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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

M3 EAGLE LLC, a Texas limited liability
company,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN, in
his capacity as Interim Director of the Idaho
Department of Water Resources,

Respondents.

Case No.: CV OC 1003180

AMENDED ORDER

On June 13, 2011, Petitioner M3 Eagle LLC ("M3 Eagle") and Respondents Idaho Department of Water Resources and Gary Spackman (together, "IDWR") filed a Joint Stipulation and Motion for Remand with Directions ("Stipulation") to dismiss the above-

captioned case and to request the matter be remanded to IDWR for further proceedings consistent with the Stipulation. On June 24, 2011, this Court issued an Order dismissing the above-captioned proceeding, including the consolidated case no. CV OC 1014928, with prejudice, and remanding the matter involving application for water right permit no. 63-32573 to IDWR for proceedings consistent with the terms and conditions set forth in the Stipulation. The June 24, 2011 Order stated that a copy of the Stipulation was attached and incorporated by reference; however, the copy of the Stipulation was inadvertently omitted. The Court is issuing this Amended Order to correct that omission by attaching a copy of the Stipulation and incorporating it herein by reference.

Therefore, this Court finding good cause shown, IT IS HEREBY ORDERED that the above-captioned proceeding, including the consolidated case no. CV OC 1014928, be dismissed with prejudice, and that the matter involving application for water right permit no. 63-32573 be remanded to IDWR for proceedings consistent with the terms and conditions set forth in the Stipulation.

DATED this 28th day of June, 2011.

By Kathryn A. Sticklen
KATHRYN A. STICKLEN
Senior District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2011, I mailed a true and correct copy of the foregoing to the following:

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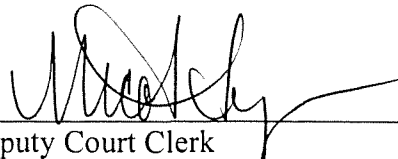
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Eagle, ID 83616

North Ada County Groundwater Users Association
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Alan Smith
Eagle Pines Water Users Association
3135 N. Osprey Road
Eagle, ID 83616

CHRISTOPHER D. RICH,
Clerk of the District Court

By: 
Deputy Court Clerk

NO. _____ FILED _____
A.M. _____ P.M. _____

JUN 13 2011

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

M3 EAGLE LLC, a Texas limited liability
company,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES, and GARY SPACKMAN, in
his capacity as Interim Director of the Idaho
Department of Water Resources,

Respondents.

Case No.: CVOC 2010-03180

**JOINT STIPULATION AND MOTION
FOR REMAND WITH DIRECTIONS**

Respondent Idaho Department of Water Resources and its Interim Director, Gary Spackman (together, "IDWR") through their counsel, together with Petitioner M3 Eagle LLC ("M3 Eagle") through its counsel, hereby jointly submit this Joint Stipulation and Motion for

Remand with Directions ("Stipulation") which stipulates to certain matters, informs the Court that the parties have reached a settlement in this matter, and seeks an order from this Court (copy enclosed):

1. Dismissing this judicial review proceeding, including consolidated case no. CV OC 1014928, and
2. Remanding M3 Eagle's application for water right permit no. 63-32573 ("M3 Application") to IDWR for further proceedings consistent with the terms and conditions set forth herein (i.e. the directions).

BACKGROUND

A. This action began when M3 Eagle filed its February 19, 2010 petition for judicial review of IDWR's January 25, 2010 Amended Final Order ("Amended Final Order") concerning the M3 Application. During the course of preparing the agency record, IDWR withheld certain documents, in response to which M3 Eagle also filed a separate action, now consolidated here, seeking their disclosure. Thereafter, the parties entered into settlement discussions.

B. On January 19, 2011, M3 Eagle and IDWR entered into an agreement ("January Agreement"), a copy of which is attached hereto as Exhibit 1 and which is incorporated by reference into this Stipulation. In the January Agreement, IDWR and M3 Eagle established a process by which the parties would submit to this Court a stipulation to dismiss this judicial review proceeding and seek remand of the M3 Application to IDWR for the purpose of the agency taking further evidence on certain limited issues—namely, those involving the City of Eagle's (the "City") annexation of the M3 Eagle project property, the City's water use projections, the relationship of M3 Eagle's proposed water use to the City's overall projections, and matters related to these questions.

C. As contemplated by the January Agreement, on June 13, 2011, M3 Eagle assigned permit no. 63-32573 and the underlying application to the City, reserving to itself an ownership interest in the permit and application sufficient to protect its interests and right to participate in the remand proceeding contemplated in the January Agreement, including the right to appeal any final order issued pursuant to such proceeding. A copy of the assigning instrument ("Assignment") is attached as Exhibit 2. M3 Eagle and IDWR agree that the City has accepted the Assignment as required by paragraph 1.B.i of the January Agreement.

D. As further contemplated by the January Agreement, the parties have agreed upon, and hereby stipulate to, the factual findings and conclusions contained in the attached Exhibit A. (This exhibit is designated "A" because the January Agreement contemplated that the parties would, through continuing negotiations, establish these stipulated findings and conclusions and attach them as "Exhibit A" to this Stipulation; that lettering is continued here for clarity.) The findings and conclusions contained in Exhibit A are based on IDWR's contested case record for the M3 Application. The parties have agreed that these findings and conditions shall become part of IDWR's final agency order following remand of the M3 Application.

E. Also as contemplated by the January Agreement, the parties have agreed upon, and hereby stipulate to, the water right permit conditions contained in the attached Exhibit B (likewise identified as such in the January Agreement). The parties have agreed that these conditions shall be included in the water right permit resulting from the remand of the M3 Application.

STIPULATED TERMS AND CONDITIONS

Based on the mutual covenants set forth below, M3 Eagle and IDWR hereby stipulate and agree as follows:

1. This judicial review proceeding, including consolidated case no. CV OC 1014928, should be dismissed with prejudice and the matter remanded to IDWR for further proceedings concerning the M3 Application consistent with this Stipulation.

2. Within 90 days of the date of the Court's Order confirming this Stipulation and remanding the matter to the agency, IDWR shall reopen or reinitiate administrative proceedings concerning the M3 Application and hold hearings to take further evidence and testimony ("Remand Proceedings") as specified herein.

3. In the Remand Proceedings, IDWR shall take further evidence and testimony only for the limited purpose of receiving or recognizing evidence of or concerning:

- (i) the City's annexation of the M3 Eagle planned community project lands;
- (ii) the City's planning horizon and reasonably anticipated future municipal water needs for City's service area, including the M3 Eagle planned community project, based on City's current water rights portfolio and planning information;
- (iii) the quantity of water requested in the M3 Application for the M3 Eagle planned community project in relationship to the water needs of the rest of the City's service area; and
- (iv) any additional matters mutually agreed upon by the M3 Eagle and IDWR.

4. M3 Eagle shall fully participate in and be a party to the Remand Proceedings and any other proceedings necessary to secure a municipal water right for the entire M3 Eagle development, as provided for in the Pre-Annexation and Development Agreement ("Development Agreement") entered into between M3 Eagle and City and recorded in the real property records of Ada County, Idaho, on December 27, 2007 as Instrument No. 107170114.

6. Following the Remand Proceedings, IDWR shall issue a second amended final order ("Second Amended Order") consistent with this Stipulation, the January Agreement, the evidence received during the Remand Proceedings, and Exhibits A and B, and shall include the contents of Exhibits A and B as findings, conclusions, and permit conditions, as the case may be. The Second Amended Order shall issue upon presentation of evidence in the Remand Proceedings that establishes, to the satisfaction of the Interim Director, there has been sufficient information provided to process a reasonably anticipated future needs water right held by the City under Application No. 63-32573.

7. IDWR will issue permit no. 63-32573 ("Permit") consistent with the Second Amended Order.

8. The Second Amended Order shall completely replace and supersede the Amended Final Order, and the Permit shall completely replace and supersede the permit issued in connection with the Amended Final Order, whereupon the Amended Final Order shall be void and shall be afforded no precedential value by IDWR, M3 Eagle, or City.

9. The Second Amended Order shall be subject to all rights of review under the law applicable to final agency orders.

10. As set forth in the Assignment, any remaining ownership interest retained by M3 Eagle in the Assignment shall terminate once the Remand Proceedings are complete, the Second Amended Order and Permit are issued, and any subsequent appeal is final.

11. Dismissal with prejudice of this judicial review proceeding and consolidated case no. CV OC 1014928 is limited to claims concerning the Amended Final Order and circumstances surrounding its issuance.

12. The material terms and obligations set forth in the January Agreement are deemed satisfied.

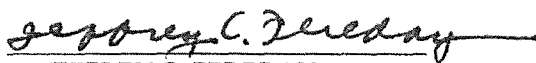
13. This Stipulation is intended to be consistent with the January Agreement, and should be interpreted accordingly.

MOTION FOR REMAND WITH DIRECTIONS

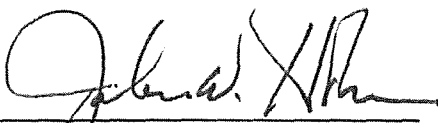
Based on the foregoing, M3 Eagle and IDWR hereby move this Court to dismiss this judicial review proceeding, including consolidated case no. CV OC 1014928, and to remand M3 Eagle's application for water right permit no. 63-32573 to IDWR for further proceedings consistent with the terms and conditions set forth herein.

Respectfully submitted this 13th day of June, 2011.

GIVENS PURSLEY LLP

By 
JEFFREY C. FEREDAY
MICHAEL P. LAWRENCE
Attorneys for M3 Eagle, LLC

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Chief, Natural Resources Division

By 
JOHN W. HOMAN
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2011, the foregoing was filed, served, or copied as follows:

FILED

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Boise, ID 83702

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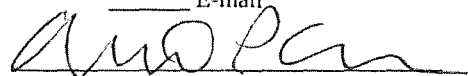
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Michael P. Lawrence

AGREEMENT

(M3 EAGLE / IDWR SETTLEMENT TERMS)

This Agreement is entered by and between the Idaho Department of Water Resources (“**IDWR**”) and M3 Eagle, LLC (“**M3 Eagle**”), collectively referred to herein as the “**Parties**,” for the purpose of settling the two consolidated lawsuits now before Judge Sticklen as *M3 Eagle v. Idaho Department of Water Resources*, Case No. CV OC 1003180 (“*M3 Eagle v. IDWR*”).

Recitals

- A. On November 21, 2006, M3 Eagle filed its application for water right no. 63-32573, which was subsequently amended (as amended, the “**M3 Application**”). The M3 Application sought a municipal ground water right permit for reasonably anticipated future needs (“**RAFN**”) to supply M3 Eagle’s proposed planned community project (“**Project**”) in north Ada County, Idaho. The M3 Application sought a maximum diversion rate of 23.18 cubic feet per second (“**cfs**”) to serve the instantaneous peak demands at full build out, and an average diversion rate of 9.03 cfs which equates to 6,535 acre-feet of water per year. The reasonably anticipated future needs component of the M3 Application would allow build-out of the 7,153-unit Project over 30 years.
- B. Protests were filed to the M3 Application, a contested case hearing was held, and IDWR issued its Final Order on December 21, 2009. M3 Eagle petitioned for reconsideration and moved to reopen the record. On January 25, 2010, IDWR issued its Amended Final Order (“**Amended Final Order**”) which concluded that M3 Eagle had not been annexed into the City of Eagle (“**City**”), was not a qualified “municipal provider,” as that term is defined in Idaho Code § 42-202B(B)(5), and therefore was not entitled to hold a municipal water right for reasonably anticipated future needs (“**Municipal Provider Issues**”). Accordingly, IDWR granted M3 Eagle a water permit with a maximum diversion rate of 3.28 cfs and an annual diversion volume limit of 923 acre-feet, the amounts deemed to be subject to development in a five-year period (hereinafter referred to as “**Permit**,” which also shall refer to the Permit as it may be amended or replaced as a result of the proceedings described herein). The Amended Final Order also concluded that the evidence in the contested case showed only 14-22 cfs of ground water would remain unappropriated in the target aquifer if M3 Eagle were granted its entire requested amount (“**Water Supply Issues**”).
- C. In *M3 Eagle v. IDWR*, M3 Eagle has petitioned for judicial review of the Amended Final Order, and also has filed an action seeking IDWR compliance with Idaho’s public records statute. M3 Eagle challenges certain of IDWR’s post-hearing procedures and the Amended Final Order’s findings and conclusions concerning Municipal Provider Issues and Water Sufficiency Issues.

- D. On December 27, 2007, M3 Eagle and City entered into a Pre-Annexation and Development Agreement, Instrument No. 107170114, Ada County Recorder's Office ("**Development Agreement**"), which is Exhibit 58 in IDWR's contested case record for the M3 Application case ("**Hearing Record**"). Among other things, the Development Agreement contemplates City's annexation of the Project property and M3 Eagle's development of the Project as a part of the City.
- E. The Development Agreement addresses water supply for the Project and requires M3 Eagle to construct a water system "sufficient to serve the Project" and to obtain "all water rights necessary to serve the Project." Under the Development Agreement, M3 Eagle is obligated to convey and assign the Project's water system and water rights "to City for inclusion in City's municipal water supply system," for purposes of "hav[ing] City be the [Project's] water service provider." Under Section 2.2(h) of the Development Agreement, "[o]nly in the event City fails to perform under Section 2.2 or, if City refuses to cooperate with [M3 Eagle] in providing for City to be the water service provider to the [Project] as set forth in Section 2.2, [M3 Eagle] may seek alternative potable water service from other capable providers" M3 Eagle intends for the City to be the Project's water service provider. The City is recognized by IDWR as a qualified municipal provider and is eligible to hold a RAFN water right.
- F. In accordance with City's comprehensive plan and pursuant to the Development Agreement, the City approved and published Ordinance 634 on November 30, 2009 which annexed and zoned the Project property, after the Hearing Record was closed.
- G. By this Agreement, M3 Eagle and IDWR, in consultation with City, intend to agree on several key issues and establish an orderly process to resolve all claims raised in *M3 Eagle v. IDWR* by: (1) agreeing to certain findings and conclusions concerning Water Supply Issues based on the Hearing Record; and (2) establishing a procedure to allow the Hearing Record to be reopened before IDWR on remand from the District Court for the limited purpose of taking additional evidence to resolve the Municipal Provider Issues.

M3 Eagle and IDWR, in consultation with the City, have concurred on several findings and conclusions, which are set forth in paragraph 5.E, below, and will continue to confer and seek agreement on additional findings more particularly addressing Water Supply Issues and pumping effects, all based solely on the Hearing Record. The Parties intend to submit to the Court all of these findings, both those in paragraph 5.E and those yet to be agreed to (if any) as part of the findings to be included in the Stipulation and Order.

Agreement Terms

In consideration of the mutual covenants and commitments contained herein, the Parties hereby agree as follows:

1. Development of Stipulation and Order. The Parties requested the District Court in *M3 Eagle v. IDWR*, at the January 14, 2011 scheduling conference, to allow the Parties 90 days to work in good faith to develop a Stipulation and Order (defined below) to be filed with the Court. The process for developing the Stipulation and Order shall be as follows:

A. Within 60 days after this Agreement's execution, the Parties, in consultation with City, shall:

i. Develop and agree upon information describing City's planning horizon and reasonably anticipated future needs for City's service area (as such terms are defined in I.C. § 42-202B), including the Project ("**City RAFN Information**"). The City RAFN Information shall include information to the satisfaction of the director such as the following for its service area: (i) the projected population based upon credible demographic information, (ii) the City's existing water rights portfolio, (iii) the projected water demand for the planning horizon for City beginning 2007, and (iv) information on the quantity of water appropriated for permit 63-32573 and appurtenant to the M3 Eagle Planned Community in relationship to the water needs of the City's service area. The City RAFN Information shall not include information regarding the service areas of other municipal providers which are located within either the City limits or in the City's comprehensive planning area. IDWR shall review City RAFN Information and notify M3 Eagle and City in writing of its completeness upon finding that no additional or different information is required.

ii. Develop and agree upon findings and conclusions, in addition to those already agreed to as set forth in paragraph 5.F, below, based on the Hearing Record ("**Findings and Conclusions**"), which shall be included in the Stipulation and Order as Exhibit A.

iii. Develop and agree upon conditions ("**Permit Conditions**") to be included in the water right Permit, which shall be included in the Stipulation and Order as Exhibit B.

B. Within 30 days following the conclusion of the 60-day period described in paragraph 1.A, the City shall:

i. accept assignment of the Permit by executing and filing with IDWR an assignment of permit form or other appropriate instrument determined by IDWR; or

ii. notify M3 Eagle in writing that it declines to accept assignment of the Permit, in accordance with section 2.2(h) of the Development Agreement.

2. Proceedings if City accepts assignment. If City accepts assignment of the Permit (as provided for in paragraph 1.B.i, above), then, within 90 days of the District Court's approval of the Stipulation and Order (as provided for in paragraph 4, below), IDWR shall reopen the Hearing Record and conduct a hearing to take evidence and testimony, but only for the limited purpose of receiving or recognizing evidence of (i) City's annexation of the Project, (ii) demonstrating the City's planning horizon and reasonably anticipated future needs for City's service area, including the Project, based on City's current water rights portfolio and planning information, (iii) information on the quantity of water appropriated for permit 63-32573 and appurtenant to the M3 Eagle Planned Community in relationship to the water needs of the City's service area, and (iv) any additional matters mutually agreed upon by the Parties. The Parties agree that M3 Eagle may fully participate in such proceedings.

3. Proceedings if City declines assignment. If City declines to accept assignment of the Permit (as provided for in paragraph 1.B.ii, above), M3 Eagle shall have an additional 180 days following City's notification of such to notify IDWR that M3 Eagle has entered into an agreement with an alternative municipal provider ("**Municipal Provider**") to accept assignment of the Permit and serve the Project ("**MP Agreement**"). Within 90 days of the District Court's approval of the Stipulation and Order (as provided for in paragraph 4, below), IDWR shall reopen the Hearing Record and conduct a hearing to take evidence and testimony, but only for the limited purpose of receiving or recognizing evidence that (1) M3 Eagle has entered into an MP Agreement, (2) the Municipal Provider is a municipal provider as defined in I.C. § 42-202B(5), (3) the Municipal Provider's service area will include the Project, (4) the Municipal Provider has adequate financial resources, and (5) the Municipal Provider can and will serve the Project with water diverted under the Permit resulting from the Second Amended Order within the constraints of the Permit. In addition to the above, the parties recognize that the director will need to determine whether the M3 Eagle Planned Community can be served by the Municipal Provider and the effect, if any, of adding the Permit to the Municipal Provider's water rights portfolio. Accordingly, if an MP Agreement is submitted in lieu of the City RAFN Information and City's acceptance of the Permit, IDWR shall require the evidence in the Record be sufficient to process a RAFN water right for the Municipal Provider.

4. Stipulation and Order. Within 30 days after (i) City accepts assignment of the Permit (as provided for in paragraph 1.B.i, above) or (ii) M3 Eagle has notified IDWR that it has entered into a MP Agreement (as provided for in paragraph 3, above), as the case may be, IDWR and M3 Eagle shall prepare and submit to the District Court a stipulation and order for dismissal in *M3 Eagle v. IDWR* conforming to the terms of this Agreement (the "**Stipulation and Order**") and shall advocate for its approval by the District Court. The Stipulation and Order shall contain Exhibits A, and B, described in paragraph 1.A, above, and shall remand this matter to IDWR for further proceedings consistent with this Agreement.

5. IDWR's Order on Remand. Following the remand proceeding described in paragraphs 2 and 3, above, as the case may be, IDWR shall issue a second amended final

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order (“**Second Amended Order**”) consistent with: (1) the evidence received during the remand proceedings, (2) Exhibits A and B included with the Stipulation and Order, and (3) the other provisions of this Agreement. IDWR shall issue Permit consistent with the Second Amended Order.

A. If the City RAFN Information is presented on remand (paragraph 2, above), the Second Amended Order and Permit shall issue upon presentation of evidence in the remand proceedings that establishes, to the satisfaction of the Director, there has been sufficient information provided to process a RAFN water right for the City.

B. If an MP Agreement is presented on remand (paragraph 3, above), the Second Amended Order and Permit shall issue upon presentation of evidence in the remand proceedings that establishes, to the satisfaction of the Director, there has been sufficient information provided to process a RAFN water right for the Municipal Provider in these circumstances.

C. IDWR’s Second Amended Order shall replace the Amended Final Order and shall include:

- i. the findings in paragraph 5.E, below;
- ii. the findings, conclusions, and conditions contained in the Stipulation and Order’s Exhibits A and B; and
- iii. other findings and conditions consistent with the evidence accepted pursuant to paragraph 2 or 3, above, as the case may be, and with the other provisions of this Agreement.

D. Once the Second Amended Order is final and unappealable, the Amended Final Order shall be void and shall be afforded no precedential value by IDWR, the Parties, or whichever entity the Permit is assigned to as provided for herein (“**Assignee**”).

E. In addition to others agreed to by the Parties and included in the Stipulation and Order’s Exhibit A (if any), findings and conclusions in the Second Amended Order shall include the following:

- i. IDWR recognizes that City or another qualified municipal provider may hold, and the M3 Application contemplates, a permit specific to the service area described in the M3 Application (i.e. conforming to the M3 Eagle planned community project (the “Project”)) described in the December 27, 2007 Pre-Annexation and Development Agreement between City of Eagle and M3 Eagle L.L.C., Instrument No. 107170114, Ada County Recorder’s Office (“Development Agreement”), which is Exhibit 58 in the record.
- ii. The aquifer proposed to supply the water right sought in the M3 Application lies beneath the southwestern portion of the M3 Eagle planned

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community property (i.e. southwest of the green line depicted in Exhibit 18, Fig. 1), and is part of the "deep, regional flow system" identified in the Treasure Valley Hydrologic Project model and reports (collectively, the "TVHP"). Ex. 33D at 49. The water supply in the aquifer is sufficient for the purpose it was sought to be appropriated as identified in the M3 Application.

iii. At the time the hearing closed, the Project had not been annexed and therefore was not a part of City. The Project was subsequently annexed into City consistent with the Development Agreement.

iv. IDWR has deemed M3 Eagle's monitoring plan acceptable.

6. Assignee's Use of the Permit. Assignee may apply to IDWR to change the authorized place of use or another attribute authorized in the Permit through an amendment, transfer or under a new RAFN application, including removal of the Permit's annual volume cap (collectively, "**Transfer**"). M3 shall not protest any such Transfer so long as Assignee demonstrates that it will (i) supply water to the Project (as described in the M3 Application) and will (ii) not use any of the water transferred under such rights to serve any other properties unless Assignee demonstrates to M3 Eagle that it has adequate water rights to serve the Project.

7. Other applications by Assignee. This Agreement shall have no effect on Assignee's existing or future water right permits, licenses, or applications (i.e. any water right permit, license or application other than the Permit), except that Assignee, in separate future proceedings, may use and rely on the evidence submitted on the remand of this matter as described above.

8. Use of existing permit pending other proceedings. Consistent with I.C. § 67-5274, M3 Eagle or Assignee shall be entitled to divert and use water under the Permit during the pendency of any litigation challenging the Permit.

9. Time periods. All time periods set forth in this Agreement are subject to extension by mutual agreement of the Parties and, as necessary, approval of the District Court.

10. Effect and timing of Agreement and Stipulation and Order. If neither City nor a Municipal Provider accepts assignment of the Permit, as provided for above, this Agreement shall be void, and the Parties may seek any remedies under the law. Neither this Agreement nor the Stipulation and Order resulting from this Agreement shall bar M3 Eagle or (as the case may be) City or Municipal Provider from challenging any IDWR rule or order arising from the remand in this matter. If IDWR and M3 Eagle do not reach agreement as to the findings of fact to be listed in Exhibits A (as described in Section 1.A.ii above) or the conditions in Exhibit B (as described in Section 1.A.iii above) or if any other term in this Agreement is not satisfied, this agreement shall be void.

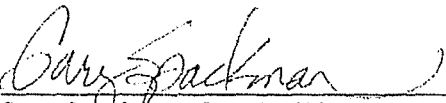
11. IDWR not a third party beneficiary. Nothing in this Agreement or in any IDWR order arising from it shall be construed as making IDWR a third party beneficiary of the

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Development Agreement, or authorize IDWR to interpret or enforce the Development Agreement. The Parties acknowledge and agree that this Agreement is part of a settlement of a contested lawsuit.

IN WITNESS WHEREOF, the Parties hereto, having been duly authorized, have executed this Agreement to be effective on this 19th day of January, 2011.

IDAHO DEPARTMENT OF WATER
RESOURCES:

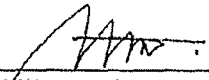
By: 
Gary Spackman, Interim Director

M3 EAGLE:

M3 Eagle L.L.C., a Texas limited liability company

By: M3 BUILDERS, L.L.C., an Arizona limited liability company, its Manager

By: The M3 Companies, L.L.C., an Arizona limited liability company, its sole member

By: 
William I. Brownlee, Member

RECEIVED

10/09

JUN 13 2011

DEPARTMENT OF WATER RESOURCES STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

\$25 fee per permit

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Receipt Amt \$ 25 -

Receipt No. 093326

Date: 6/13/2011

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ASSIGNMENT OF APPLICATION AND PERMIT

To change the ownership of an application and a permit

I, M3 Eagle, LLC, hereby assign to City of Eagle, a municipal corporation, of, 660 E. Civic Lane, Eagle, Idaho 83616 (208) 939-6813

All my right, title, and interest in and to Permit No(s) to appropriate the public waters of the State of Idaho.

OR (for partial assignments)

The following described portion of my right, title, and interest in and to Application and Permit Number(s): 63-32573, to appropriate the public waters of the State of Idaho.

Describe in detail the portion of the permit and application assigned, listing the number of acres in each 40 acre subdivision, point of diversion location, and amount of the water in cubic feet per second.

See attachment.

Does the new permit and application holder own the property at the:

Point of Diversion? [] Yes [x] No

Place of Use? [] Yes [x] No

If no, describe the arrangement enabling the new owner to access the point of diversion and/or the place of use: See attachment.

Made this ___ day of June, 2011.

Signature of Permit and Application Holder, Member, Title (if applicable), Signature of Permit Holder, Title (if applicable)

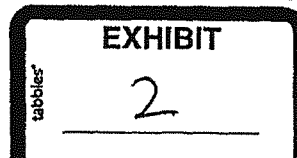
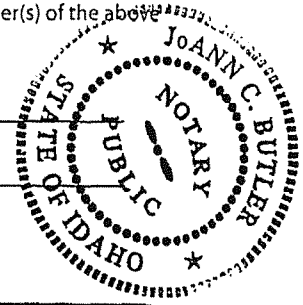
State of Idaho))ss County of Ada)

On this 13th day of June, 2011, personally appeared before me the signer(s) of the above instrument, who duly acknowledged to me that he/she/they executed the same.

SEAL

JoAnn C Butler, Notary Public

My commission expires: 9/24/14



ATTACHMENT TO ASSIGNMENTS OF APPLICATION AND PERMIT FOR PERMIT 63-32573
FILED BY M3 EAGLE, LLC

Part 1

By these Assignments of Application and Permit M3 Eagle LLC ("M3 Eagle") assigns to the City of Eagle ("City") the following:

1. Except as provided herein, M3 Eagle assigns to City all of its interest in Permit No. 63-32573 as approved in the January 25, 2010 Amended Final Order ("**2010 Order**") issued by the Idaho Department of Water Resources ("**IDWR**") and as such 2010 Order may be amended through the anticipated proceedings upon remand to IDWR by the Ada County District Court ("**District Court**") in Case No. CV-OC-1003180 ("**Remand Proceedings**") provided for in the IDWR/M3 Eagle Settlement dated January 19, 2011 ("**IDWR/M3 Eagle Settlement**") (the "**Permit**").
2. Except as provided herein, M3 Eagle assigns to City all of its interest in Application for Permit No. 63-32573 ("**Application**") such that City shall be deemed an applicant under the Application for purposes of the Remand Proceedings.
3. M3 Eagle agrees to hold harmless and indemnify City from any and all claims, costs, damages and attorneys fees which may be incurred by or asserted against City by any person or entity as a result of City's cooperation and/or participation with M3 Eagle in the Remand Proceedings and City's designation as an applicant or assignee of the Permit through the Remand Proceedings. A Pre-Annexation and Development Agreement was entered into between M3 Eagle and City and recorded in the real property records of Ada County, Idaho, on December 27, 2007, as Instrument No. 107170114 ("**Development Agreement**"). M3 Eagle agrees to pay the costs associated with any monitoring or mitigation resulting from the issuance or exercise of the Permit prior to conveyance to City of the Water System, as defined in the Development Agreement, and as may be addressed between M3 Eagle and City in connection with the Master Water Plan required under the Development Agreement, or as may be otherwise addressed between M3 Eagle and City.
4. M3 Eagle hereby reserves sufficient ownership interest in the Application and the Permit to allow M3 Eagle's full participation as a party to any judicial or administrative proceedings pertaining to the Permit, the Application and the Remand Proceedings, including the right to appeal, and to full participation in any appeal of, any final order issued pursuant to such proceeding. Any remaining ownership interest retained by M3 Eagle shall terminate and pass to City once the Remand Proceeding before the Department is complete, a final order is issued and any subsequent appeals are final.
5. This Assignment shall not be deemed nor interpreted such that it conflicts with any provision of the Development Agreement. If any provision of this Assignment conflicts with any provision of the Development Agreement, the Development Agreement prevails. This

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Attachment to Assignment—1

Assignment shall be deemed to run with the land and shall be binding on any existing and future owner, developer, member, heir, successor in interest, employee, agent or assign of M3 Eagle.

6. Pursuant to M3 Eagle's request and City's status as an applicant for the Permit, City shall have the right to take any and all actions, in City's sole discretion, necessary to protect or assert City's rights and interests in connection with the Development Agreement and/or Stipulation and Order defined in the IDWR/M3 Eagle Settlement ("**Stipulation and Order**") approved by the District Court and M3 Eagle hereby waives any and all claims against City related to such action(s) so long as City's actions are not in conflict with the Development Agreement.

7. M3 Eagle agrees to cooperate with City in City's subsequent application(s) for permits for water rights and M3 Eagle agrees to take no actions contrary to such application(s) to the extent that City's subsequent application(s) do not conflict with the Development Agreement.

8. Nothing herein waives or shall be deemed to waive any rights of City or M3 Eagle as set forth in the Development Agreement.

9. This Assignment shall be effective upon IDWR's satisfaction with the City's RAFN analysis as described in ¶ 1(A)(i) of the IDWR/M3 Eagle Settlement and the District Court's approval of the Stipulation and Order.

10. Nothing in this Assignment shall be interpreted as an assertion or conclusion that IDWR maintains jurisdiction to enforce contract or indemnification provisions between City and M3 Eagle.

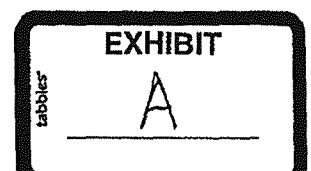
11. Nothing in this Assignment shall be interpreted as an assertion or conclusion that City approved or is a party to the IDWR/M3 Eagle Settlement.

Part 2

1. M3 Eagle authorizes City to access the place of use and points of diversion in accordance with the Development Agreement referenced to in paragraph 3 herein between M3 Eagle and City.

EXHIBIT A – FINDINGS

1. The Pierce Gulch Sand Aquifer (“PGSA”) is the target aquifer proposed to supply the water sought in the M3 Eagle Application. The PGSA lies beneath the southwestern portion of the M3 Eagle planned community property and has been identified in municipal wells in Eagle, Garden City, Meridian, Star, and the foothills north of Eagle. Ex. 12 at ii and Ex. 45 at 27.
2. The PGSA comprises a 150- to 360-foot thick sequence of stratified sand layers with interbedded thin and locally discontinuous layers of silt and clay. Ex. 2 at 3 and Ex. 44 at 4.
3. The PGSA is overlain by a sequence of fine to coarse-grained alluvial sediments that is referred to by M3 Eagle’s expert witnesses as the “unnamed shallow alluvial aquifer”. Ex. 44 at 7.
4. Beneath the southern portion of M3 Eagle property, a sequence of lower-permeability sediments consisting mostly of clay and silt separates the unnamed shallow alluvial aquifer from the PGSA and serves as a confining layer. Ex. 44 at 7 and Ex. 16 at 16. Elsewhere a distinct separation between the unnamed shallow alluvial aquifer and the PGSA is not evident at some locations using available geologic and geophysical data Ex. 45 at 6. Hydraulic communication between the unnamed shallow alluvial aquifer and the PGSA is spatially variable because the presence and thickness of the confining layer is spatially variable. Ex. 50 at 4.
5. The majority of the more than 1,600 domestic wells in the vicinity of the M3 Eagle project area are completed in the unnamed shallow alluvial aquifer that overlies the PGSA. Ex. 2 at 10 and Figure 11, Ex. 12 at 239, and Ex. 33D at 24.
6. The hydrogeologic setting is relatively complex (Ex. 19E at 6, Ex. 19H at 23, and Ex. 19D at 71) and the PGSA is heterogeneous. Ex. 12 at 210 and Ex. 12 at 211.
7. The hydrologic impact of faults at the northern margin of the Boise basin near M3 Eagle contributes to hydrogeologic complexity. Ex. 33G at 2, Ex. 67 at 32, Ex. 44 at 42, Ex. 33D at 16, and Ex. 12 at 212.
8. Wells 03N01E01DAA2 (east of Meridian), 04N01E04DCC1 (north of Eagle), 04N01W31AA1 (south of Star), and 04N01E35CCA1 (west of Garden City) were identified in the TVHP as having long-term water level declines of less than 10 feet. Ex. 33D.
9. Although the monitoring records for M3 Eagle Test Well #2, M3 Eagle Test Well #3, M3 Eagle Test Well #4 and SVR Well #9 are brief, the hydrographs show a declining water level trend of approximately 0.3 to 0.6 feet per year. Ex. 44 at 128.
10. Water levels in 14 wells in North Ada County that are monitored by IDWR have been declining at an average rate of 0.29 feet per year since 1996. Appendix A to Ex. 50.



11. The hydrograph for the United Water Idaho Redwood Creek production well (SE ¼ of the NW ¼ of Section 7 in Township 04N Range 01E) which is completed into the PGSA in west Eagle depicts fairly constant water levels throughout the 14-year period of production. This well has historically produced 10 million to 100 million gallons per year (0.04 to 0.42 cfs). Figure 15 of Ex. 45.
12. The hydrograph for the United Water Idaho Floating Feather production well which is completed into the PGSA in northwest Eagle (SE ¼ of the SW ¼ of Section 5 in Township 04N Range 01E) has remained constant throughout the 13-year period of production. This well has historically produced 250 million to 650 million gallons per year (1.1 to 2.8 cfs). Figure 15 of Ex. 45.
13. Hydrographs for the United Water Idaho State and Linder monitoring wells which are completed into the PGSA (NE ¼ of the SE ¼ of Section 11 in Township 04N Range 01W) depict relatively stable water levels in the PGSA between Star and Eagle over the past 10 years. Ex. 28.
14. Aquifer testing and water supply well production data demonstrate that the PGSA is highly productive. For example, the SVR#7 test well on the M3 property was pumped at a constant rate of approximately 900 gal/min for approximately 9 days. Moreover, the SVR#7 test data support the determination that a properly designed well could produce more than 2,000 gal/min from the PGSA on M3 Eagle property. Ex. 44 at i. Elsewhere, the PGSA yields more than 1,000 gal/min to municipal supply wells (e.g., the City of Eagle Eaglefield #2 and United Water of Idaho Floating Feather supply wells). Ex. 12 at Table i-1.
15. The volume limit sought by the M3 Eagle application (6,542 acre-ft/yr equating to an average constant diversion rate of 9.03 cfs) represents a roughly 6% increase in the estimated rate of withdrawal in 1996 from the intermediate and deep aquifer systems described in the Treasure Valley Hydrologic Project (TVHP) ground water flow model as layers 2, 3, and 4. Ex. 33B at 68.
16. The completion intervals for existing municipal wells in the Eagle area correspond to the bottom of layer 2 and the top of layer 3 in the 4-layer TVHP model. Data provided by M3 Eagle suggests that M3 Eagle also proposes production from layers 2 and 3. Ex. 33B.
17. The 1996 water budget developed for the TVHP model concluded that more than 99% of the more than 1 million acre-feet of inflow to the Treasure Valley Aquifer system was received by the uppermost aquifer (layer 1). Ex. 33I at 6-2 Table 8 and Ex. 33B at 56. Of that amount, the TVHP model estimated approximately 77% of the water received by the uppermost aquifer was discharged through surface water features, 9% was pumped from the uppermost aquifer, and 10% was pumped from deeper aquifers represented in the model by layers 2, 3, and 4. Ex. 33B at 68.

18. The TVHP study concluded that recharge to the deeper, regional aquifer system in the Treasure Valley is limited, but generally has been sufficient for current rates of withdrawal. Ex. 33A at 19.
19. The TVHP model was applied to evaluate the impacts of increased groundwater withdrawals associated with unprocessed applications for non-supplemental water rights that were filed between July 1987 and May 2002. Ex. 33C. A predictive analysis was conducted in which the increase in withdrawals by these proposed rights was simulated with several, well-calibrated (i.e. calibrated to water level data), and equally valid versions of the TVHP model. The "minimum impact" was the well-calibrated version of the model that predicted the least water level impacts. The "maximum impact" was the well-calibrated version of the model that predicted the greatest water level impacts. The predictive simulations conclude the following:
 - a. Layer 1 (shallow aquifer) The simulated pumping, which included a 29,292 acre-ft/yr (40.4 cfs) increase in withdrawals from layer 1, resulted in an average ground water decline in layer 1 at steady state from 0 feet for the minimum impact calibration to 3.9 feet for the maximum impact calibration.
 - b. Layer 2 (intermediate aquifer) The simulated pumping, which included a 6,712 acre-ft/yr (9.3 cfs) increase in withdrawals from layer 2, resulted in an average ground water decline in layer 2 at steady state from 14 feet for the minimum impact calibration to 26 feet for the maximum impact calibration.
 - c. Layer 3 (deep aquifer) The simulated pumping, which included a 2,371 acre-ft/yr (3.3 cfs) increase in withdrawals from layer 3, resulted in an average ground water decline in layer 3 at steady state ranging from 18 feet for the minimum impact calibration to 46 feet for the maximum impact calibration.
20. The range of average predicted water level declines that resulted from the TVHP model predictive analysis is a reflection of model input uncertainty. Ex. 33C at 31.
21. The TVHP model's predicted impacts of increased pumping were smallest in the uppermost model layer, which corresponds roughly with the uppermost 200 feet of aquifer system. The TVHP study concluded that most of the simulated withdrawals represented water that otherwise would have discharged to drains. Ex. 33A at 22.
22. The TVHP model's predictive analysis concludes that, due in large part to the hydrologic functioning of drains, increased pumping from the shallow and deep aquifers is expected to have relatively limited impact on water levels in the uppermost aquifer system (layer 1) at a regional scale. Ex. 33C at 34.
23. Notwithstanding the TVHP model's predicted limited impact, water levels and rates of extraction in the PGSA should be monitored to evaluate possible localized impacts and to

monitor the actual effect of pumping, if any, on water levels in the uppermost aquifer in the North Ada County area.

24. M3 Eagle constructed a numerical ground water model ("M3 Model") to simulate the effects of withdrawals from the M3 Eagle development at full build-out. The area within the model, defined as the model domain, encompasses 520 square miles. Ex. 16 at 16.
25. Concerns about the calibration of the M3 Model and inconsistencies with the conceptual model cause the Department to question the outputs of the model. Ex. 47 at 10, 13. Ex. 50 at 13, 14. Ex. 902 at 58, 60-65, 69, 87 and 92. Ex. 904 at 33-34. The Director does not rely upon the conclusions of the M3 Model's simulations.
26. Although the Director does not rely on the M3 Model, the other aquifer test, geologic data and water level measurement information provided by M3 Eagle in the record supports a determination that the PGSA is productive, extensive and has additional water available for appropriation.
27. An image well analysis is a standard methodology used by hydrologists to determine impacts from pumping on water levels. M3 Eagle's consultants conducted an image well analysis to predict water level declines that would result from ground water development in the PGSA at full build out for both "best-case" and "worst-case" conditions. Ex. 2. at 8. The predicted water level declines in that analysis are on the order of 10 to 12 feet along the boundary of the M3 Eagle property for the best-case and 20 to 24 feet for the worst-case scenarios. Ex. 2 at Figures 9 and 10. Water level declines in the Protestants' wells are expected to be much less because their wells are completed in the unnamed shallow alluvial aquifer and because the drawdown decreases with the increasing distance from the M3 Eagle pumping center.
28. IDWR staff conducted their own independent drawdown analysis. Based on their analysis, IDWR staff concluded that the results of the M3 Eagle analyses were reasonable assuming a laterally extensive aquifer. Ex. 50 at 21. IDWR's drawdown estimates were most similar to those for M3 Eagle's "worst-case" image well analysis scenario. Ex. 2 at Figure 10. Both simulations predicted approximately 8 feet of drawdown at the intersection of Floating Feather and Highway 16, a location chosen because it is easily identifiable and situated several miles south of the M3 Eagle pumping center.
29. Almost every appropriation of ground water will result in a decline of the aquifer. Some decline in the aquifer is expected and reasonable. Based upon the evidence presented in this proceeding, the Director concludes that even under the worst-case scenario described in M3 Eagle's image well analysis, the anticipated decline from pumping at full build out is not cause to conclude that there is not water available in the amount required for the appropriation.

30. Although the pumping rate of water from proposed M3 Eagle wells will vary because of seasonal irrigation demand, the available water in the PGSA is sufficient for the purpose it was sought to be appropriated in the M3 Eagle application.
31. The PGSA contains water available for appropriation for the following reasons: (1) relatively stable water levels established by the water level information in and nearby wells pumping water from the PGSA; (2) the conclusion of the TVHP that generally there has been sufficient ground water in the deeper aquifers for current rates of withdrawal of water; (3) the aquifer testing provided by M3 Eagle and testimony establish that the PGSA is productive; and (4) M3 Eagle's image well analysis and the Department's image well analysis confirm that the expected drawdown is not significant.
32. M3 Eagle has submitted, and IDWR has approved, the M3 Eagle Monitoring Plan dated March 18, 2011 in connection with the permit issued under the January 25, 2010 Amended Final Order.

EXHIBIT B - CONDITIONS

This right authorizes a peak diversion rate of 23.18 cfs with an annual diversion volume limit of 6,535 acre feet of water for reasonably anticipated future needs for a 30 year planning horizon within the service area pursuant to Chapter 2, Title 42, Idaho Code.

The full system capacity necessary to provide water for the reasonably anticipated future needs authorized under this right must be constructed by the end of the designated planning horizon, or any extension thereof approved by the Department.

I.C. § 42-204 requires that project construction commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control. Water right holder has improved, developed, and installed a pump, electrical wiring and transformer, and a measuring tube in the SVR7 well (located at NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 23, Township 5 North, Range 1 West), and has improved, developed, and installed well casing in the Kling Irrigation well (located at SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 28, Township 5 North, Range 1 West). Both of these wells are authorized points of diversion for this permit. Accordingly, the requirement concerning commencement of construction has been met.

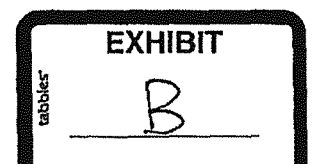
Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

The place of use is generally located within Sections 7, 15, 17, 18, 19, 20, 21, 22, Township 5 North, Range 1 East, and Sections 10, 11, 12, 13, 14, 15, 21, 23, 24, 26, 27, 28, and 33, Township 5 North, Range 1 West.

A map depicting the place of use boundary for this water right at the time of this approval is attached to this document for illustration purposes.

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

Consistent with I.C. § 42-217, a proof of beneficial use statement shall be submitted on or before ___ 2016. The permit holder may request extensions as provided by law. In connection with the proof statement submitted for this permit, the permit holder shall submit a report showing the total annual volume, the maximum daily volume, and the maximum instantaneous rate of flow diverted from the points of diversion authorized for this permit during the authorized development period for the permit. The report shall also show the extent to which the full system capacity necessary to provide water for reasonably anticipated future needs has been constructed and the extent to which planning, design, and investment have occurred for any unconstructed portion of the system capacity necessary to divert and use water for



reasonably anticipated future needs. The Department will evaluate such proof statement and report consistent with IDWR Application Processing Memorandum No. 63 (June 15, 1999) unless legally obligated to do otherwise.

In accordance with Idaho Code § 42-217, in connection with proof of beneficial use for this permit, the right holder shall also submit a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation.

The right holder shall comply with all aspects of the approved Monitoring Plan dated March 17, 2011 referenced in the Findings of Fact of the order issuing this permit.

This right does not grant any right-of-way or easement across the land of another.

The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

If, during the established planning horizon, the Department determines, based on credible evidence from the monitoring, the Monitoring Report or otherwise, that there is a substantial likelihood that diversion and use of groundwater under the Permit is causing material injury to any senior water rights, the Department may issue an order to the water right holder to show cause, after notice and hearing, as to why the water right holder should not reduce existing diversions under the Permit, forego additional diversions, or provide adequate mitigation to remedy any such material injury. Any senior water user alleging material injury may petition IDWR to commence a show cause hearing and the Department shall conduct a hearing. Any such hearing shall be held according to the Department's rules governing contested cases and its conjunctive management rules and a final decision shall be made on the record according to the evidence. Nothing in this paragraph shall create any evidentiary presumption, establish or change any burden of proof or obligation to come forward with evidence, or otherwise modify the rights of any water right holder under Idaho law.

In exercising its continuing authority under this Order, the Department shall take into consideration all monitoring data, hydrogeologic evidence, and other information pertaining to the question whether water right holder's ground water pumping under this Permit is causing material injury to any of Protestants' senior water rights.

In accordance with Idaho Code § 42-226, Idaho Code §§ 42-237a through 237h, and Idaho Code § 607, and the Department's Rules, IDAPA 37.03.011 (as these may be amended from time to time), water diversion and use under this permit shall be subject to curtailment when and to the extent the Department determines such diversion and use is causing material injury to senior water rights and is not mitigated.