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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 PETITION FOR RECONSIDERATION OF THE DECEMBER 21, 2009 FINAL ORDER, MOTION TO REOPEN THE RECORD, AND BRIEF IN SUPPORT**

PETITION AND MOTION

M3 Eagle LLC ("M3 Eagle" or the "Applicant"), through its counsel, Jeffrey C. Fereday, Christopher H. Meyer, and Michael P. Lawrence of Givens Pursley LLP, hereby petitions the Interim Director to reconsider his December 21, 2009 Final Order ("Order") in this case. M3 Eagle respectfully requests that he issue a new decision which corrects errors of fact and law in the Order and grants M3 Eagle the full "future needs" municipal water right for which it applied.

M3 Eagle also hereby moves the Interim Director to reopen the record to take testimony and documentary evidence on the facts and legal conclusions raised or identified for the first time by the Interim Director in his Order and, to the extent necessary for reconsideration, to address other points described herein. This motion is made under IDAPA 37.01.01.740.02 a (which we believe implicitly authorizes taking additional evidence in aid of reconsideration). It also is made under the provisions of Idaho Code § 67-5251(4) and IDAPA 37.01.01.712.01, which require the Interim Director to notify the parties of the specific facts or material, and sources thereof, of which the Interim Director takes official notice. These provisions also require the Interim Director to afford the parties a timely and meaningful opportunity to contest and rebut the facts so noticed. As discussed below, the Order contains several instances of the Interim Director taking official notice without notifying the parties or giving them an opportunity to rebut his new facts and opinions.

M3 Eagle requests that the Interim Director grant its August 21, 2009 motion to designate as the official transcript in this matter the independently-prepared transcript M3 Eagle lodged with the Interim Director on or about the same date, together with any similar transcript that will be prepared should the matter be reopened for additional evidence.

M3 Eagle's brief in support follows. M3 Eagle requests oral argument.

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INTRODUCTION

The Order makes an arbitrary determination to allocate to M3 Eagle one-sixth of its requested water right. The Interim Director does not find that the water supply is insufficient for M3 Eagle's full request or that M3 Eagle's requested diversions will injure existing water rights. Rather, he gives M3 Eagle a fraction of its requested water right because he concludes M3 Eagle does not qualify as a municipal provider—a conclusion he says also is in the local public interest given his suggestion that the Treasure Valley's ground water supplies may be severely limited. With all due respect, the ruling is in error both factually and legally.

The passage of the Municipal Water Rights Act of 1996 ("1996 Act" or the "Act") signaled a new era in water development for Idaho. This legislation rewards full disclosure and long term planning for municipal use while discouraging the hoarding, conflict, and speculation in municipal water rights that is prevalent in places like Arizona, Colorado, Nevada, and California. In doing so, it expanded the reach of Idaho's growing community doctrine to embrace private developers as well as traditional municipal providers—extending the benefits and burdens of long term water planning to the very investors whose actions will shape Idaho's growth in the 21st century.

The Act's message to water users and the Idaho Department of Water Resources ("IDWR" or the "Department") dovetails with that of the Local Land Use Planning Act ("LLUPA") enacted two decades earlier in 1975. LLUPA demands that cities and counties avoid conflicts over growth and embark in a coordinated, long term visioning process via comprehensive plans. Together the 1996 Act and LLUPA reflect a far-sighted effort by lawmakers to avoid the haphazard and often chaotic growth found in other western communities.

Consistent with that vision, M3 Eagle seeks to develop a planned community that incorporates thorough hydrogeologic studies, aggressive water conservation, cutting-edge wastewater reuse, mixed land uses, integrated and interconnected community components, good density mix, sound design, efficient and flexible transportation opportunities, and extensive trails and open space. In accordance with its comprehensive plan and pursuant to a Pre-Annexation and Development Agreement, the City of Eagle annexed and zoned M3 Eagle's property to accommodate this undertaking. (The annexation process underway during the hearing in this matter was completed before the Order was issued.) The Pre-Annexation and Development Agreement specifically calls for M3 Eagle to build "an addition to the City's water system" and obtain and convey to the City the water right to go with it. These are the very things the Legislature encouraged by enacting LLUPA , which promotes planned unit developments rather than indiscriminate sprawl.

Meanwhile, the detailed water planning shouldered by M3 Eagle is exactly what was envisioned by the 1996 Act. For the last three years, M3 Eagle conducted what likely is most thorough aquifer analysis ever undertaken by a municipal water right applicant in the history of the State. In so doing, it is adding to the Department's knowledge base and contributing immensely to the Department's understanding of the ground water in the Treasure Valley, particularly the Pierce Gulch Sand Aquifer ("PGSA").

Employing sophisticated water conservation and reuse technologies and incentives, M3 Eagle determined that it would require an average of 9.03 cfs to support the development at full buildout, which would occur over a 20 or 30 year period. Its studies showed that pumping this amount (or even more) would have a minimal effect on the PSGA from which the project will

draw its water. Indeed, its studies demonstrated that the aquifer is a robust and prolific source of water upon which not only M3 Eagle, but most of the region, may safely rely.

Given the in-depth studies and testimony of the leading experts in the area's ground water hydrogeology presented during the course of a 17-day hearing, it is remarkable that the Interim Director reached the result he did. The Order arbitrarily granted M3 Eagle a mere one-sixth of its requested water right—essentially inviting the project to begin construction without first resolving its long term water supply. This decision turns the 1996 Act upside down. Rather than allow and encourage developers of large scale projects like this to subject themselves to the rigor of the 1996 Act, the Order declares that first-time developers and those serving land not already within a city are beyond the Act's scope. Rather than encouraging long term planning, the Order effectively ensures fragmented development which will proceed, if at all, in fits and starts. The Act was intended to avoid conflict and uncertainty. Instead the Order promotes it.

If the Order had stopped there, it would be been troubling enough. But it does not. The Order ignores the extensive and uncontradicted evidence of a prolific and robust PGSA and misreads the scientific evidence to conclude instead that the aquifer upon which much of the region's future depends is all but exhausted. This is the opposite of what the evidence shows. The evidence shows that M3 Eagle's proposed use of 9 cfs is about <u>one percent</u> of the ground water flowing annually into the M3 Model's 520-square mile domain.

Rather than consider—or even acknowledge—the evidence of actual water levels and stable trends in the PGSA, the uncontroverted drawdown projections from the project's pumping, the expert testimony about robust aquifer recharge, and other similar facts, the Interim Director's conclusions about water availability appear instead to be based on his incorrect interpretation of a portion of a table in the ground water model report prepared for M3 Eagle (the "M3 Model

Report") (Ex. 16).[1] In essence, the Interim Director misinterprets two data points from the M3 Model Report to create his own version of a ground water budget.[2] His version misuses the model and conflicts with all other evidence in the record.

All of the substantial evidence in the record, including the M3 Model, supports the conclusion that the ground water system in north Ada County, and the PGSA in particular, extends across most of the Treasure Valley, is robust and productive, is stable despite many years of increasing ground water development, is readily recharged, and will not be significantly affected by the M3 Eagle development now or in the future.

The Interim Director's water budget analysis, on the other hand, was not presented in any documentary evidence or raised during the hearing in any question from the Interim Director (who served as the Hearing Officer). Nor was it discussed at the hearing by any expert or the Department's Staff. As noted below, the water budget is not even an essential question to be determined in this water right application. Nevertheless, we feel it is necessary to fully address the Order's erroneous conclusions on the subject because of the broader ramifications to our communities' water (and economic) outlook.

The Interim Director begins with an attempt to quantify the total available water supply in the PSGA. But he does so incorrectly.

The M3 Model does not model the entire PGSA. The "model domain" is an artificial, three-dimensional, rectangular model boundary that encompasses much of the PGSA, as well as

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[1] The M3 Model Report contains three components: (1) a "Main Model Report" prepared by Hydro Logic Inc.; (2) a "PGG Report" prepared by the ground water modeling firm Pacific Groundwater Group ("PGG") and included as Appendix A to the Main Model Report; and (3) several "PGG Memoranda" prepared by PGG and included as Appendix B to the Main Model Report.

[2] A "water budget" is like other types of budgets (*e.g.*, household budgets) in that it accounts for inflows and outflows to the system at issue. In the case of a ground water model such as the M3 Model, the water budget accounts for inflows and outflows to the model domain (whose boundaries may differ from the entire ground water systems).

other ground water aquifers above and adjacent to the PGSA. The model incorporates measurements from aquifer tests, water level measurements, and other hard data showing total inflows to the model domain of over 1,000 cfs, as compared to the Interim Director's finding that it should be seen as containing just less than 120 cfs of flow.

Of course, all recharge ultimately comes from surface sources. But because the M3 model domain includes only a portion of the PGSA, the model included an input of underground inflow of 107 to 115 cfs from the southeastern portion of the PGSA into the model domain. For reasons that are not clear, the Interim Director concluded that this was the only inflow to the modeled portion of the PGSA. Order ¶ 37, at 8. In so ruling, he ignored another 900 cfs of inflow to the aquifer—coming from other sources deriving primarily from the Boise River. This is more than enough to support the 242,650 households projected to be in Ada County by 2030. Ex. 40, App. D-2. In fact, 900 cfs is enough to support perhaps 700,000 households.

Indeed, the model shows roughly 900 cfs of inflows to the model domain would remain available for future uses even after accounting for both M3 Eagle's proposed pumping and all existing pumping by others—an order of magnitude more than the 23 to 31 cfs the Order says might remain. The record fully documents the 1,000 cfs input to the ground water system in the model domain, but the Order ignores it, finding that there is only 107 to 115 cfs of recharge. This is what the numbers show:[3]

ESTIMATED INFLOW	ESTIMATED EXISTING PUMPING	PROPOSED M3 EAGLE PUMPING
1,041 cfs	144 cfs	9 cfs
Inflow remaining after M3 Eagle: 888 cfs *M3 Eagle % of Inflow: 0.9 %*		

[3] The numbers in the table below are taken from Table 1 of the Main Model Report Ex. 16 at 27.

The M3 Model allows us to make drawdown projections in aid of answering questions posed by the water code: whether projected drawdowns are injurious, whether the proposal would withdraw beyond recharge capability, whether reasonable pumping levels are being observed, and whether the entire proposal is consistent with "full economic development of underground water resources." Idaho Code § 42-226. This is why in this case the focus of the testimony, evaluation of sixteen aquifer tests, the first-hand experience of five ground water experts intimately familiar with the aquifer, hundreds of well measurements, years of pumping records, and other exhibits—and the purpose of the M3 Model itself—was to evaluate long-term drawdown effects from M3 Eagle's pumping.[4] This has been accomplished in this case with a high degree of scientific certainty. This is the way to determine whether the water resource is sufficient, and whether the appropriation will adversely affect existing water users. The Interim Director's method is not the way to do so.

Interestingly, while the Order grossly underestimates the productive capacity of the PGSA, it still concludes that there is enough water to support the M3 Eagle project. Specifically, it concludes that if M3 Eagle takes 10 cfs (in fact, it asked for an average diversion of 9.03 cfs), there will be 13 to 21 cfs left over for other new uses. Again, this is wrong by a factor of about 50, but even the Order shows there is sufficient water for the M3 Eagle development.

The Interim Director then announces the policy that "[t]he flow of 13-21 cfs assumed to remain as unpumped water in the PGSA may be needed for future use by the communities within

[4] As Mr. Squires testified, without contradiction from anyone, "the M3 Model is the best predicter available at this time for water levels in the North Ada County area, in the Eagle/Star area." Tr. p. 3227 (emphasis added). M3 Eagle also presented an independent model of the same area done by University of Idaho researchers; it is completely supportive of the conclusions in the M3 Model. *See* Ex. 41 (Development of a Numerical Ground Water Flow Model for the M3 Eagle Development Area Near Eagle Idaho, Douglas, Stacey L., Master's Thesis (December 2007)). Dr. Osiensky testified that Ms. Douglas's work, and the ground water model she constructed, supported the conclusions about the ground water system reached by M3 Eagle's experts.

the model boundary." Order ¶ 38, at 8. In effect, the Interim Director, in the face of all the evidence, tags the PGSA as an alarmingly limited resource (which it is not) and then endeavors to reserve the bulk of the water that he thinks would "remain" to serve future land use patterns he prefers as opposed to the land use plans to which the City of Eagle has committed. *See, e.g.,* Exs. 57 and 58.

The irony is that while purporting to act on behalf of other communities, his Order will have the opposite effect. The Interim Director's implicit conclusion is that the Treasure Valley's largest and most productive ground water supply, the PGSA, actually is an extremely limited resource incapable of supporting substantial new development vital to the region's economic well-being. The Interim Director's conclusion that, at most, 31 cfs currently remains available for appropriation would mean that North Ada County may add at most 25,000 homes (including M3 Eagle's 7,153), and then all development simply stops.[5] This is compared to the 900 to 1,000 cfs in the M3 Model, an amount that would support roughly 700,000 homes using the same formula. Fortunately, the Interim Director is wrong, as the record amply demonstrates.

In his Order, the Interim Director also appears to advance a new concept of reserving water for unidentified uses—an idea that has no historical or legal precedent and which is at odds with statutory and constitutional mandates. In any case, whether he has such power need not be resolved here. The facts proven at the hearing do not support his quantification. The aquifer is under-appropriated and shows no signs of approaching full appropriation; there is no need for such a reservation.

[5] This calculation of additional development assumes that other developments will employ the same cutting edge water conservation and reuse measures proposed by M3 Eagle. M3 Eagle's proposed 7,153 homes and 9.03 average diversion rate equates to 0.00126 cfs per home. At this rate, 31 cfs could supply 24,603 new homes.

To be sure, however, the Interim Director does not have power to reserve water to serve his preferred land use planning vision. Planning and zoning is a function reserved exclusively to local municipal officials, such as the City of Eagle. It does not matter if the Interim Director disagrees with their judgment; he has overstepped his authority by attempting to reshape local land use decisions through denial or restriction of water rights.

On the municipal provider issue, the Interim Director reads standards into the 1996 Act that are not there and that do not further the Legislature's intent. When the matter was raised by the Interim Director during the hearing, M3 Eagle acknowledged the inherent ambiguity in the requirement that an applicant "qualify" as a municipal provider. Accordingly, it provided extensive research, explanation, and legislative analysis showing that the requirement was not intended by the Legislature to exclude first-time developers from obtaining municipal water rights for reasonably anticipated future needs ("RAFN") and that such an interpretation would undermine the very purpose of the 1996 Act. In the Order, the Interim Director declined even to address this analysis, declaring instead that the legislative provision is unambiguous—a conclusion that cannot be reconciled with departmental precedent. After all, even if the Interim Director believes the Department erred in granting a RAFN water right to the first-time developer of Tamarack (then WestRock)—(which had no ties to any city or city planning process)—he must concede that the provision is, at a minimum, sufficiently "ambiguous" to lead the prior Director to such a conclusion. As pointed out in earlier briefing, the Department is allowed to override precedent, but it cannot refuse to acknowledge the precedent. Yet, that is exactly what the Interim Director did in this case.

The Interim Director went on to raise in the Order for the very first time a contention that Idaho Code § 42-202B(8) (the definition of RAFN) prohibits applicants from obtaining RAFN

rights to serve areas that are not within municipal boundaries. This conclusion is wrong both legally and factually. This section describes RAFN as being water to serve the future needs of "municipalities." The Interim Director overlooked the fact that "municipalities" is defined to include counties as well as cities. Thus, there is no restriction to areas within cities. In any event, the M3 Eagle development is within the City of Eagle. The record before the Department projected it would be annexed in December of 2009, and it was.

Finally, the Interim Director ignored the fact that M3 Eagle is not simply acting on its own behalf, but on behalf of the City of Eagle pursuant to a legally binding Pre-Annexation and Development Agreement. Ex. 58. Thus, M3 Eagle is not a "first-time" provider but is an agent for an existing municipal provider that clearly "qualifies" under even the most restrictive reading of the 1996 Act. Again, although fully briefed, this was not addressed in the Order.

The bottom line is that the decision in this case is not based on the facts in this record but on conjecture that conflicts with facts in the record. Nor is it based on the governing law, which limits the Department's role to water resource matters. Rather, it appears driven by a fundamental disagreement with land use planning decisions made by local officials. To that end, the Order overreaches the Department's proper role by usurping the function assigned by LLUPA to local land use authorities. The Order renders the "qualification" provisions of the 1996 Act prohibitively and pointlessly restrictive, thus undermining its long-term planning function. Finally, the Order reaches conclusions about the availability of water in the Eagle area that are wrong by an order of magnitude, but if allowed to stand will hobble economic development for the entire region.

ARGUMENT

I. WATER SUPPLY ISSUES

A. The Order violates the basic principle that the Department's decision be based on a preponderance of the evidence.

M3 Eagle seeks to divert an average of 9.03 cfs (5.8 million gallons per day) at full build-out. The Applicant's burden is to demonstrate "that the water supply is [not] insufficient for the purpose for which it is sought to be appropriated." Idaho Code § 42-203A(5)(b). To meet that burden, M3 Eagle undertook what is probably the most thorough and comprehensive evaluation of water availability by an applicant for a water right in Idaho. As Mr. Brownlee explained, the purpose of the studies was to provide "the assurance to ourselves and our investors" and also to the future residents of the community, that there is an adequate supply of water for the project. Tr. p. 95 (Brownlee).

As discussed in the Applicant's prior briefs,[6] it is the Department's duty to determine whether a preponderance of the evidence in the record supports the M3 Eagle's position that sufficient water is available.[7] The Order fails this fundamental test. Its findings do not comport with what the evidence shows probably is true; rather, it relies on what Department Staff said possibly might be true.[8] This violates basic principles of fact-finding. *Doe v. Sec'y of Health*

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[6] On September 11, 2009, M3 Eagle submitted two briefs: *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* ("Qualification Brief."). On October 1, 2009, it filed *M3 Eagle's Response To Protestants' Post-Hearing Brief* ("Response Brief"). All three briefs are hereby incorporated by this reference. It does not appear that the legal points and detailed references to the record they contain were given full consideration by the Interim Director in arriving at his Order, and we respectfully request that he revisit them in connection with this Petition.

[7] "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)).

[8] "[A]n assertion that something is 'highly possible' does not rise to the level necessary to establish [a fact] by a preponderance of the evidence." *Doe v. Sec'y of Health and Human Services*, 19 Cl.Ct 439, 450 (1990). "The

and Human Services, 19 Cl.Ct 439, 450 (1990) ("[A]n assertion that something is 'highly possible' does not rise to the level necessary to establish [a fact] by a preponderance of the evidence.").

Indeed, some of the Order's findings are not even based on statements in the record, but rather on conjecture about technical matters that were not addressed in any exhibit or discussed by any expert.[9] This departure from the discipline of administrative decision-making permeates the Order and is reversible error.

B. Contrary to all the evidence in the record, the Interim Director announces severely limited ground water supplies in the Treasure Valley.

In Findings 33 through 39 of the Order, the Interim Director—evidently placing his own interpretation on a few lines of data in the M3 Model's water budget—suggests that, if M3 Eagle's entire water right were granted, only 13 to 21 cfs of unappropriated ground water would remain in the model domain. The model domain consists of a large part of the Treasure Valley west of Boise's Cole Road. A fair conclusion from this part of the Order is that, if the Interim Director is correct, the end of ground water development in the Treasure Valley is drawing near. However, as discussed in more detail below, such a limitation is not supported by the record—or, for that matter, by the Department's own Treasure Valley Hydrologic Project ("TVHP"), as discussed in M3 Eagle's Initial Brief. The Interim Director should reconsider his decision, rely on facts actually proven by a preponderance, and remove these findings.

This error in the Order underscores an important point about the model. It is a tool for predicting drawdowns from M3 Eagle pumping at full development. Main Model Report, Ex.

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law does not concern itself with possibilities. It rather contents itself with a preponderance of probabilities." *Hillman v. Utah Power & Light Co.*, 56 Idaho 67, 71, 51 P.2d 703, 708 (1935).

[9] The trier of fact's decision "cannot rest on conjecture." *Dent v. Hardware Mutual Casualty Co.*, 86 Idaho 427, 434, 388 P.2d 89, 93 (1964), *quoting Splinter v. City of Nampa*, 74 Idaho 1, 10, 256 P.2d 215, 220 (1953).

16, at 14 (the "model was developed to simulate realistic and defensible predictions of impacts to existing wells that could be caused by municipal water-supply wells pumping from the Pierce Gulch Sand Aquifer beneath the M3 Eagle property.")[10] There is nothing in the M3 Model Report or the record to support using pieces of model inputs, as the Interim Director has, to calculate ultimate volumes or available flows of ground water in one portion of the model domain, such as the layers assigned to the Pierce Gulch Sand Aquifer. Pumping from the PGSA affects, and obtains recharge from, other parts of model domain.

Moreover, calculating the maximum amount of drawdown that will be experienced in the model domain is the most accurate way to characterize and predict water availability in the future. It is the method used here and presented in this record. These projected drawdowns are based on data from actual aquifer tests, actual water level measurements, transmissivity and storativity calculations, and other factors about which there is no substantial dispute in this record. Indeed, the predicted drawdowns themselves were not disputed. *See* Initial Brief at 36-42 (citing to the record and discussing the insignificant differences between all testifying experts' opinions about predicted drawdowns).

The modest predicted drawdowns after 50 years of M3 Eagle's pumping demonstrate water availability and lack of injury to existing water users. It is the chief method by which M3 Eagle has proved a sufficient supply under Idaho Code § 42-203A(5)(b). It also is the method needed to fulfill the legal requirement of full economic development of ground water and the obligation of juniors to achieve reasonable pumping levels. These legal requirements were discussed in our Initial Brief and will not be repeated here. If need be, the predicted drawdowns

[10] The M3 Model's purpose was expressly recognized by the Interim Director in his Order. Order ¶ 33, at 7 ("M3 Eagle developed a numerical ground water model to simulate the effects of withdrawals from the M3 Eagle development at full build-out.")

also would be the appropriate way, on this record, to project the amount of water available in, or the sustainability of, the aquifer. This drawdown evidence serves all these purposes on this record, and the conclusion from it is clear. The Interim Director errs by inventing his own theory as to how to calculate amounts of ground water in the aquifer; it is even less defensible when it misuses model data, ignores how the model works, and makes no reference to the proven drawdown projections and other evidence of overall aquifer stability and recharge.

The Interim Director's error is compounded—and the Order's conclusions on this point are rendered even more ironic—by the fact that the M3 Model's water budget was deliberately conservative. Even its drawdown scenarios included the ultra-conservative assumption that, as M3 Eagle pumped, no additional inflow would be induced to enter the PGSA across the southeast model domain boundary.[11] The effect of this control was to show that the southwest boundary was distant enough away from M3 pumping to not be affected by the M3 pumpage and that the model obtains sufficient "recharge" in response to its pumping from all of the other recharge sources within the model domain. The M3 Model's conservative approach also is reflected in its use of the same recharge figures used in the TVHP, which concluded just a few years ago that the ground water "system as a whole, is considered to be in equilibrium," Ex. 33I p. 6-3, that the Treasure Valley does not have a ground water shortage, Ex. 33A p. 24, that "on a valley-wide basis, ground water withdrawals represent approximately 20% of the total ground water recharge," Ex. 33I pp. 6-1, and that "overall, total aquifer recharge to the Treasure Valley appears to exceed aquifer discharge." Ex. 33I p. 6-3. *See also* Ex. 33I, Fig. 11 (showing

[11] The report states: "[T]he general-head boundary cells along the southeast corner of the model do not generate additional flow during the simulation of pumping. During the latest simulation . . . the general head boundary was converted to a constant flux boundary to eliminate the possibility that pumping might artificially induce additional flow during the simulation." Ex. 16, M3 Model Report, at 18; PGG Memoranda (Nov. 14, 2008) at 6.

increasing ground water levels in Eagle area). Because the TVHP did not recognize the large component of underflow to the Payette Basin that now has been documented (and, by the way, recognized as fact by the Interim Director, Order ¶¶ 25-26, at 6), its recharge and water budget assumptions failed to account for this outflow. Thus, the TVHP's assumptions were more conservative than the facts now demonstrate they should have been with regard to the size and productivity of this resource. [12]

Indeed, based on a body of evidence that relied on the TVHP and that did not have the benefit of the M3 Eagle studies, the Department Staff itself recently stated—and the Director adopted as a finding of fact—the following conclusion in the recent *City of Eagle* water right application (which sought over 9 cfs):

> The Director specifically finds that "static water levels in the deep system near the area of the proposed development are . . . relatively stable and suggests that the deep aquifer is not currently in a state of overdraft."

Final Order ¶ 24, at 20, *In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (Feb. 26, 2008) (quoting Sean Vincent). The M3 Eagle evidence provides a far more encouraging picture of the productivity and sustainability of the "deep aquifer"—that is, the PGSA—than was available to the finder of fact in the *City of Eagle* case. In that case, the source of recharge was assumed to be a relatively limited supply emanating from the foothills, not the robust supply flowing from the Boise River system and its canals and associated shallow aquifers.

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[12] Added to this already-conservative approach is the fact that the model increased M3 Eagle's full development requirement of 9.03 cfs to 10 cfs. It also assumed a 30% increase in pumping by others in the area and artificially constrained inflow into the PGSA. Tr. p. 1623 (Utting). It calculated the effects of reducing recharge through the southeast corner of the model by twenty percent to simulate seepage reductions from canals (which produced only small differences in projected drawdowns). It also conducted a model run that "used estimates of pumping by others in the model domain that are "about 60 percent greater than the 90 cfs yearly averaged pumping used in the initial modeling efforts...." Model Report at 19.

It also is reversible error for the Interim Director, *sua sponte*, to take up the subject of water volume in the aquifer system or overall future water availability without raising this during the hearing, to make his own conclusion about it ("only 13-21 cfs would remain of the total inflow"). It is even more egregious to do so based on an erroneous assumption that only one small portion of modeled inflows should be considered, and in the process ignore the cited recharge sources from other areas, induced inflows from pumping, and the all-important expert opinions and modeled results as to projected future drawdowns. The Interim Director's findings and conclusions related to his water budget analysis are not supported by any evidence or expert opinion and should be removed from the Order. In their place, the Interim Director should make findings and conclusions, based on a preponderance of the evidence, that there is sufficient water to support the entire water right sought by M3 Eagle without injury to other water rights or even significant reductions in the area's water levels. That is what the proof shows. It does not support anything like the Interim Director's conclusion about "remaining" water in the aquifer.

Section I.D contains a more detailed discussion of the technical issues described above.

C. The Order makes conclusions about "available drawdown" that conflict with the record.

The Interim Director offers a conclusion about predicted drawdowns from M3 Eagle's pumping in this statement:

> As additional demands are made on the PGSA in the Treasure Valley floor, these demands and withdrawals of water could impact the availability of water in the up-gradient area of M3 Eagle. If the water levels or pressures in the PGSA decline significantly, the water users that potentially would be the first to be impacted by these declines will be those drawing water from the up-slope areas of the aquifer <u>where there is limited available drawdown</u>. Consequently, M3 Eagle has the ability, if these proposed future anticipated needs are recognized, to hold the future development of water in the Treasure Valley floor for the existing communities hostage to its future anticipated needs that are distant and not yet developed.

Order ¶ 15, at 12 (emphasis added). This reference about "available drawdown," together with the related paragraph 24 of the Findings of Fact, contradict the record evidence on the subject.[13]

To begin with, one must recognize that "available drawdown" can be defined as the amount of water level decline that is available above the pump intake in a well to cause ground water to flow toward and into the well. In other words, it is the saturated length of the water column between the pump intake and the non-pumping water level in a well. In addition, one must also recognize that, rather than lying completely flat or horizontal, many aquifers (like the PGSA) are sloping. As recognized in the Order, the PGSA generally "is tilted downward from the northeast to the southwest, sloping approximately one to two degrees in declination." Order ¶ 20, at 5. M3 Eagle's property lies at the upslope portion of the PGSA.

With regard to the question of "available drawdown" in the upslope area, such as the M3 Eagle area, the testimony is that M3 Eagle's "wells will be positioned over the Pierce Gulch Sand Aquifer, and they will be positioned sufficiently far away from the edge of aquifer boundary to allow a reasonable depth of the well and the available drawdown to the well." Tr. p. 1124 (Squires). Contrary to the suggestion in this part of the Order, the available drawdowns in the upslope area (where M3 Eagle is located) are substantial, not limited.

For example, M3 Eagle's available drawdown in its Test Well #1 is estimated at 350 feet. Ex. 2, Fig. 12. This means that other pumping would have to lower aquifer levels by hundreds of feet before a properly-constructed well at that site would be unable to produce at its designed high-volume capacity. The available drawdown in M3 Eagle Test Well #4 is roughly 300 feet. Ex. 44, Fig. 13. M3 Eagle's SVR #7 well has about 200 feet of available drawdown, Ex. 44, Fig 9; almost twice the available drawdown in the Eagle Pines Well, and the United Water Idaho

[13] The finding also is replete with conjecture and cannot stand as defensible conclusion of either fact or law in this case.

Swift Well, both of which are situated in (or toward) the valley floor area from M3 Eagle. Ex. 34, p. 2, Fig. 1 (Eagle Pines) and Ex. 45, Fig. 4 (Swift). Similarly, the City of Eagle's Lexington Hills Well has about the same amount of available drawdown (180 feet) as the SVR7 well near the middle of the M3 Eagle property. Ex. 12, p. 1 and App. A, p. 18 (Lexington Hills). Given the productivity of the aquifer, these are very significant amounts of available drawdown that will not be compromised by the drawdowns postulated by the Order from pumping in the Eagle area. The record is replete with references to the substantial saturated thickness and water levels in wells of the PGSA, ranging from 200 feet to over 500 feet, and its availability beneath substantial portions of the M3 Eagle site. To summarize, there is ample available drawdown in the PGSA beneath M3 Eagle, as with all other areas of the region where the aquifer exists. The M3 Eagle area where the PGSA comes up dip to near the surface, and where available drawdown is diminished, is no different than all of the extensive area where the PGSA comes up dip in the valley areas of the Treasure Valley (although the Order seems to imply otherwise). *See, e.g.,* Ex. 42(4), Fig. 3 (showing the base of the PGSA as it extends south under the valley floor). In making its conclusions about available drawdown, the Order does not address this evidence.

If the Interim Director is asserting that drawdowns of M3 Eagle's water levels by other communities' future pumping may result in water calls against these other users by M3 Eagle, this also is completely unsupported. There was no testimony about this point and it is impossible to postulate—much less find by a preponderance—a likely future conflict based on the present record.

Nor was there any evidence regarding how M3 Eagle's appropriation of 6,535 acre-feet of water would ever give it "the ability" to hold "hostage" any future community ground water development, or how any of this theory would be supported under a local public interest

analysis.[14] The M3 Model shows the project's full pumping will cause less than five feet of drawdown at the corner of Floating Feather and Eagle Roads. Ex. 16 Fig. 7-11. Likewise, pumping at valley floor locations will have similar effects at M3 Eagle. Indeed, considering the fact that even large production wells in the area (*e.g.*, United Water Idaho's Floating Feather and Redwood Creek wells) show essentially no drawdowns since they were constructed, Ex. 45 Fig. 15, it would be within this record to conclude that such effects on the M3 Eagle area would be less than those predicted by the M3 Model or the other estimates of drawdown throughout this record. In short, the Order is in error to conclude that there is "limited available drawdown" in areas of the PGSA that would enable M3 Eagle to hold other communities "hostage."[15]

D. The Interim Director's water supply analysis has no foundation, is not based on facts in the record, and is fundamentally flawed.

The error discussed above is contained primarily in Order's Findings of Fact 33 through 39, where the Interim Director creates his own inaccurate and unsupportable water budget. To recap:

First, he finds that 107 to 115 cfs of water entering the model domain in the southeast corner represents all of the modeled inflows to the PGSA. This is in error because he fails to recognize that, as noted in the M3 Model Report and explained by the experts, the model domain

[14]The claimed "hostage holding" ability is identified as a possibility in any event. In this comment about hostage holding, the Interim Director bases possibilities on top of possibilities that are not supported by the record, then uses these to arrive at the conclusion that, "[c]onsequently," M3 Eagle "has the ability, if these proposed future anticipated needs are recognized," to hold future water development hostage through its uses. This tracks with the finding in paragraph 14 of the Order asserting "the possible result" of M3 Eagle's water right "could limit the future ability of the existing municipalities in the area to extend and expand their currently existing integrated systems." Order at 11-12. This too is not a supportable holding on this record, not merely because it is conjecture. The fact is that the M3 Eagle water system is planned, and required by the City of Eagle, to be "an addition to City's [i.e., Eagle's] municipal water system." Ex, 58 p. 23. It is difficult to understand how this system, which is within the City of Eagle's planned expansion, should somehow be seen as contrary to the interests of any municipality in the area.

[15] The Interim Director's reference to holding other communities "hostage" seems to raise a fear that M3 Eagle might deliberately place its wells in areas updip in the PGSA where the aquifer's saturated thickness is less and the available drawdowns are "limited." But such a fear, aside from being a startling suggestion coming from the Department, defies both logic and the legal requirement that ground water users pump from a reasonably deep level.

includes much more (an order of magnitude more) recharge in its water budget because other aquifer units in the model domain recharge the PGSA, and pumping from the PGSA will induce additional recharge to the PGSA.

Second, he finds that 9 cfs of inflow calculated to occur at the M3 Model's north and west boundaries contradicts the conceptual model of the PGSA (in which ground water generally flows to the northwest), and therefore disregards it as part of the ground water budget. This is in error, as shown by the M3 Model Report itself.

Third, he concludes that "only 13-21 cfs would remain of the total inflow for other future uses within the model domain from the PGSA." Order ¶ 37, at 8.[16] This is error because, even if the model were designed to make such calculations (rather than provide an accurate projection of drawdowns) the model itself shows that nearly 900 cfs of the presumed total inflow would remain.

Fourth, he finds that M3 Eagle proposes to pump 10 cfs on average at full build-out; the actual number is an average of 9.03 cfs.

The Interim Director's water budget is not supported by any testimony or documentary evidence in the record, including the Department's own water budget in the TVHP. Neither M3 Eagle, Department Staff, nor the Protestants addressed such an analysis at any time or in any way during this proceeding. It appears to be the Interim Director's own opinions as to what a few select figures in the M3 Model Report mean.

[16] The Order notes that M3 Eagle "didn't know" the combined volume of water being pumped from the PGSA by other entities, and therefore "assumed" 84 cfs to be the number. Order ¶ 36, p. 8. This statement in the Order should be reconsidered because, as stated in the M3 Model Report, Ex. 16 App. A, p. 8, the researchers did base its estimate on actual production numbers from the North Eagle area. As noted, the model also was used to calculate drawdowns based on a much larger assumed number (144 cfs) for existing pumping. Ex. 16 at 19.

As discussed above and detailed in M3 Eagle's Initial Brief, the record shows that more than a decade of pumping from the PGSA by United Water Idaho and other municipal providers has not resulted in any significant water level declines. The experts who addressed this point testified to the robustly recharged and productive ground water system beneath the North Ada area that is not at risk of over-appropriation. In short, not only does the Interim Director's water budget fail because it misinterprets the model, it also flies in the face of all other actual physical evidence showing abundant water to supply the Treasure Valley's projected growth for many decades to come—not some much smaller number that the Valley essentially would be bumping up against already. The Interim Director's water budget is not supported by the record and should be reconsidered. Each of these flaws is discussed in greater detail below.

(1) The Interim Director erroneously resorts to his own opinions and assumes facts not in the record.

The Interim Director must base his decision on facts in the record. Idaho Code § 67-5248(2) ("Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding."); [17] IDAPA 37.01.01.712.01 (same). It is improper for a hearing officer to insert or assume new facts after the close of

[17] Idaho Code § 67-5251(4) states:

> Official notice may be taken of: (a) any facts that could be judicially noticed in the courts of this state; and (b) generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source thereof, including any staff memoranda and data. Notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed. When the presiding officer proposes to notice staff memoranda or reports, a responsible staff member shall be made available for cross-examination if any party so requests.

IDWR has a nearly identical rule in IDAPA 37.01.01.712.01.

evidence, and this would include his own opinions that contradict or supplant the expert opinions actually presented at the hearing.[18]

The Interim Director did not reveal his water budget analysis at the hearing, so it was not discussed by any expert. Nor was it presented in any exhibit. It appears to be entirely of the Interim Director's making.[19] Idaho's Administrative Procedure Act provides that "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251(5). However, no expert at the hearing suggested the type of water budget analysis set forth in the Order, so the Interim Director did not weigh or evaluate contradictory evidence about it, or the credibility of witnesses concerning it.

The only evidence in the record about the M3 Model (let alone the components of its water budget) is the M3 Model Report itself (Ex. 16), the supporting testimony of M3 Eagle's experts, the relatively supportive testimony of Protestants' expert, Dr. Dale Ralston,[20] and Department Staff's inconclusive comments about it.[21] There is no evidence that one can use a

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[18] To the extent that the Department's Staff assisted the Interim Director in his analysis after the close of the hearing, such post-hoc contributions would be equally inappropriate. Such input would effectively augment the record without providing any party the opportunity to confront, evaluate, or rebut any offered facts or analysis. As noted in footnote 23, below, that would violate the right to due process of law.

[19] As referenced in the preceding footnote, the Interim Director could take official notice of specific facts or material that is not in the record for this case, or what he considers to be generally recognized technical or scientific facts within the Department's specialized knowledge. But he has not notified the parties of any official notice taking in regard to his water budget analysis contained in paragraphs 33 through 39 of the Findings of Fact, nor have the parties been provided an opportunity to contest and rebut his water budget analysis as required by statute and rule. If the Interim Director wishes to pursue his water budget analysis, it would be appropriate only by following the statutory and regulatory procedures for taking official notice. In other words, it would be necessary to reopen the record.

[20] Tr. p. 2369 (Dr. Ralston stating "it is a good model").

[21] In his testimony, Department Staff witness Dennis Owsley mentioned that the M3 Model assumes 107 to 115 cfs of inflows into layers 5 through 7 in the southeast corner of the model—a point that is not disputed by M3 Eagle. However, he did not postulate that these values represented the model's only inflows to the PGSA, that the rest of the model's water budget could be disregarded, or that the water budget shows that only 13 to 21 cfs of water would remain unappropriated if M3 Eagle's full request was granted (as concluded by the Interim Director). *See* Ex. 904, at 39; Tr. pp, 1897-98. Otherwise, Department Staff's testimony about the M3 Model was that its drawdown projections were "reasonable, assuming a laterally continuous aquifer system that is hydraulically connected to one or more sources of recharge." Tr. pp. 1779-80 (Vincent). (Lateral continuity and recharge, by the way, were proven

few data points from the M3 Model's water budget to draw accurate conclusions about the entire model's (or the PGSA's) water budget. But this is what the Interim Director did. Using two out of fifteen components of the M3 Model's water budget, he implicitly concluded that only 23 to 31 cfs[22] currently remain unappropriated for future use in this large area of Treasure Valley, and that M3 Eagle's application should be considered in light of this. (A technical discussion of the Interim Director's flawed use of these two components is set out below in section I.D(2).)

The only ground water budget for the M3 Model that is supported by the record is the unadulterated water budget contained in the M3 Model Report. A summary of the M3 Model's water budget is set forth in Table 1 on page 27 of the Main Model Report, Ex. 16. Again, even if the M3 Model were produced or offered to determine overall water volumes in a dynamic, recharging aquifer such as the PGSA (and it was not), it should be taken for what it actually says on the subject: Table 1 shows that nearly 900 cfs of inflow would remain unappropriated after M3 Eagle's full diversion (and discounting induced recharge), not 23 or 31 or any other similar number. The M3 Model is designed to represent reality, and it recognizes recharge of a magnitude consistent with what the TVHP found.

Indeed, the TVHP water budget found that the Treasure Valley was receiving over a million acre-feet of ground water recharge annually, and discharging less than this. Ex. 33I at 6-2, Table 8. This works out to be nearly 1,400 cfs of inflow to ground water in the TVHP's model domain.[23] Even granting that that domain is somewhat larger than the M3 Model's

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by every expert who gave opinions on these subjects.) Staff's memoranda do not address the water budget aspect of the M3 Model at all.

[22] The range 23 to 31 cfs is based on the Interim Director's conclusion that 13 to 21 cfs would be available after M3 Eagle's development, plus the 10 cfs he attributed to M3 Eagle's development. Actually, M3 Eagle seeks an average of 9.03 cfs, but conservatively increased this to 10 cfs in its model to show that even a 10% higher average rate of diversion would not cause injury.

[23] 1 maf (325,851 million gallons) / 365 days = 900 million gpd = 620,000 gpm = 1,381 cfs.

domain, it underscores that both models' inflows to ground water are of the same magnitude. The Order's selection of only 107 to 115 cfs of inflow to the M3 Model domain is not even plausible. Nor does it agree with the data used to construct the mode.

We pointed out in M3 Eagle's Initial Brief that the project's annual average diversion of just over 9 cfs from the PGSA at full build-out represents less than one percent of the total inflow to the M3 Model domain and that the total diversions from all estimated ground water diversions in the model domain (including M3 Eagle's proposed 9 cfs) represent less than 15% of the total inflow into the model domain. Main Model Report, Ex. 16, at 27 (Table 1). This evidence is uncontroverted. It is the fact established on this subject and there is no basis for departing from it. "A trier of fact may not arbitrarily disregard credible and unimpeached testimony of a witness. In a related vein, it has long been recognized that unless a witness's testimony is inherently improbable, or rendered so by facts and circumstances disclosed at trial, the trier of fact must accept as true the positive, uncontradicted testimony of a credible witness." *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

The Interim Director is not free to reject facts that do not support his preferred outcome and substitute others he makes up, as he has done here. The Interim Director's findings and conclusions in paragraphs 33 through 39 are *ultra vires*, arbitrary and capricious, unsupported by the facts and the law, and arguably amount to a violation of M3 Eagle's due process rights.[24] These findings should be reconsidered.

[24] "A hearing at which the applicant is fully advised of the claims of the opposition and of the facts which may be weighed against him, and at which he is given full opportunity to test and refute such claims and such facts, and to present his side of the issues in relation thereto, is essential to due process." *Application of Citizens Utilities Co.*, 82 Idaho 208, 215, 351 P.2d 487, 490 (1960), *citing Morgan v. United States*, 304 U.S. 1 (1938). M3 Eagle was never given an opportunity to refute the new facts conjured by the Interim Director in his water budget analysis.

(2) Aside from being outside the record, the Interim Director's analysis of the water budget is fundamentally flawed.

In addition to the Interim Director having no authority or qualification to offer his own expert opinions as findings of fact, his oversimplified water budget analysis is fundamentally flawed. His analysis compares one inflow ("PGSA Inflow from SE Model Boundary") with one outflow ("PGSA Pumping (Municipal, Industrial & Irrigation Pumping)"), and disregards all other components of the M3 Model's actual water budget.[25] There are no facts in the record supporting such an analysis.

The figures used by the Interim Director are marked with arrows in the following tables taken from the M3 Model Report's water budget summaries (Exhibit 16, App. B, Tables 3 and 4):

[25] Comparing only one element of outflow to one element of inflow is a common error that has been perpetuated by hydrologists since at least 1940, as described in the "water budget myth" discussed by Bredehoeft and others (1982) and referenced in both of the aquifer test analysis reports admitted into the record (Ex. 12 and 44).

Table 3: Water Budget for Steady-State and 50-Year Transient Hmatch Simulation

Water Budget Component	Boundary Type	Model Layer	Hmatch (SS No Pumping) Net Inflow (cfs)	Hmatch (50 Year Pumping) Net Inflow (cfs)	Hmatch (Difference) Difference[1] 50yr-SS (cfs)	Hmatch (Difference) Percent Contribution to NPW Pumping
Recharge	Recharge	Uppermost Active	542.44	542.44	0.00	0.00%
Boise River Seepage	River	Layer 1	-530.53	-521.58	8.95	89.27%
Payette River Seepage	River	Layers 1,2,3	-386.91	-386.72	0.19	1.92%
Lake Lowell Seepage	River	Layer 1	17.49	17.51	0.01	0.14%
Dry Creek Seepage Inflow	Wells	Layer 1	3.95	3.95	0.00	0.00%
Middle Aquifer Pumping (Domestic, Industrial)	Wells	Layer 3	-59.68	-59.51	0.17	1.72%
PGSA Pumping (Municipal, Industrial & Irrigation Pumping)	Wells	Layers 5-7	-84.09	-94.12	-10.03	NA
Boise River Alluvial Aquifer Inflow	CHB	Layer 1	80.95	81.57	0.62	8.21%
Boise River Alluvial Aquifer Outflow	CHB	Layer 1	11.76	11.78	0.02	0.20%
Payette River Alluvial Aquifer Inflow	CHB	Layer 1	282.48	282.49	0.01	0.07%
Payette River Alluvial Aquifer Outflow	CHB	Layer 1	-1.92	-1.91	0.00	0.01%
PGSA Inflow from SE Model Boundary	GHB[2]	Layers 5-7	114.77	114.77	0.00	0.00%
PGSA Outflow at SW Model Boundary	CHB	Layers 5-7	7.61	7.62	0.01	0.14%
Payette River Valley Fill Outflow	CHB	Layers 5-7	1.98	1.98	0.00	0.02%
Willow Creek Aquifer Along NE Model Boundary	CHB	Layers 5-7	-0.30	-0.27	0.03	0.31%
Model Mass Balance Error			<1%	<1%		

1. Negative number indicates more outflow simulated in the transient model. Positive number indicates more inflow
2. For the 50 year pumping simulation the boundary type was constant flux

Table 4: Water Budget for Steady-State and 50-Year Transient Tmatch Simulation

Water Budget Component	Boundary Type	Model Layer	Tmatch (SS No Pumping) Net Inflow (cfs)	Tmatch (50 Year Pumping) Net Inflow (cfs)	Hmatch (Difference) Difference[1] 50yr-SS (cfs)	Hmatch (Difference) Percent Contribution to NPW Pumping
Recharge	Recharge	Uppermost Active	542.44	542.44	0.00	0.00%
Boise River Seepage	River	Layer 1	-529.18	-520.05	9.13	88.60%
Payette River Seepage	River	Layers 1,2,3	-387.02	-387.00	0.01	0.14%
Lake Lowell Seepage	River	Layer 1	17.36	17.38	0.02	0.23%
Dry Creek Seepage Inflow	Wells	Layer 1	3.95	3.95	0.00	0.00%
Middle Aquifer Pumping (Domestic, Industrial)	Wells	Layer 3	-59.52	-59.39	0.14	1.33%
PGSA Pumping (Municipal, Industrial & Irrigation Pumping)	Wells	Layers 5-7	-84.09	-94.40	-10.30	NA
Boise River Alluvial Aquifer Inflow	CHB	Layer 1	80.50	80.84	0.34	3.35%
Boise River Alluvial Aquifer Outflow	CHB	Layer 1	11.61	11.64	0.04	0.37%
Payette River Alluvial Aquifer Inflow	CHB	Layer 1	282.49	282.47	-0.01	-0.14%
Payette River Alluvial Aquifer Outflow	CHB	Layer 1	-2.18	-1.92	0.26	2.48%
PGSA Inflow from SE Model Boundary	GHB[2]	Layers 5-7	106.82	106.82	0.00	0.00%
PGSA Outflow at SW Model Boundary	CHB	Layers 5-7	7.42	7.45	0.03	0.28%
Payette River Valley Fill Outflow	CHB	Layers 5-7	1.76	1.97	0.22	2.14%
Willow Creek Aquifer Along NE Model Boundary	CHB	Layers 5-7	-0.39	-0.34	0.05	0.48%
Model Mass Balance Error			<1%	<1%		

1. Negative number indicates more outflow simulated in the transient model. Positive number indicates more inflow
2. For the 50 year pumping simulation the boundary type was constant flux

Based on the figures marked in the tables above, the Interim Director concluded that only 13 to 21 cfs[26] of water would remain unappropriated in the PGSA if M3 Eagle were granted and fully developed a water right to divert an annual average of 10 cfs.[27] However, there is no evidence in the record to support the Interim Director's method of using only two out of the fifteen elements

[26] The 13 cfs figure is based on the calculation of "PGSA Inflow from SE Model Boundary" (106.82) minus "PGSA Pumping (Municipal, Industrial & Irrigation Pumping)" (94.40) in the "Tmatch (50 Year Pumping)" column of Table 4 (both figures are rounded prior to the calculation). The 21 cfs figure is based on the calculation of the same water budget components in the "Hmatch (50 Year Pumping)" column of Table 3.

[27] 10 cfs was used in the M3 Model to conservatively represent M3 Eagle's proposed annual average diversion rate of 9.03 cfs. *See* Ex. 42, Attachment A, at 1. In his Findings of Fact, however, the Interim Director incorrectly states that M3 Eagle proposes to pump 10 cfs at full build out. Order ¶ 36, at 8. This should be corrected on reconsideration.

in the M3 Model's water budget or his conclusions about the amount of unappropriated water in the PGSA.[28]

It appears the Interim Director believes that inflow into the PGSA occurs only through layers 5-7 at the southeast model boundary. This is not the case because all of the layers are connected. This is demonstrated in Table 4-3 of the PGG Report (Ex. 16), which shows that all of the M3 Model layers have vertical conductivity—even the aquitards in layers 2 and 4. *See also* Main Model Report, Ex. 16, at 16-17 (layers 2 and 4 are "lower-permeability," not impermeable).[29] Because all of the model layers are connected, all of the inflows to the M3 Model must be considered as potential inflows to the PGSA.

This connectivity also is demonstrated by the M3 Model Report's observation that wells completed "in the unnamed alluvial aquifer overlying the Pierce Gulch Sand Aquifer" may experience drawdown impacts from M3 Eagle pumping "that are on the order of 2/3 of those predicted for wells completed in the Pierce Gulch Sand Aquifer at similar locations." Main Model Report, Ex. 16, at 33. These wells could not experience any drawdown impacts from PGSA pumping if there were no communication between the aquifers.

Moreover, this connection was explained at the hearing by M3 Eagle's ground water modeling expert witness, Mark Utting, when he was asked about the PGSA's recharge sources:

> [W]e have recharge coming in from the southeast model corner. We know that Pierce Gulch sand is there. We know we have water flowing in that area. We calculated that to begin with through this general head boundary, where we specified the transmissivity of

[28] As mentioned in footnote 21, *supra*, Department Staff witness Dennis Owsley discussed the M3 Model's water budget in his testimony. In fact, Mr. Owsley referred to the same Tables 3 and 4 from the PGG Report included in the text. *See* Ex. 904, at 39. Again, however, he did not testify that it would be appropriate to use only a few components of the M3 Model's water budget to determine water availability, nor did he give any opinion as to the amount of unappropriated water.

[29] The Interim Director should correct his misstatement in paragraph 18 of the Findings of Fact that "clay layers form impervious aquitards"—they are lower-permeability, not impervious.

> the region upgradient from there and from known water rights. And that calculates the flow. The other recharge to the Pierce Gulch Sand Aquifer would occur within the model, depending on the head differences between the layers.

Tr. pp. 1657-58 (Utting) (emphasis added.).

It is for this reason that the M3 Model and its water budget account for all inflows and all outflows to the model, not just inflows directly to the layers of the model selected to represent the PGSA. This is illustrated in the tables above; the connectivity between the various inflows and outflows is evident from the effect additional ground water pumping from the PGSA has on multiple categories of modeled inflows and outflows in all layers of the model.

The PGG Report—which is part of the M3 Model Report itself—points out that:

> Our goal during calibration was to ensure that a shallow flow system was both *represented and connected* to the deeper flow system via an aquitard portrayed with a reasonable estimate of K. The fact that the model predicts much of the water introduced to the shallow flow system to remain in the shallow flow system and discharge to the rivers rather than flow vertically downward to the deep system suggests that the K assigned to the aquitards (0.02 ft/day or 7x10-6 cm/sec) is likely conservative in restricting induced seepage during predictive simulations of proposed M3 pumping.

Ex. 16, Appendix A, PGG Report at 16 (emphasis original). It is basic hydrogeology that pumping from the PGSA will induce flows into the aquifer from all directions unless there are complete barriers to flow. Experts from all sides testified that they would expect additional recharge to be induced by additional pumping. *See, e.g.*, Tr. pp. 596 (Dittus), and 2261-62 (Ralston). This also was confirmed by Department Staff. Tr. P. 2261-62 (Vincent). The model recognizes that overlying aquifers are not separated by impervious layers and will contribute water to the PGSA (although the model conservatively estimates the conductivity of the aquitard

layers so as not to overestimate the amount of induced recharge to the PGSA for purposes of predicting drawdowns from M3 Eagle pumping).

In summary, it is error to conclude, on this record, that the entire PGSA water supply is only that which the model calculates entering three model layers across the southeast model boundary.

(3) The Order incorrectly focuses on one component of recharge as the entire PGSA water budget and ignores how the model predicts recharge effects of pumping.

The Order at ¶ 34, pp. 7-8, concludes that 107-115 cfs enters the PGSA through the model's southeast boundary, apparently with the intent to define (and limit) the amount of water available to PGSA water users within the model. However, this incorrectly focuses on one component of inflow into the model domain and does not recognize that pumping wells capture discharge, which is water that would have flowed past the well and discharged at some other location, were the well not pumping.

Tables 3 and 4 from the Model Report, reproduced above, show the effects of capturing discharge. These tables compare the various water budget components with and without the proposed M3 Eagle pumping from the PGSA, and show how the model predicts where other parts of the budget (i.e. other inflows and outflows) would be affected by such pumping. The tables project that 90 percent of the pumped water would be ground water that would have discharged into the Boise, Snake, and Payette Rivers. Out of the fourteen rows of ground water inputs, the tables demonstrate that the model calls upon nine of them as recharge inputs due to PGSA pumping—not just the single southeast boundary inflow.

These tables also show no change in the inflow component flowing into the model through the southeast boundary of the model ("PGSA Inflow from SE Model Boundary"). The

reason for this is that that the modelers conservatively fixed that boundary at roughly 115 cfs of inflow "to eliminate the possibility that pumping might artificially induce additional flow during the simulation." M3 Model Report, Ex. 16, at 18.

Inherent in the model (which is based on actual geological, aquifer testing, and water level data) is leakage from all the other sources cited by all the expert opinion on the subject. The proposed pumping is not limited or controlled by the one component of recharge the Interim Director cites in Paragraph 34 of the Order. The Order misunderstands this issue. In other words, the Order selectively assumes only one source of recharge: that which enters the PGSA through this one southeast boundary. Water availability within the model domain actually depends on all sources of recharge programmed into the model (some 1,040 cfs—and again, based on real data), not just a single source as declared by the Order.[30]

While M3 Eagle's experts have recognized that recharge directly to the PGSA is limited because the PGSA lies beneath geologic strata under much of the model area, this does not mean that it does not occur. As Dr. Osiensky explained, "recharge occurs from land surface down, and however that is, whether that's from leakage from rivers or leakage from precipitation and so forth." Tr. p. 3505. The model can apply surficial recharge (either through precipitation, irrigation or canal and river seepage) only to the top active layer of the model. This is consistent with the real world; water must enter the surface before it can more to deeper layers. Stating that there is little direct infiltration to the PGSA does not mean that recharged water, once in these surficial layers, cannot flow to the PGSA, especially when it is pumped by wells. This is

[30] As Dr. Osiensky testified, the aquifer's high transmissivities, combined with its geographic expanse, means that the cone of depression from pumping on the M3 Eagle site will extend over "tens of square miles." Tr. p. 3464 (Osiensky). This too is why PGSA pumping will draw from widespread recharge sources.

especially true where the PGSA comes up dip closer to the land surface, both in the M3 Model and in the real world.

In summary, as Tables 3 and 4 referenced above demonstrate, pumping affects multiple parts of the modeled area such that the effects are realized in overlying model layers, as well as within the PGSA. Groundwater flowing through the PGSA must originate first as recharge into other (surficial) layers, before it can reach the PGSA. The model shows that 107 to 115 cfs enters the model through its southeast corner. However, it also shows that more than 1,000 cfs inflow to the model, including more than 540 cfs that infiltrate the upper layer of the model from which PGSA pumping can draw.[31]

(4) The Interim Director misquotes and evidently misunderstands M3 Eagle's undisputed scientific conclusions about PGSA recharge.

The record does not support the statement in paragraph 34 of the Order's Findings of Fact that "[t]he model assumes little or no inflow to the PGSA from surficial recharge." An accurate statement would be that the model assumes little direct inflow to the PGSA from surficial recharge. The distinction is important because, as discussed above, water in these surficial layers can flow to the PGSA, especially when water is pumped from the PGSA.

As Dr. Osiensky explained, "recharge occurs from land surface down, and however that is, whether that's from leakage from rivers or leakage from precipitation and so forth." Tr. p. 3505. Thus, the model assumes surficial recharge (either through precipitation, irrigation or canal and river seepage) directly recharges only the top active layer of the model that represents

[31] In addition, the Interim Director missed that fact that the flow contour maps presented in Figures 4 and 5 of the November 14, 2008 PGG report (Ex. 16 App B) show that the captured component of ground water flowing under the M3 property that would have discharged into the Boise River would have done so downstream of Caldwell. In other words, this effect of the M3 Eagle pumping will not be felt in the immediate area, and instead will show up as effects to the Boise River essentially as it leaves the basin.

the land surface. *See* Main Model Report, Ex. 16, at 17 ("Layer 1 represents the Boise River Gravels in the Boise Valley and unnamed alluvial gravels in the Payette Valley") and 21-22 (discussing the surficial recharge component of the water budget). A portion of the PGSA is present at or near the land surface under the M3 Eagle property and therefore is able to receive direct surficial recharge.[32] This is the only portion of the PGSA that the M3 Model assumes to receive direct inflow from surficial recharge. Tr. pp. 1674-75 (Utting).

Again, however, the entire PGSA is capable of receiving indirect inflow (that is, inflow that first passes through non-PGSA aquifer units) from surficial recharge because all the model layers are connected. Tr. pp. 1657-58 (Utting stating, "The other recharge to the Pierce Gulch Sand Aquifer would occur within the model, depending on the head differences between the layers.") This connection is illustrated in the tables reproduced above, which show that an additional 10 cfs of outflow in the "PGSA Pumping (Municipal, Industrial & Irrigation Pumping)" category affects nearly every other category of the water budget.

Even Mr. Vincent of Department Staff acknowledged (based on the findings of M3 Eagle's experts, not his own work) that pumping in the PGSA is predicted to cause some level of decline in the overlying aquifer. Tr. p. 3827 (Vincent).[33] Dr. Osiensky testified that water from the river and from "the hundreds of miles of canals that crisscross the valley . . . is recharging the gravels. And then water is infiltrating from the gravels down into the Pierce Gulch and all the

[32] The Interim Director properly recognized that there is "exposure of the PGSA to land surface" in this area. Order ¶ 21, at 6.

[33] In pointing this out, however, we note that while the model predicts these declines in overlying zones due to some degree of interconnection, the actual evidence—such as the experience with the Miller and Vail wells and the long-term stability of the PGSA's water levels as shown in the United Water Idaho wells and in the high quality monitoring wells—suggests that the recharge entering the PGSA is so prodigious that production from it has had modest or no effect on the PGSA itself, and none in overlying alluvial zones.

other aquifers." Tr. p. 3513. In discussing the robustness of the Aquifer's recharge, Dr. Osiensky also explained, "We do know that there's lots of recharge getting into the system . . . ."

Mr. Squires gave the opinion that, regardless of whether applied irrigation water has yet found its way to the PGSA, it also will be a recharge source and currently provides "a driving head" to PGSA recharge. Tr. pp. 3227-28 (Squires). Mr. Squires also cited several additional available sources of recharge to the PGSA. *See, e.g.,* Ex. 45 p. 25; Tr. pp. 3216-19 (Squires).

In short, all these various recharge sources cited by M3 Eagle's experts, to varying degrees, are available to the PGSA. It is error for the Interim Director to ignore them. No other expert, and not the Staff, had any contradictory opinion about recharge.

The Interim Director's basic misunderstanding about PGSA recharge is further demonstrated in paragraph 32 of the Order's Findings of Fact, in which he cites Ex. 2, p. 5, for the proposition that "most of the 'groundwater in the PGSA originates as recharge in the east and south Boise regions augmented by leakage of canals south and east of Meridian'. PGSA recharge is from the Boise River in the Boise area. *See* Exhibit 2 page 5." However, Exhibit 2 actually states:

> Most of this groundwater originates as recharge in the east and south Boise regions augmented by leakage from canals south and east of Meridian <u>and</u> recharge from the Boise River in the Boise area.

Ex. 2 at 5 (emphasis added). This rephrasing in the Order is significant because recharge to the PGSA is from a broad area and a multiplicity of sources across the Treasure Valley, originating with the Boise River, not just main stem Boise River or "the Boise River in the Boise area" as suggested by the Order.

(5) Any suggestion that the Aquifer may be approaching full appropriation is contradicted by the record.

The Interim Director concludes, in the Order, ¶ 38, p. 8, that a "flow of 13-21 cfs assumed to remain" in the PGSA under current levels of pumping if M3 Eagle fully develops. This too is incorrect. The Interim Director apparently assumes that were this 13-21 cfs to be pumped from the PGSA, then the aquifer would be "fully appropriated." He has incorrectly assumed that only the 102-115 cfs of estimated inflow from the southeast model boundary supplies water to the PGSA, and that this value defines the total amount of ground water that could be pumped from the PGSA. This is incorrect. The modeling study demonstrates that the PGSA is not isolated and should not be considered as separate from all other parts of the ground water flow system of the greater M3 Eagle vicinity; pumping from the PGSA affects other aquifers as shown in Tables 3 and 4 (referenced above). The fact of robust recharge and leakage from other aquifers is supported Mr. Dittus who testified that pumping at thousands gallons per minutes at several United Water of Idaho wells completed in the PGSA for periods of up to 15 years and more has not caused noticeable drawdown in the aquifer. Tr. p. 521 (Dittus); Tr. pp. 518-21; Ex. 45 Fig 15. The Order makes no reference to these crucial facts.

The Interim Director also implies that M3 may be proposing "an overdraft that would reverse the direction of groundwater flow." Order ¶ 38, p. 8. None of the figures presented in any of the modeling runs presented in any part of Exhibit 16 show a reversal of gradient or for that matter any significant change in the direction of ground water flow on any of the water level contour maps included in the exhibit. In fact, the M3 Model Report shows very little (and mostly undetectable) change in gradient and no PGSA gradient reversals. Some local vertical gradients will change (as shown by the model) and eventually some additional water will enter (recharge) the PGSA via overlying aquifers and other sources. However, as the model shows,

almost all of the pumpage proposed by M3 Eagle, is groundwater that would have discharged into the Boise, Snake, and Payette River basins, as shown in Tables 3 and 4 (referenced above). The Order's finding that flow for future uses would be "only 13-21 cfs" (a calculation based on flow quantities limited by the model-calculated flow through the SE corner of the model) is incorrect.[34]

The Department's inability to recognize the deliberately conservative nature of the M3 Model, including all of its inflow components (and especially the surficial recharge component), leads it to conclude that actual PGSA recharge is limited to the single component of 107 to 115 cfs of water designated as "PGSA Inflow from SE Model Boundary" in Tables 3 and 4 above. This is a fundamental flaw in the Order's water budget analysis. As shown in the tables above, surficial recharge alone adds more than 540 cfs of the more than 1,000 cfs of inflows to the model domain. All of these inflows must be included to accurately portray the M3 Model's water budget and available sources of drawdown. It was error to ignore any of them. The model runs were programmed to depict a very conservative scenario for purposes of showing adequate water supply assuming what amounts to a minimal, worst-case scenario as to model inflows. This was to give the Department assurance that the project will not cause unreasonable effects on aquifer levels. The actual situation has far more available recharge and sources of recharge as has been explained in the supporting documents and expert testimony. M3 Eagle's model simulations show small drawdowns in the PGSA at full development even assuming a <u>20% reduction in inflow through the southeast model boundary.</u> Ex. 16, Main Model Report at 28-29.

[34] The rest of the Order's finding at ¶ 38, p. 8 also is confusing. It states that "[s]ome component of ground water should be dedicated to underflow and to buffer the estimates used in the ground water flow model unless M3 Eagle proposes and overdraft that would reverse the direction of the flow gradient." It is unclear what is intended by "buffering" estimates in the model. But in any case, M3 Eagle's proposed average daily pumping of 5.8 million gallons is only about 25-30 percent of the total estimated ground water flow passing beneath its property alone. Ex. 2 p. 15; Tr. p. 1573 (Utting).

The focus of the testimony pertaining to the model was its prediction of drawdowns due to PGSA pumping by M3 Eagle. This included testimony about the potential amounts of drawdowns in the shallow overlying aquifers and effects on the input through the model boundary to the southeast. The evidence explains the total inflows. If the Interim Director believes this should be further evaluated or changed, he should reopen the record to take testimony on it. It is appropriate to consider the large regional scale of the PGSA: it ranges from about 200 to over 500 feet thick, and it covers an enormous portion of the Boise River Valley.[35]

(6) The Interim Director selectively seizes upon, and incorrectly interprets, model entries of about 9 cfs of aquifer inflow, a subject not aired at the hearing.

Based on the data on which it is based, the M3 Model includes two small elements of inflow to ground water in the model domain totaling about 9 cfs at the north and west model boundaries. This was not discussed at the hearing, but in the Order the Interim Director focuses on this and opines that this inflow "conflicts with the conceptual model of flow from the Boise Valley to the Payette Valley," Order ¶ 35, and decides to "ignore the 9.0 cfs"[36] in his water budget analysis. *Id.* at ¶ 37. M3 Eagle addresses this issue here not because the inclusion or exclusion of these inflows would significantly affect the M3 Model's drawdown predictions. They do not. You can take away 9 cfs and still have hundreds of cfs available for new uses.

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[35] The Order recognizes that, "in areal extent, the PGSA is a large hydrogeologic formation. Order ¶ 26, at 6. However, rather than reciting the facts known about the PGSA, the Order states that M3 Eagle "estimates that the PGSA extends to the south towards Meridian, to the east into Garden City, to the west in the Boise River Valley toward the Snake River, and northwest toward the Payette River Valley." Order ¶ 26, at 6. The clear preponderance of the evidence is that the PGSA does extend to each of these areas; it is not an estimate. Tr. pp. 970, 974, 976-78 (Wood describing the PGSA's "characteristic signature over most of the western Snake River Plain," into the Payette Valley, in Caldwell area, and even into Oregon). M3 Eagle requests the Order be corrected to establish this fact.

[36] It is unclear where the Interim Director comes up with "9.0 cfs." It appears that the number comes from combining two M3 Model water budget categories in Tables 3 and 4 above: "PGSA Outflow at SW Model Boundary" (the model calculates some 7.62 cfs of inflow to ground water here) and "Payette River Valley Fill Outflow" (where the model calculates 1.98 cfs of inflow to ground water). However, these two categories do not quite add up to the Interim Director's "9.0 cfs" (they add up to 9.6 cfs in Table 3 and 9.42 in Table 4), but we can find no other logical source for the Interim Director's number. In any event, the rest of the discussion assumes that the Interim Director's rejection of the "9.0 cfs" refers to these 9.6 cfs of inflows.

Rather, this is significant because it is another instance where the Interim Director makes unsupportable conclusions that undercut, or more accurately go beyond, the actual scientific evidence in the record.

Small as they are, there is no basis for ignoring these inflows. The M3 Model correctly calculated them based on the available well head data used to create the model. The modelers expressly explained this in the M3 Model Report, which the Order fails to acknowledge. The model scientists recognized that the model calculated small inflows to the east where northerly and westerly outflows were conceptualized. The modelers concluded that these inflows are supported by the data and, in any event, are so small as to not affect the model's outcome. Ex. 16, PGG Report at 16.[37] The modelers' explanation is the only evidence in the record as to how this approximately 9 cfs of inflow should be treated. The Interim Director's decision both to characterize it his own way and then to "ignore" it as a water budget element is based no fact whatsoever in this record.

It is important to note that the roughly 9 cfs of model domain inflow is not induced by M3 Eagle's proposed pumping. This is demonstrated in Tables 3 and 4 above, which show these inflows in the columns depicting inflow both before and after M3 Eagle's pumping.

Moreover, as noted by the modelers, these inflows do not conflict with M3 Eagle's conceptual model of PGSA ground water flowing generally in a northwesterly direction. Actually, the M3 Model Report contains figures illustrating this, which also were ignored in the Order. *See, e.g.*, Ex. 16, PGG Report, Fig. 5-2 (contour maps calculated by the M3 Model, based

[37] Regarding the 7.62 cfs of inflow listed as "PGSA Outflow at SW Model Boundary" in Table 3, the modelers explained that "[i]nflow or outflow are both acceptable from the PGSA CHB along the southwest model boundary, as this boundary was designated to help match observed heads in this vicinity." Ex. 16, PGG Report at 16. Regarding the 1.98 cfs of inflow listed as "Payette River Valley Fill Outflow" in Table 3, the modelers explained that this boundary "could have been adjusted during calibration to achieve the expected flow directions; however, [its] influence on PGSA conditions was too small to be concerned with during calibration . . . ." *Id.*

on actual date, which show ground water flowing into the model at these north and west locations).

M3 Eagle has consistently asserted that PGSA ground water flows to the Payette, Boise, and Snake River Valleys. *See, e.g.*, Tr. p. 1053 (Squires stating "we have never postulated that all the water that flows through the M3 site goes to the Payette River. We think that it flows—some of it flows to the Payette River, some of it flows to the Snake River, some of it flows back to the Boise River . . . ."). *See also* Tr. p. 2072 (Vincent recognizing that "As I understand it from testimony, [M3 Eagle's experts] are saying that it's both the Boise River and the Payette drainage"). The contour maps calculated by the M3 Model support this conceptual model. Dr. Ralston provided the only other evidence on this subject—his simple contour map included as Figure 9 of Ex. 47—but, as discussed in M3 Eagle's Initial Brief and Reply Brief, this supports rather than refutes the basic conceptual model developed by Hydro Logic Inc. and ratified by model calculations based on data.

In summary, the point about the "9 cfs" finding is not the magnitude of this number—it is too small to make any difference to the issue of water sufficiency for the M3 Eagle project. The point is that the Interim Director somehow derived this number from the water budget after the hearing (presumably on his own), applied an analysis that was not explored on the record, and reached a conclusion that is wrong. What is noteworthy—even disturbing—is that the Order then sets this forth as a fact, presumably offering it in an attempt to discredit the model. The model stands as accurate on this point, and M3 Eagle deserves to have such matters subjected to inquiry at hearing, not manufactured after the record is closed.

E. The Interim Director's speculation about ground water flow impediments based on a deep fault beneath M3 Eagle are not findings of fact; the evidence is that there are no such flow impediments.

The Interim Director dedicates paragraphs 27 to 30 of his Findings of Fact to Department Staff's speculative comments about ground water flow impediments in the PGSA. Specifically, the Interim Director notes that "Department witnesses raised questions about the data that might indicate some limitation on the availability of water from the larger PGSA" and that "Department staff referred to several M3 Eagle exhibits that identify a possible fault running diagonally from the southeast to the northwest in the southwest portion of the M3 Eagle property… ." Order ¶ 27, at 6 (emphasis added). He also states that "larges [sic] differences in drawdowns [between upgulch and downgulch wells on the M3 Eagle property] could be caused by a horizontal flow impediment that restricts ground water communication between the PGSA underlying the M3 Eagle property and the larger PGSA underlying the Boise River Valley floor." Order ¶ 28, at 7 (emphasis added). The Interim Director concludes that there are "indications of discontinuity, possibly caused by faulting, in the PGSA underlying the M3 Eagle property" and that "[t]his discontinuity could limit the supply of available ground water for appropriation proposed by M3 Eagle." Order ¶ 30, at 7 (emphasis added).

The Order's statements about a potential discontinuity based on an inferred fault are not findings of fact. They are mere summaries of the conjecture and speculation—not facts—Department Staff presented at the hearing.[38] As discussed in section I.A at page 16, findings of "possibilities" do not meet the preponderance of the evidence standard. Because they are not

[38] The merits of this subject were discussed in great detail in M3 Eagle's Initial Brief and Reply Brief and are not repeated here. Suffice to say that each of the possibilities or indications was soundly disproven by expert testimony and documentary evidence.

findings of fact and particularly because they do not support any of the Interim Director's conclusions of law or his ultimate decision, paragraphs 27 through 30 should be stricken.

Moreover, M3 Eagle's experts, who identified a possible fault in the bedrock thousands of feet below the aquifer in this location, testified and provided exhibits showing, based on seismic, geochemical, and hydraulic test data that there is not an impediment to ground water flow related to this deep structural fault. Tr. pp. 3485-86 (Osiensky testifying that the data show "no indication that any of those faults cause any hydraulic compartmentalization or any impedance to ground water flow.") *See, e.g.,* Tr. p. 1300 (Squires expressing the opinion that the fault in this area does not affect ground water flow); Tr. pp. 987, 989 and 994 (Wood's opinion that this fault is "in the volcanic basement only" and does not penetrate the PGSA and provides "no significant barrier to flow"). All experts addressing the point agreed that no fault boundary here is apparent in pumping test data, which is the best indicator of such boundaries. Tr. 3299-3300 (Squires); Tr. pp. 1568-69 (Utting); Tr. p. 3471 (Osiensky); Tr. p. 608 (Dittus). The staff also agreed that no boundary showed up in test data. Tr. p. 692 (Vincent); Tr. p. 2442 (Owsley).

In short, it is incorrect to conclude that "a fault line separates test well no. 1 and the Kling well from other M3 Eagle wells located in the Big Gulch Drainage northeast of the fault line." Order ¶ 27, at 7. In our Initial Brief, we explained this issue thoroughly and noted that Staff had no opinions as to whether the deep fault here causes an impedance to flow. Initial Brief at 24-26. Because no evidence supports such a statement, and all the opinion evidence on the subject suggests just the opposite, it is improper for the Order to suggest that faulting "might indicate some limitation on the availability of water from the larger PGSA." Order ¶ 27, at 6. This should be remedied on reconsideration.

The last point on this subject concerns Order ¶ 30, at 7, which states that "[s]ignificant differences in comparative ground water level drawdowns and differences in water level trends are indications of discontinuity, possibly caused by faulting . . . ." The clear preponderance of scientific evidence demonstrates no discontinuity here. In addition, the Interim Director failed to note that the wells exhibiting the smaller seasonal variations in water levels are completed in the unconfined portion of the PGSA and should, based on commonly accepted hydraulic theory, exhibit much smaller water level changes because of their much larger storage coefficients (in this case, specific yields) in comparison to confined portions of the same aquifer where the storage coefficients (storativities) are orders of magnitude smaller. Ex. 45 at 8. Furthermore, the testimony make perfectly clear that the variations in drawdown between up and down-gulch wells are exactly as expected based on distance between these wells and from pumping centers, as explained by Dr. Osiensky, Tr. pp. 3515-16, and Mr. Squires, Tr. p. 3309. *See also* Exs. 45, pp. 19-20 and Fig. 5; Ex. 52. This subject was covered on pages 32 and 33 of the Initial Brief and will not be further discussed here. Suffice it to say that this "possibility" has no credible basis and was soundly refuted in the record and the preponderance of evidence does not support the Interim Director's findings.

F. The Order's statement about the "slight downward trend" in three upgulch wells focuses on an insignificant point and also is not consistent with the evidence.

The Order states that "the slight downward trend of ground water levels for the PGSA wells in Big Gulch plotted on Figure 46 [of Ex. 44] is inconsistent with testimony regarding stable or rising water levels exhibited by PGSA wells in the Boise River Valley floor." Order ¶ 29 at 7. There is nothing inconsistent here, as explained in Hydro Logic Inc.'s technical memorandum, Ex. 45, responding to the Staff Memorandum and in the testimony.

In the first place, these three wells, with two years of data, show from between 3 to 6 inches of water level declines. Tr. p. 3599. Mr. Owsley of the Staff conceded that these declines are "not significant," so it is difficult to discern how this can be evidence to overcome the substantial, multi-year and multi-well data (and the unequivocal testimony about it) to the effect that the PGSA exhibits no discernible declining trend despite years of substantial pumping. *See, e.g.,* Ex. 44 Fig. 48; Ex. 45 at 29; Tr. p. 536 (Dittus); Ex. 45 Figs. 14-18. It was explained that these three upgulch wells are in the updip portion of the PGSA that is unconfined, that the geochemistry data shows that this part of the aquifer receives recharge from precipitation, and that precipitation has been on a declining trend during the last decade. Ex. 45 p. 21; Ex. 43; and Ex. 45, Figs. 14, 16, 19, 20 and 21. The Order fails to confront these facts, much less engage in a balancing of these three "insignificant" trends against the clear, long-term evidence of PGSA stability.

II. MUNICIPAL "QUALIFICATION" AND RAFN ISSUES.

A. M3 Eagle "qualifies" as a municipal provider.

Protestants challenged M3 Eagle's application on the basis that M3 Eagle does not meet the definition of a "municipality" under section 42-202B(4) or the definition of a "municipal provider" under section 42-202B(5). At the hearing, the Interim Director rejected the arguments under these sections and reframed the question as whether M3 Eagle "qualifies" as a municipal provider under section 42-202(2). The question boils down to whether an applicant must already <u>be</u> a municipal provider in order to qualify <u>as</u> a municipal provider for RAFN or whether an applicant may qualify by demonstrating that it is ready, willing, and able to be a municipal provider when its permit is issued.

M3 Eagle acknowledges that section 42-202(2) is ambiguous on this point and presented a hundred plus pages of briefing and attachments in the Qualification Brief carefully exploring the function and intent of the 1996 Act. M3 Eagle explained how the Act's goals cannot be reconciled with a *per se* rule prohibiting new non-traditional[39] municipal providers from obtaining water rights for future needs.

The Interim Director ignored all of this, declaring instead, without explanation, that section 42-202(2) is unambiguous: "M3 Eagle argues that the interim director should consider the broader intent of the statute. However, the requirement that the qualification be established at the time of the application is clear from the statutory language." Order ¶ 10, at 11. This is the opposite conclusion reached by the Department in granting a RAFN water right to a first-time, non-traditional municipal provider in the Tamarack case (discussed in section II.D at page 59). In any event, by calling the statute unambiguous, the Interim Director avoided even addressing the bulk of M3 Eagle's arguments on the qualification issue.

In fact, the statute is ambiguous. It says that an applicant must qualify, but it says nothing about how or when an applicant must qualify. Assuredly, it is a plausible reading of the statute that an applicant may qualify by showing that it is ready, willing, and able to be a municipal provider once the permit is issued. To determine whether this is the correct reading, it is necessary to evaluate this statutory provision in the light of the structure and intent of the overall statutory scheme. The Interim Director's refusal to do so is error. We urge the Interim Director to acknowledge that the qualification language in section 42-202(2) is ambiguous and to give due consideration to the arguments presented in M3 Eagle's Qualification Brief.

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[39] As described on page 12 of M3 Eagle's Qualification Brief, "non-traditional" municipal providers are those authorized under Idaho Code Section 42-202B(5)(c) ("A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a 'public water supply' as described in section 39 103(12), Idaho Code.").

The Interim Director's apparent position is that M3 Eagle not only must currently be a municipal provider to qualify as one, but also must have constructed in advance of the permit application the infrastructure it proposes to use to divert and deliver its requested water right. Why else would he point out that "M3 has not constructed any of the water services that it proposes," the "wells needed for diversion have not been constructed," "[n]one of the water lines are in place, [and] service stubs are not provided for the anticipated residential development," and "[n]one of the other water related infrastructure has been constructed. Order ¶ 9, at 10-11. No rational, prospective water right holder would ever commit its resources to constructing a water system before it even knew whether water would ever flow through it. And the Legislature certainly would not encourage people to do so. Reading this unworkable requirement into the word "qualifies" is a stretch too far. The Interim Director should discard his standards for qualifying as a municipal provider.

B. Section 42-202B(8) does not limit RAFN to areas within municipal boundaries and, in any event, this project is within the City of Eagle.

In addition to section 42-202(2), the Interim Director addressed for the first time section 42-202B(8). This was entirely new to us, not having been raised by Protestants, the Department Staff, the Interim Director, or any other party during the hearing. The Interim Director raised section 42-202B(8) after the conclusion of the hearing, relied on it, and ruled on it without the benefit of briefing, oral argument, or any notice to M3 Eagle.

Section 42-202B(8) contains the definition of RAFN. In his Order, the Interim Director quoted only the first sentence of the definition:

> "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be <u>required within the planning horizon of each municipality within the service area not</u>

> inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

Idaho Code § 42-202B(8) (emphasis by the Interim Director; second sentence omitted by the Interim Director). He relied on the underlined portion to conclude: "The quoted language above in Idaho Code § 42-202B(8) establishes that, in order to obtain a municipal water right for a reasonably anticipated future need, the municipal provider must have a service area that includes a municipality within the service area . . . ." Order ¶ 11, at 11.

When the Interim Director states that section 42-202B(8) requires that "the municipal provider must have a service area that includes a municipality," he apparently believes that only cities are municipalities.[40] In fact, the term "municipality" is defined in section 42-202B(4) to include both cities and counties. Thus, contrary to the Interim Director's assumption, section 42-202B(8) does not limit RAFN water rights to providers serving people within city limits, a conclusion which is at odds with the express language of section 42-202B(9) authorizing cities and counties to serve areas beyond their corporate boundaries.

Rather, the thrust and intent of the section is underscored in the final sentence, which the Interim Director did not quote. The purpose of the section is to ensure that RAFN rights are not extended to serve areas where overlapping comprehensive plans (which are issued by both cities and counties) reflect fundamentally conflicting visions of future development by competing municipal authorities. (See footnote 43 and accompanying text at page 53.) In other words, cities and counties must not be in conflict as to their prospective growth paths under LLUPA

[40] Indeed, the Interim Director expressly recognizes only cities as "municipalities" located within the M3 Model's 520 square mile domain, even though it also includes portions of Ada and Canyon Counties. Order ¶ 33, at 7.

before they or municipal providers serving them may obtain RAFN rights.[41] That is the purpose of section 42-202B(8). It is not to prevent RAFN water rights from serving unincorporated areas. In sum, the Interim Director's conclusion that "the proposed development is not part of the City of Eagle" (Order ¶ 11, at 11) misstates the legal requirement in section 42-202B(8).

The statement that the M3 Eagle property is not within the City is also wrong as a matter of fact. The Interim Director presumably knows that the City of Eagle now has acted pursuant to the Pre-Annexation and Development Agreement it entered into with M3 Eagle to annex the entire M3 Eagle property. *See* Ex. 58. If he has any doubt on the matter and if he thought it relevant, he could have re-opened the record. Indeed, he still could. More simply, if he thought it relevant, he could take official notice of the annexation. Or, he could have conditioned the permit to allow RAFN only upon annexation.

After all, the evidence in the record demonstrates without contradiction that M3 Eagle's property would be annexed. "And the public hearing process, as I understand it, will have us fully annexed by December of this year." Tr. p. 3785 (Brownlee). There was never a reason to doubt that this voluntary annexation would occur. The Interim Director knew it was going to happen, and it is exactly what did happen. The Interim Director may disagree with the City's decision to annex, but he may not undo that decision by pretending it did not happen. The finding based on the supposedly "closed record" (Order ¶ 11, at 11) is in contradiction of indisputable fact accurately forecast by the record.

The Interim Director also is incorrect to conclude that "there is no water system, [and] it is not owned by the City of Eagle." Order at 11. The Pre-Annexation and Development Agreement recognizes that the City of Eagle has an existing water system, and that the M3 Eagle

[41] Nothing in the record identifies any failure in this regard.

system will be "an addition to City's Municipal Water System." Ex. 58 at 23. In addition, the City's own Comprehensive Plan recognizes that freestanding systems may be necessary for development in this area. Ex. 57 § 4.6.4.l, at 18. The arrangement between M3 Eagle and the City of Eagle contemplated that the system serving the new development would be conveyed to the City and made a part of its municipal water system; the Order does not consider the implications of these facts.

C. There is no requirement that the applicant rely only on planning data prepared by the City of Eagle.

The Interim Director also appears to have premised his denial of RAFN on the fact that M3 Eagle developed and presented planning data in support of its application, rather than just relying on preexisting data. He stated, "[T]he population and other planning data presented at the hearing was not population and planning data for the City of Eagle. The population and other planning data related solely to M3 Eagle's projections of what its development might be in the future." Order ¶ 12, at 11. In a similar vein, he concluded as a matter of fact: "There is no nexus between population projections in the comprehensive plan and the population projections for the M3 Eagle development presented at the hearing." Order ¶ 12, at 5.

First of all, one would think that if this "nexus" were a requirement, the Interim Director might have raised that point during the lengthy hearing, if not during pre-hearing consultations. M3 Eagle's population and other planning data presumably were relevant to RAFN, and thus were properly admitted into evidence.

In any event, the Interim Director is wrong on the law and the facts. There is no requirement that a private municipal provider rely solely on data provided by the municipalities within its service area. Section 42-202B(8) simply requires "population and planning data"; it does not say who must prepare it. In many instances, there is no such data or the data compiled

by the city or county is not designed for or capable of predicting future water needs.[42] The whole point of the 1996 Act is to encourage and require applicants to go out and develop the data. The more, the better. The Interim Director's conclusion turns the Act on its head.

Idaho's statutory frameworks for land use planning and water rights allocation—LLUPA and the 1996 Act, respectively—have different purposes. One of the important purposes of LLUPA is to provide a mechanism for cities and counties to work out conflicts over which entity will have jurisdiction over growth areas. To this end, section 67-6526 mandates that those jurisdictional conflicts be worked out through such mechanisms as negotiation of areas of city impact.[43] It is in that context that section 42-202B(8) references conflicting comprehensive land use plans. Section 42-202B(8) does not mandate that whatever population planning projections may happen to be included within those comprehensive plans define the bounds of the planning horizon and the quantity of RAFN. Doing so would undermine a fundamental purpose of the 1996 Act—to encourage applicants to develop (and disclose) a better understanding of their future water needs. The requirement for population projections required in the 1996 Act serves a different purpose and is far more rigorous than whatever population forecasting may occur under LLUPA.

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[42] This is illustrated by comparing the single summary page of population information in the City of Eagle's Comprehensive Plan, Ex. 57, at 9, with the extensive demographic analyses prepared for M3 Eagle by Dr. John Church, Ex. 40, 59, 60, 61.

[43] An area of city impact is located outside of, but adjacent to, the boundaries of a city. If the respective jurisdictions cannot agree, LLUPA establishes formal negotiation and judicial processes to resolve the dispute. Idaho Code § 67-6526. The establishment of an area of city impact is usually (but not always) the first step toward annexation. Voluntary Category A annexations can occur outside of a city's area of city impact, as was the case here. (The 2002 amendment to the annexation statute expressly required that Category B and C lands be within an area of city impact. Idaho Code §§ 50-222(5)(b)(i) and 50-222(5)(c)(i) (2002). No comparable requirement was set out for voluntary Category A annexations.[43] Idaho Code §§ 50-222(3)(a) and 50-222(5)(a) (2002).) Thus, the Legislature has determined that it is a "conflict" for a city to involuntarily annex lands outside of its area of city impact, but appropriate and not a "conflict" to voluntarily annex such lands.

The only requirement for population forecasting in LLUPA is the inclusion of population in the list of fourteen "components" of the comprehensive plan. Specifically, the comprehensive plan is to include: "A population analysis of past, present, and future trends in population including such characteristics as total population, age, sex, and income." Idaho Code § 67-6508(b). LLUPA does not contain any provision for establishing a planning horizon nor quantification of water demand. To the contrary, a 2006 amendment to LLUPA clarifies that water rights are the exclusive domain of the Department. S.B. 1353, 2006 Idaho Sess. Laws, ch. 256 (codified at Idaho Code § 42-201(7)). The bill delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other agency from taking any "action to prohibit, restrict or regulate the appropriation" of water. Thus, the Legislature has made it clear that it is the Department's job is to determine and quantify RAFN rights; the Department would be abdicating its responsibility if it refused to review detailed population and planning analyses prepared for the purpose of determining future needs and instead relied only on existing comprehensive plans that were not intended for and are incapable of fulfilling that purpose. *See supra* note 42 and accompanying text

The Interim Director is also wrong as a matter of fact. The record shows that the data presented by M3 Eagle is consistent with the City of Eagle's Comprehensive Plan. The City of Eagle's Comprehensive Plan (which includes the foothills area as one of its planning areas) estimates the City's population will grow by 19,945 people between 2010 and 2025. Ex. 57, at 9. This alone is enough to cover M3 Eagle's estimated population of 17,455 at full-build out. Ex. 40 at 15. Assuming the same 4% per year growth, however, the City's population will grow another 35,919 by 2040 (*i.e.*, by the end of the M3 Eagle 30-year planning horizon), for a total of 55,864 additional people in the City of Eagle by 2040—easily absorbing M3 Eagle's estimated

population at full-build out. M3 Eagle's residents "will be incorporated into the city of Eagle." Ex. 40 p. 6. They "are not likely to raise the overall population of Ada County." Ex. 40 p. 10. In other words, the population projected by M3 Eagle for its planned community in 30 years is included in the area's population forecast, and is not in addition to it. Ex. 40 pp. 10-11; Ex. 40 App. D-1. The M3 Eagle project will not create added population; it will absorb a portion of the project population growth in the Boise MSA and Ada County.

The consistency between M3 Eagle's and the City of Eagle's population and planning information is hardly surprising since they used the same sources to create their forecasts. The Eagle Comprehensive Plan cites population growth figures from the Ada Planning Association, U.S. Census, and Idaho Power Company. *See* Ex. 57, at 9 ("Historic and projected households and population for the City of Eagle and the Eagle Planning Area can be obtained from the Ada Planning Association, U.S. Census and Idaho Power Company."). The demographic and economic forecast prepared by M3 Eagle's consultant also used population growth data from U.S. Census and Idaho Power Company. Ex. 40, at 10-19; Tr. pp. 322-23 (Church).

The Interim Director seems to suggest that the recent economic downturn will have a commensurate slowing effect on the City of Eagle's growth. Order ¶ 12, at 4 ("The City of Eagle projections were made in 2007 prior to the present economic downturn."). But there is no evidence in the record to support this assumption. Indeed, sound long term population forecasting is premised on the assumption that there will be economic upturns and downturns, neither of which last forever. Tr. pp. 309-10, 328, 337-40, 347 (Church); see also Ex. 40, 59, 60.[44] This is one reason that Church's report addresses both a 20-year and a 30-year build-out to

[44] Dr. Church stated "This housing downturn and this economic recession is—is a temporary situation. We've had recessions in the past. Idaho has had recessions in the past that have been deeper than what we've experienced thus far, and we came out of those rather handsomely with periods of strong growth, decades long growth without a downturn. And so there's no reason to believe that we have fundamentally changed and that Idaho

account for economic downturns. The Interim Director should remove from the Order his personal conjecture about the impact of current economic conditions on long-term projections prepared by a qualified expert.

In any event, contrary to the Interim Director's suggestion, there is no disconnect between the M3 Eagle's growth projections or planning information and the City's. There is no doubt that M3 Eagle's proposed project is part of the City of Eagle's comprehensive planning. The City's Comprehensive Plan dedicates more text to planning in the north foothills area than any other part of the City. Ex. 57 at 58-76. The City's desire to plan for this area is evident from its finding that "the City will hit the build-out population by 2014 and will run out of vacant land in approximately by 2018." Ex. 57 § 1.2, at 4. The north eagle foothills area, shown in the following map taken from the City's Comprehensive Plan,[45] encompasses approximately 49,000 acres of land considered by the City to be of "significant value" and of "special concern" because it is "intimately linked to the City and the Eagle downtown." Ex. 57 § 6.8.10, at 58-61.

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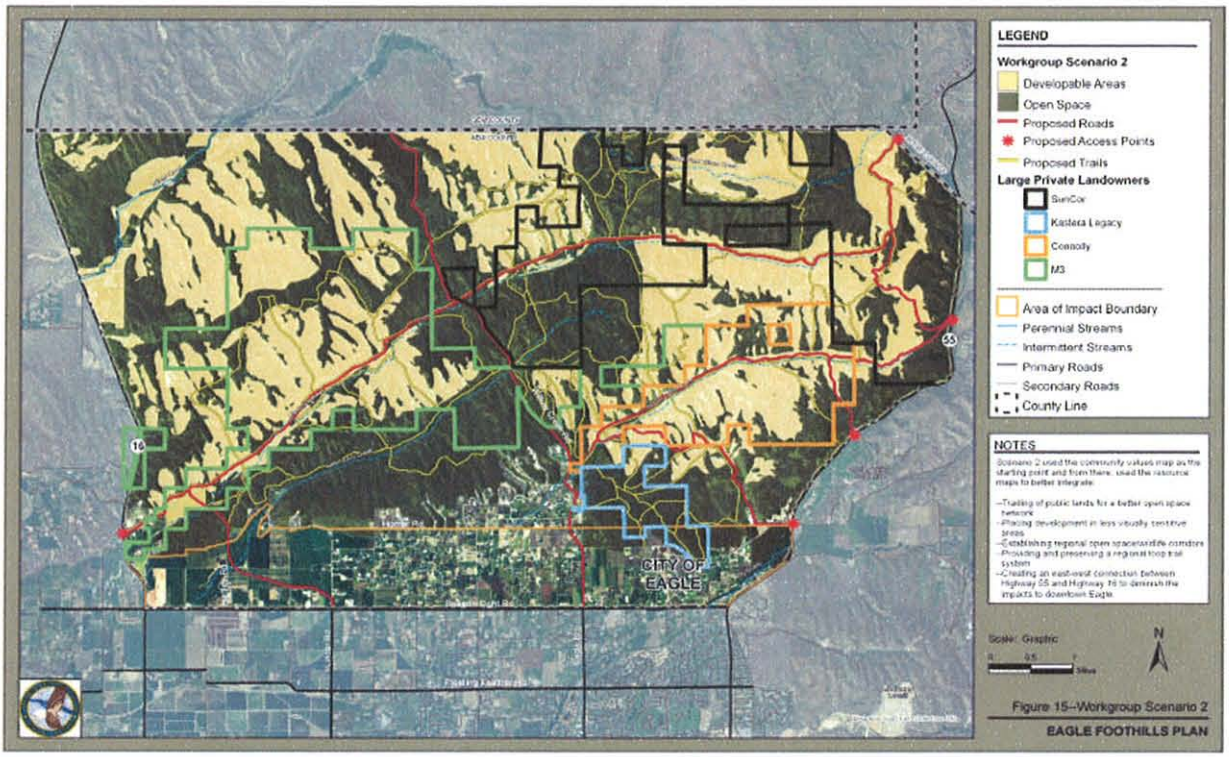
is on a perpetual downward spiral economically. This is a delay, and it will come back and Idaho will grow again. . . . An economic downturn always has an end, as this one will." Tr. pp. 309-10, 328.

[45] The map shows only the Ada County portion of the north eagle foothills planning area, not the Gem and Boise County portions.



Ex. 57 at 60 (Illustration 6.5). Through its comprehensive planning process for the north foothills area, the City did not develop specific development guidelines. Rather, "The intent of the North Eagle Foothills sub-area plan is to be a guide for future development as it is integrated into the Eagle Community and part of the City of Eagle. . . . It is expected that specific area plans (Planned Unit Development) will be drafted by land owners at the time of development that provide specific implementation measures for the broad community policies of this plan." *Id.* § 6.8.10, at 60-61. The Comprehensive Plan expressly states that this process "will be accomplished through incorporation of the area into the jurisdictional boundaries" of the City. *Id.* This is exactly what M3 Eagle has done.

Indeed, through the annexation and the Pre-Annexation and Development Agreement, the M3 Eagle project now <u>is</u> the City's land use plan for the M3 Eagle property. This fact is absolutely clear in the Recitals contained in the Pre-Annexation and Development Agreement

entered into between the City of Eagle and M3 Eagle. There, the City of Eagle expressly states its "desire" that the M3 Eagle property be annexed into the City of Eagle (Recital H), that it be zoned in accordance with the Eagle Comprehensive Plan and the M3 Eagle Zoning Map (Recital J), and that it be "planned for development as a PUD [planned unit development], which PUD shall be guided by the Ordinances, this Agreement, Eagle City Code and the PUD Standards" (Recital N). Ex. 58, at 8. The City's intent is further explained as follows:

> The development of the Property pursuant to this Agreement is intended to result in significant planning and economic benefits to City and Developer by, without limitation: (i) encouraging investment in and commitment to comprehensive planning for efficient utilization of municipal and other public resources to secure quality planning, growth and protection of the environment; (ii) requiring development of the Property consistent with the Eagle Comprehensive Plan, Ordinances and this Agreement; (iii) providing for the planning, design, engineering, construction, acquisition, and/or installation of Public Infrastructure to support anticipated development of both the Property and the larger land area that includes mitigation of impacts to the Property; (iv) increasing tax and other revenues to City based on private and Public Improvements to be constructed on and in reasonable proximity to the Property; (v) creating employment through development of the Property consistent with this Agreement; and (vi) creating quality housing, employment, recreation and other land uses on the Property.

Id. Recital D, at 7. The Pre-Annexation and Development Agreement also states that the proposed zoning designation for the M3 Eagle property "is the appropriate zoning designation . . . [and] is designed to establish proper and beneficial land use designations and regulations, densities, provisions for Public Infrastructure, design regulations, procedures for administration and implementation and other matters related to the development of the Property." *Id.* Recital K, at 8. The City's execution of the Pre-Annexation and Development Agreement is an express acknowledgment that "the public health, safety and welfare of City's citizens shall be best served by entering into this Agreement" for the annexation, zoning, and development of the M3 Eagle

project "to provide for high-quality development and ensure orderly, controlled and quality growth in City." *Id.* Recitals P-Q, at 9.[46] Notably, the City's Comprehensive Plan seeks to encourage planned developments and the use of development agreements such as M3 Eagle's. Ex. 57 § 13.3 at 122-23. There was no evidence presented to contradict the unambiguous statements expressing the City of Eagle's adoption of the proposed M3 Eagle project as its land use plan for this area.

D. The Order failed to address the Tamarack precedent

In its brief on municipal qualification, M3 Eagle carefully addressed the Tamarack precedent, in which the Department granted an RAFN water right to a new private developer much like M3 Eagle and found that it qualified. The Tamarack precedent is plainly at odds with the Interim Director's ruling here. Yet the Interim Director failed even to acknowledge the *stare decisis* effect of Tamarack precedent and the sharp departure from that precedent reflected in the Order. While the Department is not prohibited from overturning precedent, it is irresponsible to do so without carefully evaluating that precedent and explaining why it should not have been relied on by the applicant. Finally, as pointed out above, this precedent (even if the Interim Director thinks it is wrong) demonstrates that the "qualification" requirement is at least ambiguous. It also is fundamentally unfair to an applicant like M3 Eagle for the Department to accept its application without pointing out this policy change.

[46] The Pre-Annexation and Development Agreement also states that "City's approval of this Agreement does not exceed City's authority under any multi-jurisdictional agreements." *Id.* Recital Q, at 9.

E. The Order failed to recognize that M3 Eagle is acting on behalf of an existing municipal provider, the City of Eagle.

Section IV of the Qualification Brief explained that even if first-time municipal providers are barred from obtaining RAFN water rights, this application may be approved because the Applicant is acting on behalf of the City of Eagle, an existing municipal provider.

M3 Eagle and the City contracted that if the City would annex the property, M3 Eagle would develop a water right and a water delivery system, and convey both of them to the City. This is not window dressing. This is a contractual arrangement reflecting the City's authorization that "Developer shall have the right to file for a municipal water right prior to annexation." Ex. 58 ¶ 2.2, at 23-24.[47]

The Interim Director apparently overlooked this section of the Post-Hearing Brief as well. Yet these arguments are serious and compelling. They demonstrate that M3 Eagle is in a posture unlike that of other non-traditional applicants for RAFN. M3 Eagle is entitled to be heard on this issue.

III. OTHER ERRORS

A. The Interim Director has no authority to deny appropriations of water in order to reserve water supplies to promote his preferred land use policy.

A significantly troubling aspect of the Order is the Interim Director's frank admission that he denied the bulk of the application on the basis of his views (as opposed to the City of Eagle's views) on the subject of land use policy. In section II.C at page 52, we noted that the

[47] To the extent the Interim Director believes a future needs water right must be utilized in an existing system or a system that will be connected to an existing system, he is wrong. *See, e.g.*, Order ¶ 13 ("the legislature wanted to allow existing communities, and more specifically, existing municipalities within which an established integrated water system was in place, to protect future water supplies . . . . [T]he orderly extension of these systems as the municipalities grow would be more cost effective and would be more orderly than to allow fragmented developments or developments that could preclude these existing systems from expanding.") Nothing in the 1996 Act's plain text or legislative history supports this interpretation. Nevertheless, M3 Eagle points out that the Pre-Annexation and Development Agreement expressly states that the M3 Eagle water system will be "an addition to" the City of Eagle's existing water system. Ex. 58 ¶ 2.2(a), at 23.

Legislature has drawn a line to ensure that local governments do not usurp the responsibilities of the Department. Idaho Code § 42-201(7). The flip side of this is the equally bright line drawn by the Legislature to ensure that the Department leaves land use policy and other such matters to those agencies charged with such responsibility. In 2003, the Legislature amended the local public interest provision of the water code to stop the Department from overreaching its jurisdiction. 2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code § 42-202B(3)).

The Legislature left no doubt about its purpose: "The 'local public interest' . . . should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. . . . In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public's water resource." Statement of Purpose, H.B. 284 (2003).

In his Order, the Interim Director violates this mandate. He denies M3 Eagle its full water right based in part on his finding that "[t]he amount of undeveloped land within the model domain that logically could be developed by the existing municipalities as they expand could easily require diversion flow rates in excess of 13-21 cfs for these future uses." Order ¶ 39, at 8. Based on this finding, he concludes:

> Consequently, M3 Eagle has the ability, if these proposed future anticipated needs are recognized, to hold the future development of water in the Treasure Valley floor for the existing communities <u>hostage</u> to its future anticipated needs that are distant and not yet developed. This further statement of the <u>public interest</u> supports the decision of the interim director."

Order ¶ 15, at 12 (emphasis supplied). These rulings have no basis in fact or law. They reveal a fundamental hostility to the applicant's project and a failure to grasp the limits of the Department's role.

The Interim Director's bias against the project based on his personal views about land use policy is further evidenced by this statement:

> The logical support for this reasoning would be that these integrated systems are in place, that the orderly extension of these systems as the municipalities grow would be more cost effective and would be more orderly than to allow fragmented developments or developments that could preclude these existing systems from expanding.

Order ¶ 13, at 11. He also appears to disapprove of "the distance of the M3 Eagle development from the cores of the existing communities," Order ¶ 15, at 12, which further evidences his personal land use desires. He complains that the M3 Eagle project will be separated by a "one mile wide buffer zone" of BLM property. Order ¶ 4, at 4. He does mention that this "buffer zone" will be turned into a park connecting the new project with the existing City of Eagle (which M3 Eagle has supported) and which is called for in the City's Comprehensive Plan. The City thinks apparently this is a good idea. The Interim Director may disagree, but his disagreement should have no bearing his decision as to water matters.

As already discussed, the Pre-Annexation and Development Agreement entered into between the City of Eagle and M3 Eagle contains numerous statements demonstrating unambiguously that M3 Eagle's project is the City of Eagle's land use plan for this area. *See* Ex. 58, at 8-9. By denying the greater part of a water right application, the Interim Director has abused his authority in order to second-guess the considered judgment of the City of Eagle on land use matters. This is the very sort of overreaching condemned by the Legislature in 2003.

The core of the Interim Director's Order is his incorrect premise that ground water is short and what little is left must be saved for infill and closer-in development. But this is not only beyond the Interim Director's authority, it is also simply wrong. As discussed above, there is no evidence in the record to support the Interim Director's water budget analysis or his

conclusion that only 13 to 21 cfs would remain unappropriated if M3 Eagle was granted its full water right. In addition, there is no testimonial or documentary evidence regarding the amount of undeveloped land in the model domain, how "existing municipalities"[48] will expand, what these muncipalities' water needs will be when they expand, or whether they will seek to divert water from the PGSA (rather than from another source) to meet those needs. In short, the Interim Director's ruling is without factual support and amounts to nothing more that a bias against what he perceives as "fragmented developments" (which M3 Eagle is not).

Furthermore, even if there was evidence in the record to support the Interim Director's conclusions about how limited the supply of water is or how large future demand will be, Idaho's water law would not allow the Interim Director to deny M3 Eagle any part of its requested water right. As discussed in M3 Eagle's Initial Brief at 9-11, the Idaho's water law advances the policy of "optimum development" of the state's water resources in general and "full economic development" of its ground water resources in particular. The full economic development policy is underpinned by the constitutional guarantee that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied." Idaho Const. art. XV, § 3.[49] Assuming all other statutory criteria are met, an applicant is entitled to its requested water right if a preponderance of the evidence shows that unappropriated waters are available. While this constitutional "right to divert" is not unbounded, it means something. At a minimum, it reinforces the idea that the Interim Director is not empowered to grant and deny water rights on the basis of personal land use preferences that are at odds with those of local governments.

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[48] As noted in section II.B at page 49, the Interim Director's statements about how "existing municipalities" may be expected to expand ignores the 1996 Act's definition that municipalities includes counties and their unincorporated areas.

[49] This provision applies to ground water sources. *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049, 1053 (1931).

The Department has long recognized that optimal utilization and the right to divert are paramount constitutional concerns. As stated by former IDWR Director Higginson:

> Pursuant to Article XV, Sec. 3 of the Constitution of the State of Idaho, to the extent that there is water available for appropriation, the application for permit should be approved even if such approval will result in the need for additional care in the delivery of water in order to protect senior water rights.

Memorandum Decision and Order at 7-8, *In the Matter of Application for Permit No. 65-12842 and Application for Transfer of Water Right No. 65-03104* (April 28, 1989) ("*Dovel Decision*"), *aff'd in relevant part in Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992).[50]

M3 Eagle recognizes that the Interim Director couches his conclusion as being in "the public interest." Order ¶ 15, at 12. In this regard, he may have in mind a sentence in the Statement of Purpose prepared for the 2003 amendment:

> Water Resources' role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and <u>the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time</u>.

Statement of Purpose, H.B. 284 (2003) (emphasis supplied).

At most, however, this would give IDWR the authority to weigh the impact of "alternative uses" of water on the public interest. Thus, hypothetically and without conceding the Department's authority to do so, IDWR might turn down a water right application for a massive coal-fired power plant if it determined that this use of water would choke off future

[50] In the *Dovel Decision*, IDWR approved a new appropriation from a stream where "[d]uring most years there are periods when flows . . . exceed the existing rights and are available for diversion and use" and despite the fact that "there are periods during <u>each</u> irrigation season when the flow of the creek can fill only the senior irrigation water right" and not applicant's permit. *Dovel Decision* at 4 (emphasis supplied). A sufficient supply existed because "[t]here are periods of time in most years when water is available for appropriation and diversion." *Id.* at 7.

municipal development. That is one thing. It is an entirely different thing for the Department to favor one municipal development over another municipal development (the very same "use") based on the Department's views on land use policy and an idea about "fragmented developments." In short, nothing in the Statement of Purpose supports what the Interim Director did here. And whatever authority he may have to reserve water for alternative future uses is constrained by the constitutionally guaranteed right to divert unappropriated water.

B. It is arbitrary to divide M3 Eagle's requested water right by six.

In paragraph 16 of the Conclusions of Law, the Interim Director uses simple math to allocate M3 Eagle one-sixth of their requested water right. There is no evidence in the record to support doing this. Nothing in the record suggests that, since M3 Eagle proposed a 30-year planning horizon, that one-sixth of the project will be completed in 5 years. Nor is there any evidence that the first one-sixth of the project will require one-sixth of the requested water supply. To simply divide the requested water right by six without looking to the project's actual needs is arbitrary and capricious.

Even if the requested water right could be allocated *pro rata* by year, the requested right should be divided by four because of the evidence presented that the M3 Eagle project could reach full built-out in 20 years. Tr. pp. 338-39 (Church); Ex. 40.

C. The Order contains other errors that should be corrected.

The following errors in the Order should be corrected as follows:[51]

- "The parcel is ~~bounded by~~ between Willow Creek Road on the east~~,~~ and Highway 16 on the west, and is bordered by BLM property on the south, and additional undeveloped land

[51] M3 Eagles suggested edits in the items below are shown in strikethrough to show deletions (e.g. ~~deletion~~) and underlined to show additions (e.g. addition).

to the north." Order ¶ 2, at 3. These edits more accurately describe the location of the M3 Eagle property.

- "This means that the water in the PGSA is derived primarily from the Boise River and the water presently being pumped is one hundreds to thousands of years old." Order ¶ 31, at 7. The evidence presented by M3 Eagle supports the conclusion that water pumped from the PGSA at the M3 Eagle property could be one hundred years old. Tr. p. 1448 (Glanzman).

- "The chemistry of the water in the PGSA underlying the M3 Eagle property does not exhibit chemical characteristics of water from surficial recharge, except from two wells located near where the PGSA daylights." Order ¶ 31. The geochemistry evidence presented by M3 Eagle showed that water from surficial recharge has been detected in two upgulch wells. Tr. pp. 1373-75 (Glanzman).

- "PGSA recharge is primarily from the Boise River in the Boise area. See Ex. 2, at 5." Order ¶ 32, at 7. The word "primarily" is added here because M3 Eagle's evidence shows that there are numerous sources of recharge to the PGSA (including overlying aquifer units), but that the Boise River and its canal diversions are the PGSA's primary source of recharge.

- "M3 Eagle does not have ~~any~~ sufficient financial reserves in hand to complete the entire development." Order ¶ 41, at 8.

- The Order's conclusions in paragraph 21, page 12, as to the storage component of M3 Eagle's permitted water right are confusing. M3 Eagle requests the Interim Director grant M3 Eagle a permit with the full storage amounts it requested.

- The last sentence of paragraph 21 of the Order, page 6, states that the ground water on the northeast of the PGSA strike line is "shallow ground water." This is incorrect. As noted in the record, the ground water to the northeast of the strike line is considerably deeper

than the PGSA, and is in the Willow Creek Aquifer. Ex. 12, p. 152. It is not "shallow ground water."

- Conclusion of Law 18, page 12, states that M3 Eagle "has sufficient financial resources to develop a first phase of the project within five years at a flow rate of 4.0 cfs." The evidence is that pursuant to the applicable legal standard, M3 Eagle has a reasonable probability of assembling the resources to develop the entire project. There is no evidence upon which to restrict the scope of the development in this way, or to assume that the first phase will need only 4.0 cfs.

- Conclusion of Law 19, page 12, states that a 4.0 cfs appropriation will not injure other water rights. While this is correct it is improper to the extent it might be read to imply that a larger appropriation would cause injury. The proof actually is that the full appropriation of 6,535 acre-feet of annual diversions, averaging a rate of 9.03 cfs, will not injure other water rights.

- Conclusion of Law 22, page 12, states that a 4.0 cfs appropriation is in the public interest, perhaps implying that a greater amount would not be. The preponderance of the evidence is that the full amount for which M3 Eagle has applied is in the public interest.

IV. PERMIT CONDITION ISSUES

The Interim Director should reconsider the permit conditions listed in the Order that are affected by the disposition of issues raised above. Specifically, and in addition, M3 Eagle requests the Interim Director reconsider the conditions as follows:

- The date for submitting proof of application of water to beneficial use should be adjusted to be five years from the date of issuance of a final, unappealable order determining M3 Eagle's water right application no. 63-32573.

- The date for commencement of project construction should be removed or adjusted to be two years from the date of issuance of a final, unappealable order determining M3 Eagle's water right application no. 63-32573.
- The total flow rate diverted under this right shall not exceed 23.18 cfs.
- The total annual volume diverted under this right shall not exceed 6,535 acre feet.
- The total volume of storage, and diversions to and from storage, should be as requested in the application.
- The restriction on the use and sequence of use of reuse wastewater should be removed. The use sequence is factored into the flow rates set forth in the detailed spreadsheet of water uses attached to the application, and these should be approved. No evidence was elicited to question that plan.
- "Prior to the diversion of water in connection with this right, the right holder shall provide the Department with a plan for monitoring ground water levels in the vicinity of the place of use for this water right. The monitoring should occur in parallel with development and production and should include identification of non-producing wells and timelines for measuring and reporting. The right holder shall not divert water in connection with this right until the monitoring plan is approved by the Department, whose approval shall not be unreasonably withheld or delayed. Failure to comply with the monitoring plan once it is accepted shall be cause for the Department to cancel or revoke this right."

CONCLUSION

If a project as well conceived as the M3 Eagle project cannot qualify to obtain a water right to serve its future needs, what project can? The answer, likely, is none.

The Interim Director's Order slams the door on the master-planned communities like this one that are able to incorporate the hydrogeologic characterization studies, efficient water conservation and high quality municipal wells that will protect and conserve the aquifer. Instead, the Order invites the very haphazard, uncoordinated, ad hoc development—without any long term vision and without the financial backing to maximize water efficiency and quality. Ironically, the Order, which apparently was intended to prevent sprawl, will promote it. Likewise, unless corrected, the Order's erroneous conclusions about the nature and productive capacity of the aquifer serving much of the Treasure Valley can be expected to discourage investment vitally needed by the community and limit long term economic growth and employment.

For all of the reasons outlined above, M3 Eagle urges the Interim Director read the evidentiary record and revisit his Order and to approve the application in full.

Respectfully submitted this 4th day of January, 2010.

GIVENS PURSLEY LLP

By _____
Jeffrey C. Fereday

By _____
Christopher H. Meyer

By _____
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2010, the foregoing was filed, served, or copied as follows:

FILED

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