.
3. Continuing to pursue this case when they knew it had major material defects.
4. Filing a frivolous appeal which M3 did not intend to pursue since they knew they could not prevail.
5. Using that appeal to delay matters for over a year in order to acquire contiguity with City of Eagle boundaries.
6. Using that delay to negotiate the case to obtain new findings on water supply issues and to "cherry pick" new facts from the exhibits which were more favorable to M3 and were never found as part of the original judgment. That changed the entire scope and focus of

the case from what the issues were in the contested case.

7. having to use "Remand Proceedings" to augment and supplement the record to establish material issues including contiguity with Eagle City boundaries, annexation and qualification of the municipal provider. All material issues which "experienced water lawyers" would need to establish as part of the "application proof".

Perhaps, IDWR might have prevented some of these costs by rejecting the defective application that had no documentation or information as required by I.C. - $42-202(2) or by granting the dismissal motion of Protestants at the conclusion of the "applicants' case in chief". (See 42-202(2) and 42-205B5, I.C.)

Finally, the three (3) major issues set forth above are material to this case.

1. Jurisdiction to make the 32 new findings after the appeal was perfected.

> "Jurisdiction to make findings is terminated by the perfection of an appeal from a final order." US v Aluminum Co. 2 Fed R. Dec 224. Lowery v Board of County Commissioners of Ada County, 115 Idaho 64, (App) at p. 71, 764 P. 2d 431, (ct. app. 1988). Hells Canyon Excursions v Oakes, 111 Idaho 123 (app), 721 P. 2d 223, (ct. app. 1986) at p. 125.

Protestants have repeatedly raised the jurisdiction issue asking for a ruling, but have been ignored and denied any ruling without due process as this is a material issue.

2. The judicial impropriety of negotiations between the IDWR Judge, Attorney General staff, and M3 and its representatives behind closed doors without all litigants present. This resulted in the "January 19, 2011 deal" signed by the judge of this tribunal and M3 before Petitioners ever saw it in derogation of Petitioners' due process. That deal required a SECOND AMENDED FINAL ORDER superseding and replacing the judgment of January 25, 2010 which had been fully litigated and received "full due process".

3. Due process. Ignoring and refusing to rule on these material issues which are essential to support the validity of the Second Amended Final Order of March 9, 2012 most certainly deprives part of the litigants of full due process.

These DUE PROCESS issues do have merit. The settled course of judicial proceedings involves not only questions of fact and law, it also must protect all affected individual legal rights, and where the decision affects a legal right and may result in terminating or destroying any such rights the court must exercise its power in a way that safeguards those rights through due process. (see 11 Am Jur 904, 12 Am Jur 258).

In a very recent United States Supreme Court decision in a case arising out of North Idaho, SACKETT v EPA, the U.S. Supreme Court unanimously held that individual due process had been denied by a governmental agency.

Respectfully submitted this 12th day of April, 2012.

/S/ JOHN THORNTON
John Thornton,
North Ada County Water Users Association

Alan Smith,
Eagle Pines Water Users Association, and
Individually

/S/ NORMAN EDWARDS
Norm Edwards,
Individually

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12TH day of April, 2012, a true and correct copy of the foregoing Rebuttal Brief to M3 Response was served on the following parties as set forth below:

NOTICE OF SERVICE AND DISCOVERY

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