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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 RESPONSE TO PROTESTANTS' AND CITY OF EAGLE'S POST-HEARING STATEMENTS**

Co-Applicant M3 Eagle LLC ("M3 Eagle"), through Jeffrey C. Fereday and Michael P. Lawrence of the firm Givens Pursley LLP, hereby submits this response ("Response") to Protestants' November 23, 2011 *Final Argument* and their *Closing Statement* (together, "Protestants' Statements"). M3 Eagle also comments on the *Closing Statement of the City of Eagle* ("City's Statement").

This Response first addresses City's Statement, and simply for purposes of clarification. The main points in City's Statement are consistent with those in M3 Eagle's November 23, 2011 *Post-Hearing Brief, Including Response to Protestants' Motion Challenging Remand Proceedings and City of Eagle's Motion to Strike* ("M3 Eagle's Post-Hearing Brief").[1]

This Response next addresses Protestants' Statements, which contain the same arguments and assertions Protestants have made previously. M3 Eagle already has responded to each of them. The Hearing Officer already has rejected each of them. Nothing in Protestants'

[1] Unless otherwise defined in this Response, capitalized words have the same meanings as those defined in M3 Eagle's Post-Hearing Brief.

Statements provides a basis for ruling differently now—Protestants' arguments still are contrary to law and inconsistent with the facts of this case. In addition, Protestants Statements' barely touch on the Remand Issues, which of course are the sole issues on which evidence was presented at the Remand Hearing.

For the reasons set forth herein and in M3 Eagle's Post-Hearing Brief, the Department should issue a Second Amended Order and Permit to City for the full 23.18 cfs future needs municipal water right requested in the Application.

I. COMMENTS ON CITY'S STATEMENT

City's Statement confirms the main points made at the hearing and fully supported by the record: City currently holds insufficient water rights to serve the reasonably anticipated future needs within City's service area—including Spring Valley—at the end of a 30-year planning horizon. Based on the record in this case, there can be no doubt about this conclusion.

City's Statement also confirms that M3 Eagle and City have fulfilled the obligations set forth in the January Agreement, Stipulation, and District Court Order, including the assignment of the Application to City and the presentation of "sufficient evidence . . . to process a reasonably anticipated future needs water right held by the City." Stipulation at 5 ¶ 6.

City's Statement further reviews the evidence supporting its population forecasting method, its projected growth rate, and its right and obligation as a City under Idaho's Local Land Use Planning Act ("LLUPA"), I.C. § 67-6501, *et seq.*, to forecast its population growth as part of its comprehensive land use planning process. City's evidence should be seen as commanding the preponderance on the subject of population forecasting, as compared to the evidence supporting the IDWR Evaluation's method as expressed by Dr. Reading and Mat Weaver. Accordingly, and in light of City's statutory land use planning authority under LLUPA, M3 Eagle agrees that

City's population forecast presented in the City RAFN Report is entitled to substantial deference, both in this matter and in any future water right application City might file.

However, regardless of which population forecast is used—that in the IDWR Evaluation or that adopted by the City—the conclusion is the same when applied to the Application at issue in this case: City's reasonably anticipated future needs exceed the amount requested in the Application. City needs the entire 23.18 cfs (peak flow at full build-out) and 6,535 acre-feet (annual diversion at full build-out) requested in the Application to serve Spring Valley, and will have to file another application to obtain water rights necessary to meet the remainder of its future needs. Determining whether the additional amount is 3.08 cfs (as suggested in the IDWR Evaluation)[2] or 26.57 cfs (as found by City), or something in between, will be appropriate in the context of the future application; it is not appropriate or necessary now.

The 3.08 cfs and 26.57 cfs figures reflect IDWR's and City's respective forecasts of City's reasonably anticipated future needs beyond the amount requested in the Application, which IDWR, City, and M3 Eagle agree is a reasonable amount to supply Spring Valley at full build-out. The only disagreement related to the Application and City's future needs for Spring Valley concerns the IDWR Evaluation's assumptions and conclusions about the planning horizon start date, Spring Valley's likely construction start date, and the amount of time it will take Spring Valley to build out. As discussed in M3 Eagle's Post-Hearing Brief, however, there is no basis for reducing the quantity of water requested in the Application—the evidence shows that Spring Valley reasonably can be expected to fully build out before the end of the 30-year planning horizon.[3]

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[2] As the Hearing Officer knows, it would not be 3.08 cfs in any event, even if the approach used in the IDWR Evaluation were relied upon, because this figure does not include roughly 10 cfs of irrigation diversions that unrebutted evidence demonstrates that City will need.

[3] As far as calculating City's reasonably anticipated future needs for Spring Valley, it makes no difference whether City's planning horizon ends in 2040 (as assumed by IDWR), 2041 (as assumed by City), or 2042 (as

II. RESPONSE TO PROTESTANTS' STATEMENTS

Protestants' Statements involve two separate filings: a five-page letter entitled "Closing Statement," and a sixteen-page brief entitled "Final Argument."[4] These filings dwell mainly on the Protestants' dissatisfaction with the process that has taken place since the Judicial Review Case commenced in the Ada County District Court. Protestants assert that M3 Eagle manipulated IDWR into engaging in settlement negotiations that somehow inappropriately resulted in stipulated findings resolving the Water Supply Issues and in a stipulated process for resolving the Municipal Provider Issues. Protestants also assert that IDWR had no authority to negotiate a settlement, but that Protestants somehow had a right to participate in the settlement negotiations even though they did not intervene as parties in the Judicial Review Case. In short, Protestants' Statements contain more of the same meritless arguments they already have made, and the Hearing Officer already has rejected.

In earlier briefing, M3 Eagle addressed Protestants' arguments concerning the effectiveness of the Assignment and the Department's authority to settle the Judicial Review Case. *See* M3 Eagle's Post-Hearing Brief at 25-31; M3 Eagle's *Response to Protestants' Motion to Dismiss Remand Proceedings* (Oct. 12, 2011). The Hearing Officer rejected Protestants' arguments on these points in his October 14, 2011 *Order Denying Motion to Dismiss Remand Proceedings*. Protestants' Statements make no new arguments and cite no new case law or facts warranting a reversal of the Hearing Officer's decision. Protestants' analysis remains incorrect.

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suggested by M3 Eagle). A preponderance of the evidence shows that Spring Valley reasonably can be expected to fully build out within any of those time frames. *See discussion in* M3 Eagle's Post-Hearing Brief at 22-23. In addition, City's and the IDWR Evaluation's conclusions that City has insufficient water rights to fulfill its reasonably anticipated future needs in 2040 or 2041 necessarily means that City has insufficient water rights to fulfill its needs in 2042 (M3 Eagle's proposed end date). For the reasons described in M3 Eagle's Post-Hearing Brief, M3 Eagle believes that 2012-2042 is the most appropriate planning horizon period for the water right requested in the Application.

[4] All of the Protestants— NACGUA, Eagle Pines Water Users Association, Alan Smith, and Norman Edwards—signed both filings.

Notably, aside from complaining that the scope of the Remand Proceedings was improperly limited,[5] Protestants' Statements are almost completely silent on the Remand Issues. Protestants touch upon only one issue concerning the evidence presented at the Remand Hearing: whether M3 Eagle's existing surface water rights were included in Spring Valley's demand analysis. Closing Statement at 4. This question is answered in the Application. The existing surface water rights held by M3 Eagle (which are represented by shares in the Farmers' Union Ditch Company) are included in the water demand calculations attached to the Application as Attachment A, Tab 5. The water demand calculations—and, therefore the Application's 23.18 cfs peak daily demand and 6,535 acre-foot maximum annual diversion figures—assume full use of the surface water rights. In other words, excluding the surface water rights would have resulted in the Application requesting more water. These facts have been an undisputed part of the record from the beginning, and they remain that way. Protestants' statements about whether, or how, surface water rights will be used in this portion of the City fail even to articulate a legitimate argument.

As explained in the following subsections, Protestants' misplaced complaints and arguments are based on their apparent misunderstandings about these proceedings.

A. The Application process has been sound.

Protestants assert that the Application was "void from the start," and that processing the Application has been "bizarre, absurd and frivolous." Final Arguments at 1. They further assert that "M3 Eagle is bound and determined to own a future needs municipal water right when it does not qualify," that the Development Agreement prevents the parties to it from effecting an assignment of any water right permit from M3 Eagle to City except on a phase by phase basis as

[5] As discussed below and in M3 Eagle's Post-Hearing Brief at 7-10, the scope of the Remand Proceedings was limited because the record developed during the 2009 Hearings contained sufficient evidence to satisfy the other criteria for approving the Application.

the project is constructed, and that M3 Eagle "never made a valid municipal future needs water right application at the very start and never had such an application to assign." *Id* at 1, 14-15. These contentions are completely wrong.

M3 Eagle did file a legitimate future needs municipal water right application, the Application was reviewed and received by IDWR, and the Application remains a legitimate RAFN application. In the January 2010 Order, the Hearing Officer ruled that M3 Eagle did not qualify as a municipal provider entitled to hold a RAFN water right permit,[6] but that ruling was challenged in the Judicial Review Case. The Assignment, which was executed as part of settling the Judicial Review Case, has mooted the municipal provider question because City—a municipality and undisputed qualified municipal provider—now is the applicant and future permit holder.

The Judicial Review Case could have resulted in a ruling overturning the Hearing Officer's conclusion that M3 Eagle did not qualify as a municipal provider (as M3 Eagle believes it would have), or the question could have been decided in IDWR's favor. Like many other litigating parties, M3 Eagle and IDWR avoided the need for a ruling on this legal question by resolving the issue through settlement. This was a prudent and expedient way to overcome M3 Eagle's and IDWR's disagreement about who could hold the applied-for RAFN water right. It certainly was a decision within the power of these parties to pursue and it was within the District Court's power to approve and order it. Which it did.

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[6] Protestants question why it took until the middle of the 2009 Hearings for the Hearing Officer to "finally" recognize Protestants' argument that M3 Eagle was not a municipal provider. Closing Statement at 1. The answer is: because the Hearing Officer actually rejected Protestants' argument on that issue, and instead based his ruling on a different section of the water code. Protestants had argued that M3 Eagle did not meet the present tense definition of "municipal provider" in I.C. § 42-202B(5). The Hearing Officer rejected this argument, and instead ruled that M3 Eagle did not "qualify" as a municipal provider under his interpretation of I.C. § 42-202(2). 2009 Hearing Tr. p. 1759-70, 2174-79. Of course, the result reached by the Hearing Officer was the same result Protestants desired. However, the fact is that the Hearing Officer did not agree with Protestants' argument, and based his ruling on a completely different section of the water code (Section 42-202) than relied on by the Protestants (Section 42-202B).

Protestants continue to cite *Lowery v. Bd. of County Commissioners*, 115 Idaho 64, 764 P.2d 431 (Ct. App. 1988) (*"Lowery I"*),[7] for the proposition that a quasi-judicial agency (in that case a county commission) has no ability to settle litigation in which the agency's decision has been challenged on judicial review. However, *Lowery I* did not even address this question, much less announce such an extraordinary rule. *Lowery I* dealt with only two issues. First, it addressed the form of the district court's decision (and, specifically, its failure to order a remand). Second, it dealt with attorney fees under I.C. § 12-121 in the context of a judicial review proceeding. The language quoted by Protestants has to do only with the *Lowery I* Court's attorney fee analysis. The *Lowery I* Court found that Ada County had adopted such a "passive, nonpartisan and removed posture on appeal" that attorney fees should be awarded only against the private party who obtained the conditional use permit and pulled the laboring oar in district court. *Lowery I*, 115 Idaho at 71, 764 P.2d at 438. Everything the *Lowery I* Court said about "the government's role [being] limited to defending its decision below," *id.*, should be understood in that context.

In short, the *Lowery I* case has nothing to do with the remarkable proposition urged by Protestants. Indeed, there is nothing in Idaho law—or in the jurisprudence of any other jurisdiction of which we are aware—prohibiting a state agency from availing itself of all options as a litigant when it is the defendant in a district court challenge to its permitting decision. If anything, the opinion supports the opposite conclusion. In its ruling denying attorney fees

[7] Subsequent to the Court of Appeals' decision in *Lowery I*, the Idaho Supreme Court decided *Lowery v. Bd. of County Comm'rs for Ada County* (*"Lowery II"*), 117 Idaho 1079, 793 P.2d 1251 (1990)—an appeal based on the same district court decision appealed in *Lowery I*, but not a further appeal of the *Lowery I* decision. *Lowery I* and *Lowery II* involved separate but related appeals from the same district court decision overturning Ada County's decision to issue a conditional use permit to the applicant (the Hayeses) and awarding attorney fees to the Lowerys. Both appeals (one by the Hayses and one by the County) ended up at the Idaho Court of Appeals but, for some reason, were never consolidated. An explanation of the two cases' similarities and differences is not necessary here because the *Lowery II* decision does not change the fundamental point M3 Eagle makes about *Lowery I*—that the case offers no support for the Protestants' argument that an agency, having once sat in a quasi-judicial role, has no authority to settle a judicial review case challenging its decision.

against the county under the facts of that case, the *Lowery I* Court was careful to point out that there may be circumstances where "an administrative or government tribunal could be subjected to an award of attorney fees to an appellant for frivolously defending its decision below." *Id.* at 71, 764 P.2d at 438. In other words, the agency must be in a position to make strategic decisions, including a decision to settle, rather than blindly defend a decision that may be in error. The law simply does not compel agencies to be tied into only one rote and unbending defensive posture as Protestants contend.

Moreover, the other holding in *Lowery I,* dealing with the form of the decision, reinforces correctness of the actions by the District Court in approving the Stipulation and remanding the matter in this case. In *Lowery I*, the Court ruled that the district court was obligated to remand the matter to the quasi-judicial decision-maker for further proceedings that must be in accordance with district court's order, but are otherwise subject to the administrative body's broad authority and discretion. *Lowery I*, 115 Idaho at 67, 764 P.2d at 434.

Nothing about this process is bizarre, absurd or frivolous, let alone cause to deem the Application void *ab initio*. The Application was and is for a future needs municipal water right to supply the City's Spring Valley region. M3 Eagle applied for the right because it believes it is entitled to obtain such a water right. However, IDWR has insisted that City be the applicant and ultimate permittee. M3 Eagle has obliged by executing the Assignment to City now, during the application stage.[8] Contrary to Protestants' assertions, by virtue of the Assignment, M3 Eagle will not own the Permit; it will be issued in City's name. There is no merit to Protestants' suggestion that "M3 is bound and determined to own a future needs municipal water right," Final

[8] Protestants ask "How can M3, a non-municipal water provider, and therefore illegal to have a RAFN water right, assign a RAFN water right permit to the city of Eagle?" Closing Statement at 1. Aside from M3 Eagle's belief that it may in fact legally hold a RAFN water right, the answer to this question is that M3 Eagle did not assign a RAFN permit to City—M3 Eagle assigned its RAFN water right application to City, as well as the non-RAFN permit issued in connection with the Hearing Officer's January 2010 Order.

Argument at 1, or that these Remand Proceedings "circumvent the law" and are designed to "allow a private developer to own a thirty (30) year future needs municipal water right worth millions." *Id.* at 2.

The Remand Proceedings were ordered by the District Court to allow for the presentation of evidence that was not presented during the 2009 Hearings because, at that time, IDWR had not insisted that City be the applicant. Thus, the Remand Proceedings' scope is limited to the Remand Issues: the annexation of Spring Valley lands; City's overall reasonably anticipated future needs; and Spring Valley's needs in relation to the rest of the City. M3 Eagle and IDWR agreed that there is sufficient evidence in the 2009 Hearing Record to resolve the hydrogeological issues presented in the Judicial Review Case,[9] and to satisfy the statutory criteria for approving the Application. These issues have been decided by stipulation, and therefore were excluded from the Remand Proceedings.

In summary, the processing of the Application has followed a simple, albeit lengthy, path. First, M3 Eagle filed the Application and put on evidence to support it. IDWR ruled that M3 Eagle did not qualify to hold a RAFN water right, and the Judicial Review Case ensued. As part of a settlement, IDWR insisted that City be the applicant, so M3 Eagle executed the Assignment. The District Court accepted the Stipulation and its exhibits and remanded the matter to the agency for further proceedings. Additional evidence was put in the administrative record in conformance with the District Court Order. More bluntly: an aggrieved applicant filed

[9] Protestants ask "What is going on?!" in regard to the finding in the Stipulation's Exhibit A that "[t]he water supply in the aquifer is sufficient for the purpose it was sought to be appropriated as identified in the M3 application." Closing Statement at 2. The answer to this question is that, rather than fully litigate M3 Eagle's challenges to IDWR's findings and conclusions concerning hydrogeological evidence presented in the 2009 Hearings, M3 Eagle and IDWR stipulated to findings based on what they could agree was a preponderance of evidence in the 2009 Hearing Record. M3 Eagle and IDWR certainly are not "apprehensive about the full truth and scientific assessment of the sustainability of the aquifer." Closing Statement at 4. Despite there being evidence in the record that M3 Eagle and IDWR may not agree on, they do agree that "[t]he water supply in the aquifer is sufficient for the purpose it was sought to be appropriated as identified in the M3 application." That truth is undisputed.

a lawsuit against the permitting agency; the applicant and agency settled most issues, and stipulated to a remand for consideration of narrow questions. Protestants' complaints about the process have no merit.

B. The Development Agreement and Assignment are consistent with each other.

Protestants' say the Development Agreement conflicts with, and effectively blocks, the Assignment.[10] Nothing could be further from the truth, and the Hearing Officer should not accept Protestants' invitation to interpret the Development Agreement differently than the interpretation made by the very parties who wrote and entered that contract—not to mention in a way that conflicts with the Stipulation, the District Court Order, and the terms of these Remand Proceedings. The Development Agreement does not prohibit the course of action undertaken by M3 Eagle in making the Assignment, or by City in accepting it.

As explained in M3 Eagle's Post-Hearing Brief at 29-31, the Assignment is fully consistent with specific language in the Development Agreement. Despite provisions in the Development Agreement contemplating M3 Eagle's "phase by phase" conveyance of water rights to City, other provisions allow for the Assignment's one-time, up-front conveyance that was mandated by the January Agreement.[11] City and M3 Eagle—the only parties to the Development Agreement—have interpreted it in this way, and it is not appropriate for a stranger to the contract to assert a different interpretation.

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[10] Protestants ask: "How can M3, a non-municipal water provider assign a RAFN water right permit to the city of Eagle in phases, which could be over a 30-year window?" Closing Statement at 1 (emphasis in original). The answer is that the Assignment is not in phases, it is immediate and it is an established fact. All remaining interest M3 Eagle holds in the Application and resulting Permit will terminate the instant the Second Amended Order becomes final and non-appealable.

[11] The Development Agreement § 2.2(e) 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 the January 2010 Agreement and Stipulation, and by the District Court Order.

Protestants' position is that they know better than the two parties to the Development Agreement how that contract must be interpreted. Protestants lack standing even to make such a claim, and they are not third party beneficiaries. But even if Protestants had standing, the fact is that the parties to an agreement can, by course of conduct—and certainly in response to an administrative ruling, district court litigation, and a settlement—interpret the terms of the agreement or even change them to conform to the agency's positions of policy or law.

In any event, one struggles to divine a substantive difference between, on the one hand, assigning a water permit (or application) all at once and, on the other hand, assigning it in stages. The result is the same, and this result remains the central point of this portion of the Development Agreement: the water right and the water system will be held by City, even though they are obtained and built by M3 Eagle. The fact that Protestants are making this argument underscores the fact that they simply oppose the Spring Valley planned community project.

C. Protestants' waiver of rights to individually participate was legal and appropriate.

Early in the contested case, thirty-some individual protestants asked the Hearing Officer to allow David Head or John Thornton to represent their interests. However, IDWR Rule of Procedure 202, IDAPA 37.01.01.202, prohibits non-lawyers from representing other individual protestants (except in limited circumstances not applicable here). But the Rule does allow an unincorporated association or non-profit organization to be represented by an officer. So, as an accommodation, the Hearing Officer allowed the individual protestants to band together as the North Ada County Groundwater Users Association ("NACGUA") for the purpose of being represented by NACGUA officers Mr. Thornton and Mr. Head. As a condition of this representation, the Hearing Officer required that the individuals' protests be subsumed into the NACGUA protest and that the individuals waive their rights "to independently participate in discovery, to call and examine witnesses, and to administratively or judicially appeal any

decision by IDWR." *Prehearing Order and Notice of Prehearing Conference* at 2-3 (Aug. 5, 2008). In other words, the Hearing Officer ordered that all individuals represented by Mr. Head and Mr. Thornton be members of NACGUA, and that those individuals' participation as protestants in the contested case occur solely through NACGUA.[12]

Now Protestants "wonder if this waiver is even legal." Closing Statement at 4. Yes, the waiver was legal and appropriate under the Rules cited above. Moreover, the waiver was necessary to accommodate the Protestants' desire to band together under common representation by non-lawyers. The Hearing Officer's waiver requirement was structured to ensure that the party to this contested case was the NACGUA organization, and that it alone, not its individual members, could appeal (or participate in an appeal). The Hearing Officer bent over backwards to accommodate Protestants.

In any case, this question about the waiver's legitimacy presumably is raised by Protestants only because none of the Protestants chose to intervene as parties in the Judicial Review Case, which would have allowed them to participate in that proceeding and at least provided them standing to participate in settlement negotiations. For this, Protestants have no one to blame but themselves.

In fact, NACGUA representative John Thornton belatedly attempted to intervene in the Judicial Review Case *pro se* as an individual, but this was in direct conflict with the terms set down by the Hearing Officer in the first place. Therefore, the Court appropriately denied his intervention request because, as one of the individual protestants who banded together under NACGUA organization, he had agreed to give up his status as an individual protestant in the

[12] Protestants ask: "Why was this waiver not a requirement for the Eagle Pines Water Users Association spokesperson?" Closing Statement at 4. The answer is that Mr. Smith filed a protest individually and as Eagle Pines' spokesperson. No other protestant requested that Mr. Smith represent their interests. As a result, Mr. Smith was allowed to participate as an individual protestant and as Eagle Pines' spokesperson without any need for any other protestant to sign a waiver or have such person's protest subsumed into that of Eagle Pines.

administrative proceeding and waive his right to independently participate in administrative or judicial proceedings.

Protestant Alan Smith also could have intervened in the Judicial Review Case as a *pro se* individual party (because he had participated as an individual protestant in the administrative case), but instead he chose to participate in the Judicial Review Case only as a non-party *amicus curiae.* He fully availed himself of this status and presented briefing and argument. But he did not convince the District Court to reject the Stipulation or establish different requirements for the Remand Proceedings.

D. The District Court rejected Protestants' arguments.

At the June 14, 2011 hearing before the District Court in the Judicial Review Case (attended by counsel for M3 Eagle and IDWR, as well as by the Protestants), Protestant Alan Smith presented an *Amicus Curiae Brief* and *Supplemental Amicus Curiae Brief.* In these briefs and in his oral presentation to the District Court, Protestant Smith made the same arguments (citing the same cases) that are made to the Hearing Officer in Protestants' Final Argument, including the contention that IDWR was without authority to settle the Judicial Review Case by entering into the Stipulation with its Exhibits A and B, and that the Assignment is invalid. Protestant Thornton argued to the District Court (although he was not a party) in support of Mr. Smith's theories. Obviously, by issuing the District Court Order fully approving and incorporating the Stipulation, Judge Sticklen rejected the Protestants' arguments. The District Court Order is the law of this case; Judge Sticklen's approval of the Stipulation and its Exhibits cannot be altered in these Remand Proceedings.

E. Other statutory criteria, including financial resources, are satisfied.

Protestants assert that the Remand Proceedings are invalid because the scope is limited to the Remand Issues, and does not include the presentation of evidence on all the statutory criteria

listed in I.C. § 42-203(A)(5). Final Argument at 9; Closing Statement at 4. They are wrong. As mentioned, the Remand Proceedings were designed for a limited presentation of evidence because there is sufficient evidence in the record developed during the 2009 Hearings to satisfy the statutory criteria. M3 Eagle's Post-Hearing Brief at 9-10 describes how the Stipulation's Exhibits A and B—which were based on the 2009 Hearing Record—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), and how a preponderance of the evidence presented during the 2009 Hearings and the Remand Hearing satisfies the criteria concerning good faith, financial resources, and conservation of water resources, I.C. § 42-203A(5)(c), (d), and (f).

Protestants' only specific question in this regard is their contention that City has not yet demonstrated sufficient financial resources to put the requested water right to beneficial use. Final Argument at 9-10; Closing Statement at 4. Of course, the reason no such evidence was introduced is that the question of financial resources is not within the limited scope of evidence of these Remand Proceedings and because it already is answered by the 2009 Hearing Record; the Remand Proceedings simply augmented that record on the points specified in the District Court Order and Stipulation. As M3 Eagle described in its Post-Hearing Brief, there is ample evidence in the record showing that this statutory criterion is satisfied.

City and M3 Eagle were proceeding diligently toward development of the Spring Valley project when the 2009 Hearing Record closed, and have since continued toward that goal with an expected construction start date in 2013. Tr. pp. 263-64, 268 (Brownlee); Ex. R9. No evidence has been presented to suggest that M3 Eagle's financial picture has changed since the 2009 Hearings, and the evidence presented then showed that it is reasonably probable that M3 Eagle can finance and build Spring Valley. *See* IDAPA 37.03.08.45.01.d.i (requiring applicants to show that it is "reasonably probable that funding is or will be available for project

construction"); *see also Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 447 (1985) (explaining why the standard is reasonably probable that an applicant will be able to finance a project, rather than requiring evidence that an applicant "then and there" has the financial resources to complete the project).

Protestants wrongly suggest that City is required to show that it (not M3 Eagle) has sufficient financial resources. City is not funding the construction of the Spring Valley project; the Development Agreement requires M3 Eagle to do so. This is the kind of "growth paying for itself" that Protestants consistently advocated at City's public hearings on the Spring Valley project. In any case, the 2009 Hearing Record already shows, and therefore City can show, that it is reasonably probable that funding is or will be available for project construction by virtue of the contractual obligations set forth in the Development Agreement and M3 Eagle's proven financial resources. This is a matter of record in this case, and it is not subject to further debate.

III. CONCLUSION

For the reasons described herein and in M3 Eagle's Post-Hearing Brief, the Hearing Officer should issue a Second Amended Order and Permit to City for the full future needs municipal water right requested in the Application: 23.18 cfs peak diversion rate, and 6,535 acre-feet maximum annual diversions.

DATED this 7th day of December, 2011.

Respectfully submitted,

GIVENS PURSLEY LLP

By Jeffrey C. Fereday

Jeffrey C. Fereday
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2011, the foregoing was filed, served, or copied as follows:

FILED	
Idaho Department of Water Resources 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098	____ U. S. Mail __X__ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
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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