

JUN 05 2009

DEPARTMENT OF
WATER RESOURCES

Jeffrey C. Fereday [ISB No. 2719]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for M3 Eagle LLC

**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' PETITION FOR REVIEW
BY DIRECTOR OR DESIGNATED
AGENCY HEAD**

Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby responds to the *Petition for Review by Director or Designated Agency Head* ("Petition") filed by the Protestants at the May 29, 2009 hearing in the above-captioned matter. The Petition should be denied because this is not the appropriate point in the proceedings for the Director's review of the Hearing Officer's interlocutory orders.

In the Petition, Protestants seek review of the Hearing Officer's rulings denying their *Motion to Dismiss Application No. 62-32573* ("Motion to Dismiss") and *Motion for Reconsideration* regarding the same ("Motion for Reconsideration") (together, "Motions").¹ The

¹ Protestants presented the Motion to Dismiss orally on the record during the hearing in this matter on May 11, 2009, and the Motion for Reconsideration orally and in writing at the hearing on May 28, 2009. Protestants filed the Petition at the hearing on May 29.

Motions were premised on the Protestants' claim that M3 Eagle is not a "municipal provider" eligible to obtain a "future needs" municipal water right under the 1996 Municipal Water Rights Act. The Hearing Officer orally denied the Motion to Dismiss at the hearing on May 11, and implicitly denied the Motion for Reconsideration at the May 29 hearing.² Protestants filed their Petition requesting the Director's review of both Motions.

Protestants are not entitled to immediate review of the Hearing Officer's rulings on their Motions because the rulings were interlocutory and the Department's rules do not provide for immediate review of interlocutory orders by the Director. Idaho Department of Water Resources Rule 710, IDAPA 37.01.01.710, defines interlocutory orders as "orders that do not decide all previously undecided issues presented in a proceeding"³ The Hearing Officer's rulings on Protestants' Motions address one discrete issue among several factual and legal issues in the case. Because the Hearing Officer "did not decide all previously undecided issues," his rulings on the Motions are interlocutory.

² Although the Hearing Officer did not expressly deny the Motion for Reconsideration, it was apparent from his discussion on the record that he disagreed with the Protestants' arguments (which were the same arguments they raised in the Motion to Dismiss) for the same reasons he gave when ruling upon the Motion to Dismiss. To the extent the Hearing Officer did not deny the Motion for Reconsideration, there is no ruling to seek review of by the Director.

At the May 29 hearing, the Hearing Officer *sua sponte* raised the separate legal question of whether M3 Eagle has sufficient facts to show it "qualifies as a municipal provider" entitled to a municipal water right for "reasonably anticipated future needs" within the intent of Idaho Code § 42-202. The Hearing Officer did not rule on this question, but instead invited the parties to brief this issue post-hearing.

³ The full text of Rule 710 states:

Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the agency may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration or appeal, but is not final on other issues. Unless an order contains or is accompanied by a document containing one (1) of the paragraphs set forth in Rules 720, 730 or 740 or a paragraph substantially similar, the order is interlocutory. The following orders are always interlocutory: orders initiating complaints or investigations; orders joining, consolidating or separating issues, proceedings or parties; orders granting or denying intervention; orders scheduling prehearing conferences, discovery, hearing, oral arguments or deadlines for written submissions; and orders compelling or refusing to compel discovery. Interlocutory orders may be reviewed by the officer issuing the order pursuant to Rules 711, 760, and 770.

IDAPA 37.01.01.710.

Nothing in the Department's Rules of Procedure provides Protestants a means to obtain the Director's review of interlocutory rulings at this point in the proceeding. This is not a situation contemplated by Rule 710 where the Hearing Officer "by order decide[d] some of the issues presented in a proceeding and provide[d] in that order that its decision on those issues is final and subject to review by reconsideration or appeal." The Hearing Officer did not provide that his rulings on Protestants' Motions were final or subject to review.

Protestants also are not entitled to the Director's immediate review of the Hearing Officer's rulings under Rules 711, 760, or 770. These Rules are cited in the last sentence of Rule 710, which expressly states that "[i]nterlocutory orders may be reviewed by the officer issuing the order," not the Director or agency head. Moreover, nothing in Rules 711, 760, or 770 provides a basis for Protestants' Petition.⁴

Protestants cite Rule 562, IDAPA 37.01.01.562, as the basis for their Petition, but that Rule also does not provide for immediate review of interlocutory orders by the Director. Rule 562 states:

The presiding officer rules on motions and objections presented at hearing. When the presiding officer is a hearing officer, the presiding officer's rulings may be reviewed by the agency head in determining the matter on its merits and the presiding officer may refer or defer rulings to the agency head for determination.

This Rule provides for review of the presiding officer's rulings by the agency head "in determining the matter on its merits," meaning when (and if) the entire matter appears before the agency head for a decision on appeal or otherwise. Accordingly, the time for the Director to review the Hearing Officer's rulings on the Protestants' Motions will be when (and if) the entire

⁴ Rule 711, entitled "Review of Interlocutory Orders," allows parties to "petition the officer issuing the order to review the interlocutory order," not the Director. (Emphasis added.) Rule 760 allows a hearing officer to amend an order on his own motion. Rule 770 allows a party to petition the hearing officer for clarification of an interlocutory order, which the Protestants have not done here.

matter is appealed to the Director by a party after the Hearing Officer issues a recommended or preliminary order or after the Hearing Officer expressly refers the matter to the Director.

Neither has occurred here.

Because the Department's Rules of Procedure do not allow immediate review of interlocutory orders by the Director, M3 Eagle respectfully requests that the Hearing Officer and/or Director deny the Petition. If the Hearing Officer and/or Director determines that the Director has authority to review the Hearing Officer's rulings on Protestants' Motions, M3 Eagle requests an opportunity to brief the issues raised in the Motions.

DATED this 5th day of June, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th of June, 2009, the foregoing was filed, served, or copied as follows:

FILED

Idaho Department of Water Resources
Attn: Gary L. Spackman
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

SERVICE

John Westra
Western Regional Office
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705-5082

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

North Ada County Groundwater Users Association
c/o David Head
855 Stillwell Drive
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

North Ada County Groundwater Users Association
c/o John Thornton
5264 N. Sky High Lane
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Norman Edwards
884 W. Beacon Light Road
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Alan Smith
3135 N. Osprey Road
Eagle, ID 83616

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail



Michael P. Lawrence