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DEPARTMENT OF
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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' JUNE 30 MOTIONS**

M3 Eagle LLC ("M3 Eagle") through its counsel, Jeffrey C. Fereday and Michael P. Lawrence of Givens Pursley LLP, pursuant to Idaho Department of Water Resources ("IDWR" or "Department") Rule of Procedure 270.02, IDAPA 37.01.01.270.02, hereby responds to the Protestants' June 30, 2011 *Motion to be Included as Parties and Demand for Notice* ("Motion to Include") and *Motion to Alter or Amend the Exhibit A Findings and for Additional Findings, Motion in Limine* ("Motion to Amend Findings and in Limine").¹ M3 Eagle does not oppose Protestants' Motion to Include—indeed, M3 Eagle has presumed the Protestants would be

¹ The Protestants' Motions, although dated June 30, were hand delivered to IDWR and the other parties on July 1, making July 15 the deadline for responding according to Rule 270.02. However, because the Hearing Officer has not yet issued a pre-hearing order or held a pre-hearing or status conference, the Protestants' Motions arguably are premature and do not obligate M3 Eagle to respond under the rules. Nevertheless, M3 Eagle files this Response within the timeframe dictated by Rule 270.02. If the Hearing Officer establishes an alternative schedule for filing and responding to pre-hearing motions, M3 Eagle reserves the right to submit an additional response within the deadlines set forth by the Hearing Officer.

allowed to participate in the remand proceeding mandated by Judge Sticklen's June 30, 2011 *Amended Order* ("Amended Order") issued in Ada County District Court case no. CV-OC-2010-03180 (the "Judicial Review Case").

However, M3 Eagle strongly objects to the Protestants' Motion to Amend Findings and in Limine. By this Motion, the Protestants ask the Department to toss out: (1) the January 19, 2011 Agreement between M3 Eagle and IDWR; (2) the June 13, 2011 *Joint Stipulation and Motion for Remand with Directions* ("Stipulation") filed by M3 Eagle and IDWR; and (3) Judge Sticklen's Amended Order which attaches and expressly incorporates the Stipulation and its Exhibits. The Protestants ask, in essence, that this matter be re-tried from the ground up. As the Department knows—and the Protestants should know—the terms and conditions set forth in the Stipulation and its Exhibits cannot be altered at this stage; much less could they be thrown out at the request of individuals who were not parties, and elected not to intervene and become parties, to the Judicial Review Case.

M3 Eagle and IDWR negotiated the Stipulation and its Exhibits for more than one year and presented it to the Ada County District Court with a request that the Court order remand proceedings consistent with the terms and conditions set forth in the Stipulation. The District Court issued its Amended Order requiring just that—"that the matter involving application for water right permit no. 63-32573 be remanded to IDWR for proceedings consistent with the terms and conditions set forth in the Stipulation." (Emphasis added.) The Amended Order and the terms and conditions in the Stipulation and its Exhibits are the law of the case governing the remand proceedings.

Moreover, the findings contained in the Stipulation's Exhibit A are based on the existing record from the 2009 agency proceedings—proceedings the Protestants participated in and a

record they had a full opportunity to affect. These terms and conditions contained in, and the Exhibits attached to, the Stipulation cannot be changed at the Protestants' request.

The Protestants could have—but did not—avail themselves of the opportunity to formally participate in negotiating the contents of the Stipulation and its Exhibits. On multiple occasions, the District Court reminded (arguably invited) them to intervene in the Judicial Review Case. They declined.

The contents of the Stipulation and its Exhibits agreed to by M3 Eagle and IDWR are final, and there is no room to contemplate granting any of the Protestants requests in their Motion to Amend Findings and in Limine.

ARGUMENT

I. THE DISTRICT COURT'S AMENDED ORDER REFLECTS A JUDICIAL ACT THAT SETS FORTH THE LAW OF THE CASE.

The District Court's Amended Order represents the judicial confirmation of the Stipulation, which the Amended Order incorporates by reference. Accordingly, the Stipulation “is not simply a contract entered into between private parties seeking to effectuate parochial concerns but is a judicial act.” 46 Am.Jur. 2d Judgments § 183 (2006) (footnotes and citations omitted).

A consent judgment is a conclusive adjudication with the same force and effect as any other judicially enforceable decree In the absence of fraud or mistake, or unconscionable advantage, a consent judgment, with the approval of the court, binds parties and their privies as fully as any other judgment.

Id. § 198 (footnotes and citations omitted).²

² Although the cited authority speaks in terms of “consent decrees” and “consent judgments” rather than “stipulations” or “stipulated orders,” there is no legal or practical difference between any of the terms for purposes of this analysis. Indeed, “[i]n distinguishing a judgment from an order, the test is not its designation, but whether it is a final adjudication of the cause, or a ruling on a motion, preliminary or collateral to the final adjudication.” 46 Am.Jur. 2d Judgments § 4 (2006). The District Court's Amended Order is a judgment (i.e. a decree) because it represents the final adjudication of the Judicial Review Case.

M3 Eagle and IDWR are bound by the Amended Order and by the Stipulation's terms under the law pertaining to enforcement of court judgments:

Consent judgments are subject to continuing supervision and enforcement by the court. Because a consent judgment is a judicial act, the proper remedy is enforcement where one of the parties does not comply with its terms. . . . There is authority to the effect that prospective provisions of a consent decree operate as an injunction. This injunctive quality compels the court to:

- (1) retain jurisdiction over the decree during the term of its existence;
- (2) protect the integrity of the decree with its contempt powers; and
- (3) modify the decree should changed circumstances subvert its intended purpose.

Id. § 200 (footnotes and citations omitted). In short, the Amended Order confirming and incorporating the Stipulation is a judicial act—a mandate—that M3 Eagle and IDWR, as parties to the Judicial Review Case, must follow. Neither M3 Eagle nor IDWR could deviate from the terms of the Stipulation without risking contempt of court.

Moreover, the Amended Order is the law of the case governing the remand proceedings, which means that M3 Eagle, IDWR, the City of Eagle, and the Protestants are bound by its terms and conditions. The law of the case doctrine has long been the rule in Idaho. *Suits v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985). According to the doctrine, when a case is remanded from an appellate court, the case “must be tried in the light of and in consonance with the rules of law as announced by the appellate court in that particular case.” *Creem v. Northwestern Mut. Fire Ass'n*, 58 Idaho 349, 352, 74 P.2d 702, 703 (1937).

The Ada County District Court served in an appellate capacity in the Judicial Review Case. *In re City of Shelley*, 2011 WL 2150189, 6 (Idaho, 2011) (“On a petition for judicial review, the district court is sitting in an appellate capacity.”); *Burns Holdings, LLC v. Madison County Bd. of County Com'rs*, 147 Idaho 660, 662, 214 P.3d 646, 648 (2009) (“When a district

court entertains a petition for judicial review, it does so in an appellate capacity.”) Accordingly, the Amended Order requiring that M3 Eagle’s water right application “be remanded to IDWR for proceedings consistent with the terms and conditions set forth in the Stipulation” is the law of the case governing the remand proceedings for M3 Eagle, the City of Eagle, IDWR, the Protestants, and any other parties who might enter the case.

II. THE PROTESTANTS CANNOT ALTER THE TERMS OF THE STIPULATION.

The Stipulation contains the terms and conditions of M3 Eagle’s and IDWR’s negotiated settlement resolving the Judicial Review Case. The Stipulation is a settlement agreement and binding contract that neither M3 Eagle nor IDWR may unilaterally alter, and which certainly cannot be altered by the Protestants. They were not parties to the Judicial Review Case, the settlement negotiations, or the Stipulation.³

The Idaho Supreme Court has held that a settlement agreement “stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally.” *Vanderford Co., Inc. v. Knudson*, 150 Idaho 664, ___, 249 P.3d 857, 865 (2011) (quoting *Wilson v. Bogert*, 81 Idaho 535, 542, 347 P.2d 341, 345 (1959)). “When construing a settlement agreement, normal rules of contract construction apply.” *Mihalka v. Shepherd*, 145 Idaho 547, 551, 181 P.3d 473, 477 (2008). “[I]f the language of the contract is plain and unambiguous, the intention of the parties must be determined from the contract itself.” *Id.* at 551, 181 P.3d at 477; *Rowan v. Riley*, 139 Idaho 49, 54, 72 P.3d 889, 894 (2003).

The Stipulation specifically limits the scope of the remand proceedings and requires the Department to issue a Second Amended Order that not only is consistent with the Stipulation

³ It makes no difference that one party to the Stipulation—the Department—is a government agency. The Idaho Supreme Court has recognized that a contract between a government body and a private entity “is binding upon the parties, enforceable and entitled to the respect a court must give all valid contracts.” *Alpert v. Boise Water Corp.*, 118 Idaho 136, 144, 795 P.2d 298, 306 (1990) (addressing a city’s franchise ordinance).

(including Exhibits A and B), but that actually includes the contents of Exhibits A and B. There is no ambiguity in its language that

IDWR shall issue a second amended final order (“Second Amended Order”) **consistent with** this Stipulation, the January Agreement, the evidence received during the Remand Proceedings, and **Exhibits A and B**, and shall include the contents of **Exhibits A and B** as findings, conclusions, and permit conditions, as the case may be.

Stipulation at 5 ¶ 6 (boldface emphasis added). Nor is there ambiguity in the Stipulation’s requirement that:

In the Remand Proceedings, IDWR shall take further evidence and testimony **only** for the limited purpose of receiving or recognizing evidence of or concerning:

- (i) the City’s annexation of the M3 Eagle planned community project lands;
- (ii) the City’s planning horizon and reasonably anticipated future municipal water needs for City’s service area, including the M3 Eagle planned community project, based on City’s current water rights portfolio and planning information;
- (iii) the quantity of water requested in the M3 Application for the M3 Eagle planned community project in relationship to the water needs of the rest of the City’s service area; and
- (iv) any additional matters mutually agreed upon by the M3 Eagle and IDWR.

Stipulation at 4 ¶ 3 (boldface emphasis added). Reasonable minds would not differ as to the interpretation of these provisions—their meaning is plain.

Despite the Court’s multiple invitations for Protestants to intervene in the Judicial Review Case, they did not become parties to the case and consequently did not have a seat at the negotiating table.⁴ Nevertheless, IDWR kept the Protestants informed during the settlement process, provided them with draft documents, solicited their feedback, and held multiple

⁴ At his request, Mr. Smith was allowed to participate in the Judicial Review Case as amicus curiae, but this did not entitle him to participate as a full party or one entitled to negotiate settlement. As the District Court stated in its June 23, 2011 *Order Denying Amicus Request for Additional Time*, Mr. Smith “was to be allowed to speak as to the merits of the petition for judicial review, not the proposed settlement. Amicus Curiae is not a party to the judicial review, and there will now be no briefing on the merits.”

meetings with them to discuss the negotiations. In short, the Protestants were afforded far greater privileges than typically extended to non-parties.

Their apparent dissatisfaction with the Stipulation and its Exhibits is not a matter that IDWR can redress. The Protestants' requested alterations and additions to Exhibit A, and their request to expand the scope of remand proceedings, directly contradict the terms of the Stipulation. The terms and conditions set forth in the Stipulation, as well as the contents of its Exhibits, are final. The time for addressing them expired when the Stipulation was filed with the District Court, and they will not change unless IDWR and M3 Eagle so agree—which M3 Eagle has no intention of doing. The Protestants, as non-parties to the Judicial Review Case and the Stipulation, have no standing to suggest changes to the terms of the contract between M3 Eagle and IDWR.

The binding force of a stipulation is well-settled. “Valid stipulations are controlling and conclusive, and courts must enforce them.” *Gander v. Livoti*, 250 F.3d 606, 609 (8th Cir. 2001), citing *Burstein v. United States*, 232 F.2d 19, 23 (8th Cir. 1956); 83 C.J.S., Stipulations, § 12, p. 30. “Courts cannot make contrary findings.” *Id.*, citing *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447 (1905). Stipulations that are “freely-made . . . bind the parties, the trial court, and the appellate court too.” *Rodriguez v. Señor Frog's de la Isla, Inc.*, ___ F.3d ___ (1st Cir. April 12, 2011) (No. 09–2548), citing *H. Hackfeld & Co.*, 197 U.S. at 446; *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 889 (D.C. Cir. 2010); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *Fisher v. First Stamford Bank and Trust Co.*, 751 F.2d 519, 523 (2d Cir. 1984).

In *Seminole Elec. Co-op., Inc. v. Dep't of Environmental Protection*, 985 So.2d 615 (Fla. App. 5 Dist., 2008), a Florida District Court of Appeal held that “[a]s a general rule, and absent a

showing of fraud, misrepresentation or mistake, stipulations are binding on the parties who enter them, including administrative agencies participating in administrative proceedings and the courts.” *Seminole*, 985 So.2d at 621 (emphasis added), *citing Doyle v. Dep’t of Bus. Regulation*, 794 So.2d 686, 692 (Fla. 1st DCA 2001) (an agency’s stipulation in an administrative proceeding cannot be “simply set aside as not supported by evidence” by the agency head in a final order).

In *Seminole*, a non-profit rural electric cooperative (“Seminole”) filed an application to construct and operate a new coal-fired generating unit with the Florida Department of Environmental Protection (“DEP”). The application was assigned to an administrative law judge to hold a certification hearing. *Seminole*, 985 So.2d at 618. Subsequently, Seminole and DEP (and all other parties) submitted a joint stipulation that “confirmed that there were no issues of disputed fact or law,” that stated that “all [project] impacts ‘have been addressed and determined,’ and ‘have been adequately addressed through [conditions] agreed to by the parties . . . ,’” and that “agreed to the relinquishment of jurisdiction to DEP for issuance of a final order in accordance with [Florida statutes].” *Id.* at 620. The parties also stipulated to what the *Seminole* Court described as “an extensive factual record (consisting of thousands of pages of documentation and analysis) for consideration by the DEP Secretary.” *Id.* at 622. The ALJ accordingly cancelled the hearing and “relinquished jurisdiction to DEP for action on the Joint Stipulation.” *Id.* at 620. DEP and Seminole co-authored and jointly filed a proposed final order for DEP’s Secretary to issue. *Id.*

However, despite the joint stipulation, DEP’s Secretary issued an order denying Seminole’s application on grounds that “‘the parties’ stipulation did not contain specific findings of fact’ sufficient to allow the agency to apply the statutory test” *Id.* at 621.

The *Seminole* Court rejected the Secretary's attempt to tamper with the joint stipulation. The court found there was "no basis for the Secretary's assertion that the joint stipulation and record are 'sparse,' or fail to demonstrate compliance with all [statutory] criteria. In short, the Secretary had no legal basis to deny certification of Seminole's [project], given the parties' stipulations in this case." *Id.* at 622. The *Seminole* Court reversed the Secretary's order and remanded the matter back to the Secretary "with instructions to issue a final order granting certification, consistent with the parties' stipulations and with the agreed recommended final order." *Id.*

Here, paraphrasing the *Doyle* case cited in *Seminole*, the Stipulation between M3 Eagle and IDWR cannot be set aside by the agency head. It was freely-made, and it is controlling and conclusive as to the matters contained therein. It also is based on a full record developed in the 2009 agency proceedings. Accordingly, IDWR should deny Protestants' requests in their Motion to Amend Findings and in Limine.

III. THE PROTESTANTS' PROPOSED CHANGES TO EXHIBIT A ARE NOT CONSISTENT WITH THE STIPULATION OR THE PREPONDERANCE OF THE EVIDENCE IN THE RECORD.

IDWR and M3 Eagle agree that "[t]he findings and conclusions in Exhibit A are based on IDWR's contested case record for the M3 Application," Stipulation at 3 ¶ D, and that the Second Amended Order will be consistent with and will include the contents of Exhibit A. *Id.* at 5 ¶ 6. On the other hand, the Protestants' proposed changes to Exhibit A are not based on the record and are not consistent with the Stipulation. Thus, even if Protestants had an opportunity now to alter the Stipulation or Exhibit A (which they do not), it would be inappropriate to make their proposed changes. Protestants' proposed changes or complaints are not supported by the extensive factual record already concluded in this case. In the remand proceeding, IDWR has

been directed by the District Court to augment that existing record only as to the three matters set forth above.

Based on the foregoing, M3 Eagle respectfully requests the Interim Director deny the Protestants' Motion to Amend Finding and in Limine.

Respectfully submitted this 14th day of July, 2011.

GIVENS PURSLEY LLP

By 
Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of July, 2011, the foregoing was filed, served, or copied as follows:

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