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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-32573 IN THE
NAME OF M3 EAGLE LLC

**M3 EAGLE'S RESPONSE TO
PROTESTANTS' POST-HEARING BRIEF**

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INTRODUCTION

Applicant M3 Eagle LLC (“M3 Eagle” or the “Applicant”) hereby submits the following response to the *Brief and Written Argument* (“Protestants’ Brief”) submitted by Protestants Eagle Pines Water Association, North Ada County Ground Water Users Association, Alan Smith, and Norm Edwards on September 11, 2009.¹ This response supplements M3 Eagle’s two briefs filed on September 11, 2009, *M3 Eagle’s Post-Hearing Brief on the Merits* (“Initial Brief”) and *M3 Eagle’s Brief in Support of its Qualification as a Municipal Provider* (together, “September 11 briefing”).

Protestants’ Brief consists primarily of bald conclusions unsupported by the law or the record, inaccurate references to exhibits and discovery documents, and not a single citation of substantive testimony presented during 16 days of hearing. Protestants begin their brief with the observation that: “So many times, attorneys provide the one who has to decide the case with briefs . . . without any real ‘authorities’ or ‘case law’ to back up those arguments.” Protestants then proceed to provide an example of exactly this problem; their Brief contains virtually no authority, and the case law they do cite is unavailing.

For instance, Protestants call the Hearing Officer’s attention to *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001), a water right transfer dispute.² But the situation in *Barron* is starkly distinct from that in the present case. Indeed, the transfer applicant in *Barron* was admonished for his refusal to provide information the Department requested five times before

¹ Protestants continue to caption their pleadings and briefs incorrectly under 63-32576. The correct number for this application is 63-32573.

² *Barron* involves the Department’s denial of an application for transfer of a portion of a primary surface water right leaving a supplemental ground water right in place at the original location; it does not provide useful guidance as to the proof required of a new water right applicant.

giving up. *Barron*, 135 Idaho at 416, 18 P.3d at 221. Compare that to the substantial effort undertaken by M3 Eagle over the last three years to test, model, evaluate, and accurately characterize the public water resource and the Project’s potential effects upon it. This information, most of which M3 Eagle provided to the Department well before the hearing, shows the Pierce Gulch Sand Aquifer (“PGSA”) is highly productive—thicker, more regionally extensive, and more robustly recharged than previously thought. The additional work and analysis that M3 Eagle insisted its experts carry out served to reinforce earlier findings of sufficient water supply in the area. As a result, the proof is that the resource is more than sufficient for the Project, and its proposed diversion will have minimal effect on other water rights, even after fifty years of sustained pumping at full build-out withdrawals.

But that is not enough to satisfy Protestants. Their brief makes no secret of their ultimate objective—a requirement that M3 Eagle indemnify them for any and all future declines in their ground water levels regardless of whether M3 Eagle causes such impacts and regardless of how poorly constructed, shallow, or inadequate their own wells are. What they want is the very thing the U.S. Supreme Court refused to grant to the waterwheel operator in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912)—the ability to prevent the full use of a huge public water resource for the benefit and convenience of a few.

Nowhere is this clearer than in the section of Protestants’ Brief dedicated to criticizing the “unpredictable and non-objective nature” of the reasonable pumping level requirement. Protestants’ Brief at 10. Protestants suggest—in contravention of the express dictates of Idaho’s Constitution, the Idaho Code, and Idaho’s Supreme Court—that the Department should jettison the reasonable pumping level requirement and “create a more objective standard” to replace it. *Id.* In addition, Protestants insist that water right applications be denied if the “full impacts on

other water users” are not known precisely at the application stage. Protestants’ Brief at 7. They believe that unused “paper water rights,” such as unprocessed applications and unfulfilled permits, should block new beneficial uses of water. Protestants’ Brief at 9-10. At the end of the day, they demand that no new water use be allowed if there is a chance of the smallest impact on their pumping levels or artesian pressures. Protestants’ Brief at 5, 10.

Protestants’ proposals cannot be reconciled with the constitutional principle of optimum development. Their view contradicts laws requiring reasonable pumping levels and efficient diversion methods, requiring a showing of actual injury before limiting another water right, allowing mitigation of injury rather than automatic curtailment, and recognizing that not all possible questions reasonably can be answered before granting rights to develop shared public resources. Protestants’ quarrel, it seems, is with our Constitution and the water code. Their complaints are misdirected at the Department—it is bound to follow the law.

On the municipal provider qualification issue, there is nothing new. The Hearing Officer previously disposed of the Protestants’ arguments under Idaho Code § 42-202B(5) as presented in their *Motion for Reconsideration* and oral argument on May 28, 2009.³ The Hearing Officer invited briefing on the related question of whether, under Idaho Code § 42-202(2), an applicant may obtain a permit for reasonably anticipated future needs (“RAFN”) despite the fact that it is not then (at the time of application) serving municipal customers. On this question, Protestants appear to be confused; they do not acknowledge that section 42-202(2) presents a legal question distinct from the one they raised. Instead, they offer up their prior *Motion for Reconsideration*, which fails to address the new question altogether.

³ Protestant’s *Motion for Reconsideration* is undated, but is file-stamped May 29, 2009. A copy was submitted to the Hearing Officer and argument was heard on the motion on May 28, 2009. Tr. pp. 1941 *et seq.*

M3 Eagle believes it has met—indeed, exceeded—the preponderance of the evidence standard on every statutory and regulatory criterion. M3 Eagle respectfully requests the Hearing Officer grant it the full RAFN municipal water right for which it applied.

ARGUMENT

I. PROTESTANTS ASK THE DEPARTMENT TO IGNORE THE APPLICABLE LEGAL STANDARDS.

A. Protestants misstate the standard of proof for approving an application for water right permit.

Protestants describe M3 Eagle’s standard of proof as being both “clear and convincing evidence” and “substantial evidence.” Protestants’ Brief at 7, 13, 21. Neither is correct.

The substantial evidence standard is applicable only upon judicial review.⁴ This is a contested case, not a judicial review. The applicable standard here is “preponderance of the evidence”—in other words, more likely than not.⁵

The preponderance of the evidence standard actually is tougher than the substantial evidence standard identified by the Protestants.⁶ But it is a test that the M3 Eagle easily meets. We mention it because it is important to correctly articulate and apply the standard in order to protect and properly evaluate the Department’s ruling in any court review that might follow.

The preponderance of the evidence standard, by the way, is considerably more lenient to the party carrying the burden of proof than the clear and convincing evidence standard identified

⁴ Idaho Code § 67-5279(3)(e); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 362-63 (1993).

⁵ “Absent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings 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)).

⁶ “Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla.” *Spencer v. Kootenai County*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008).

by the Protestants. Protestants' Brief at 7. The standard of clear and convincing evidence requires a heightened level of proof and is applicable in special cases such as water rights abandonment⁷ or forfeiture,⁸ fraud,⁹ and adverse possession¹⁰—cases where the allegation is disfavored in the law. It is not applicable here.

While the Protestants identify the “substantial evidence” and “clear and convincing” evidence tests, they apparently really have another test in mind. They seem to believe that the standard of proof in this contested water case is one wherein all uncertainty and doubt is removed. *See, e.g.*, Protestants' Brief at 5-7, 10, 19. *See also* Tr. pp. 3861-62, 3864-65, 3868, 3876 (Thornton closing statement) and 3896 (Smith closing statement). That, of course, is not the requirement under any evidentiary rule, and certainly not under the preponderance of the evidence standard. 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).

The record in this case overwhelmingly supports M3 Eagle's application, far beyond a preponderance of the evidence.

⁷ *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982).

⁸ *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001).

⁹ *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000).

¹⁰ *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

B. Protestants, lacking any evidence of likely injury, instead criticize the constitutional and statutory bases for the reasonable pumping level standard.

In their brief, as in the hearing, Protestants cite no evidence that their water rights will be injured in any way by M3 Eagle's pumping. Instead, they engage in a kind of transference and rail against the "unpredictable and non-objective nature of the 'reasonable pumping level' language that is employed in dry well circumstances" and ask the Department to "create a more objective standard with language that creates some certainty and protection" Protestants' Brief at 10.¹¹ This demand fails to recognize that the reasonable pumping level standard is mandated by statute,¹² that Idaho's Constitution sets forth a policy of "optimum development of water resources,"¹³ that the Idaho Supreme Court has repeatedly reinforced the reasonable pumping level (and the related reasonable means of diversion) standard,¹⁴ that the Court has enforced the closely-related state goal of maximum use of water resources,¹⁵ and that the Department has consistently applied these principles.¹⁶ Protestants ignore this settled law, despite their citation to some of it (*Parker v. Wallentine*). Protestants' Brief at 10-11.

¹¹ This section of Protestants' Brief under the heading "Reasonable (Historic) Pumping Levels" is a verbatim recitation of a portion of Mr. Thornton's closing argument at hearing. See Tr. pp. 3875-76.

¹² Idaho Code § 42-226.

¹³ Idaho Const. art XV, § 7.

¹⁴ *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("Appellants contend that our Act's use of the phrase 'reasonable pumping levels means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels. We agree . . ."; see also *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

¹⁵ *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907); *State v. Hagerman Water Right Owners*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (partial forfeiture of water rights advances the State's "goal of securing maximum use and benefit of our natural water resources.")

¹⁶ See, e.g., Condition No. 5 of City of Eagle's Amended Permit No. 63-11413 (issued by IDWR Nov. 20, 1998).

The Department cannot here “create” a standard to apply in water right applications, and certainly not one differing from the reasonable pumping level standard and related principles. It is wrong to ask it to do so.

II. PROTESTANTS IGNORE THE ACTUAL EVIDENCE IN THE RECORD—INCLUDING ALL OF THE HEARING TESTIMONY—AND THEY MISCONSTRUE THE PORTIONS OF THE RECORD THEY DO CITE.

Protestants contend there is “a vast amount of conflicting evidence” in the record of this matter, and that there are “more ‘unknowns’ than ‘knowns’ about the sustainability of the aquifer, the impacts to other wells, recharge of the aquifer, water levels of ground water, and ground water flow.” Protestants’ Brief at 1. Not so. The record demonstrates that a much greater understanding of the PGSA in North Ada County is now available owing to M3 Eagle’s commissioned studies—much more than necessary to support granting a water right permit. As to “conflicting evidence,” that too is unsupported rhetoric; the record actually contains very little disagreement on any determinative scientific or technical question. On the critical points of water availability and lack of injury, there is no disagreement whatsoever.

Protestants fail to address or even reference the hearing testimony or to evaluate what actual opinions were given either by the Staff or Protestants’ expert, Dr. Ralston. They do not grapple with how any of these witnesses responded to cross-examination. At the same time, Protestants fail to point to any contradiction or weakness in the opinions provided at hearing by M3 Eagle’s experts or by Messrs. Dittus or Whitney. Instead, Protestants’ Brief cites (and often misquotes¹⁷) “possibilities” or non-germane points lifted (often without context) from a few

¹⁷ M3 Eagle will not discuss all of Protestants’ inaccurate quotes, but a couple of examples from page 4 of Protestants’ Brief are in order. Protestants quote Ex. 12 p. 241 as saying, “Some wells will have to be deepened or replaced.” The actual quote is: “Development of additional municipal ground-water supplies, and associated watertable drawdowns, may require some existing wells to be deepened and/or replaced.” Protestants quote another passage from the exhibit’s same page as stating: “Artesian wells may cease to flow.” The intent appears to be to suggest that it is M3 Eagle’s water diversions that would do this. The actual quote is more complex: “Development

exhibits. But these citations establish not a single fact displaying any meaningful disagreement between experts, much less any that would support denial of the Application. Protestants cite Staff's musings about possibilities. They reference Dr. Ralston's belief (whether germane or not) that the evidence he reviewed does not present in his mind a "compelling" case as to the continuation of the PGSA to the Payette Valley. But possibilities, no matter how they are presented, do not tilt the scales that measure the preponderance of the actual data and expert opinion evidence. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

A. All evidence in the record supports a conclusion that the water supply is sufficient for M3 Eagle's proposed needs; the statements cited in Protestants' Brief do not show otherwise.

(1) M3 Eagle stands by its experts' statements that Protestants cite in their brief.

To support their contention that there is "conflicting evidence" about the sufficiency of the water supply and the potential impacts of M3 Eagle's pumping on area ground water levels, Protestants mainly cite documents produced by M3 Eagle's own experts. Indeed, over half of the quoted statements listed on pages 3 to 5 of Protestants' Brief are attributable to M3 Eagle's exhibits. These statements, however, are not conflicting and they do not contradict these experts' testimony that the PGSA is sufficient to supply M3 Eagle's needs or that the Project's diversions will not injure existing water rights.

For example, the statement that "Water levels would likely be lowered to some degree in some of these wells under long term pumping," Ex. 42(4) at 10 (misquoted in Protestants' Brief at 3), is nothing more than an acknowledgement of the basic hydrologic fact that ground water pumping can be expected to reduce ground water levels over time. Similarly, take the statement

of additional wells and full development of existing municipal water rights will cause artesian pressures to decline over time throughout the Star-Eagle area. This decline of artesian pressures may cause some wells that flow at ground surface (or above) to cease doing so."

from Dr. Ralston's brief initial memorandum to his clients (partially quoted on page 7 of Protestants' Brief but set forth here in full) that "[c]ontinued operation of the wells would result in an ever increasing cone of depression (area of water level decline) until pumping effects reach the recharge and/or discharge areas." Ex. 46 p. 5. Again, this is a statement of a hydrologic principle, not (as portrayed in Protestants' Brief) a conclusion that M3 Eagle's pumping will cause adverse or even unusual impacts to any water right, much less injury that would require denial of M3 Eagle's water right application.

Protestants also quote from Exhibit 67 (mistakenly referring to it as Exhibit 68), a 1992 technical report co-authored by Mr. Squires, Dr. Wood, and Dr. Osiensky, for the proposition that "[t]he Boise aquifer system is limited in areal extent and depth." Protestants' Brief at 3. While it would seem self-evident that every aquifer system is limited in area and depth, Protestants evidently are attempting to assign to the PGSA findings from that 1992 technical report. But the 1992 report did not evaluate the PGSA. When co-author Dr. Osiensky was asked whether the study evaluated the PGSA, Dr. Osiensky testified, "No, it did not. . . . It dealt primarily with the Terteling Springs Sand Aquifer and it . . . covered the area primarily within the Boise City area east of Cloverdale." Tr. p. 3458. This report on a separate aquifer system is not relevant to the technical issues before the Hearing Officer in this case.

Protestants also recite a statement in the 1992 report that "[i]ncreased withdrawal coupled with decreased replenishment will eventually lead to water level declines." Ex. 67 p. 62. While the correctness of this statement as a general hydrologic principle is not in dispute, Protestants' Brief implies that this is a reference to the PGSA. It is not. In fact, this statement in the 1992

report is directed specifically at an aquifer in southeast Boise.¹⁸ Ex. 67 p. 62 (“water levels in wells in parts of the southeast Boise area have declined at least 40 feet in the last 20 years.”). It was this same southeast Boise aquifer—now known as the Boise Fan Aquifer, designated a Ground Water Management Area after the 1992 report—that Mr. Squires described as being “in equilibrium” and “one of the successes of IDWR’s administration” due to its now-stabilized ground water levels. Tr. pp. 3250, 3247.

Protestants’ use of this quote from Exhibit 67 about yet another non-PGSA aquifer does not illuminate any issue in the present case. While it is a truism that increased withdrawals together with decreased recharge will cause ground water levels to decline, here the undisputed facts, including testimony from Protestants’ own expert, is that the PGSA exhibits neither decreased recharge nor aquifer declines.

(2) Protestants mischaracterize Staff’s and Dr. Ralston’s findings.

Protestants also attribute words and views to Dr. Ralston that are not supported by the record. For example, they cite Dr. Ralston for the statement that “water levels in the PGSA near M3 are declining and suggest that current aquifer discharge rates exceed current recharge rates.” Protestants’ Brief at 7, quoting Ex. 49 (Ralston memo) at 2. But these are not Dr. Ralston’s words. Rather, they are from his memorandum reporting to his clients verbatim what the Staff wrote in its March 2, 2009 memorandum, Ex. 50. Moreover, Protestants recite this statement without the slightest acknowledgement that (as discussed below) neither Staff nor Dr. Ralston supported it at hearing.

¹⁸ While neither had been formally named at the time, Exhibit 67 addressed the Terteling Springs Formation Aquifer and what came to be called the Southeast Boise (a/k/a “Boise Fan”) Aquifer. Tr. pp. 3245-50 (Squires).

Our Initial Brief at 15-16 already has explained at some length what Dr. Ralston did say about this point. Suffice it to say that when asked by Mr. Smith at the hearing whether he agreed with that statement, Dr. Ralston immediately responded, “I’m not sure that I do,” and then followed this with several additional statements in response to Mr. Smith’s attempts to elicit some kind of endorsement of the Staff’s statement. Tr. p. 2317. None of his testimony added up to such an endorsement. Tr. pp. 2323-24. At the hearing, the Staff likewise did not provide an opinion that water levels in the PGSA are declining; indeed, as discussed below, at the hearing Staff substantially retreated from the entire subject of water level trends.¹⁹

Another example of Protestants’ creative approach to the record is demonstrated by their take on statements in Dr. Ralston’s memoranda questioning whether available data support a conclusion that the PGSA is laterally continuous from the M3 Eagle site to the Payette River Valley. Protestants proclaim that “Dr. Ralston is of the strong opinion that the north and northwest boundaries of the PGSA are along the northern boundary of the M3 site.” Protestants’ Brief at 8.

However, Dr. Ralston’s opinion, when probed through cross-examination, came down to his belief that the evidence he reviewed was not “compelling” in demonstrating that the PGSA extends from the M3 Eagle site to the Payette River Valley. Tr. p. 2234. He did not opine that the PGSA ends abruptly at the northern and western boundaries of the M3 site, as Protestants evidently are suggesting. Protestants’ Brief at 8. Indeed, as pointed out in our Initial Brief, Dr. Ralston found a “reasonable geologic, hydrologic basis” for the conclusion that the PGSA

¹⁹ Even if Staff had opined that PGSA water levels are declining, this hardly could overcome the uncontroverted evidence from Mr. Dittus, Mr. Squires, Dr. Osiensky, and several other sources (including long-term monitoring data) that there are no declines in the PGSA. Of course, Mr. McVay, the Staff’s worker on the question of aquifer level measurements, ultimately testified that he was not evaluating aquifer level trends and was unsure what aquifers he was measuring. See discussion beginning on page 14, below.

extends, at least, “perhaps a mile or so to the west” of the M3 Eagle property. Tr. p. 2221. He conceded that the Aquifer could extend in to the Payette Valley. Tr. p, 2234. He knows of “no evidence” that it does not. Tr. p. 2263.

And, contrary to Protestants’ assertion on this point, Staff did not “appear to agree” with Dr. Ralston’s alleged “strong opinion.” Protestants’ Brief at 8. Rather, Staff merely recited verbatim Dr. Ralston’s statements in their Staff Memo and concluded that “[t]he determination that the regional flow direction is northwest toward the Payette River is less convincing” than the evidence showing a westerly ground water flow beneath the M3 Eagle site. *See* Ex. 50 at 8, 15-17. The Staff and Dr. Ralston liberally quoted each other, but neither engaged in much actual analysis.

As discussed in M3 Eagle’s Initial Brief, there is ample evidence in the record, including Dr. Ralston’s own contour mapping exercise, to set straight his equivocation about the PGSA’s lateral continuity to the Payette River Valley. Initial Brief at 16-23. His statement that he did not see “compelling evidence” of the PGSA’s continuity there is insufficient to overcome the clear preponderance, expressed by scientists who actually did the investigations spanning at least twenty years, that it is continuous to the Payette and Snake basins. Such a statement certainly does not provide a “strong opinion” on the subject that the Staff agreed with. Indeed, as Mr. Vincent testified:

I’m comfortable in saying that, I think it’s plausible that ground water flow could be from the M3 property towards the Payette drainage at some point. I don’t know that I have anything that suggests that that’s impossible. I don’t pretend to know. . . . I think that it’s very possible that flow is from M3 towards the Payette River. I don’t think that’s beyond the realm of possibility. . . . I think that it’s plausible that the aquifer could extend to the Payette River.

Tr. pp. 696-97, 2137, and 2157. In short, Protestants’ Brief simply miscasts the record and ignores the actual testimony of both Staff and Dr. Ralston.

B. Mr. McVay's analyses cannot be relied upon to show declining water levels trends in any aquifer, much less in the PGSA.

This section concerns the work of Michael McVay, a young Department hydrologist who was asked by Mr. Owsley of IDWR to evaluate certain ground water level measurements from some sixteen North Ada County wells. Tr. p. 1909. Based on the data points he was given, Mr. McVay produced ground water trend plots that he described as relying on "variable length of data records" and "sporadic data collection intervals" that together "did not allow a statistically rigorous data evaluation." Ex. 50 App A p. 4. At the hearing, Mr. McVay explained that the plots were "not intended to determine periods of rising and declining water levels in individual wells," Tr. p. 1910, that the sporadically selected data did not reflect actual seasonal highs or lows, Tr. pp. 1916-17, and that he is unaware which aquifer(s) the data came from. Tr. 2460. Nonetheless, in their Staff Memo, Messrs. Owsley and Vincent initially cited these plots as indicating slight ground water declines in the PGSA from roughly 1996 to 2008. This was the basis for the statement in their Staff Memo that PGSA water levels "are declining."

Protestants cite Mr. McVay's work for the proposition that ground water levels are declining in North Ada County. Protestants' Brief at 4 (item no. 10).²⁰ But these out-of-context

²⁰ Protestants quote Mr. McVay's statement in his January 28 memo, Ex. 906 p. 4, that "[a]ll wells classified as undifferentiated or Pierce Gulch display negative water level trends" and cite his March 2 memo, Ex. 50 App. A p. 4, that states, "All wells in the area (except 04N01E11BBB1) exhibit negative water level trends that range from -0.11 ft/year to -1.06 ft/year, with an average trend for all wells of -0.29 ft/year." Protestants' Brief at 4.

However, during his testimony later, Mr. McVay pointed out that he "made many errors, and so I wanted to graph them up and show you what those errors caused." Tr. pp. 1921-22. His corrections fundamentally changed the statements quoted and cited by Protestants. First, Mr. McVay noted, an additional non-Dry Creek well (04N01E03DAD1) exhibited rising water levels rather than only the one well cited in his March 2 memo. Tr. p. 1921. Second, he noted that his corrections resulted in non-Dry Creek well water level trends "ranging from positive 0.13 feet per year to a negative 0.49 feet per year with an average trend of negative 0.20 feet per year." Tr. p. 1925. *See also* Tr. p. 2470 (Mr. McVay responding to Mr. Smith's question whether "all of these wells, in your [March 2] evaluation, show negative water-level trends, other than that one" by stating "I revised that, and now there are two wells that display positive water-level trends that are not in the Dry Creek area.")

quotations ignore the explanation and evidence presented at hearing by all experts who testified about water level trends in the PGSA—including Mr. McVay’s own memoranda and testimony.

Mr. McVay produced two memoranda—respectively dated January 28, 2009 and March 2, 2009—ostensibly regarding “Evaluation of North Ada County historical water level trends.” The January 28 memo (Ex. 906) included his analysis of water level data for sixteen North Ada County wells. The March 2 memo (Appendix A to Ex. 50) commented on water level trends apparent in ten of the sixteen wells analyzed in the January 28 memo. Mr. McVay testified that the March 2 memo’s ten wells included only those analyzed in the January 28 memo that had water level data “beyond 2003.” Tr. p. 1923; Ex. 905 p. 19. Frankly, the McVay exercise—how it was constructed, what it was supposed to do—was never clearly explained.

In any event, Mr. McVay at least did make it very clear at the hearing that his analyses “were not intended to assign a water level trend to any aquifer, only to compare water levels in an effort to identify aquifers.” Tr. p. 1926; Ex. 905 p. 22. Indeed, in his first and last words during his narrative testimony, Mr. McVay disavowed any suggestion that his analyses were intended to determine whether water levels were rising or declining in any aquifer—much less the PGSA. Here’s how he described his analysis that resulted in the two memoranda:

[T]his analysis was conducted to compare water levels from the different wells, to each other, in an effort to identify Pierce Gulch completions from other wells - based on water level behavior. This undertaking was not intended to determine the periods of rising and declining water levels in individual wells.

Tr. p. 1910; Ex. 905 p. 1. *See also* Tr. p. 1932; Ex. 905 p. 30 (“It is important to remember that these analyses were not intended to assign a trend value to the Pierce Gulch aquifer, only to compare the wells that I was given to assess similarities and differences.”) In other words, Mr. McVay’s memoranda and testimony cannot be relied upon for the purpose Protestants cite it for:

determining whether water levels in the PGSA were or are declining (or, for that matter, whether they are increasing or remaining stable).

Despite citing Mr. McVay's analysis in their Staff Memo, at the hearing itself the Memo's authors, Mr. Owsley and Mr. Vincent, made no attempt to support that document's statement that "our review of available water level data indicates that water levels in the PGSA near M3 are declining, and suggests that current aquifer discharge rates exceeds current recharge rates." Ex. 50 at 20. This plainly was because the "available water level data" was the McVay analysis, and by the time the hearing took place that analysis no longer was being offered as indicative of water level trends.

Little wonder, then, that in response to initial questioning, Mr. Vincent did not support or further explain these "indications" or "suggestions" about PGSA water levels. Rather, he merely said that Mr. McVay's analysis was "unbiased," though "not statistically rigorous," Tr. p. 723, and that it was "a worthwhile analysis that yielded results that, perhaps not conclusive, but certainly something that needs to be considered." Tr. p. 726. Later, during his narrative and rebuttal testimony, Mr. Vincent did not mention the McVay analysis at all. Nor did he offer an opinion at the hearing that PGSA water levels are declining. And even if he had offered such an opinion, he has no evidence of it.

Mr. Owsley, upon cross-examination, also did not rely on Mr. McVay's analyses or provide such an opinion. Rather, in response to questions from Mr. Smith, he commented briefly on Figure 46 in M3 Eagle's Exhibit 44. This exhibit plots hydrographs for a number of wells, including four wells in the up-dip portion of the PGSA on the northeastern portion of the M3 Eagle property—an area of the Aquifer that, because of its proximity to land surface, is affected

by the recent negative precipitation trend. *See, e.g.*, Ex. 43 p. 4 and Tr. 1592-93 (Utting).²¹ According to Mr. Owsley, the roughly two years of data (2006-08) displayed in plots in these four up-dip wells in Exhibit 44 show a slight declining water level trend. His only mention of Mr. McVay's analysis was that, while the apparent water level changes shown in Figure 46 are "not significant," they "match coincidentally very well with the rate of decline that Mr. McVay provided." Tr. p. 3599. Mr. Owsley did not attempt to explain how this squared with McVay's testimony that his effort was "not intended to determine the periods of rising and declining water levels in individual wells." Tr. p. 1910.

Staff's failure to rely on Mr. McVay's work at the hearing or testify about PGSA water level trends is further highlighted by their express recognition that other evidence shows PGSA water levels are stable or increasing. *See, e.g.*, Tr. p. 2403 (Mr. Owsley testifying that the monitoring data for TVHP#1, as plotted in Ex. 45 Fig 17, does not show a water level decline).

Likewise, Protestants' expert, Dr. Ralston, agreed that water level trends in State and Linder and TVHP#1 PGSA monitoring wells are not indicative of long-term water level declines, Tr. pp. 2342-43,²² and that the hydrographs of United Water's Redwood Creek and Floating Feather PGSA production wells "show . . . that there hasn't been a very large, if any, water level change in these wells" Tr. p. 2348.

²¹ Mr. Utting testified that "when I saw Glanzman's figures that showed that we had some rainfall as part of the recharge water in wells SVR-9 and test well 2, that just made me smile because that's the area where I would expect to see some rainfall coming in, because the aquifer is near the surface, it's unconfined, that's where the rainfall could get in. To me, that was really good." The rainfall record demonstrates that this area has been on a downward trend in precipitation since 1997. *See, e.g.*, Ex. 45 Fig. 17.

²² Such statements are in accord with Mr. Squires's testimony that "I think in wells of known construction that have been monitored for some time, such as the State and Linder well, United Water Idaho, the State Street [i.e. TVHP#1] well United Water drilled and later donated to the Treasure Valley Hydrologic Project, those are sealed wells of known construction that have been monitored for a long time. And they generally show increases in water level over the last, you know, seven to eight years." Tr. pp. 3251-52.

Neither Mr. Owsley nor Mr. Vincent ever explained why, if Staff was interested in PGSA water level trends in North Ada, they never evaluated the records from these established North Ada PGSA monitoring wells.

Other expert testimony underscored why Mr. McVay's analyses could not support any conclusion about water level trends in the PGSA. Dr. Osiensky testified that Mr. McVay's methodology "is not what I would do." Tr. p. 3518. Mr. Squires testified in more detail about his concerns with Mr. McVay's methodology and the suggestion (in the Staff Memo if not from Mr. McVay) that water levels in the PGSA are declining. See Tr. pp. 1169-1204. Of particular note was Mr. Squires testimony that all available data from other wells known to be of good construction and completed into the PGSA (such as the State and Linder and TVHP#1 dedicated monitoring wells and the Redwood Creek and Floating Feather production wells) show increasing water levels in the PGSA despite increased production during the same time period. Tr. pp. 1181-83.

Mr. Squires also testified that only one (if any) of the wells reviewed by Mr. McVay is completed into the PGSA, Tr. pp. 1170, 1181, 1190.²³ Several wells analyzed by Mr. McVay were not of suitable construction for monitoring. Tr. pp. 1180; Ex. 45, Table 1.

In reviewing why the McVay analysis did not (and in our view could not) support an opinion about PGSA water level trends, it is important to recall a couple of points in addition to all those described above. Mr. McVay was given only 8 to 13 measurements (i.e., data points) with which to plot aquifer levels in each of the wells he was asked to evaluate. Ex. 50 App. A.

²³ As shown in Exhibit 45, Table 1, an earlier analysis by Hydro Logic, Inc. showed that twelve of the wells McVay analyzed are in the shallow river gravel aquifer, an unnamed alluvial aquifer, the Terteling Springs Aquifer, and in one case the deep geothermal system. Table 1 indicates that only three are possibly in the Pierce Gulch Sand Aquifer. *Id.* (Again, at the time of the hearing, Mr. Squires testified he believes only one likely is.) Mr. McVay testified that he does not know which aquifers any of these wells are completed into. Tr. pp. 2459-60. The well whose overall plot "showed the steepest decline" could not be compared to other wells because Mr. McVay "only had fall data" for it and he did not feel this data was applicable. Tr. p. 2471-72.

However, IDWR's records for these same wells contain from tens to hundreds of data points for each well. Ex. 45 Figs. 8-25. The complete water level data record from these wells—regardless of the aquifer involved—mainly show increasing aquifer levels over the past 8 to 10 years. Tr. pp. 1173-76, 1179-81 (Squires); Ex. 45 Figs. 8-14, 16-17, and 19-26.²⁴

But beyond this, the evidence clearly shows that one effect of Staff's approach to data selection for Mr. McVay's work, whether deliberate or not—and regardless of the fact that Staff ultimately made clear they were not calculating water level trends—was to increase the appearance of negative ground water level trends in the McVay plots.

This is because Staff not only used a small number of data points for each well and selected these from among many, but also chose points from differing times of the spring season from one year to the next. As Mr. Squires testified, and displayed graphically in Exhibit 77, Staff “pick[ed] water levels that go later and later in the year”—that is, in “the early parts of the graph, the data points were picked for March, and the middle part of the graph, the data points were picked from April, and later on from May.” Tr. p. 3202. Seasonal water levels in the PGSA decline throughout the spring, bottom out in July or August,²⁵ and then rise again to peak in approximately January. Therefore, it is obvious that comparing year one's water level, based on a March datum, with April data from year two and May data from year three will automatically introduce a downward bias into the multi-year plot; it would not reflect a real trend.

²⁴ Interestingly, most of the wells McVay reviewed showed an overall decline since the beginning of data records, an abrupt downward spike of approximately four feet, and an increasing trend in the past eight or so years. Mr. Squires described the downward spike as “a change in measurement datum,” Ex. 77, but no other expert attempted to describe what caused this decline.

²⁵ See, e.g., Ex. 45 Fig. 5.

Indeed, simply selecting some data points from a larger set of points itself introduces bias. This is illustrated in Exhibit 77's comparison of plots "a" and "c," both of which use all of the data, with the McVay plot, "b."²⁶ Plot "c" is particularly revealing in that it separates the well's water level trends into logical groups. As Mr. Squires explained, "in the trend from 2001 through 2008 our regression showed, as our visual inspection showed, that there is an increasing water level over that period." Tr. p. 3201. Again, this was using all the data, not a selection of data.

As Mr. Squires also explained, the researcher not using all the data should attempt to eliminate the variability of the seasonal trend by selecting water levels at the full recovery period (i.e., at the top of the hydrograph) each year. Tr. pp. 3208, 3201. Mr. Squires and his staff applied this technique to the IDWR data in producing the plot labeled "d" in Exhibit 77. The result in "d" is "the water levels in green" that Mr. Squires plotted on this exhibit based on the top-of-hydrograph values "closer to January 1" in these years. Tr. p. 3204. As Mr. Squires testified, using these data points "show[s] even more of an increase [in water levels] than all of the data on the lower left"—that is, even a greater increase than the "all data" regression in the exhibit's plot "c." Tr. p. 3204. These increasing green values on Exhibit 77 compare to the decreasing or flat trend values in red on plot "c." The red values depict the McVay plot which used the variable selection, or "later every year" technique.

Mr. McVay testified that he is "not sure" of all the reasons the data he used was collected on variable sampling frequencies, and agreed it may have been a case of "get the data

²⁶ Exhibit 77 includes two pages, evaluating two different wells from McVay's list. Both pages are set up the same way with four separate plot examples, so the references here simply refer to them in the singular. Both pages present plots based on all of the data (plot "a"), the McVay plot (plot "b"), a third using all the data and marking the trends in logical groupings (plot "c"), and a fourth that compares the results when consistent annual January 1 measurement is plotted against the Staff's selected measurements from progressively later in the spring each year (plot "d"). This fourth plot (d) shows how selecting progressively later-in-the-year data points exaggerates the plotted drawdown. Staff did not offer an explanation for this approach.

when and where you could.” Tr. p. 2459. He conceded that this selection technique “forced me to deviate from the best-case filtering scenario” which is to select water levels from “the same date during the most stable period of year . . . before or after the irrigation season.” Tr. p. 1916. Whatever the reason, the variation introduced by this initial problem was compounded by selecting successively later water level measurements year-by-year for each hydrograph. Doing this produced multi-year hydrographs that seem to be declining when this might not be the case at all. Exhibit 77 demonstrates how such selections, inadvertent or not, affected McVay’s plot of water level trends as compared to annual same-time measurements.

We did not dwell on Mr. McVay’s analysis in our opening brief because Messrs. Owsley and Vincent did not rely on it after initially citing it in their Staff Memo and Mr. McVay himself explained it was not a study of ground water trends. However, Protestants’ Brief cites his memos as if Staff, Dr. Ralston, Mr. Squires, Mr. Dittus, and Dr. Osiensky had never testified at all. As demonstrated above, in our Initial Brief, and throughout the record in this case, there is no evidence of long-term water level declines in the PGSA, even in the face of increased ground water withdrawals. Mr. McVay’s work certainly provides no such evidence.

C. Although exact pumping effects cannot be known until pumping occurs, M3 Eagle’s conservative estimates predict declines that are modest in the PGSA and even smaller in the overlying shallow aquifer.

Protestants appear to be contending that this water right should be denied because “the actual effects of any future impacts can not be truly known until actual pumping wells are in place.” Protestants’ Brief at 7, quoting Ex. 42A(4) p. 7. It is always the case that the actual effects of pumping cannot be precisely known until the pumping itself takes place, but this

hardly is a reason to deny a water right. Here, the actual effects have been conservatively projected, based on scientific data and on tests that both sides' experts, including Dr. Ralston, agree were competently conducted. As discussed in M3 Eagle's Initial Brief at pages 36 to 42, Staff concluded that HLI's drawdown predictions based on the Theis method and the M3 Model are reasonable, if not conservative. Dr. Ralston stated that HLI's Theis predictions did not show "significant" drawdowns in the PGSA and that the M3 Model is a "good model." Tr. pp. 2344, 2369.

Protestants point to no contrary evidence in their brief. Rather, they quote Staff's conclusion that "[b]ased on the existence of a delayed hydraulic connection between the PGSA and overlying aquifers, pumping in the PGSA is likely to eventually impact the majority of area well owners." Staff Memo at 24 (partially quoted in Protestants' Brief at 7). M3 Eagle does not deny this, another obvious hydrologic fact. Indeed, Staff's statement is premised solely on M3 Eagle's experts' own statements which are quoted in the Staff Memo. The question is whether such impacts to area well owners (who primarily pump from overlying shallow aquifers in any event) will be injurious. There is no evidence in the record that they will be.

Insofar as Protestants complain that M3 Eagle has not provided sufficient evidence of impacts to the overlying shallow aquifer, that issue is addressed in M3 Eagle's Initial Brief at 41 to 42; the point there is that shallow aquifer effects would be less than those in the PGSA. It is worth noting here, however, that Protestants' own expert testified that he "thought [HLI] did a reasonable job of presenting that and talked about the magnitude of impacts that would occur in overlying aquifers." Tr. pp. 2240-41.

D. Protestants attempt to argue that the PGSA is in danger of overappropriation, but cite no relevant evidence in the record to support such a contention.

On pages 9 and 10 of their brief, Protestants seem to argue that the area's ground water will be (or maybe already is) overappropriated.²⁸ Nothing in the record supports this contention.

Protestants cite Exhibit 851, a list of pending ground water applications in Basin 63 (incorrectly cited by Protestants as Exhibit 821), as evidence that "there was [sic] over 90 cfs applied for in the Boise Valley in front of the M3 Eagle application." Protestants' Brief at 9. But this "evidence" does not support Protestants' theories about the area's ground water, and certainly not PGSA ground water. For the reasons discussed in M3 Eagle's Initial Brief at 76 to 79, this listing indicates little, if anything, about future withdrawals from the PGSA. Contrary to Protestants' suggestion, there is no evidence in the record as to what their "experts" (Norm Young and Paul Drury) determined from this listing. These individuals were never recognized as experts in this case and did not testify at the hearing.²⁹

Protestants also cite Exhibit 217, a 110-page report authored in 2008 by the Bureau of Reclamation and IDWR entitled *A Distributed Parameter Water Budget Data Base for the Lower Boise Valley* ("BOR Water Budget"). They believe this exhibit supports their hypothesis that "we could have a fully appropriated basin with no room for additional growth of existing cities or other planned communities in the future if much of the current queue along with M3 Eagle is approved." Protestants' Brief at 10. Like Exhibit 851, the BOR Water Budget was admitted into the record, but there was no expert testimony to lend any insight as to its relevance to any question at issue in M3 Eagle's application. The only comment about it came from lay

²⁸ This section of Protestants' Brief under the heading "Other Prior Water Right Applications" is a verbatim recitation of a portion of Mr. Thornton's closing argument at hearing. See Tr. pp. 3871-75.

²⁹ At the hearing, the Hearing Officer recognized this and admonished Mr. Thornton to "stay well within the facts that were presented at the hearing" during his closing argument. Tr. p. 3873.

witness Jason Smith, who said only that he “read through it,” Tr. p. 2924, and felt statements in the report were a “concern.” Tr. p. 2926-27.

In any event, Protestants quote the BOR Water Budget for the proposition that “over the course of an average year in the Boise Valley as a whole, there is an aquifer storage deficit of about 73 kaf (73,000 acre feet).” Protestants’ Brief at 9-10. However, the BOR Water Budget never identifies which aquifer(s) it evaluated in the Boise Valley; the report’s overall structure and listing of data sources indicate that it was concerned primarily with surface water supplies, return flows to the Boise River, and seepage from irrigated lands to shallow aquifer systems. For example the BOR Water Budget’s “data sources” include no reference to ground water other than United Water’s ground water diversion records, and do not indicate any use of actual ground water measurements. *Id.* at 4.

Furthermore, when the language from Exhibit 217 Protestants quote is read with the rest of the passage in which it appears, the message is much different than the one Protestants seek to convey:

Based on Figure 5-8, over the course of an average year and in the Boise Valley as a whole, there is an aquifer storage deficit of about 73 kaf. However, this relatively small deficit could be interpreted as a result of estimation error, indicating a near balance between groundwater recharge and discharge in the Boise Valley. This is possible given the magnitude of budget components such as irrigated lands ET (750 kaf), total drain return (1,140 kaf), and the uncertainty associated with estimating their values.

Indeed, a near balance between recharge and discharge could be expected as long as there is a substantial and widespread groundwater return to drains in the Boise Valley. Groundwater returns to drains which average about 618 kaf per year (not including rediverted drain return) can be thought of as excess groundwater recharge.

BOR Water Budget at 94. The very next section in the BOR Water Budget begins by stating: “There may be a near balance between groundwater recharge and discharge conditions for the Boise Valley as a whole.” *Id.* at 95.

Although no expert addressed the BOR Water Budget, M3 Eagle’s experts did discuss the studies done as part of the Treasure Valley Hydrologic Project (“TVHP”), which also included a Boise Valley water budget that arbitrarily (and incorrectly) assumed ground water does not cross the surface water divide between the Boise and Payette basins.³⁰ These experts’ uncontroverted testimony is that the TVHP water budget underestimated recharge to the PGSA because “the TVHP did not recognize flow to the Payette” and this is “water that’s not recognized in the budget.” Tr. pp. 1627-28 (Utting). Mr. Squires stated, “I think the recharge estimates that we’ve been working off are too low” for the same reason: because PGSA underflow toward the Payette “has been unaccounted for in . . . the TVHP model.” Tr. p. 1280. Furthermore, the TVHP, which—unlike the BOR Water Budget study—at least attempted to account for both deep and shallow ground water systems, concluded that “[o]verall, total aquifer recharge to the Treasure Valley appears to exceed aquifer discharge. . . . and the system as a whole is considered to be in equilibrium.” Ex. 33I p. 6-3.

It is difficult to pin down exactly what can be concluded from the BOR Water Budget about Boise Valley ground water. Perhaps there is a “relatively small” recharge deficit; perhaps there is “excess groundwater recharge.” Perhaps some of this is relevant to the PGSA, and then again perhaps it is not. In any case, the study, residing unexplained in the record, is hardly a basis for overcoming facts in evidence that the Pierce Gulch Sand Aquifer is robustly recharged, has substantial artesian heads in North Ada, exhibits little or no water level declines, shows

³⁰ As Dr. Wood testified, “they essentially put a groundwater dam all along that topographic divide. And it simply doesn’t make sense.” Tr. p. 981.

increasing aquifer levels at high-quality and reliable North Ada monitoring sites, and is sufficient to support the M3 Eagle project.³¹

E. Protestants point to no fact or opinion to contradict the evidence showing it is reasonably probable that M3 Eagle can finance the project.

In its Initial Brief at 57 to 64, M3 Eagle set forth in detail the evidence showing it is reasonably probable that it can finance the entire project. Protestants continue to assert that M3 Eagle is required to show they have financing for the entire project in hand today. Protestants' Brief at 18-19. But that is not what the reasonably probable standard requires. IDAPA 37.03.08.40.05.f; *Shokal v. Dunn*, 109 Idaho 330, 335-36, 707 P.2d 441, 446-47 (1985). Protestants point to no evidence to contradict the documentation and testimony presented by M3 Eagle to support the conclusion that it is reasonably probable that M3 Eagle can finance the entire project.

III. PROTESTANTS DO NOT ADDRESS THE MUNICIPAL PROVIDER ISSUE WITH ANY RELEVANT LAW OR FACTS.

The contention before the Hearing Officer is whether M3 Eagle qualifies as a municipal provider under Idaho Code § 42-202(2). Technically, Protestants do not make this argument. Their argument is slightly different. Protestants base their position on the present-tense definition of "municipal provider" in Idaho Code § 42-202B(5), with additional references to sections 42-219 (licensing) and 42-222 (transfers).³²

³¹ We appreciate the Hearing Officer's reluctance to exclude exhibits from the record despite their potential lack of foundation, preferring instead to let it all in so that it may be sorted out later. But when the time comes to weigh evidence under the preponderance standard, it is, of course, essential to differentiate between meaningful exhibits explained and supported by testimony, as opposed to those which simply have been deposited into the record.

³² See Protestants' Brief at 14; *Motion for Stay* (Nov. 10, 2008) at 3-4; Protestants' three oral motions on May 11, 2009, Tr. pp. 1749-53 and 1767; Protestants' oral argument on May 28, 2009, Tr. pp. 1942-43 (a reference to 42-202 on page 1946, read in context, is evidently a reference to 42-202B); Protestants' *Motion for Reconsideration* (May 29, 2009) at 1-4.

All of Protestants' municipal provider arguments have been disposed of. The Hearing Officer has explained that the latter two (dealing with licensing and transfers) are irrelevant to a permit application. Tr. pp. 1761-62. The Hearing Officer also rejected Protestants' contention that the present-tense wording in the municipal provider definition in section 42-202B(5), precludes a first-time municipal provider from obtaining a permit to divert water for non-RAFN municipal purposes.³³

Thus, the sole remaining question is one not raised by the Protestants; rather, it is one noted by the Hearing Officer: May an applicant that is not currently providing municipal water under other water rights nevertheless qualify as a municipal provider and obtain a water right for RAFN under Idaho Code § 42-202(2) if that applicant demonstrates that it is ready, willing, and able to provide municipal water once the permit issues? Tr. pp. 2174-78 (comments by the Hearing Officer). Protestants did not address section 42-202(2). Instead, Protestants' Brief simply incorporates by reference the arguments made in their *Motion for Reconsideration* dealing with sections 42-202B(5) and 42-219. In so doing, Protestants have failed to engage in any substantive way on the very question that was to be the subject of further briefing: section 42-202(2).

The only reference in the Water Code to the definition of municipal provider in the context of permitting is found in section 42-202(2), and that section relates solely to RAFN rights. M3 Eagle discussed section 42-202(2) at length in *M3 Eagle's Brief in Support of its Qualification as a Municipal Provider*. The Applicant explained that the language of the 1996 Act, the underlying purpose of the legislation, the legislative history, the statute read as a whole,

³³ The Hearing Officer explained his reasoning and concluded, "And it's my opinion that it doesn't prevent an entity not yet a municipal provider from filing an application for municipal purposes." Tr. p. 2176. Also see Tr. p. 1761-62.

the forward-looking language in section 202(2) itself, a century of forward-looking water right permitting practice, departmental guidance, administrative precedent, and common sense all point to the conclusion that the term “qualifies” means that the applicant is ready, willing, and able to perform as a municipal provider, not that it is necessarily doing so today under some other water right. Given Protestants’ failure say anything new on the subject, and M3 Eagle’s comprehensive response to the Hearing Officer’s questions in its *Brief in Support of its Qualification as a Municipal Provider*, we will not respond further here on the merits of this subject.

The Applicant does wish, however, to respond to Protestants’ continuing misstatements regarding three discovery admissions. Under the heading “Effect of Admissions,” Protestants falsely declare that “M3 Eagle has admitted that it does not qualify as a ‘municipal provider’ under any of the definitions of 42-202B(5)(a) (b) or (c).” Protestants’ Brief at 19.

The referenced admissions were attached both to Protestants’ Brief and to their earlier *Motion for Reconsideration*. Protestants mischaracterize M3 Eagle’s admissions in answering discovery. M3 Eagle admitted only that it is not now supplying water through a public water supply system, that it does not currently hold a franchise to supply water for municipal purposes, and that it is not a municipality. It did not admit that it does not qualify as a municipal provider under the Municipal Water Right Act of 1996.

This is not the first time that Protestants have misled the Hearing Officer with respect to these admissions. They did so on May 11, 2009 when they stated that “M3 Eagle admits it does not qualify for a municipal water right.” Tr. pp. 1766. On June 5, 2009, they again offered the admissions into evidence. Tr. pp. 2486-89. At that time, counsel for M3 Eagle explained the limited nature of M3 Eagle’s admissions. They boil down to a single fact that has never been in

dispute: M3 Eagle is not currently providing municipal water to municipal customers. Tr. p. 2488. Counsel then reiterated M3 Eagle's position that, as a matter of law, the Applicant is "qualified" as a municipal provider for purposes of obtaining an RAFN water right despite the fact that it is not now delivering municipal water to municipal customers. Tr. p. 2488.³⁴

The admission that the Applicant is not serving municipal water today is hardly surprising. M3 Eagle has been forthcoming on this, so the facts are not in dispute. If, on the other hand, Protestants disagree with M3 Eagle's view of the law, they are welcome to cite authority and argue why M3 Eagle is wrong.³⁵ Rather than cite appropriate authority, Protestants persist in making inaccurate claims that M3 Eagle has conceded the very legal issue in question.

In addition to ignoring the pertinent legal question and misconstruing the Applicant's admissions in discovery, Protestants also mischaracterize the factual record. Protestants contend, "Absolutely no evidence was presented by M3 to establish it was a municipal provider in M3's case in chief or at any time during the entire proceedings." Protestants' Brief at 20.

This could not be further from the truth. As discussed and documented in its September 11 briefing, M3 Eagle has demonstrated the following through ample and uncontradicted evidence:

³⁴ Here is the colloquy:

THE HEARING OFFICER: Well, my other concern, I guess, I think there's been an admission by the applicants, at least at the present time and based on what was discussed before, that the applicant is not presently a municipal provider. That's what I understood, Mr. Fereday. If that's a misrepresentation, please correct me.

MR. FEREDAY: That's what we have stated, at least -- but it is not our position that we do not qualify as a municipal provider. We believe we are qualified.

THE HEARING OFFICER: Okay.

MR. FEREDAY: We are not currently providing water. That is the -- that is the admission.

Tr. p. 2488.

³⁵ Counsel for M3 Eagle made this facts-versus-law point on May 28, 2009 in response to Protestants' *Motion for Reconsideration*. "Either way, we don't have a problem with this [the admissions] being before the Hearing Officer for consideration. Our admissions simply admit facts. Mr. Smith misconstrues the law." Tr. p. 1945.

(1) Once the permit is issued, M3 Eagle is ready, willing, and able (in other words, “qualified”) to provide municipal water to customers of a public water supply in accordance with the definition set out in Idaho Code § 42-202B(5)(c).

(2) M3 Eagle is acting at the behest of and for the benefit of the City of Eagle, a current municipal provider within the meaning of Idaho Code § 42-202B(5)(a). Pursuant to a legally enforceable contract, the water right and the facilities will be conveyed to the City of Eagle to become part of the city’s municipal water supply serving the M3 Eagle development.

Either of these is sufficient to satisfy the “qualification” requirement. In combination, the case is even stronger.

In sum, it is evident that Protestants have failed to provide a basis for their position on the qualification issue. Of course, that does not end the matter. The Hearing Officer has an independent duty to ascertain that the Applicant qualifies as a municipal provider, just as the Department did in ruling that WestRock was qualified to receive a permit for RAFN.³⁶ For all the reasons set out in M3 Eagle’s September 11 briefing and the record itself, the Department has ample authority to conclude that M3 Eagle qualifies as a municipal provider.

CONCLUSION

Idaho’s water appropriation statutes set a high standard for the awarding of permits. M3 Eagle has met, and exceeded, this standard.

M3 Eagle’s application for permit and supporting documentation is, we believe, among the most thorough and comprehensive water permit applications ever submitted in Idaho; it

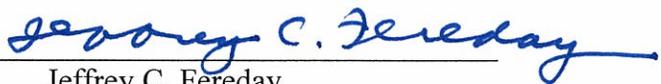
³⁶ Indeed, this point is made in the case cited by Protestants, *Barron v. IDWR*, 135 Idaho 414, 421, 18 P.3d 219, 226 (2001). The *Barron* case held that it is not sufficient that the applicant make a prima facie case in support of the application. Even when there are no protests, the Department “is statutorily required to examine all the available evidence and information” and must deny an application for transfer if it does not meet all statutory requirements. The same, of course, applies to appropriations. This confirms that the WestRock decision is precedent for the award of an RAFN water right to a first-time municipal provider, despite the fact that the protestants in that case did not challenge WestRock’s qualification.

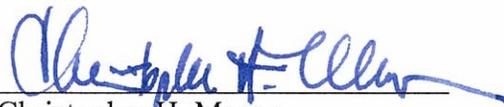
certainly is the most with respect to RAFN applications. The Applicant has credibly and thoroughly documented the availability of water for the Project based upon the best available scientific evidence. M3 Eagle has spent over three years studying the aquifer and has produced high quality data through testing, monitoring, modeling, and geological analyses. It has done so through the efforts of recognized experts in the field of hydrogeology who have substantial experience in this area. The Applicant has neither over-reached nor cut corners. Instead, it has carefully circumscribed its request, asking for no more than it needs and itself proposing a volume limit on diversions. It has invited monitoring conditions and offered other commitments (such as re-use of treated wastewater) that will amply protect all other users within the bounds of the prior appropriation doctrine. M3 Eagle has complied with the rigorous planning and disclosure requirements for RAFN water rights and has responded to all questions and concerns by IDWR Staff.

If this application becomes the standard for what a municipal applicant must do to satisfy the 1996 Act, the bar will be set high indeed. As it should. If this application is denied, the Department will have established a standard that cannot be met.

Respectfully submitted this 1st day of October, 2009.

GIVENS PURSLEY LLP

By 
Jeffrey C. Fereday

By 
Christopher H. Meyer

By 
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of October, 2009, the foregoing was filed, served, or copied as follows:

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