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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 LLC

**M3 EAGLE'S RESPONSE TO
PROTESTANTS' OPPOSITION TO
MOTION TO DESIGNATE OFFICIAL
HEARING TRANSCRIPT**

Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby responds to Protestants' September 8, 2009 *Notice of Opposition to M3 Eagle's Motion to Designate the M&M Transcript the Official Hearing Transcript* ("Opposition Notice") and their separate letter dated September 4, 2009 ("September 4 letter"). Both filings oppose designating the written transcript of the hearing in this matter prepared by M&M Court Reporting Services, Inc. ("M&M") as the official hearing transcript. Protestants state no legitimate objection to M3 Eagle's lodging of the M&M transcript or its request that the Hearing Officer designate it the official hearing transcript. For the following reasons, Protestants' objections should be denied.

Protestants misconstrue the Department's rules regarding the contents of the record in a contested case. Rule 650.02 plainly states "The record for a contested case shall include: . . . (d)

all evidence received or considered (including all transcripts or recordings of hearings[]]” IDAPA 37.01.01.650.02.d (emphasis added). This Rule does not state, as Protestants suggest, that the official record is limited to the Department’s audio recording of the hearing. Opposition Notice ¶ 1.

Rule 650 also does not state, contrary to Protestants’ claim, that the official record may include a transcript only if the Hearing Officer bases his decision on it. Opposition Notice ¶ 2. The Protestants have it backwards. It is incorrect to say that a transcript becomes part of the record because the Hearing Officer refers to it in his decision. Rather, the Hearing Officer may base his decision on a review of a transcript because it is part of the record per Rule 650.02.d (“The record for a contested case shall include . . . all transcripts or recordings of hearings”).¹

Under Rule 650.02.d, the M&M transcript, at least since it has been lodged with the Department, is part of the record. M3 Eagle has simply gone through the formality of asking that it be designated the “official transcript of the hearing” under the Department’s rule 651. Rule 651, by the way, appears to address only the circumstance where a transcript is prepared—by the Department or by one of the parties—from the department’s audio tape recording. In the present case we have an actual hearing transcript produced by an uninterested third party professional court reporter, not by a party or a Department employee as Rule 651 allows. No logical argument is apparent as to why the M&M transcript should be rejected as the official transcript and instead the Department should rule that it or one (or more) of the parties instead should transcribe the tape.

¹ It is noteworthy that the Idaho Rule of Civil Procedure regarding depositions treats both audio-visual recordings and transcripts equally as “official records.” I.R.C.P. 30(b)(4)(B) (“The audio-visual recording is an official record of the deposition. A transcript prepared by a reporter is also an official record of the deposition.”)

There also is no basis for Protestants' assertion that they (or their expert) are entitled to review the transcript "for accuracy" before it is designated part of the record. Opposition Notice ¶¶ 2, 5, 6. Neither the Department's rules nor the Idaho Rules of Civil Procedure contemplate such a procedure with regard to the reporter's transcript of testimony in a contested case hearing. Protestants confuse the Idaho Rule of Civil Procedure 30(e), which allows a deponent to review a deposition transcript, with the Department's Rule 651 procedure for deeming a transcript the official transcript of a contested case hearing.² There is no Department rule or Rule of Civil Procedure allowing a party to review a hearing transcript "for accuracy." Nor does a court reporting service offer witnesses a chance to correct or explain in the case of a hearing transcript.

Protestants provide no reason to suspect the hearing transcript M3 Eagle lodged with the Hearing Officer—which was prepared and certified by M&M's certified court reporters—does not accurately and completely reproduce the hearing testimony. Each of the 16 transcript volumes was certified as "a true and correct record" of all hearing testimony by M&M's professional court reporters who attended the hearings and who are certified shorthand reporters (C.S.R.) governed by Idaho Code Title 54, Chapter 31.³ These certifications were made under threat of penalties set forth in Idaho Code 54-3112, which provides for suspension or revocation of C.S.R. certification in cases of "[f]raud, dishonesty, corruption, willful violation of duty, gross incompetence in practice or unprofessional conduct in performing services as a certified shorthand reporter." We do not read Protestants's opposition as suggesting that M&M's certified

² Review of deposition transcripts allows deponents to correct and explain misstatements or inaccuracies. However, a deponent is not entitled to have the court reporter change the transcript. "Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them." I.R.C.P. 30(e). Idaho's Rules of Civil Procedure contain no similar provision allowing witnesses to review, correct, and/or further explain a transcript of their trial testimony.

³ Copies of M&M's hearing transcript certifications are attached as Exhibit A to the *Affidavit of Michael P. Lawrence in Support of M3 Eagle's Response to Protestants' Opposition to Motion to Designate Official Hearing Transcript ("Affidavit of Michael P. Lawrence")* filed contemporaneously herewith.

transcript must be reviewed for accuracy (or dismissed entirely) because M&M's court reporters misrepresented the hearing testimony. Nor would such an accusation be reasonable.

With all due respect, we believe Protestants also incorrectly recall alleged representations made by the Hearing Officer and M3 Eagle's counsel at the hearing regarding the Department's audio recording and M&M's transcript. Counsel does not recall (and the transcript does not contain) any statement by the Hearing Officer that the Department's audio recording is the official record of the hearing, much less the only official record. Contrary to Protestants' assertion in their September 4 letter, M3 Eagle's counsel also did not state or imply that M&M's transcription (which was paid for by M3 Eagle) would not become part of the official record. The Rule makes the transcript part of the record, and M3 Eagle's counsel stated several times that M3 Eagle intended to provide the Hearing Officer with a copy of it. On one occasion, M3 Eagle's counsel stated that "We do intend to provide the Hearing Officer with a complete transcript for the Hearing Officer's use." Tr. p. 2976 (attached as Exhibit B to the *Affidavit of Michael P. Lawrence*). We believe the Hearing Officer's understanding of this intention is apparent in an off-the-record colloquy with M3 Eagle's counsel in the presence of all other parties on the last day of the hearing. The colloquy went as follows:

MR. FEREDAY: We could provide you with a copy of the transcript, from which you could determine exactly which exhibits were [admitted].

THE HEARING OFFICER: Okay. If we need to do that. And I assume you—based on your past statements, Mr. Fereday, you were planning to do that anyway. I hadn't requested it.

MR. FEREDAY: Right. Yes, I was.

THE HEARING OFFICER: I assume that was the case. Okay. Let's go back on just for a minute.

Affidavit of Michael P. Lawrence, Exhibit C. In short, M3 Eagle's counsel made it clear throughout the hearing that it would provide the Hearing Officer with a copy of the hearing transcript.

Protestants' suggestion that the Department's audio recording should serve as the only official hearing record is unworkable and unnecessary. Referring solely to the audio recording would be unduly burdensome to brief writers and readers, and for no good reason since M&M's certified hearing transcript is finished and available. To the extent Protestants are suggesting that only a wholly new transcript prepared from the Department's audio recording would suffice as an official hearing transcript, such a wasteful exercise should not be sanctioned by the Hearing Officer. It also is not required by any rule.

No useful purpose would be served by refusing to designate M&M's certified transcript—one prepared at no cost to Protestants or the Department—the official hearing transcript.⁴ No prejudice would befall Protestants. Protestants are and have been fully entitled to obtain copies of the transcript from M&M. Indeed, recognizing the M&M transcript as official would only benefit Protestants because their only other alternative would be to download or obtain copies of the audio recording of the hearing and have them transcribed. Which of course would contain exactly what M&M produced. Far from “hiding the ball,” use of the existing transcript serves both the parties and the Department.

After it received the final, complete version of the transcript from M&M, M3 Eagle filed and served its August 21, 2009 *Motion to Designate Official Hearing Transcript and Notice of Lodging of Transcript* (“Transcript Motion”), in which it alerted Protestants (although

⁴ This is not to say that Protestants do not have to pay M&M for copies of the transcript should they want them. M3 Eagle paid for M&M to attend the hearings and prepare a certified transcript, and is obligated to provide a copy to the Department should it be deemed an official hearing transcript. M3 Eagle is not obligated to provide a copy to Protestants. Protestants can obtain copies by contacting M&M.

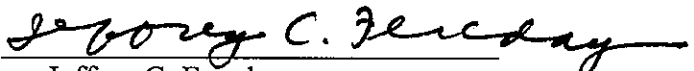
presumably Protestants already knew) that they could obtain their own transcript copy from M&M. Protestants apparently have not done so. Instead, on September 8—four days before parties' initial post-hearing briefs are due—M3 Eagle received Protestants' Opposition Notice and September 4 letter.

In summary, granting the Transcript Motion creates no possible disadvantage or prejudice to Protestants. It removes any need for the Department or any of the parties to transcribe the audiotape of the proceedings. The M&M transcript, already part of the record, is properly designated the official transcript in this action. M3 Eagle again requests that the Hearing Officer so rule, and deny the Protestants' Opposition Motion and September 4 Letter.

DATED this 9th day of September, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2009, the foregoing was filed, served, or copied as follows:

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