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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 POST-HEARING BRIEF, INCLUDING RESPONSE TO PROTESTANTS' MOTION CHALLENGING REMAND PROCEEDINGS AND CITY OF EAGLE'S MOTION TO STRIKE**

Co-Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby submits its Post-Hearing Brief ("Brief"). This Brief is in three parts:

First, the Introduction summarizes the events in this contested case leading up to and including the October 18-19, 2011 hearing (the "Remand Hearing") held upon remand order of the Ada County District Court.

Second, this Brief reviews the record and discusses the evidence showing that the City of Eagle, Idaho ("City") is entitled to issuance of a permit for 23.18 cfs for municipal purposes over a planning horizon of 30 years beginning the date the permit is issued.

Third, this Brief responds to the two motions filed in this matter at the conclusion of the Remand Hearing: 1) Protestants' October 18, 2011 *Renewed Motion to Dismiss Remand Proceedings* ("Protestants' Renewed Motion"); and 2) City's October 18, 2011 *Objection and*

Motion to Strike June 1, 2011 Revised October 4, 2011 RAFN Evaluation for the City of Eagle in Connection with the Application for Permit 63-32573 ("City's Motion").

INTRODUCTION

This matter concerns the February 1, 2008 Second Amended Application originally filed by M3 Eagle in 2007 ("Application"), which requests a future needs municipal ground water permit for diversions up to 6,535 acre-feet annually to serve a 6,000-acre portion of City. City has approved development of this part of City as the Spring Valley planned community ("Spring Valley"). M3 Eagle, Spring Valley's developer, prosecuted the Application's contested case through a 16-day hearing in 2009 ("2009 Hearings"). Following briefing,[1] on January 25, 2010, the Hearing Officer issued an *Amended Final Order* (the "January 2010 Order") granting the Application only in part, on grounds that M3 Eagle did not qualify as a "municipal provider" under the relevant statutory definition and therefore should be granted only that portion of its projected need that the Hearing Officer determined would materialize in the first five years after the permit is granted.

M3 Eagle brought suit against IDWR challenging the January 2010 Order in the Ada County District Court ("District Court Case"). M3 Eagle disputed the January 2010 Order's findings and conclusions concerning the determination that it does not qualify as a municipal provider ("Municipal Provider Issues"). M3 Eagle also challenged the January 2010 Order's statements—which were not germane to the Municipal Provider Issues or necessary to the Order's ultimate conclusion—about hydrogeology and the ground water sought to be appropriated under the Application ("Water Supply Issues"). Despite the Water Supply Issues,

[1] On September 11, 2009, M3 Eagle submitted two briefs: *M3 Eagle's Post-Hearing Brief On The Merits* and *M3 Eagle's Brief in Support of its Qualification as a Municipal Provider*. On October 1, 2009, it filed *M3 Eagle's Response To Protestants' Post-Hearing Brief*. On January 4, 2010, it filed *M3 Eagle's Petition for Reconsideration of the December 21, 2009 Final Order, Motion to Reopen the Record, and Brief in Support*. All of M3 Eagle's prior briefs to the Hearing Officer are hereby incorporated by this reference.

the January 2010 Order found sufficient water for the entire 23.18 cfs peak diversion requested in the Application and did not find that diverting this amount would cause injury to existing water rights. M3 Eagle and IDWR were the only parties to the District Court Case; neither Protestants nor anyone else intervened.

By means of a January 19, 2011 Agreement ("January Agreement"), IDWR and M3 Eagle negotiated settlement terms to resolve the District Court Case. The January Agreement set forth a process for resolving all issues between the parties, issuing a full permit in City's name, and replacing the January 2010 Order with a new order (the "Second Amended Order")—all after a Remand Hearing addressing certain remaining Municipal Provider Issues. As for the Water Supply Issues, the January Agreement initiated a process for developing stipulated permit conditions and findings and conclusions based on the record in the 2009 Hearings ("2009 Hearing Record").

In accordance with this process: (1) M3 Eagle assigned the Application (and the permit resulting from the January 2010 Order) to City; (2) M3 Eagle and IDWR, in consultation with City, developed and agreed upon permit conditions and findings and conclusions based on the 2009 Hearing Record that are to be included in the Second Amended Order; (3) IDWR reviewed City's information describing its reasonably anticipated future needs ("RAFN"); and (4) the parties agreed the Application would be remanded to IDWR to address specific, limited questions pertaining to City's future water needs.

On June 13, 2011, M3 Eagle executed and filed with IDWR an instrument assigning the Application to City ("Assignment"). On the same day, M3 Eagle and IDWR filed with the District Court a *Joint Stipulation and Motion for Remand With Directions* ("Stipulation") in which they agreed to dismissal of the District Court Case and remand of the matter to IDWR "for further proceedings concerning the [Application] consistent with th[e] Stipulation." Stipulation

at 4 ¶ 1. As contemplated in the January Agreement, the Stipulation required IDWR to reopen administrative proceedings concerning the Application ("Remand Proceedings") during which IDWR would hold hearings to

> 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 (emphasis added). Items (i) through (iii) are referred to herein as the "Remand Issues." (Neither M3 Eagle nor IDWR suggested any additional matters, making item (iv) inapplicable.)

The Stipulation also requires IDWR to issue the Second Amended Order

> consistent with th[e] Stipulation, the January Agreement, the evidence received during the Remand Proceedings, and Exhibits A and B [to the Stipulation], 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. The Stipulation provides that the Second Amended Order "shall completely replace and supersede the [January 2010 Order], and the Permit [issued consistent with the Second Amended Order] shall completely replace and supersede the permit issued in connection with the [January 2010 Order]." Stipulation at 5 ¶ 8.

Exhibits A and B to the Stipulation contain the permit conditions and findings and conclusions that M3 Eagle and IDWR developed, based on the 2009 Hearing Record, and agreed

to in consultation with City, again as contemplated by the January Agreement. Stipulation at 3 ¶¶ D, E. The Stipulation included an attached copy of the January Agreement, and a copy of the Assignment. The Stipulation stated that "M3 Eagle and IDWR agree that the City has accepted the Assignment as required by paragraph 1.B.i of the January Agreement." Stipulation at 3 ¶ C.

On July 5, 2011, the District Court entered its *Amended Order* in the District Court Case ("District Court Order"), which attached and incorporated by reference the Stipulation, and ordered 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." District Court Order at 2.

On June 1, 2011, IDWR delivered to all parties to the Remand Proceedings (which included M3 Eagle, City, and the Protestants involved in the 2009 Hearings) its *RAFN Evaluation for the City of Eagle in Connection With Application for Permit 63-32573* ("IDWR Evaluation"), Ex. R100 in the Remand Hearing record, which evaluates the information City had provided concerning its reasonably anticipated future needs.[2,3] The Hearing Officer took official notice of the IDWR Evaluation as a staff memorandum under IDWR Rule of Procedure 602, IDAPA 37.01.01.602. *See Notice [of] Hearing, Prehearing, and Scheduling Order* at 2 (Aug. 2, 2011) ("Notice of Hearing").

Meanwhile, Protestants filed their June 30, 2011 *Motion to Alter or Amend the Exhibit A Findings and for Additional Findings and Motion in Limine* asking IDWR, in essence, to

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[2] As discussed below, City submitted updated information concerning its reasonably anticipated future needs at the Remand Hearing. The IDWR Evaluation was based on an earlier City submission, and not on the City's updated RAFN analysis admitted into evidence at the Remand Hearing as Ex. R1 ("City's RAFN Report," defined below). Nevertheless, because City's service area, planning horizon, and water demand elements are the same in both versions, the conclusion in the IDWR Evaluation that these components are "reasonable" is unaffected.

[3] The IDWR Evaluation released on June 1, 2011, differs slightly, but importantly, from the version admitted into evidence as Ex. R100 at the Remand Hearing. A typographical error concerning Spring Valley's 30-year buildout scenario (set forth in Ex. 60) was discovered in the earlier version and was corrected in Ex. R100.

disavow both the January Agreement and the District Court Order and to declare the Stipulation to have "no force and effect." Protestants also requested that IDWR amend the findings in Exhibit A to the Stipulation. By means of his August 2, 2011 *Order Acknowledging Party Status of Protestants and Denying Motion to Alter or Amend Findings* ("Order Denying Motion to Alter or Amend Findings"), the Hearing Officer denied this motion, appropriately noting that:

> Altering or amending the findings in Exhibit A would be contrary to the express language in the [District Court Order] as well as the Settlement Agreement dated January 19, 2011 and the Joint Stipulation dated June 13, 2011. IDWR is obligated under these earlier agreements and is required under the [District Court Order] to conduct the remand proceedings consistent with the terms and conditions of the Stipulation. Accordingly, the Protestants Motion to alter or amend the Exhibit A findings and for additional findings and motion in limine is DENIED.

At the Remand Hearing, IDWR employee Mat Weaver and consultant Dr. Don Reading testified about the IDWR Evaluation, of which they were the principal authors. City and M3 Eagle presented witnesses and exhibits concerning the Remand Issues, including a report containing updated information on City's reasonably anticipated future needs, entitled *City of Eagle Reasonably Anticipated Future Needs Water Rights Analysis* (Oct. 13, 2011), Ex. R1 ("City's RAFN Report"). City's witnesses included Vern Brewer from City's contracted engineering firm, and Nichoel Baird Spencer, City's planner in charge of long-range and comprehensive planning. M3 Eagle presented Dr. John Church, expert economist, and Bill Brownlee, Managing Member of the manager of M3 Eagle. Protestants presented no witnesses or exhibits.

At the conclusion of the Remand Hearing, counsel for City presented City's Motion, which asks that the IDWR Evaluation be stricken on the ground that it uses "the wrong population assessment" and therefore results in an inaccurate and understated future water need

for the non-Spring Valley portion of the City. Tr. p. 296.[4] Also at the Remand Hearing's close, Protestants presented Protestants' Renewed Motion, which again seeks to have the Remand Proceedings dismissed on the same grounds asserted in their October 5, 2011 *Motion to Dismiss Remand Proceedings* that the Hearing Officer denied in his October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings*.[5]

In lieu of oral closing arguments, the Hearing Officer invited the parties to submit post-hearing briefs on the Remand Issues, including any arguments concerning City's Motion and Protestants' Renewed Motion.

DISCUSSION

I. THE REMAND PROCEEDINGS' PURPOSES ARE LIMITED AND ARE CONTROLLED BY THE STIPULATION AND THE DISTRICT COURT ORDER.

The Stipulation and the District Court Order require that the Remand Proceedings be "consistent with the terms and conditions set forth in the Stipulation." District Court Order at 2. This means the Remand Proceedings are limited to the Remand Issues set out in the Stipulation:

> (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; and
>
> (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.

Stipulation at 4 ¶ 3. The Hearing Officer repeatedly has ruled that these three Remand Issues

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[4] "Tr." in this Brief denotes citations to the Remand Hearing transcript; the transcript from the 2009 Hearings is cited as "2009 Hearings Tr."

[5] Protestants' October 5, 2011 *Motion to Dismiss Remand Proceedings* sought essentially the same result—nullification of the Stipulation and the District Court Order—that Protestants earlier had sought in their June 30, 2011 motion that the Hearing Officer denied on August 2, 2011(discussed *supra*).

control the scope of the evidence presented during the Remand Hearings. *See, e.g.,* Notice of Hearing at 2.

Because all other questions were resolved by the Stipulation and the District Court Order, the Remand Issues are designed to resolve the "Municipal Provider Issues" in light of City being the applicant. January Agreement at 2 ¶ G.[6] M3 Eagle and IDWR agreed in the Stipulation that, upon the presentation of evidence within the limits of the Remand Issues—namely, evidence demonstrating that City is a municipal provider and that it needs the amount of water requested in the Application to meet its reasonably anticipated future needs—City is entitled to issuance of a permit for the applied-for water right. As set forth in the Stipulation at 5 ¶¶ 6-7:

> The Second Amended Order shall issue upon presentation of evidence in the Remand Proceedings that establishes, to the satisfaction of the Interim Director, there has been sufficient evidence provided to process a reasonably anticipated future needs water right held by the City under Application No. 63-32573. . . .
>
> IDWR will issue permit no. 63-32573 ("Permit") consistent with the Second Amended Order.

A preponderance of the evidence presented at the Remand Hearing, including that in IDWR Evaluation, shows that City's overall reasonably anticipated future needs exceed the amount of water requested in the Application for Spring Valley. This fact was not disputed. Accordingly, City has shown it is entitled to a permit for reasonably anticipated future needs of 23.18 cfs and 6,535 acre-feet over a 30-year planning horizon, as directed by the Stipulation (including its Exhibits) and District Court Order incorporating them.

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[6] The central point of the January 2010 Order was that a private applicant such as M3 Eagle could not hold a future needs water right because, the Hearing Officer found, it did not come within the statutory definition of "municipal provider." This issue now has been resolved by the Assignment, which makes City—a municipality that indisputably meets the definition of "municipal provider"—the applicant.

II. THE APPLICATION SATISFIES ALL STATUTORY CRITERIA.

The whole point of the settlement in the District Court Case was to take evidence only on the three Remand Issues; everything else necessary to issue the Permit—including each of the statutory criteria for granting a permit in I.C. § 42-203A(5)[7]—has been established through the record and the Stipulation's Exhibits A and B.

The Stipulation's Exhibits A and B conclude all questions concerning water supply, potential injury to existing water rights, and local public interest, I.C. § 42-203A(5)(a), (b), and (e).[8] Exhibit B provides for the Permit's peak diversion rate of 23.18 cfs and an annual diversion volume limit of 6,535 acre-feet—the amounts requested in the Application for Spring Valley's future needs at full-build out. Exhibit A ¶ 29 states that "the anticipated decline from pumping at full build out [of Spring Valley] is not cause to conclude that there is not water available in the amount required for the appropriation." Paragraph 30 states that "the available water in the PGSA is sufficient for the purpose it was sought to be appropriated in the M3 Eagle application." Paragraph 31 states that "expected drawdown [from the City's proposed pumping for Spring Valley] is not significant." There is no room to reevaluate such issues in the Second Amended Order, which must include and be consistent with Exhibits A and B. Matters covered by the

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[7] The statutory criteria for application approval in I.C. § 42-203A(5) include:

(a) whether it will reduce the quantity of water under existing water rights;
(b) whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
(c) whether it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes;
(d) whether the applicant has not sufficient financial resources with which to complete the work involved therein;
(e) whether it will conflict with the local public interest as defined in section 42-202B, Idaho Code; or
(f) whether it is contrary to conservation of water resources within the state of Idaho.

[8] The statutory definition of "local public interest" is "the interests that the people in the area directly affected by the proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). As noted in the text, the Stipulation and its attached exhibits conclude that there is sufficient water for this Permit, and that there will be no injury to any other water right. In addition, because City—a municipality—is the applicant, the Application now must be seen as furthering "the orderly expansion of existing municipal water systems," a concern raised in the January 2010 Order, ¶ 17. Accordingly, granting the Application would not conflict with the local public interest. No evidence in the record suggests that it would.

Stipulation and its exhibits are the law of this case.

Although Exhibits A and B and the evidence presented within the scope of the Remand Issues do not expressly address questions of good faith, financial resources, and conservation of water resources, I.C. § 42-203A(5)(c), (d), and (f), a preponderance of the evidence presented during the 2009 Hearings and the Remand Hearing shows these criteria also are satisfied. M3 Eagle's September 11, 2009 *Post-Hearing Brief on the Merits* at 57-66 addresses the evidence from the 2009 Hearing Record relevant to these criteria. M3 Eagle's and City's actions since the January 2010 Order, the Stipulation (and its Exhibits, including the numerous conditions in Exhibit B), and the evidence City and M3 Eagle presented at the Remand Hearing, demonstrate these criteria remain satisfied.

M3 Eagle and City have complied with all requirements of the January Agreement, the Stipulation, and the District Court Order. M3 Eagle has continued to take the steps necessary to begin Spring Valley's construction and to reach full buildout, and indeed plans to begin project construction in 2013. Tr. pp. 263-64, 268 (Brownlee); Ex. R9.

M3 Eagle's witness Dr. John Church testified that population increases over the next 30 years in the Boise metropolitan area—including the City of Eagle—will require approximately 200,000 new residential homes, and that Spring Valley reasonably can be projected to absorb some 7,100 of these. Tr. pp. 206-07 (Church) (Spring Valley will capture 3% of new Ada and Canyon County households between now and 2040); Ex. R8. No evidence contradicted these expert opinions. IDWR witness Mat Weaver testified that the projected demand of 23.18 cfs to supply Spring Valley's 7,153 new homes is "reasonable." Tr. pp. 39-40, 43-44. There is no contrary evidence in the record. In summary, the proof is that the Application is in good faith, not for speculative purposes, and does not conflict with the conservation of water resources.

III. CITY AND M3 EAGLE HAVE ANSWERED ALL MATERIAL QUESTIONS PERTAINING TO THE REMAND ISSUES; THE RECORD ESTABLISHES THAT CITY'S REASONABLY ANTICIPATED FUTURE NEEDS INCLUDE 23.18 CFS FOR SPRING VALLEY.

M3 Eagle and IDWR agreed in the Stipulation that, upon the presentation of evidence within the limits of the Remand Issues—namely, evidence demonstrating that City is a municipal provider and that it needs the requested amount of water to meet its reasonably anticipated future needs—City is entitled to issuance of a permit for the applied-for water right. The evidence presented during the Remand Hearing indisputably meets this burden.

All evidence presented at the Remand Hearing concerning City's reasonably anticipated future needs—namely, City's RAFN Report, Ex. R1, and the IDWR Evaluation, Ex. R100[9]—shows that City does not have sufficient water rights in its existing portfolio to supply its reasonably anticipated future needs, including Spring Valley. As to the question of City's reasonable future water need, this is the only conclusion that matters in this remand. Because there is no dispute that City has reasonably anticipated future needs exceeding the amount of water requested in the Application, the Application should be granted in full.

A. The standard of proof is a preponderance of the evidence.

According to the Department's rules, the applicant has the initial burden of coming forward with evidence, and has the ultimate burden of persuasion, concerning the criteria in Idaho Code § 42-203A(5). IDAPA 37.03.08.04. Protestants are obligated to come forward with evidence relevant to the "local public interest" criterion in section 42-203A(5)(e) of which they can be expected to be more cognizant than the applicant. *Id.*

The standard of proof in a contested case is a preponderance of the evidence. "Absent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings

[9] M3 Eagle's citation to the IDWR Evaluation in this Brief is not undercut if the Hearing Officer strikes the IDWR Evaluation as requested in City's Motion. IDWR witness Mat Weaver testified to the substance of the IDWR Evaluation's contents, including testimony that City's service area, planning horizon, and water demand assumptions, and M3 Eagle's demand assumptions, were reasonable. Tr. pp. 28-29, 39-40.

are governed by a preponderance of the evidence standard." *Northern Frontiers, Inc. v. State*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996) (citing 2 Am. Jur. 2d, *Administrative Law* § 363 (1994)).

"A 'preponderance of the evidence' is evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth." *Harris v. Electrical Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004) (quoting *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967)). This means that the Department's findings must comport with what the evidence shows probably is true, not what possibly might be true. Even "an assertion that something is 'highly possible' does not rise to the level necessary to establish [a fact] by a preponderance of the evidence." *Doe v. Sec'y of Health and Human Services*, 19 Cl.Ct 439, 450 (1990). "The law does not concern itself with possibilities. It rather contents itself with a preponderance of probabilities." *Hillman v. Utah Power & Light Co.*, 56 Idaho 67, 71, 51 P.2d 703, 708 (1935). Our Supreme Court described the preponderance of the evidence standard this way: "It is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth." *Newman v. Great Shoshone & Twin Falls Water Power Co.*, 28 Idaho 764, 768, 156 P. 111, 112 (1916) (quoting *Greenleaf on Evidence*, 15th ed. § 13a).

In other words, the trier of fact's decision "cannot rest on conjecture." *Dent v. Hardware Mutual Casualty Co.*, 86 Idaho 427, 434, 388 P.2d 89, 93 (1964), *quoting Splinter v. City of Nampa*, 74 Idaho 1, 10, 256 P.2d 215, 220 (1953). Where the party with the burden provides substantial credible evidence, it can be overcome only with more persuasive contrary evidence, not with speculation. *See Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 418 (4th Cir. 1949) ("a preponderance of evidence may not be avoided by indulging in mere conjecture").

The Remand Proceedings involved the testimony of experts. As a matter of law, opinions by experts must rest on actual facts, and must describe more than "possibilities."

> Expert opinion must be based upon a proper factual foundation. Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict . . . . Expert opinion that merely suggests possibilities would only invite conjecture . . . .

Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999) (quotation marks and citations omitted; emphasis supplied).

The criteria for approving the Application are satisfied by the Stipulation's Exhibits A and B and a preponderance of evidence in the record.

B. City annexed the Spring Valley lands.

The Stipulation calls for M3 Eagle and City to demonstrate that Spring Valley has been annexed into City. There is no question that this has happened. City's witness, Nichoel Baird Spencer, testified to this fact and a certified copy of the annexation ordinance was admitted into the record at the Remand Proceedings. Tr. p. 164; Ex. R5.

C. A preponderance of the evidence shows City's overall reasonably anticipated future needs include, and exceed, the 23.18 cfs requested in the Application for Spring Valley.

As required by the Stipulation, sufficient evidence has been presented during the Remand Proceedings to establish City's reasonably anticipated future needs within its service area during a 30-year planning horizon. Indeed, the evidence in the record indisputably shows that City needs additional water rights to meet its reasonably anticipated future needs above and beyond the 23.18 cfs requested in the Application for the Spring Valley portion of the municipal service area. The only disagreement between City's and IDWR's witnesses concerns how much additional water rights City needs. However that question will be decided in a future application, there is no doubt in the record that 23.18 cfs is necessary and proven as part of City's reasonably anticipated future needs in this Application. That is the amount requested in the Application

pending before the Department, and it should be granted to the City consistent with the Stipulation and District Court Order.

At the Remand Hearing, City presented testimony and documentary evidence describing the City's reasonably anticipated future municipal water needs over a 30-year planning horizon, including the needs in the Spring Valley portion of the City. Tr. pp. 109-89, Exs. R1-R7. City's RAFN Report, Ex. R1, concludes that, in addition to the 23.18 cfs requested in the Application for the Spring Valley portion of the community, City has reasonably anticipated future needs of 26.57 cfs more than the amount held in its current portfolio.

The IDWR Evaluation, Ex. R100, concludes that City has reasonably anticipated future needs of 3.08 cfs in addition to City's existing portfolio and the 23.18 cfs requested in the Application. As discussed below, the primary difference between City's and IDWR's conclusions is based on differing approaches to calculating population growth and also on the fact that IDWR did not have the benefit of City's municipal irrigation figures (which were not presented until the Remand Hearing). Importantly, IDWR's witnesses agreed with all elements of the City's RAFN Report except for its population projections. IDWR witness Mat Weaver testified that City's assumptions of 2.7 people per household and 281 gallons per day per residence, its 30-year planning horizon, and its service area, all were reasonable. Tr. pp. 28-29.[10]

The disagreement between IDWR and City concerning the population component is not material to determining the Application at issue in this case. The result is the same regardless of

[10] Appendix A of the IDWR Evaluation sets forth a "protocol" for evaluating reasonably anticipated future needs containing "four fundamental components": (1) service area; (2) planning horizon; (3) population projections within the planning horizon; and (4) water demand. Ex. R100, App. A at 1. As mentioned in note 2, *supra*, because City's service area, planning horizon, and water demand elements were the same in the information evaluated by IDWR in the IDWR Evaluation and in City's Ex. R1, Mr. Weaver's conclusion that these components are "reasonable" is unaffected by City's updated information. Similarly, although City's Motion challenges the reference to a protocol in the IDWR Evaluation on the ground that it invades City's planning prerogatives (*see, e.g.*, Tr. p. 294-96), a decision in this matter fully approving the Application need not reach the question whether such a protocol is appropriate.

which methodology that you chose to follow—City does not have enough water to supply Spring Valley. M3 Eagle offers this discussion to make clear its point that the differences between IDWR's and City's analyses are immaterial to this Application.

IDWR assumed (using Dr. Reading's numbers in the IDWR Evaluation) City would experience a 3.0% annual growth rate over 30 years beginning with an adjusted 2010 census population of 7,584 within City's service area (excluding the current service areas of Eagle Water Company and United Water Idaho, and an alleged "planning area overlap" between City and the City of Star). Ex. R100, Apps. B at 2, C at 4. In contrast, City assumed a 4.0% annual growth rate over 30 years beginning with an estimated 2011 population (based on the 2010 census) of 20,140 within City's existing entire city limits (including the areas served by Eagle Water Company and United Water, and the alleged City of Star "planning area overlap"). Ex. R1, pp. 5-6.[11] As a result, City assumes roughly 30,000 more people will live in the City's service area at the end of the planning horizon than IDWR projects. *Compare* R1 at 11-12 (City's estimated population of 47,867, not including Spring Valley) *with* R100 at 5 (IDWR estimated City population of 18,408, not including Spring Valley).

In addition to the population growth assumptions, City's Ex. R1 assumes a slightly greater number of persons per household ("pph") than IDWR (2.82 pph v. 2.7, respectively), a greater population in Spring Valley than IDWR (17,455 v. 16,524), and, most significantly, a

[11] IDWR's exclusion of Eagle Water Company and United Water Idaho service areas, and the alleged City of Star "planning area overlap," from City's service area reduced the beginning population figure it used to forecast City's future population within City's service area by approximately 16,000 people (from 24,035 to 7,584). Ex. R100, App. C at 4. City included the Eagle Water Company and United Water Idaho service areas, and the alleged City of Star "planning area overlap," in its beginning population figure of 20,140 within its existing city limits—not its service area. Ex. R1 at 5-6. Ms. Spencer testified that IDWR's methodology incorrectly assumes the United Water Idaho and Eagle Water Company service areas have sufficient vacant land to support the same growth rate as the rest of City's service area—an assumption that improperly reduced IDWR's estimate of City's future population because IDWR excluded these areas from City's service area. Tr. pp. 156-57.

The upshot is that IDWR's and City's population forecasts are based on different starting points. However, in this case, the Department need not determine which is the better methodology because, under either one, it is clear that City needs the full 23.18 cfs requested in the Application for Spring Valley.

foothills irrigation component of 10.82 cfs (whereas the IDWR Evaluation assumes no foothills irrigation component).[12] City also calculates that it holds an existing municipal water rights portfolio 0.10 cfs larger than IDWR found; the City's number is 5.58 cfs of existing water rights. These divergent assumptions are of lesser impact than the population growth assumptions. And, of course, only City's population and foothills irrigation estimates serve to increase City's reasonably anticipated future needs calculation.

In any case, the result is that City calculates it will need 26.57 cfs at the end of the 30-year planning horizon compared to 3.08 cfs (again, not counting municipal irrigation) estimated by IDWR. Whichever assumption is used—City's or IDWR's—there is no dispute that the City does not have sufficient water rights in its portfolio to meet City's, including Spring Valley's, reasonably anticipated future needs. M3 Eagle believes the preponderance of evidence in the record submitted by City supports City's population calculations (including its foothills irrigation component, which was not disputed). Dr. Church corroborated City's population growth projections, and described population projections for the area generally and for Spring Valley in particular. Tr. pp. 210-12. Under any analysis, City needs the full 23.18 cfs requested in the Application plus additional water rights for which City has not yet applied to meet the City's reasonably anticipated future needs. In sum, City has reasonably anticipated future needs of at least 13.90 cfs beyond the amount needed for Spring Valley (the 3.08 cfs in the IDWR Evaluation plus the 10.82 cfs for irrigation in City's RAFN Report).

[12] As noted, Mat Weaver and Dr. Reading evaluated City's RAFN information based on information provided by City (while the District Court Case was still pending) and determined City's reasonably anticipated future need in 2040 would be 3.08 cfs in addition to the 22.42 cfs IDWR suggested Spring Valley would need in 2040 (which, as discussed below, should be 23.18 cfs). As a result, the IDWR Evaluation prepared by Mr. Weaver and Dr. Reading did not include an irrigation component—and irrigation unquestionably is needed. City's RAFN Report presented at the Remand Hearing (Ex. R1) demonstrates that City has 10.82 cfs of reasonably anticipated future needs for irrigation of lands in the foothills area. Ex. R1, Att. 1. This irrigation figure was not disputed.

D. City needs the full 23.18 cfs requested in the Application to meet its reasonably anticipated future needs for Spring Valley.

Based on the evidence in the record, the only question as to Spring Valley's future needs is whether, within the 30-year planning horizon, the required peak diversion rate should be 23.18 cfs as requested in the Application, or 22.42 cfs as suggested in the IDWR Evaluation. This difference is not based on disagreement about Spring Valley's forecasted demands at full buildout; both Mat Weaver (through testimony) and the IDWR Evaluation confirmed that these demands are reasonable. Tr. pp. 39-40; Ex. R100, App. D. Rather, this three percent difference (between 23.18 and 22.42 cfs) is the result of Dr. Reading's unsupported assumptions and is not supported by the record. The evidence shows that City needs all 23.18 cfs requested in the Application for Spring Valley.

(1) Dr. Reading's assumptions are not supported by evidence in the record.

IDWR's 22.42 cfs figure is based on Dr. Reading's assumptions that the 30-year planning horizon for this water right should be calculated as already having begun (in 2010), that Spring Valley will not initiate construction until 2016, and that it will take the entire 30 years to fully build out. These assumptions led Dr. Reading to the incorrect conclusion that M3 Eagle would essentially run out of planning horizon before it could build the entire 7,153-unit project. Dr. Reading assumed that only 6,691 residential households could be completed by his 2040 deadline. This in turn led to Mr. Weaver's conclusion that Spring Valley needed 0.76 cfs less water (peak diversion) than requested in the Application. The 0.76 cfs reduction was derived as follows:

(1) the 2010 planning horizon start date results in a 2040 end date (i.e. 30 years);

(2) the 2016 project start date results in 25 years available—that is, available within the planning horizon end date Dr. Reading assumed—for Spring Valley development;

(3) Year 25 of M3 Eagle's 30-year buildout scenario (Ex. 60) shows a projected population of 16,524 people in 6,557 non-vacant households;[13]

(4) 16,524 is 95% of the full Spring Valley buildout projection of 17,455 people in 7,010 non-vacant households;

(5) 95% of the 14.49 cfs of indoor and outdoor residential demand calculated in the Application is 13.73 cfs, or 0.76 cfs less;

(6) the total 23.18 cfs requested in the Application reduced by 0.76 cfs is 22.42 cfs.

See generally Ex. R100, Tr. pp. 21-104 (Reading and Weaver testimony). While the math is correct, there is no reasonable basis for Dr. Reading's planning horizon or construction start date assumptions, or his assumption that Spring Valley will take 30 years to build out. Dr. Reading confirmed that he had "no hard data" upon which to conclude that construction would begin no earlier than 2016, Tr. p. 92, and that he had not reviewed any market studies or analyses in picking that date. Tr. p. 94. He selected 2010 as the planning horizon starting year only because census information was available for that year. Tr. p. 98. He agreed that the effect of selecting 2010 as the planning horizon starting year and 2016 as the construction start "was to lop off five years of available build-out time," thus reducing (by 0.76 cfs) the portion of the 23.18 cfs that he assumed could be developed by 2040. These are unreasonable assumptions. They are not supported by the evidence, as explained more fully below. Accordingly, there is no basis for reducing the amount requested in the Application.

(2) The 30 year planning horizon should begin when the permit is issued, presumably in 2012.

There is no provision in statute, regulation, or guidance document concerning the

[13] For purposes of deriving a Year 25 to Year 30 ratio, as IDWR used to reach the 0.76 cfs reduction, it makes no difference whether IDWR used Exhibit 60's population projection that includes vacant (but built) households or the no-vacancy figures, so long as apples were compared to apples. To properly forecast water supply, however, vacancies should not be assumed because water service must be available and provided even for non-occupied homes and businesses. *See, e.g.*, Tr. p. 167 (Spencer).

appropriate start date for a planning horizon requested in a future needs municipal water right application. However, logic and past IDWR practice suggest a planning horizon starts on the date of permit issuance (if not on a later, more convenient, date).

Dr. Reading's assumed 2010 start date for the Application's 30-year planning horizon was based on the availability of 2010 census data. Tr. p. 98. He did not base this assumption on anything contained in the Application or related to Spring Valley, on anything in City's RAFN Report, on any statute or rule, or on any established IDWR policy.

The Application does not specify a planning horizon start date because the date of permit issuance was unknown when the Application was filed. Instead, the Application requests a 30-year planning horizon, Ex. 42, Att. A at 6, and the evidence presented in support of that planning horizon describes the passage of time in terms of build-out years rather than in calendar years. *See, e.g.,* Ex. 40 at 13; Ex. 60. As discussed further below, the testimony in this case shows that Spring Valley is expected to take less than 30 years to fully build-out—perhaps 20 years or less. Tr. pp. 227-28. Thirty years was requested to "take a conservative approach" and "to have adequate time for the full buildout of the community and be able to address any future economic cycles." 2009 Hearings Tr. pp. 163-64.

IDWR typically pegs the planning horizon start date to the permit issuance date, or a convenient date shortly thereafter. For example, on October 5, 2009, IDWR approved permit nos. 63-33022 and 63-32835 in the name of the City of Nampa, each with a 21-year planning horizon ending on December 31, 2030. This end-date is 21 years from January 1, 2010—a convenient beginning date occurring roughly three months after the date of each permit's issuance. The planning horizons did not begin on the permit application dates of March 31, 2008 (for 63-33022) and August 18, 2007 (for 63-32835), or on any date prior to permit issuance.

Similarly, the 15-year planning horizon for permit no. 65-22357 (Tamarack Resort) ends on December 31, 2017—slightly more than 15 years after the December 20, 2002 permit.

On other occasions, IDWR has not stated a date certain to begin or end a planning horizon, but instead simply has recited the length of the planning horizon in a permit's conditions. *See, e.g.,* Permit Nos. 98-7825 (City of Bonners Ferry), 95-9009 (Ross Point Water District), *and* 65-23088 (City of Fruitland). And on one occasion, IDWR described the planning horizon simply by stating an end date ("for a planning horizon through 2025") and without reference to the planning horizon's start date or length. *See* Permit No. 37-20853 (ITD).

In summary, there is no basis in fact or law for concluding that the 30-year planning horizon requested in this Application has already begun, even before the Permit, effectively held in abeyance pending litigation, has issued. It certainly should not be tied to the permit issued with the January 2010 Order—that permit will be "completely replace[d] and supersede[d]" by the Permit issued in connection with the Second Amended Order. Stipulation at 5 ¶ 8. M3 Eagle respectfully suggests that the 30-year planning horizon should begin no earlier than the date the Permit issues. Therefore, even if the approach suggested in the IDWR Evaluation were used in issuing the Permit, but the planning horizon start date is changed to 2012, the 0.76 cfs reduction would become a 0.15 cfs reduction.[14]

(3) M3 Eagle anticipates beginning project construction in 2013 and selling homes by 2014.

A similar analysis should be applied to the other factor leading to Dr. Reading's assumption of a truncated buildout window for the Spring Valley portion of the City: the year in

[14] Following IDWR's methodology that resulted in the 0.76 cfs reduction, starting the 30-year planning horizon in 2012 would result in an additional two years of buildout based on Ex. 60 (i.e. Spring Valley would reach year 27 instead of year 25) and only a 0.15 cfs (or 0.66%) reduction. These reductions (whether 3% or 0.66%) are so small that they must be considered irrelevant and unfit for supporting a conclusion that the amount of water requested in the Application should be reduced. In light of the fact that Spring Valley is expected to build out in less than 30 years, there is absolutely no basis for reducing the amount requested in the Application.

which construction will start. Dr. Reading testified that he had no "hard data" to support his choice of a 2016 start date for Spring Valley's construction start date. Tr. p. 92. He said 2016 was his "best guess," Tr. p. 95, and also testified that it would be reasonable to assume construction could begin earlier. *Id.*

In fact, the testimony is that M3 Eagle plans to begin construction of Spring Valley in mid-2013 and selling residential units by the third quarter of 2014. Tr. pp. 268-69. Mr. Brownlee testified that the project is currently on schedule to meet these timeframes, Tr. p. 263, and that, based on market research and studies, it is not probable that market factors will cause delay. Tr. pp. 269-70.[15] Dr. Church concurred that the economy in general, and the new housing market in particular, are beginning to rebound from the recent economic downturn, and that Spring Valley could begin construction as early as 2013. Tr. p. 233.

Mr. Brownlee's and Dr. Church's testimony, as well as M3 Eagle's Exhibits R8 and R9, constitute a preponderance of evidence in the record that Spring Valley likely will commence construction well in advance of the 2016 start date that was Dr. Reading's "best guess." Accordingly, any analysis of Spring Valley's degree of buildout within the 30 year planning horizon must assume a construction start date of 2013 and home sales by 2014.[16]

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[15] Mr. Brownlee also testified, in response to the Hearing Officer's questions, that the January 2008 Robert Charles Lesser report prepared for M3 Eagle (and cited in Ex. R8) is useful to show "the various product levels that you need to deliver product in" to "achieve a larger absorption in the community," and that it "really doesn't deal with current pricing or those types of things." Tr. pp. 281-82. In other words, the Lesser report supports the conclusion that Spring Valley will build out more quickly than surrounding areas that are not master planned communities because Spring Valley will offer housing products in all traditional pricing segments and achieve additional velocities by introducing an Active Adult and Resort components. To account for changed economic circumstances since 2008, M3 Eagle intends to have the Robert Charles Lesser group "reanalyze the market" and suggest the product segmentations that M3 Eagle should be targeting. *Id.* at 282. Whatever the product mix that results from the reanalysis, it will not change the conclusion that Spring Valley will build out faster than surrounding areas and well within the proposed 30-year planning horizon—indeed, even cutting in half the 2008 report's conclusion that Spring Valley could absorb 660-plus units per year, Spring Valley could build out in less than 22 years.

[16] Building upon footnote 14, which suggests the planning horizon should begin in 2012, further assuming Spring Valley's home sales commence in 2014 (instead of 2016, as assumed by Dr. Reading) would result in an additional two years of buildout based on Ex. 60 (i.e. Spring Valley would reach year 29 instead of year 27) and only a 0.05 cfs (or 0.21%) reduction using IDWR's methodology. Again, such a reduction is so small that it must be

(4) Spring Valley can fully build out in less than 30 years.

Dr. Reading's conclusion that Spring Valley may not fully build-out by the end of the planning horizon is premised on his assumption that it actually will take 30 years to fully build the project. Ex. R100, App. C at 5. ("M3's 30-year buildout scenario as used in this forecast . . . ."). However, full build-out likely will occur much sooner—perhaps 20 years or less.

The only testimony in the record that actually focuses on this question supports a conclusion that Spring Valley will fully build out in less than 30 years. Dr. Church stated: "I would say 15 years, you know, would be reasonable. You could do it in 20. 30 is really conservative, very conservative. This could be done faster." Tr. p. 225. Mr. Brownlee concurred that full build out could occur in less than 20 years, Tr. pp. 270-71, explaining Spring Valley is designed to provide housing products that, in terms of both price and function, will appeal to a broad segment of the market, and that Spring Valley reasonably will build out fully within the planning horizon and thus need all of the 23.18 cfs for peaking purposes that is sought in the Application. Tr. pp. 271-72. Dr. Reading did not disagree—when asked if Spring Valley could build out in less than 30 years, Dr. Reading testified, "That's possible." Tr. p. 99.

Of course, no one can predict the precise timing of Spring Valley's development. That is why M3 Eagle requested a 30-year planning horizon in the first place. The Application requests a 30-year planning horizon to "take a conservative approach" and "to have adequate time for the full buildout of the community and be able to address any future economic cycles." Tr. pp. 163-64. Prior to filing the Application, many studies were prepared—for other purposes—using a 20-year build-out scenario. Ex. 58 (Pre-Annexation and Development Agreement); Ex. 40

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considered irrelevant and unfit for supporting a conclusion that the amount of water requested in the Application should be reduced. In light of the fact that Spring Valley is expected to build out in less than 30 years, there is absolutely no basis for reducing the amount requested in the Application

(Church study). The Application, however, requested a 30-year planning horizon as a matter of prudence, because of the uncertainty of how IDWR will treat planning horizon extensions.

In summary, there is no support in the record for a conclusion that the planning horizon start date should begin prior to Permit issuance (presumably in 2012), that Spring Valley will not begin construction until 2016, or that it will take 30 years to build out. On the contrary, the planning horizon start date should coincide with Permit issuance, and the record shows that Spring Valley will begin selling homes in 2013 or 2014 and could reach full buildout as early as fifteen years following the initial home sale, or 2028. On these facts, there is no basis for reducing the amount of water requested in the Application.

Moreover, M3 Eagle is aware of no rational policy basis for IDWR to engage in second-guessing an applicant's own investment-backed analyses of a project dependent upon the requested water right—especially upon such questionable grounds and for such a seemingly insignificant portion of the proposed water right.[17] City, as applicant, is entitled to the full 23.18 cfs shown to be necessary to supply the Spring Valley portion of the City.

E. There is sufficient evidence in the record to demonstrate Spring Valley's water demands in relation to the rest of City's service area.

The record contains ample evidence concerning the quantity of water requested in the Application for Spring Valley in relationship to the water needs of the rest of City's service area. Spring Valley will average less water per capita than the rest of the City's service area—274

[17] A three percent reduction in the City's peaking entitlement for the Spring Valley area might well prove to be insignificant to the City. However, it would be equally insignificant to the ground water resource and, it would seem, to IDWR. There is nothing in the water code or IDWR's rules that supports such micro-analysis of an applicant's project plans. If the applicant reaches the end of the allotted planning horizon and has not fully placed the permitted water to beneficial use, then this amount simply would continue to be fully available to serve others. It would appear inappropriate for an agency to engage in a "we-know-better-than-you-do" exercise (particularly one based purely on assumption or "best guess"), where the applicant has engaged in substantial expert analysis, budgeting, and projection relative to a project and its pace and nature of development.

gallons per day per residence compared to City's 281 gallons per day per residence. Ex. R1 at 10-11; Ex. 42, Att. A, Tab 5, at 5.7 p.2.

For irrigation of residential landscaping, Spring Valley will average less water per acre than City plans for other foothills areas—0.02 cfs per acre compared to City's estimated 0.03 cfs per acre. Ex. R1 at 12; Ex. 42, Att. A, Tab 5, at 5.7 p.1. Spring Valley's use of ground water for public area irrigation will be reduced by using a combination of: 1) existing surface water rights,[18] which is consistent with City's requirements in the rest of its service area, and 2) reused treated wastewater effluent, which is not required or contemplated in the rest of City's service area. Ex. 42, Att. A, Tab 5, at 5.7 p.1. In addition, Spring Valley will incorporate other conservation measures, such as requiring sprinkler and drip irrigation technologies, that are not planned in the remainder of the City or accounted for in the City RAFN Report. *Id.*, Att. A at 4. This, too, is evidence of the reasonableness of City's Spring Valley entitlement of 23.18 cfs in relation to the proposed diversions for the remainder of the City.

In short, Spring Valley's water use is consistent with—if not more conservative than, (meaning smaller diversions per acre or per capita)—than the rest of City's service area. City's expert witness Vern Brewer, who participated in the development of City's RAFN Report, testified that the Application's water demands are reasonable, Tr. pp. 115-16, that City needs the entire 23.18 cfs to meet its reasonably anticipated future needs for Spring Valley, *id.* at 129, and that Spring Valley's demands are reasonable in relation to the rest of the City. *Id.* at 129-30.

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[18] The 23.18 cfs requested in the Application assumes full use of M3 Eagle's existing surface water rights. Ex. 42, Att. A, Tab 5, at 5.7 p.1. Without them, Spring Valley would need more than 23.18 cfs to accommodate irrigation of an additional 197 acres. *Id.* Protestants' questions at the Remand Hearing concerning whether the surface water rights have been assigned to City miss the point—unlike future needs municipal water rights, there is no requirement in Idaho law that a municipal provider own the surface water irrigation rights used within its service area. Indeed, surface water irrigation rights typically are held in the name of someone other than the municipal provider, such as a private individual or an irrigation district or ditch company (here, it is a ditch company). In other words, these surface water rights remain appurtenant to a portion of the Spring Valley area within the City, and their continued use at Spring Valley is mandated by ordinance and is calculated into City's overall ground water need here.

City's other expert witness, Nichoel Baird Spencer, testified that Spring Valley is within and is contemplated by City's comprehensive plan, and the water use contemplated for Spring Valley, as reflected in the Application, "is consistent . . . with the approvals of M3 and what the City anticipated seeing from M3." Tr. p. 164-65.

The inquiry into the quantity of water requested in the Application for Spring Valley in relationship to the water needs of the rest of City's service area appears to be rooted in I.C. § 42-202B(8), the definition of "reasonably anticipated future needs," which reads:

> "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

(Emphasis added.) The question raised by this definition is whether the Application requests a quantity of water for future uses in City's Spring Valley area that is reasonably expected to be required within the planning horizon "not inconsistent with comprehensive land use plans."[19] Plainly, based on the evidence in the record, including the testimony of City's and M3 Eagle's witnesses described above, 23.18 cfs is reasonably expected to be required for Spring Valley.

M3 EAGLE'S RESPONSES TO MOTIONS

I. RESPONSE TO PROTESTANTS' RENEWED MOTION

As its caption suggests, Protestants' Renewed Motion makes arguments the Hearing Officer has seen before. It reiterates the same arguments made in Protestants' October 5, 2011 *Motion to Dismiss Remand Proceedings*, which M3 Eagle responded to in its October 12, 2011

[19] The question cannot be whether the quantity of water requested in the Application for Spring Valley is "proportional" to the quantity of the water needed in the rest of City's service area. Such a question would not be consistent with the applicable statutory definitions and criteria for granting future needs municipal water rights, nor would it be consistent with the Local Land Use Planning Act, which provides municipalities (not state agencies) with authority to plan future growth.

Response to Protestants' Motion to Dismiss Remand Proceedings ("October 12 Response"), and the Hearing Officer rejected in his October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings* ("Order Denying Motion to Dismiss"). M3 Eagle hereby incorporates by this reference the arguments set forth in its October 12 Response.

Protestants make no new arguments in their Renewed Motion, and cite no new case law or facts warranting a reversal of the Hearing Officer's decision on these same points in his Order Denying Motion to Dismiss. Accordingly, for the same reasons set forth in that Order, Protestants' Renewed Motion should be denied.

M3 Eagle includes the following discussion as further support for denying Protestants' Renewed Motion.

A. IDWR had no "role as a judge" during the District Court Case; it was a party litigant.

Protestants fail to recognize the distinction between an agency sitting in a quasi-judicial capacity in a contested administrative case, and an agency litigating as a respondent (i.e. defendant) in a court case. The distinction is made clear in the cases cited by Protestants. For example, in *Lowery v. Board of County Commissioners for Ada County*, 115 Idaho 64, 71, 764 P.2d 431, 438 (Ct. App. 1988), the Idaho Supreme Court held that "[w]hen acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge." Then, a couple of sentences later, the *Lowery* Court recognized that when "named as a respondent on appeal [of its quasi-judicial decision] the government board's role is limited to defending its decision below." *Id.*

In short, having once sat in a judge-like capacity when deciding a quasi-judicial matter put before it, a governing board (or state agency, in this case) becomes a defendant in a lawsuit when its decision is appealed. By "defending its decision below," the agency, like any defendant in a lawsuit, has the power to settle the case, concede points, make motions, and otherwise act as

a defending litigant. As a litigant, a board or agency's quasi-judicial role ends, and it has the same right to settle its case as any other party to litigation. Similarly, Idaho's courts, like the District Court here, have full power to accept and enforce settlements, including those that involve state agencies as litigants. Protestants identify no precedent whatsoever that would deny such authority to any Idaho court, such as the District Court that exercised that very power in this case. Protestants' suggested approach, if it were to become law, would severely undercut any state agency's ability to participate in litigation, to defend itself, or to reach accommodations with other parties to a lawsuit. Protestants' approach is simply not the law.

B. A state agency named as a respondent on judicial review of its quasi-judicial decision is entitled to stipulate facts and to settle a case.

Settlements and stipulations by agencies are common. None of the court opinions Protestants cite suggest they are impermissible. While the issue understandably has not received much attention by the Idaho Supreme Court (because the settlements eliminate the need for further appeal), the Court has addressed the matter. Not surprisingly, it has upheld the settlements.

In *Hardcastle v. Board of Commissioners of Jefferson County*, 110 Idaho 956, 719 P.2d 1216 (1986), Wanda Hardcastle petitioned for judicial review of the County Commissioners' denial of her indigency claim for medical benefits. *Id.* at 957, 719 P.2d at 1217. In other words, she sued the County after its quasi-judicial ruling against her. During the judicial review litigation, Hardcastle and the County stipulated to the amount of her unreimbursed medical expenses that would be owed to her if the district court deemed the County obligated to pay. *Id.* That is, the County defended in part by entering a binding stipulation. Ruling on the remaining issues, the district court found the County was obligated to pay. The court then remanded the matter back to the County to determine—in its quasi-judicial capacity—additional amounts owed to Hardcastle that accrued after the period to which the parties had stipulated. *Id.* at 960 n.2, 719

P.2d at 1220 n.2. The County appealed to the Idaho Supreme Court, which affirmed the district court's decision (modifying it slightly in ways not relevant here). *Id.*

Hardcastle demonstrates that a governing board (or state agency) whose quasi-judicial decision is challenged on judicial review has the inherent authority to stipulate to facts in the record so they will no longer be at issue when the matter is remanded back to the board or agency for further proceedings.

Similarly, in *Drake v. Craven*, 105 Idaho 734, 672 P.2d 1064 (Ct. App. 1983), the Idaho Court of Appeals affirmed a district court's decision confirming a board of county commissioners' denial of a rezoning application. The district court judicial review proceedings involved two remands to the county commissioners with instructions for rehearing the application. *Id.* at 735-36, 672 P.2d at 1065-66. One of the remands was stipulated to by the applicant and the county, and the county was given the option of holding new hearings or using the evidence in the record from the previously held hearings. *Id.* Again, this shows that a governing board (or state agency) defending its quasi-judicial decision in a judicial review proceeding is entitled to stipulate to, and agree to terms for, a remand for further proceedings before that very agency. This is what happened in settlement of the District Court Case.

These examples describe situations exactly like the present case. M3 Eagle and IDWR entered into the January Agreement, negotiated further as called for in that contract, settled on the terms of the Stipulation (including its Exhibits A and B), and asked the court to approve the deal. The District Court approved, and ordered the matter remanded on those terms. Plaintiffs were not parties to the District Court Case and cannot complain about its outcome here; they lack standing. The matter is final. Likewise, this agency lacks authority to overturn, and cannot proceed in derogation of, the District Court Order. But even if Protestants somehow could challenge the Stipulation in these Remand Proceedings, there is no legal basis for their position.

C. The Assignment is not in violation of the Pre-Annexation and Development Agreement, the construction of which is not before the Department in this matter.

Protestants assert that the Assignment somehow should be invalidated. There is no basis for this. In the first place, the Assignment has been accepted by IDWR and is an accomplished fact.[20] The Assignment also is not a subject within the scope of this remand.[21] It is curious that Protestants would complain about the Assignment, since it was they who argued during the 2009 Hearings that it is City, not M3 Eagle, who should be entitled to apply for a RAFN water right. A central portion of the Stipulation before the District Court (a proceeding in which Protestants chose not to become parties) was that the Application and Permit would be assigned to City, which M3 Eagle did.

Despite this, Protestants now contend that the Assignment impermissibly conflicts with the Pre-Annexation and Development Agreement entered into between M3 Eagle and City, Ex. 58 ("Development Agreement"), because the Development Agreement states that the water rights for the M3 Eagle planned community are to be assigned to the City on a "phase by phase basis," and not all at once as contemplated by the Assignment, and because the attachment to the Assignment states that

> This Assignment shall not be deemed nor interpreted such that it conflicts with any provision of the Development Agreement. If any provision of this Assignment conflicts with any provision of the Development Agreement, the Development Agreement prevails.

Thus, argue Protestants, City and M3 Eagle are in violation of their own Development Agreement and IDWR should declare the Assignment void.

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[20] *See, e.g., Order Acknowledging Party Status of Protestants and Denying Motion to Alter or Amend Findings* (August 2, 2011), n. 1 (noting that IDWR has received the Assignment and has changed the caption of this case to list City as applicant). *See also* Stipulation at 3 ¶ C ("M3 Eagle and IDWR agree that the City has accepted the Assignment as required by paragraph 1.B.i of the January Agreement.").

[21] *See, e.g., Order Limiting Presentation of Evidence at Supplemental Hearing* (October 3, 2011).

Even if Protestants had standing to make such a claim[22] and even if this question were properly before IDWR in this remand (neither of which is the case), there is no question that the Assignment fully conforms to the Development Agreement and to the intent of its parties. The Development Agreement itself states that M3 Eagle is to "convey the water system" (which is defined as including the water rights) "to City in accordance with the terms of this Agreement, the Master Water Plan, and any necessary Planning Unit Master Plans and applicable federal, state, and local laws." Development Agreement at 2.2(c) (emphasis added). In this case IDWR has required and bargained for in settlement—and the District Court has ordered—that the municipal water right application and permit be assigned to the City now and that the City become the applicant for the water right. In other words, the Assignment is a requirement imposed pursuant to state law, and it is fully in line with the Development Agreement.

The Development Agreement further states that "[i]f any transfer, amendment or other proceedings are required under Idaho Code or IDWR rule or policy for the water rights necessary to serve the [M3 Eagle] Project, City shall cooperate with developer in Developer's efforts to obtain all necessary permits and approvals from IDWR . . . ." The Assignment was required by an IDWR ruling on a matter of state law, by a contract, and by the District Court Order. The City has cooperated by, among other actions, accepting the Assignment, producing City's RAFN information, and fully participating as a party in the Remand Hearing.

It is City and M3 Eagle who are solely responsible for determining the intent and meaning of the Development Agreement, and for amending its terms by course of dealing or by exchange of documents. Both City and M3 Eagle made their intentions clear at the Remand

[22] Protestants have no standing to challenge M3 Eagle's and City's interpretation of the Development Agreement because they are not parties to it, are not within the zone of interests protected by this contract between City and M3 Eagle, and can show no specialized and peculiar injury. *See Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989). M3 Eagle and City are the only parties entitled to enforce the Development Agreement. Ex. 58 at 38 § 8.8 (no third party beneficiaries, and no right of third parties to enforce the Development Agreement).

Hearing, if it were not already clear from the delivery and acceptance of the Assignment itself: the Assignment is valid and binding, and neither party interprets it as conflicting with the Development Agreement in any way. Neither City nor M3 Eagle is asking IDWR to enforce the Development Agreement. Indeed, the Attachment to the Assignment states that "[n]othing in this Assignment shall be interpreted as an assertion or conclusion that IDWR maintains jurisdiction to enforce contract or indemnification provisions between City and M3 Eagle." The rights and responsibilities of the two parties under the Development Agreement are not a subject for determination in this contested case before IDWR.

Moreover, City has accepted the Assignment and now has taken substantive actions in reliance on it—including becoming the central party advocating in the contested case for the issuance of the full water right permit sought in the Application. It is simply incorrect for anyone, especially individuals not parties to the Development Agreement, to claim that City is not the holder of the Application and Permit in this matter.

In asserting that "M3, a private developer, will be allowed to own a municipal water right," Protestants' Renewed Motion at 4, Protestants fail to recognize that the Assignment expressly states "[a]ny remaining ownership interest retained by M3 Eagle shall terminate and pass to City once the Remand Proceeding before the Department is complete, a final order is issued and any subsequent appeals are final." Ex. R1, Att. 3 ¶ 4. This provision will terminate M3 Eagle's interest the moment the Second Amended Order and resulting Permit become final and unappealable, which means M3 Eagle never will hold a future needs municipal water right under this Application. In sum, Protestants' attack on the validity of the Assignment is meritless.

II. RESPONSE TO CITY'S MOTION TO STRIKE THE IDWR EVALUATION

As City points out, the IDWR Evaluation underestimates City's reasonably anticipated future needs by using population estimates and other information not produced or confirmed by

City and that conflict with City's comprehensive plan. Dr. Reading's testimony in support of his population numbers also was significantly discredited because Dr. Reading relied on non-expert or inherently unreliable information. *See, e.g.,* Tr. 78-81 (Reading); 157-61 (Spencer). City also correctly points out that nothing in Idaho's water statutes, Title 42, Idaho Code, gives the Department authority to usurp municipalities' authority under the Local Land Use Planning Act, Title 67, Chapter 65, Idaho Code.

Significant portions of the IDWR Evaluation are not disputed.[23] As stated in the IDWR Evaluation and confirmed by IDWR witness Mat Weaver, the City has made reasonable and supportable assumptions in projecting 2.7 (or 2.82) people per household, 281 gallons per day per residence, a 30-year planning horizon, and the service area described by Ms. Baird Spencer. Tr. pp. 28-29; IDWR Evaluation at 3-4. The IDWR Evaluation, Mat Weaver's testimony, and City's RAFN Report also confirm that Spring Valley's RAFN numbers are reasonable. There is no evidence contrary to these conclusions, and this will be the case regardless of whether the IDWR Evaluation remains a part of the record. IDWR's own witness agrees that City's RAFN Report is reasonable as to three of the four items in the protocol described in the IDWR Evaluation.

On the fourth element—population growth rate projections—City's testimony and exhibits command the clear preponderance of the evidence. As noted, Dr. Reading's 3 percent annual population growth projections were not well supported, and neither were the IDWR Evaluation's assumptions of what portion of City's future population will reside in other providers' service areas. In contrast, City's annual population growth figure of 4 percent—

[23] Of course, as discussed, M3 Eagle challenges the suggestion in the IDWR Evaluation that the Application should be granted for 0.76 cfs less than applied for, based on Dr. Reading's belief that the Spring Valley portion of the City might not build to its full capacity within the 25 years Dr. Reading thought it would have to do so.

which is based upon a conservative interpretation of City's historical growth rates and which was confirmed by M3 Eagle's expert economist as being reasonable—was well supported and, arguably, within City's sole statutory purview under the Local Land Use Planning Act's comprehensive planning requirements.

CONCLUSION

City's and M3 Eagle's actions during the Remand Proceedings, and the evidence they presented, all are consistent with the Stipulation and in furtherance of its goal of granting to City a future needs municipal water right for the full amount requested in the Application. There is no reason to deviate from the course set forth in the Stipulation and District Court Order, which require IDWR to issue the Second Amended Order and Permit consistent with the Stipulation, the January Agreement, the evidence received during the Remand Proceedings, and Exhibits A and B (which must be included verbatim in the Second Amended Order).

Accordingly, and for the reasons stated herein, the Hearing Officer should:

- Grant City a RAFN municipal water right permit for 23.18 cfs with an annual volume limit of 6,535 acre-feet for use within the Spring Valley planned community;
- Establish a 30-year planning horizon for the permit calculated as beginning on a date no earlier than the date this RAFN Permit becomes final and non-appealable; and,
- Deny Protestants' Renewed Motion.

Regardless of how the Hearing Officer might rule on City's Motion, there is more than ample evidence in this record, by a clear preponderance, to grant the City of Eagle a permit for the full requested amounts to serve the Spring Valley portion of its service area.

DATED this 23rd day of November, 2011.

Respectfully submitted,

GIVENS PURSLEY LLP

By _____
Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of November, 2011, the foregoing was filed, served, or copied as follows:

FILED	
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SERVICE	
City of Eagle Bruce M. Smith, Susan Buxton Moore, Smith, Buxton & Turcke, Chtd. 950 W. Bannock Street, Suite 520 Boise, ID 83702	X U. S. Mail _____ Hand Delivered _____ Overnight Mail _____ Facsimile X E-mail
North Ada County Groundwater Users Association c/o David Head 855 Stillwell Drive Eagle, ID 83616	X U. S. Mail _____ Hand Delivered _____ Overnight Mail _____ Facsimile X E-mail
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