

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)
_____) VOLUME XVI
(Pages 3636 through 3916)

BEFORE
HEARING OFFICER: GARY SPACKMAN

Date: July 30, 2009 - 8:30 a.m.
Location: Idaho Department of Water Resources
322 East Front Street
Boise, Idaho

REPORTED BY:
JEFF LaMAR, C.S.R. No. 640
Notary Public

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 2
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 10 For North Ada County Groundwater Users
 11 Association:
 12 BY MR. JOHN THORNTON
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 14 Eagle, Idaho 83616
 15 For Eagle Pines Water Users Association and
 16 Individually:
 17 BY MR. ALAN SMITH
 18 3135 Osprey Road
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 20 Appearing Individually:
 21 BY MR. NORMAN L. EDWARDS
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 23 Eagle, Idaho 83616
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 25 ///

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 2
 3 Also Present:
 4 Jason Smith
 5 Steven Purvis
 6 David Head
 7 Debbie Gibson
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1 THE HEARING OFFICER: Okay. We're
2 recording now.
3 Mr. Fereday, do you wish to make a
4 statement before examination?
5 And Mr. Froelich is in the witness
6 chair.
7 If you'll go ahead at this point.
8 MR. FEREDAY: Yes, Mr. Hearing Officer, we
9 would like to -- like leave to continue
10 Mr. Froelich's direct testimony for the limited
11 purpose of introducing two exhibits having to do
12 with financial statements of M3 and its financial
13 partner, Dallas Police and Fire Pension System.
14 THE HEARING OFFICER: Okay.
15 MR. FEREDAY: But in addition to this, I
16 would just like to point out for the record that
17 it's our position that the question -- the legal
18 question as to finances in a case such as this
19 establishes a relatively low threshold, a low bar
20 of proof.
21 It is not that the applicant have
22 finances here and now to finance the project. It
23 is only that the applicant have a reasonable
24 probability or reasonable prospect of being able
25 to raise these finances.

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1 Clearly, in order for developments to
2 go forward and for water rights to be obtained for
3 those developments, there has to be leeway in that
4 regard, and I think our Supreme Court has clearly
5 recognized that and upheld the Department's rules
6 with regard to the reasonable probability
7 standard. And we feel that that is a fairly low
8 standard.
9 Nevertheless, we have put on a
10 substantial amount of evidence with regard to this
11 topic, primarily because of the Hearing Officer's
12 comments and the protestants' insistence on this
13 subject.
14 Therefore, we have provided documents
15 to the protestants in the last couple of days.
16 And we would like to have Mr. Froelich, and then
17 later Mr. Brownlee, speak to these documents and
18 other issues pertaining to finances to address
19 those concerns. We feel that we're -- with all
20 due respect to the process, we feel like we're way
21 beyond what needs to be put into evidence on this.
22 But since it has been raised, we feel that we
23 should leave this hearing with the impression that
24 we have put on more than enough evidence to show
25 financial capability under the standard enunciated

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1 by the rules and by our Court. So that's my
2 introductory statement.
3 THE HEARING OFFICER: Okay. Anything in
4 response, Mr. Thornton?
5 MR. THORNTON: Yes, Mr. Hearing Officer. I
6 actually got a brief statement that I'd like to
7 read into the record regarding that.
8 THE HEARING OFFICER: Okay.
9 MR. THORNTON: Mr. Hearing Officer, as we
10 are all aware, one of the specific criterion
11 obtaining a municipal water right in the state of
12 Idaho is the financial capability of the applicant
13 to successfully complete the project as proposed
14 so that the beneficial use of the resource is
15 accomplished.
16 In regards to the M3 municipal water
17 right application utilized in the 1996 future
18 needs planning statute, it has become increasingly
19 clear that the scope in money, time, complexity,
20 and community planning impacts are way outside the
21 norm for the stated roles of IDWR and the
22 protestants.
23 We believe the current application of
24 the statute and process is flawed relative to
25 having to predict the long-term outcomes for

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1 community development over 30 years and hundreds
2 of millions of dollars. It is unreasonable for us
3 to be expected to analyze and make reasonable
4 judgments on the financial and development
5 wherewithal of the applicant.
6 We have not even been afforded the
7 ability to utilize our own financial experts
8 because the information presented to us this past
9 Tuesday evening should have been provided last
10 year in discovery when we could have reviewed it,
11 deposed their financial experts, and declared our
12 own expert witnesses to examine the information in
13 the formal hearing process.
14 Mr. Hearing Officer, we strongly
15 recommend that you and IDWR consider obtaining
16 your own impartial financial expert who can
17 consider the data provided by M3 in light of the
18 criteria enumerated in Idaho Code Section 42-203A
19 and provide the Department with written expert
20 findings and opinions.
21 We believe this makes extraordinary
22 sense due to the significant consequences to the
23 community and the people of Idaho if these
24 financial judgments are not made correctly. By
25 having an outside independent expert assist the

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1 Department in assessing the financial criteria, it
2 would go also a long way in addressing the
3 nonspeculation criteria also demanded of the
4 Department in Section 42-203.
5 Certainly the Department does not want
6 to be part of granting water rights to an
7 applicant that cannot obtain and keep adequate
8 financing over the term of the development that
9 leads to beneficial use of the water resource.
10 One has to ask if this type of
11 circumstance should occur, would the Department
12 have the right to revoke the said water right?
13 Would the applicant be able to keep the water
14 right and reposition their investment strategy to
15 sell off their property at great profit margins
16 because the land now has a water right attached?
17 We believe any of these scenarios may
18 be mitigated through an independent financial
19 analysis commissioned by the Department that would
20 require ongoing financial monitoring.
21 And in light of all the information
22 that was presented to us late on Tuesday, it
23 appears some of this information was potentially
24 available weeks before, including a letter that
25 was addressed also to the Department of Water

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1 Resource dated June 22nd, I believe it is, of
2 2009.
3 We've been obviously on the record as
4 interested in this, concerned about it, and we
5 didn't even get a copy of that particular letter
6 that was apparently sent on June 22nd to the
7 Department from CDK.
8 So that's our position.
9 THE HEARING OFFICER: Okay. I guess I'm
10 unaware of that particular letter you're referring
11 to, Mr. Thornton.
12 MR. THORNTON: It is in their packet of
13 information that they sent. It was -- thank you.
14 It was from CDK to Mr. Bill Brownlee and addressed
15 to Department of Water Resource on June 22nd.
16 MR. FEREDAY: Mr. Hearing Officer, if I
17 could respond?
18 THE HEARING OFFICER: Okay. Okay,
19 Mr. Fereday.
20 MR. FEREDAY: The letters that -- or the
21 materials that we provided, including the letter
22 just referenced that we provided a couple of days
23 ago, were recently acquired by us. The financial
24 statement that Mr. Froelich will testify about
25 is -- was available as of June 22nd. We got it

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1 more recently than that. We've made them
2 available to the other side at the earliest
3 opportunity that we could.
4 And the same goes for the Dallas
5 Pension Fund financials to which Mr. Froelich will
6 testify.
7 So there has been no withholding of
8 documentation. And I also would point out that
9 the -- the protestants have made -- have made no
10 effort to -- didn't make any effort to depose any
11 of our witnesses, including Mr. Brownlee, early
12 on. But we have made these available when they
13 became available to us.
14 We're going to testify to them today,
15 in part, because of your bringing this, we
16 believe, into the hearing just within the last
17 couple of sessions of this hearing. So that's the
18 reason for this time.
19 THE HEARING OFFICER: I will point out,
20 Mr. Fereday, that the reasons for my comments were
21 based solely on the fact that Mr. Froelich was
22 testifying about the financial health of the
23 Dallas Fire and Police Retirement Fund. So he was
24 actually testifying about that information,
25 presenting that evidence, and I merely said that

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1 he had now opened up that particular subject
2 matter as a result of your examination.
3 So I'm not sure that that's properly
4 characterized as something that I, on my own
5 volition, brought into the -- as a subject matter.
6 It was a result of your examination of
7 Mr. Froelich and his responses. And I think that
8 subject matter is now before us.
9 MR. FEREDAY: I understand that. I'm
10 actually referring to prior to that when you
11 indicated that financing was --
12 THE HEARING OFFICER: Oh.
13 MR. FEREDAY: -- financing beyond what had
14 been presented was an issue, in your mind, prior
15 to Mr. Froelich's testimony.
16 THE HEARING OFFICER: Okay.
17 MR. FEREDAY: That is what I was referring
18 to.
19 THE HEARING OFFICER: Okay. Mr. Smith,
20 comment?
21 MR. ALAN SMITH: We would join in
22 Mr. Thornton's motion and objection here. We feel
23 that we should be entitled to five days' notice at
24 least, and we got a day and a half or less. Under
25 the Idaho Rules of Civil Procedure, we should be

1 entitled to five days' notice of all of these
 2 documents.
 3 They still do not comply with the
 4 requirements of the statute. There's no
 5 certification, no statement from a lender, and no
 6 commitment financially from anybody.
 7 And that's the only issue that we've
 8 raised, and we think this is going way beyond
 9 rebuttal evidence. We did raise the issue with --
 10 Mr. Thornton did, with Mr. Brownlee about those
 11 statutory requirements in the Idaho water
 12 appropriation rules, and they still have not
 13 complied with it, and they should have done that
 14 in their case-in-chief -- case-in-chief, not in
 15 rebuttal evidence.
 16 They played "hide the ball" with us
 17 all along in this hearing. We get these documents
 18 less than a day and a half before the next
 19 hearing. And I don't know what their problem is
 20 with getting the documents to us, but that's not
 21 our problem. That's theirs.
 22 And we ought to be entitled to at
 23 least five days' notice so that our people have a
 24 chance to review these documents and pose
 25 questions to this witness about them.

1 That's all. Thank you.
 2 THE HEARING OFFICER: Okay. Mr. Edwards?
 3 MR. EDWARDS: I agree with Mr. Smith's
 4 statement.
 5 THE HEARING OFFICER: Okay.
 6 MR. THORNTON: If I could add one more
 7 thing I forgot, if that's possible.
 8 THE HEARING OFFICER: Okay. I guess what
 9 I'd like to do is give everybody an opportunity --
 10 and perhaps I gave Mr. Fereday's opportunity out
 11 of order not going through -- all the way through
 12 the protestants.
 13 I'm not sure that I need to have a
 14 continued roundtable now on this subject. I think
 15 we've aired it out. And I'd like to go forward
 16 with Mr. Froelich's testimony. There will be an
 17 opportunity for objection if these exhibits or
 18 these documents are offered as exhibits in the
 19 record. Okay?
 20 MR. THORNTON: Okay.
 21 THE HEARING OFFICER: All right. Are we
 22 ready to start, then?
 23 MR. FEREDAY: Yes.
 24 THE HEARING OFFICER: Okay. Mr. Froelich,
 25 you're seated again in the witness chair. I'll

1 remind you you're under oath.
 2
 3 CARTER FROELICH,
 4 having been previously called as a rebuttal
 5 witness by M3 Eagle LLC and previously sworn,
 6 testified as follows:
 7
 8 THE HEARING OFFICER: Mr. Fereday, further
 9 questions?
 10
 11 FURTHER DIRECT EXAMINATION
 12 BY MR. FEREDAY:
 13 Q. Mr. Froelich, I'm having handed to you
 14 what have been marked as Exhibits 84 and 85. I'd
 15 like you to please tell us what these are and when
 16 you saw these.
 17 A. Okay. My exhibits are not numbered,
 18 but the two exhibits that I was just handed -- the
 19 first being the M3 Eagle LLC financial statements,
 20 dated March 31st, 2009; the second being the
 21 audited financial statements of the Dallas Police
 22 and Fire Pension System, dated December 31st, 2008
 23 and 2007.
 24 So Exhibit 84 is the Dallas Police and
 25 Fire. Exhibit 85 is the M3 Eagle LLC financial

1 statements.
 2 Q. When did you receive these?
 3 A. I received those approximately two
 4 weeks ago, give or take. I received them prior to
 5 our -- or my initial testimony at the hearing.
 6 Whether it was that week or late in the previous
 7 week, I can't recall.
 8 Q. Have you reviewed these, sir?
 9 A. Yes, I have.
 10 Q. Is your review of these something that
 11 you routinely do in your position as a consultant
 12 for entities that are seeking to set up community
 13 infrastructure districts?
 14 A. Yes, it is. It's typically done by us
 15 as we get further along in the process when we are
 16 in the process of issuing bonds.
 17 Q. Do these appear to you to be complete
 18 and correct statements for what they purport to
 19 show?
 20 A. All I can say is they are financial
 21 statements prepared by an accounting firm that
 22 purport to report the financial condition of the
 23 two entities involved.
 24 MR. FEREDAY: We offer Exhibits 84 and 85.
 25 THE HEARING OFFICER: So these should be

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1 marked. We'll mark the M3 Eagle LLC as 84, and
2 the Dallas Police and Fire Pension System document
3 as Exhibit 85.
4 MR. LAWRENCE: Excuse me, Mr. Hearing
5 Officer, I think that's reversed from what
6 Mr. Froelich stated. I think the Dallas Police
7 and Fire financial statements should be 84,
8 according to what Mr. Froelich said.
9 THE HEARING OFFICER: Well, I didn't know
10 Mr. Froelich was assigning exhibit numbers,
11 Mr. Lawrence.
12 MR. LAWRENCE: I'm sorry, Mr. Hearing
13 Officer. I'm just trying to keep the record
14 straight.
15 THE HEARING OFFICER: Okay. We'll change
16 them.
17 MR. EDWARDS: I couldn't hear that.
18 THE HEARING OFFICER: Apparently the
19 pension document is Exhibit 84, and the M3
20 document is Exhibit 85.
21 (Exhibits 84 and 85 marked.)
22 THE HEARING OFFICER: Okay. Those
23 documents have been offered.
24 Mr. Thornton?
25 MR. THORNTON: Yeah. I was hoping I'd

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1 never have to object. But to me, definitely
2 object on the grounds, several points of which
3 were some identified in our statement in terms of
4 this information being provided untimely when
5 apparently it has been available prior to.
6 As we stated we haven't had any
7 information -- we asked for this information
8 originally when we had Ms. Beeman as our counsel.
9 Mr. Alan Smith asked for additional
10 information as part of a request of financial
11 statements and was not provided any of this
12 information.
13 When we had Mr. Brownlee on as a
14 witness in our case, I had at that time attempted
15 to enter some information that we had on CDK on
16 the Dallas Pension Plan much to the objection --
17 and successful objection -- of Mr. Fereday where
18 he made the statement this information should have
19 been available to us during discovery.
20 My reply was, "I didn't even know who
21 your investor was until Mr. Brownlee's original
22 when he was on the stand." None of this
23 information was available.
24 Mr. Fereday objects to our information
25 because they didn't have a chance to see it in

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1 discovery. I mean it seems almost laughable that
2 they provide this information on Tuesday evening
3 of such importance that we just object to it being
4 entered into the record.
5 THE HEARING OFFICER: Mr. Smith?
6 MR. ALAN SMITH: We join with Mr. Thornton
7 in that objection.
8 THE HEARING OFFICER: Okay. Mr. Edwards?
9 MR. EDWARDS: And I join Mr. Smith.
10 THE HEARING OFFICER: Response,
11 Mr. Fereday?
12 MR. FEREDAY: Well, as we've stated, these
13 materials were -- are very recent materials that
14 have been -- have become available to us just
15 recently.
16 With regard to the material that we
17 objected to, that was material that the
18 protestants obtained apparently off the web. We
19 don't know what its providence is. And in any
20 event, it did not deal with financial statements,
21 much less audited financial statements, which we
22 understand is what the Hearing Officer is looking
23 for with regard to his last statement concerning
24 Mr. Froelich's testimony.
25 Furthermore, the M3 Eagle statement is

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1 simply an update of what was provided originally.
2 This is the most recent one that was -- that
3 became available. It's dated the 22nd. I mean
4 obviously it's for the period through March 31st,
5 2009. But it was -- the cover letter on it is
6 June 22nd.
7 So we didn't even have this at the
8 time of Mr. Brownlee's testimony. So -- when we
9 put him on in our case.
10 So therefore, this is timely. And
11 we're trying to be forthcoming with this
12 information. And they are concerned about it.
13 That's, I guess, their prerogative. But if they
14 want -- if the Hearing Officer feels this is
15 something that's not relevant to this case,
16 that's -- that, of course, is the Hearing
17 Officer's prerogative.
18 We have stated that the financial
19 issue is one of reasonable probability. We
20 believe we have long since shown that. But we're
21 willing to put on this additional testimony for
22 the reasons I've stated.
23 THE HEARING OFFICER: Okay. Well --
24 MR. ALAN SMITH: I would like to make one
25 other statement, Mr. Hearing Officer.

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1 It's my recollection that Mr. Brownlee
2 testified about a CID clear back in his first
3 testimony way back in April. Now, they knew about
4 this stuff. And they wait until the last minute
5 that they have to actually produce it.
6 THE HEARING OFFICER: Okay. Let me tell
7 you what I'll do. Mr. Froelich testified about
8 the financial health of the Dallas Police and Fire
9 Pension System.
10 And I made the comment to Mr. Fereday
11 that based on his testimony, the subject matter
12 had been opened up.
13 Mr. Thornton, Mr. Smith, Mr. Edwards,
14 I did that because I wanted to make it clear to
15 you that you had an opportunity to inquire of
16 Mr. Froelich about that subject.
17 However, if you want to object to
18 the -- to the detailed information that's being
19 submitted regarding the Dallas Police and Fire
20 Pension System, I'll let the testimony of
21 Mr. Froelich stand and this document won't come
22 in.
23 So if you object to it, then I'll
24 limit the further inquiry on this subject because
25 from my perspective you don't want to inquire

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1 about the details of that testimony. So it's your
2 choice. And I'll -- if I refuse to allow this
3 into the record, I'll also limit inquiries on that
4 subject because apparently you don't want to
5 inquire about the detail. You put me in a box,
6 essentially, in giving you that opportunity. So
7 it's up to you whether you want to have this
8 information in or not.
9 MR. THORNTON: Okay.
10 THE HEARING OFFICER: Now, with respect to
11 the M3 financial statement, I've just perused the
12 format of this, and it appears to be almost
13 identical in form to what we received before. And
14 I view it as an update, not necessarily new
15 information.
16 So it's something that's ongoing. I
17 don't see that this is prejudicial in its
18 submittal. So I'll receive Exhibit 5 (sic) into
19 evidence.
20 (Exhibit 85 admitted.)
21 THE HEARING OFFICER: Exhibit 84 --
22 MR. THORNTON: Mr. Hearing Officer?
23 THE HEARING OFFICER: Yes.
24 MR. THORNTON: May we have just a couple
25 minutes to discuss that among our folks here?

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1 THE HEARING OFFICER: Yeah.
2 MR. THORNTON: Okay. Maybe go off the
3 record.
4 THE HEARING OFFICER: Let's recess.
5 MR. FEREDAY: Exhibit 85?
6 THE HEARING OFFICER: 85 is received.
7 There's a question about 84.
8 (Recess.)
9 THE HEARING OFFICER: Okay. We are
10 recording again.
11 Mr. Thornton.
12 MR. THORNTON: After consultation with some
13 of the NACGUA members, we are fine with Exhibit 84
14 being entered in, however, contingent upon
15 appropriate time for us to review that and
16 formulate questions.
17 We've spent all of our time in
18 preparation for Mr. Froelich and the document 83
19 with questions on that. We had no time, other
20 than to briefly look at it, to spend in developing
21 questions for that. So we're fine with it.
22 However, what we need is appropriate
23 time, and it wouldn't be today, that we can sit
24 down and -- with our folks and develop the
25 appropriate questions. We feel we're at an

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1 extreme disadvantage with only given a day to look
2 over all of those documents and then to develop
3 any appropriate response.
4 And is everything still working?
5 THE HEARING OFFICER: Yeah.
6 MR. THORNTON: So that's what it's
7 contingent upon. We just don't feel that we have
8 had appropriate time for that.
9 THE HEARING OFFICER: Let me inquire. Was
10 that just a lighting?
11 THE AUDIENCE: That was me.
12 THE HEARING OFFICER: Oh, okay. Okay. I
13 thought I heard something click over here, and I
14 was concerned that we lost our recording. Okay.
15 So we're still recording.
16 MR. THORNTON: And in addition to that,
17 what we would want is who were the appropriate
18 people to respond to those documents? These were
19 authored by other folks other than Mr. Brownlee or
20 Mr. Froelich. And it only seems appropriate to
21 have those individuals that authored that letter
22 be present so we could go ahead and ask questions
23 of them and not a person that is not the author of
24 that document.
25 THE HEARING OFFICER: Okay. Well, I'm not

1 expanding the time or the scope of the inquiry at
2 this point.

3 Mr. Fereday, you have a comment?

4 MR. FEREDAY: I do. The Exhibit 84, the
5 audited financial statement of Dallas Police and
6 Fire, has a cover letter dated July 17th, 2009.
7 This -- so this is recent. That's true. We just
8 received it, I think, a couple weeks is what
9 Mr. Froelich testified to he's seen it.

10 It's also, to my understanding, on the
11 web. It's been available to the protestants that
12 way. I do not believe it is appropriate for a
13 document such as this for the Hearing Officer to
14 insist on calling the people who authored it. It
15 is something upon which Mr. Froelich can
16 reasonably rely.

17 Therefore, we would ask that the
18 Hearing Officer admit the exhibit and not enlarge
19 this hearing to add additional witnesses
20 pertaining to this or additional time.

21 THE HEARING OFFICER: Okay. With that, I
22 will not allow 84 into the record, Mr. Thornton.
23 I will limit the inquiry related to the financial
24 health of the Dallas Police and Fire Pension
25 System because this is not coming in,

1 consequently. You know, I -- it seems patently
2 unfair that the inquiry be made and the
3 documentation not be available to us. So I guess
4 that's the -- that's the ruling and the
5 consequence of it.

6 MR. THORNTON: And I'm not -- I heard it,
7 but I'm not sure I fully understood what that
8 meant.

9 THE HEARING OFFICER: Well, Mr. Froelich
10 testified at least briefly that he had reviewed
11 the financial health of the Dallas Police and Fire
12 Pension System.

13 Please correct me if my
14 characterization is wrong, Mr. Fereday.

15 And as a result of that statement --
16 and there were no details, and I said the subject
17 was open and it could be explored.

18 Now, Mr. Fereday, in my opinion, has
19 attempted to be responsive to that statement in
20 providing information that you and others can then
21 inquire from. But if we can't have the
22 information in the record, but on the other hand
23 you want to inquire in detail about Mr. Froelich's
24 knowledge, I think that's patently unfair to him
25 and to the rest of us.

1 So I guess my ruling is if this
2 doesn't come in, then I'll limit the inquiry on
3 that subject to Mr. Froelich, because he's not
4 able to testify about the information that's
5 available, based on my ruling that it's not coming
6 in because of your objection to the document.

7 Like you say, in a way, the objection
8 has put me in a box. This was not provided, and I
9 recognize that you want an opportunity to review
10 it.

11 And consequently, I don't want you to
12 say "We can't bring it in, but I want to ask all
13 of these questions." Okay?

14 MR. THORNTON: And I don't -- and thanks
15 for that clarification or whatever. We are fine
16 with that document coming in as long as we have
17 time to go ahead and review it, develop questions
18 based on that, which we have not been able to do.
19 That's our concern.

20 THE HEARING OFFICER: And I'm not
21 expanding -- I'm not delaying and giving an
22 opportunity for another day or two of hearing in
23 this matter.

24 MR. THORNTON: And I understand that
25 concern. When Mr. Fereday said he was -- they

1 were forthcoming in providing this information,
2 what appears to me is since the outset they have
3 only been providing information when we have been
4 asking tough questions, and then to all of a
5 sudden have this stuff come on my doorstep Tuesday
6 early evening seems rather odd in terms of them
7 trying to be in favor of their case, not
8 forthcoming, but holding information back and not
9 allowing us time to ask questions on what are very
10 important information.

11 THE HEARING OFFICER: And so I won't let it
12 in. Okay?

13 MR. THORNTON: But I want to be on the
14 record that we're perfectly fine with that being
15 in given the appropriate time to review that.

16 THE HEARING OFFICER: Okay. I still won't
17 let it into the record, given your objection.

18 MR. THORNTON: Okay.

19 THE HEARING OFFICER: Okay. Mr. Fereday.

20 Q. (BY MR. FEREDAY): Mr. Froelich, with
21 respect to Exhibit 85, the M3 Eagle LLC financial
22 statements dated March 31, 2009, with a cover
23 letter dated June 22nd, 2009, could you please
24 describe what this is.

25 A. This is a reviewed financial statement

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1 of the M3 LLC dated March 31st, 2009.
2 Q. And does this cover letter by Simek &
3 Company provide certification, in your opinion, as
4 to what it shows?
5 A. Yeah, it --
6 MR. ALAN SMITH: We would object to that
7 question as asking for a legal conclusion of the
8 witness as to what a legal certification is.
9 MR. FEREDAY: Mr. Hearing Officer, this is
10 an accounting expert and an accounting question.
11 THE HEARING OFFICER: Overruled.
12 THE WITNESS: Yeah, in my opinion, this
13 represents -- the accountants have done work with
14 the M3 LLC financial statements. They have in
15 their document -- in their cover letter they said
16 they have reviewed the financial statements, and
17 based on their review they are not aware of any
18 material modifications that should be made in the
19 financial statements.
20 So in my opinion, they have certified
21 that these are a fair representation of the
22 financial condition of the M3 LLC as of that date.
23 MR. FEREDAY: Thank you. No further
24 questions.
25 THE HEARING OFFICER: Okay.

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1 Mr. Thornton, questions?
2 MR. THORNTON: Yes.
3
4 CROSS-EXAMINATION
5 BY MR. THORNTON:
6 Q. So, Mr. Froelich, on this financial
7 statement on Exhibit 85, where can you point me to
8 where it says that it is a certified audit?
9 A. Well --
10 MR. FEREDAY: Objection. I think that's
11 been answered. He did not say that that word
12 appeared in this. He said that it was his opinion
13 as a CPA that it is a certification for what it
14 shows.
15 THE HEARING OFFICER: Okay. Overruled.
16 You may answer the question,
17 Mr. Froelich.
18 THE WITNESS: Basically, there are four
19 types of opinions -- or financial statements that
20 can be prepared.
21 One is an internal-generated financial
22 statement that is done by internal staff. That's
23 the lowest type of reliance that one or a bank
24 would put on a financial statement.
25 The second is a compiled financial

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1 statement, where an accountant actually takes that
2 information and compiles the financial statements
3 according to generally accepted accounting
4 principles or GAAP. That would be the next step
5 up, if you will, that third parties may place
6 reliance on, on the financial statement.
7 The second is a -- the second highest
8 would be the review, which was prepared by Simek &
9 Company dated March 31st, 2009. And they are
10 giving their opinion as to based on the work that
11 they had prepared as discussed in the cover
12 letter, that they are comfortable that there are
13 no material modifications that need to be made in
14 the financial statements of M3 Eagle LLC.
15 The highest type of certification that
16 there is available would be the audited financial
17 statements. And that is where the independent
18 accounting firm goes and reviews all of the
19 internal controls, verifies transactions so that
20 they can state their opinion as to the financial
21 condition of the -- of the entity in question.
22 But this -- what we have before us is also a
23 statement of their opinion and a certification to
24 that effect.
25 Q. (BY MR. THORNTON): Okay. The

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1 statement "certification to their effect," that's
2 your term; correct?
3 A. It could be called a lot of different
4 things. "Certification" is one of them.
5 "Opinion" would be another.
6 Q. Do you see anywhere in this letter --
7 again, on page 1 of Exhibit 85 -- where it says
8 this is a certified audit?
9 A. Well, it wasn't an audit.
10 Q. It wasn't an audit?
11 A. It was a review.
12 Q. So if you'd go to page 1 of that
13 document, on page 85, it's about the third page
14 in.
15 A. Third page?
16 Q. Yeah.
17 A. Okay. Right.
18 Q. For, again, the context of the
19 question, the second paragraph, it says, "A
20 review" -- not an audit, as you stated --
21 "consists principally of inquiries of the
22 company's management and analytical procedures
23 applied to financial data."
24 A. Uh-huh.
25 THE HEARING OFFICER: You are referring to

1 what? The letter?
 2 MR. THORNTON: Exhibit -- yeah, the letter.
 3 Exhibit 85, page 1 of the letter from Simek &
 4 Company.
 5 THE HEARING OFFICER: Okay.
 6 THE WITNESS: Okay.
 7 Q. (BY MR. THORNTON): It states, "It is
 8 substantially less in scope than an audit in
 9 accordance with generally accepted auditing
 10 standards, the objective of which is the
 11 expression of opinion regarding the financial
 12 statements taken as a whole. Accordingly, we do
 13 not express such an opinion."
 14 A. Uh-huh.
 15 Q. The question I have for you, what do
 16 you find in this quarter-page letter that offers
 17 any certainty as to the financial wherewithal and
 18 capability and sustainability of M3?
 19 A. I would be looking at the third
 20 paragraph that says, "Based on our review, as we
 21 are not aware of any material modifications that
 22 should be made to the accompanying financial
 23 statements in order for them to be in conformity
 24 with income tax and accounting, as described in
 25 note one."

1 So they -- and as I discussed earlier,
 2 there are different types of financial statements,
 3 some of which are prepared internally, some of
 4 which are prepared by independent third-party
 5 sources.
 6 These financial statements were
 7 prepared, and any transactions that caused
 8 interest on the part of the -- of the accounting
 9 firm were investigated as you had indicated in
 10 your reading of the second paragraph, that they
 11 made inquiries of management, that they perform
 12 financial analyses on the data.
 13 So here again, what they described is
 14 exactly what they did. It was less in scope than
 15 a full-blown audit, which involves a substantial
 16 amount of work.
 17 Here again, they have made and done a
 18 limited amount of work so that they could
 19 determine whether any material modifications were
 20 required. And in their own statement they had
 21 said that there are not any that need to be made.
 22 So that, in my -- when I look at that,
 23 it gives me comfort that I can look at this and
 24 know that this is a fair representation of the
 25 financial condition of M3 Eagle as of that date.

1 Q. And is there any information in here
 2 other -- that they actually looked at in terms of
 3 their financial stability, other than what was
 4 provided by M3?
 5 A. I think it's important to note that
 6 the accountants are not necessarily given the
 7 scope of what they were prepared to do, to discuss
 8 the financial stability, if you will, of M3 Eagle.
 9 They were going and compiling -- or preparing the
 10 information to present a review of the financial
 11 statements.
 12 Now, generally, this is -- is a great
 13 document, and banks will put great reliance on
 14 this type of -- of financial statement.
 15 Q. Reliance enough to give them a letter
 16 of credit for five years, ten years?
 17 A. I -- every different bank has
 18 different lending criteria. But yes, absolutely.
 19 And I'd need to point out that I'm not a lending
 20 officer.
 21 But as a certified public accountant,
 22 this is the second highest level of assurance that
 23 can be given for a CPA.
 24 Q. So would you agree that a review is
 25 based on inquiring of information of a company and

1 an audit is based on actual documentation?
 2 A. What is your definition of
 3 "acquiring" -- or "inquiring"?
 4 Q. Verbally looking at what their books
 5 show, asking them a question and looking at
 6 spreadsheets.
 7 A. The -- every accountant would have
 8 different methodology, although there are
 9 standards that the accounting profession has to
 10 follow in regards to compilations, reviews, and
 11 audits.
 12 So for the CPA to do a review such as
 13 they've done, they have to go through those
 14 standards.
 15 Now, it's been awhile since I have
 16 been practicing, so I can't speak directly to
 17 those. But part of it would be looking at hard
 18 copies of -- of the balance -- balance sheet and
 19 the profit-and-loss statement.
 20 To the extent that there are
 21 transactions, they may look at original source
 22 documentation for that transaction to get
 23 themselves comfortable with that transaction.
 24 And -- because what they are trying to
 25 do is present the financial statements in

1 accordance with GAAP, or generally accepted
2 accounting principles. For them to do that, they
3 need to take such steps as they deem necessary to
4 be able to do that. And what they're referring to
5 is material modifications, material modifications
6 as it relates to GAAP or income tax basis
7 accounting.

8 Q. So again, regarding this letter on
9 page 1, it is a review, but does not meet the
10 standard of an audit?

11 A. It is not -- they did not perform as
12 much work as would be required under an audit,
13 correct.

14 Q. And I believe you said an audit would
15 include a substantial amount of work?

16 A. With an audit, typically you're
17 looking at internal controls, checks and balances.
18 You're going back and statistically looking at
19 certain transactions and -- that are selected at
20 random or statistically at random. So you are
21 doing quite a bit more work in an audit than you
22 would be doing in a review.

23 Q. Would you not agree that -- or do you
24 agree that the project that M3 is proposing is
25 substantial in size and scope, money, time?

1 A. It is substantial in all those, yes,
2 sir.

3 Q. Would you not then agree that an
4 audit, a substantial audit, is appropriate to
5 determine for the citizens of the state of Idaho
6 that they have the financial wherewithal over
7 putting the water to beneficial use over a 30-year
8 time period?

9 A. No. In my experience, the only time
10 we've actually had to use audited financial
11 statements is if we're dealing with a public
12 company. And M3 is not a public company. I think
13 this is absolutely sufficient, in my opinion.

14 Q. So the question is, underneath the
15 CID, are you not going to be issuing public debt?

16 A. We will be issuing public debt, yes,
17 sir.

18 Q. So is the public involved?

19 A. In what ways? Could you be more
20 definitive?

21 Q. By the bonds that will be issued.

22 A. Depending on how the bonds are sold,
23 they may be involved. Generally what we attempt
24 to do is have the bonds purchased by an
25 institutional investor, such as a Franklin

1 Templeton Funds, a State Farm, et cetera, rather
2 than selling them to the public. But they could
3 be, in essence, sold to the public.

4 Q. So you do agree that these bonds could
5 be sold to the public, individuals, pension plans,
6 or whatever; is that correct?

7 A. They could.

8 Q. Yeah. Well, it does involve the
9 public, then, unlike what you said; is that
10 correct?

11 A. It could.

12 MR. THORNTON: Okay. If I could have a
13 minute, please?

14 THE HEARING OFFICER: Okay.

15 MR. THORNTON: All right. Mr. Hearing
16 Officer --

17 THE HEARING OFFICER: Okay.

18 MR. THORNTON: -- we'd like to continue
19 questioning, and we actually have a number of
20 questions for Mr. Froelich, but the questions that
21 we have formatted are based on the earlier
22 testimony on Exhibit 83. And so what we'd like to
23 do is just --

24 And part of it is to help you know
25 where we're come from, Mr. Froelich.

1 THE WITNESS: Sure.

2 THE HEARING OFFICER: Do you have a copy,
3 Mr. Froelich?

4 THE WITNESS: Yes, I do.

5 THE HEARING OFFICER: Thank you.

6 MR. THORNTON: And I've got to get mine as
7 well.

8 -- is ask questions regarding the CID,
9 and then we'd like to come back to the document 85
10 with some follow-up questions on that one.

11 Would that be okay, Mr. Spackman?

12 THE HEARING OFFICER: Okay. What's your
13 question?

14 MR. THORNTON: The question is -- I guess
15 is maybe a statement, is that we're going to ask
16 questions regarding the CID that we do have
17 prepared. And then we'll come back around and
18 finish up with questions on this particular
19 document here, if we could.

20 THE HEARING OFFICER: "This particular" --

21 MR. THORNTON: "On this particular
22 document," meaning Exhibit 85 on the M3 financial
23 statements, if that's okay.

24 THE HEARING OFFICER: Okay.

25 MR. THORNTON: And what we would like to

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1 enter in as an exhibit -- and it is Idaho statutes
2 dealing with the Community Infrastructure District
3 Act that we'll be referring to.
4 THE HEARING OFFICER: Do you want this
5 document marked, Mr. Thornton?
6 MR. THORNTON: Yes. And I don't know what
7 number we're on for our exhibits. I don't
8 really -- I'm fine whatever exhibit it is, Idaho
9 statutes. But I would like to have that entered
10 in as an exhibit. We will be referring to that in
11 our questions to Mr. Froelich.
12 THE HEARING OFFICER: Okay. To me,
13 Mr. Thornton, unless there's a specific purpose
14 for this exhibit that is not clear to me, I guess
15 I would be reluctant to mark copies of the Idaho
16 code as an exhibit, and we just -- as an exhibit.
17 We would just use it as reference material.
18 MR. THORNTON: And that sounds fine to me.
19 So based on what I understand that to be accepted
20 in terms of its authenticity or whatever, is we'd
21 be referring to that. And so if it doesn't need
22 to be an exhibit, that's fine.
23 THE HEARING OFFICER: Okay.
24 Q. (BY MR. THORNTON): And I did give you
25 a copy of that, Mr. Froelich?

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1 A. Yes, sir.
2 Q. Okay. Thank you.
3 Okay. In Exhibit 83, which is your
4 letter dated July 21st, 2009 --
5 Do you have that in front of you,
6 Mr. Froelich?
7 A. Yes, I do.
8 Q. -- you provided a list of eligible
9 infrastructure projects.
10 A. Uh-huh.
11 Q. Is there any limitation on the portion
12 of these projects that would be eligible?
13 A. Meaning?
14 Q. Eligible for reimbursement.
15 A. These costs are all eligible for
16 reimbursement through the CID.
17 Q. And are there any limitations?
18 A. Meaning financial?
19 Q. Yes, in terms of being able to get the
20 reimbursement back.
21 A. There are certain limitations which
22 are outlined in statute related to the different
23 types of bonds that can be issued and the amount
24 of bonds that can be issued. For instance, with
25 the -- with the special-assessment bonds, the

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1 statute calls out for a limitation of a
2 value-to-lien ratio of three to one.
3 For the general-obligation bonds, I
4 believe there is an -- a limitation. I think it's
5 12 percent of the assessed valuation of all the
6 property contained within the boundaries of the
7 district.
8 Q. Okay. And then the -- so if you'd
9 refer to the Idaho statute 50-3107.
10 A. 50-3107.
11 Q. And paragraph or parentheses 1.
12 A. Uh-huh.
13 Q. And if you could read that first
14 sentence.
15 A. "Only community infrastructure"? Is
16 that the paragraph you're referring to?
17 Q. Yes, correct.
18 A. "Only community infrastructure to be
19 publicly owned by the State or a political
20 subdivision thereof may be financed pursuant to
21 this chapter."
22 Q. Okay. And what does that mean to you?
23 MR. FEREDAY: I'm going to object to the
24 extent this calls for a legal conclusion, but --
25 MR. THORNTON: If I could?

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1 THE HEARING OFFICER: I'll overrule it.
2 But I guess part of the problem,
3 Mr. Fereday, is there are references to statutory
4 information in the letter itself. It seems to me
5 that it's an area that --
6 MR. FEREDAY: We understand it's within the
7 scope. I just want to make sure he's not being
8 asked to give legal conclusions.
9 THE HEARING OFFICER: Yeah, overruled.
10 THE WITNESS: In my opinion, it's -- to the
11 extent that we're building public infrastructure
12 and that public infrastructure will in fact be
13 public and be owned and operated by a public
14 political subdivision of the state of Idaho, that
15 we may finance that infrastructure through the
16 CID.
17 Q. (BY MR. THORNTON): And could you go
18 to statute 50-3102, paragraph (2).
19 A. 3102.
20 Q. So 50-3102, paragraph (2).
21 A. Uh-huh. Beginning "Community
22 infrastructure"?
23 Q. Yes.
24 A. Okay. Did you want me to read it?
25 Q. Yes, if you could read the first

1 sentence, please.
 2 A. "Community infrastructure means
 3 improvements that directly or indirectly benefit
 4 the district."
 5 Q. And the next sentence?
 6 A. "Community infrastructure excludes
 7 public improvements fronting individual,
 8 single-family residential lots."
 9 Q. So are there single-family residential
 10 lots in this development?
 11 A. Yes.
 12 Q. Okay. So will the entire assessed
 13 value be able to be used as a basis for the
 14 12 percent of issuing bonds?
 15 A. Yes.
 16 Q. And if you could go to, on your
 17 Exhibit 83, the last page. I have a No. 6, and
 18 it's also titled Exhibit A by Stanley Consultants.
 19 A. Okay.
 20 Q. And I've got to get my copy I can read
 21 a little better.
 22 And if you could look at the bottom
 23 line, "Total cost."
 24 A. Uh-huh.
 25 Q. And there's two columns, one that's at

1 the top is identified "Amount CID" and "Amount
 2 developer."
 3 A. Uh-huh.
 4 Q. Do you see those?
 5 The "Amount CID" --
 6 A. Correct.
 7 Q. -- is for approximately 217 million?
 8 A. Uh-huh.
 9 Q. The "Amount developer" is about
 10 120 million; correct?
 11 A. Correct.
 12 Q. So can the CIDs cover the entire cost
 13 of the project?
 14 A. No. Well, what we're showing is
 15 that -- what we're trying to do in this exhibit is
 16 to break out that infrastructure that is eligible
 17 for CID financing and that which is the total
 18 cost.
 19 So that was prepared by Stanley
 20 because, as I indicated to you previously, only
 21 public infrastructure may be financed along the
 22 guidelines that we just went through, meaning
 23 public infrastructure fronting a single-family
 24 home is not eligible for financing.
 25 For instance, grading of a super-pad

1 is not available for CID financing, because that
 2 is -- those are costs related to a private trade
 3 or business.
 4 So what's been done here is the
 5 segregation of those costs, what is eligible for
 6 financing through the CID and that which is not
 7 eligible for CID financing. That is the purpose
 8 of this exhibit.
 9 Q. Okay. So the entire project cannot be
 10 taken care of by the CIDs?
 11 A. And in my experience, I haven't run
 12 across one project in the 2,000 that we've done
 13 where there is a special taxing district that will
 14 pay for all of the public infrastructure.
 15 Q. So would you agree at some point in
 16 time M3, the developer, will need to come up with
 17 approximately \$120 million?
 18 A. They will have to come out of pocket
 19 some number, absolutely correct.
 20 Q. Okay. So in your letter, Exhibit 83,
 21 you describe three types of debt that can be
 22 issued; is that correct?
 23 A. That is correct.
 24 Q. Would you please describe them and,
 25 from your experience, what each type of debt is

1 generally used for.
 2 A. The three types of debt that a CID may
 3 issue in the state of Idaho are special-assessment
 4 bonds, general-obligation bonds, and revenue
 5 bonds. All three bond types may be utilized to
 6 finance any infrastructure that's allowed by
 7 statute.
 8 Q. Okay. And then could you describe
 9 each one of those bonds --
 10 A. A special --
 11 Q. -- and, excuse me, what they're used
 12 for?
 13 MR. FEREDAY: We're going to have to object
 14 here. There appear to be two people for the
 15 protestants asking questions here, at least it may
 16 be showing up on the tape, and we're concerned at
 17 least about the transcript here.
 18 THE HEARING OFFICER: Well, I have the same
 19 concern. I guess if there's consultation -- and I
 20 don't object to that, but it needs to be at least
 21 to some degree inaudible, because I have a double
 22 conversation that's going on, Mr. Thornton.
 23 MR. THORNTON: Yes, and I appreciate that.
 24 And we will work to minimize that.
 25 MR. ALAN SMITH: Put your hand over the

1 microphone.

2 Q. (BY MR. THORNTON): So could you

3 describe those three and what they're used for?

4 A. Sure. Here again, all three may be

5 utilized to finance any eligible infrastructure

6 pursuant to statute. Doesn't matter.

7 Assessment bonds are bonds that are

8 issued that are secured by a specific lien on a

9 specific piece of property. And in statute it

10 calls out for a three-to-one value-to-lien ratio,

11 meaning there has to be an appraisal done, the

12 appraisal is based on the fair-market value of

13 that property. Assuming that the infrastructure

14 to be financed through the CFD and or for the --

15 or the CID and/or for which performance bonds or

16 completion guarantees are in place is completed as

17 of the date of valuation.

18 So based on that value, the

19 underwriters are able to go and issue debt based

20 on that amount, and it is secured by a specific

21 lien on a specific piece of property, meaning a

22 lot will have an assessment lien on it of \$5,000,

23 \$7,000, whatever that number is.

24 The general-obligation bonds are

25 secured by an increase in the ad valorem property

1 tax of the property contained within the

2 boundaries of the district. It only affects the

3 property within the boundaries of the district.

4 There would be a -- generally a target

5 set, meaning two mills, three mills, four mills,

6 whatever that number is, and the bonds would be

7 issued based upon the assessed value of the

8 property contained within the boundaries of the

9 district. That could be raw land in the initial

10 stage, or as development occurs, it will be the

11 value of the raw land plus single-family homes,

12 plus the commercial, et cetera.

13 The revenue bonds are generally

14 secured by revenue generated by some source. The

15 best example of that type of bond would be, for

16 instance, if -- and I'm going to go outside of the

17 M3 example, but if a city wanted to purchase a

18 private water company or a -- that had been in

19 existence for a long period of time, there would

20 be a financial statement, there would be some

21 understanding of the revenue that would be

22 generated by that asset, and then that revenue is

23 utilized and pledged against the bonds to pay back

24 the bonds.

25 In all cases, we're talking about a

1 bond term of 30 years. And that is the maximum

2 allowed in the state of Idaho.

3 Q. Okay. And are the bonds generally

4 issued in phases?

5 A. They are issued over the life of the

6 project.

7 Q. Okay. Are you aware of any phase one

8 bonds that have been issued for planned

9 communities since January 2008 in either

10 California, Nevada, Arizona, Idaho, or Florida?

11 A. Well, it depends on what you mean by

12 "phase one bonds." I mean our -- our firm has

13 been involved in some bond issuances, and so yes.

14 Can I call them out specifically to

15 you? No, other than the ones that I was directly

16 involved with.

17 Q. Can you identify any in the state of

18 Idaho that have been issued?

19 A. No. And it's not because I don't

20 necessarily know. I just haven't been involved in

21 any.

22 Q. From your experience, what has been

23 the credit rating for the CID bonds issued since

24 January 2008?

25 A. CID bonds?

1 Q. Yeah.

2 A. To my knowledge, there have not been

3 any CID bonds that have been issued. This law was

4 just enacted in July of 2008, so it's a fairly new

5 law on the books in the state of Idaho.

6 Q. What about other locations, what has

7 been your experience with the credit rating for

8 those CID bonds in other states?

9 A. And I would go back to special taxing

10 district bonds as a general term. But typically,

11 they are unrated, at least in the initial phases

12 of a bond. Here again, it depends on what type of

13 bond we're issuing, be it special-assessment

14 and/or general-obligation bonds.

15 But in the initial phases of a

16 development, typically these bonds are unrated.

17 That is typical for the industry.

18 As the project progresses, the

19 general-obligation bonds typically will move to a

20 rated status of some sort. Assessment bonds, for

21 the most part, are typically unrated.

22 Q. Are the bonds when they have been out

23 for a while, are they generally investment-grade

24 bonds?

25 A. As I just referred to earlier, they

1 can be, but in the initial stages of a
 2 development, they are typically nonrated debt.
 3 Q. Can you give me an example of where
 4 some are investment-grade bonds?
 5 A. If there were a great diversification
 6 of the tax base, meaning there were a lot of
 7 residents who were paying their property taxes
 8 that were being utilized to fund the debt
 9 repayment of the bonds.
 10 Q. Can you give me a specific example of
 11 one?
 12 A. Projects such as Palm Valley and
 13 Pebble Creek in Goodyear, Arizona. I think some
 14 of the last ones that have gone out have been
 15 rated.
 16 Q. Investment grade?
 17 A. Well, I don't -- I would say that I
 18 don't know the exact, so I'd just be speculating
 19 what their rating was, if they were quote/unquote
 20 "investment grade," which, in my opinion, is
 21 triple B or better. I don't know.
 22 Q. Can they be insured to improve their
 23 credit rating?
 24 A. They may be insured, absolutely.
 25 Q. Are they typically insured to improve

1 their credit rating?
 2 A. Most of the transactions that we are
 3 involved with are not insured.
 4 Q. Okay. Are the CID bonds generally
 5 considered to be junk bonds?
 6 A. I would not say junk bonds. I would
 7 say that they are unrated bonds.
 8 Q. Are phase one CID bonds for planned
 9 communities similar to the M3 project generally
 10 sellable in the current market?
 11 A. They are generally sellable. The
 12 question is what are the valued lien requirements
 13 that are required and what is the interest rate
 14 that one would have to pay.
 15 In the environment that we're at right
 16 now, typically we're seeing higher value lien
 17 requirements and higher interest rates than that
 18 which is typical. However, the underwriting
 19 criteria has loosened up and we're moving more
 20 towards normalcy. But as we're all aware, all the
 21 credit markets are in some state of disarray right
 22 now.
 23 Q. So are you aware of any being issued
 24 recently in the current market?
 25 A. And I didn't come prepared to talk

1 about this. But I have heard that there have been
 2 bonds that have been issued in California. Our
 3 California office has been involved on some of
 4 those transactions. I cannot speak directly to
 5 those.
 6 Our firm recently was involved in the
 7 issuance of \$19 million in improvement district
 8 bonds. So -- and those were oversubscribed. So
 9 there is a market for tax-exempt bonds.
 10 Q. And since some have been issued, have
 11 they required credit enhancement?
 12 A. The ones that I was specifically
 13 involved in were assessment bonds secured by the
 14 land only. So in that regard, there was no credit
 15 enhancement.
 16 Q. Okay. Are you aware of any letters of
 17 credit that have been issued in the last six
 18 months in support of CID bonds for planned
 19 communities similar to M3?
 20 A. There have been no CID bonds issued in
 21 the state of Idaho, so no.
 22 Q. Have there been any CID bonds issued
 23 in other states that have been supported by
 24 letters of credit?
 25 A. I -- here again, I have not been

1 involved in the specific transactions. I
 2 cannot -- specifically outside of my scope of
 3 experience, so I would just be guessing.
 4 Q. You do -- you are certified or
 5 qualified, I believe, in your testimony and work
 6 in other states; is that correct?
 7 A. That's correct.
 8 Q. But you're not aware of that in other
 9 states?
 10 A. I mean there have been letters of
 11 credit that have backed up other types of bonds,
 12 as an additional credit enhancement. It all
 13 depends on the specifics of the transaction and
 14 what the issuer is trying to accomplish.
 15 But as a general rule, you can credit
 16 enhance all types of bonds, if you want. Is it
 17 necessary in my opinion? No. You typically pay a
 18 different interest rate to the extent they are
 19 not -- that they are not -- have -- to the extent
 20 that they do not have additional security.
 21 Q. Okay. All right. I got to consult
 22 here for a second.
 23 Most of your reference to the
 24 questions that I've asked -- and I'd like to ask
 25 the same questions, but you've answered those in

1 the form of special-assessment bonds.
 2 A. Uh-huh.
 3 Q. I'd like to ask that in light of
 4 general-obligation bonds --
 5 A. Uh-huh.
 6 Q. -- which you have spoke about M3
 7 having.
 8 A. Uh-huh.
 9 Q. So what is your knowledge of
 10 general-obligation bonds in terms of their ability
 11 to -- and their saleability?
 12 A. Here again, it's whether we're talking
 13 G.O. or special assessment. In fact, we've got a
 14 client that's going out to issue a \$7 million G.O.
 15 bond right now that's secured by the existing
 16 assessed valuation of the property only. So are
 17 they sellable? Yes. Is the interest rate higher
 18 than what we've seen previously and which is
 19 normal? Yes. Have they been priced yet? No. Is
 20 there a market for them? Yes. I don't -- you
 21 keep on asking the same question.
 22 Q. But I hear what you're saying "Is
 23 there a market for them? Yes," but you haven't
 24 identified any that have been sold.
 25 A. Well, I -- I'm happy to come back and

1 supply a listing of assessment bonds that -- and
 2 G.O. bonds that are being sold.
 3 The ones that I'm referring to right
 4 now that are in the process of being issued are
 5 for a project in Phoenix by the name of Festival
 6 Ranch, which is a large master-planned community
 7 located in Buckeye, Arizona.
 8 Q. And is Festival Ranch, is that a
 9 startup community or a mature project?
 10 A. This is a -- it's halfway through its
 11 development cycle currently.
 12 Q. So it already has, does it not, some
 13 assessed value in which to generate some of the
 14 bonds?
 15 A. Right, it does. But any project has
 16 assessed valuation. So we're only issuing off of
 17 the assessed valuation that currently exists. For
 18 instance, a project -- Estrella Mountain Ranch --
 19 and I'm going to be speaking specifically about
 20 Arizona projects that I have been involved, as
 21 there have not been any CID debt issued in the
 22 state of Idaho.
 23 So Estrella Mountain Ranch,
 24 9,771 acres, they have the ability to issue both
 25 general-obligation bonds and assessment bonds. In

1 relation to the general-obligation bond, their
 2 first bond issue prior to any development
 3 occurring within the boundaries of the district
 4 was \$200,000. That's all the -- that's all that
 5 the property would support, all 9,771 acres. That
 6 \$200,000 bond was sold.
 7 Two years later we issued a \$2 million
 8 bond after there had been houses built within the
 9 confines of the district, and the assessed
 10 valuation had increased.
 11 Two years later we issued a
 12 \$14 million bond. I mean -- and so what happens
 13 is strictly, if you will, a mathematical exercise.
 14 What is the existing assessed valuation contained
 15 within the boundaries of the project, what is our
 16 target ad valorem property tax increase, and what
 17 will that allow us to sell.
 18 So we just sell every year, every
 19 other year as the assessed valuation grows. So
 20 that's what we're doing now. The assessed
 21 valuation has grown on this particular project to
 22 the extent that they are able now to issue a
 23 \$7 million bond because they had stopped issuing
 24 G.O. bonds. And it wasn't because there wasn't a
 25 market. They had some challenges with the town of

1 Buckeye in relation to certain entitlement issues.
 2 And so there were some politics involved in that
 3 transaction.
 4 Q. And I believe what you described to me
 5 is, especially at the startup of the project,
 6 there needs to be a fair amount of financing
 7 available by the developer, not by -- not through
 8 the CID bonds, correct, or special-assessment
 9 bonds?
 10 A. Well, there won't be a large amount of
 11 bonds available through the general-obligation
 12 bonds. Through the special-assessment bonds --
 13 and that's why we use special-assessment bonds,
 14 because rather than being based upon the assessed
 15 value of the property, which is low in its
 16 undeveloped state, we're looking at the
 17 fair-market value of the property, assuming the
 18 improvements to be financed through the CID and/or
 19 for which we have completion guarantees are in
 20 place as of the date of valuation.
 21 So that could potentially take you to
 22 a finished lot status or a super-pad status,
 23 rather than just raw land.
 24 Q. And you'd stated before, did you not,
 25 that bonds are generally issued in phases?

1 A. Bonds are issued over the life of the
2 project.

3 Q. Okay. Since each phase is technically
4 a separate bond, does it have to meet the
5 12 percent of adjusted market value test?

6 A. The -- and I would just -- I don't
7 necessarily agree with what your statement -- the
8 G.O. bonds are going to encompass the entire
9 project, which could include -- if you're working
10 on the first phase, it will include all phases.
11 It's the entire project.

12 Assessment bonds are allocated to land
13 that benefits from the infrastructure, which could
14 be a part of a phase, could be all of a phase,
15 could be multiple phases. It's that land area
16 that benefits, and that's required by statute.

17 So I just want to clarify what you
18 just said so that it's clear.

19 But -- and I'm sorry, I lost your
20 question in my clarification.

21 Q. Okay. Since each phase is technically
22 a separate bond, does it have to meet the
23 12 percent of adjusted market value test?

24 A. Just for which the full faith and
25 credit of the district is pledged. And in all my

1 experience, we have never hit that limit.

2 Q. Okay. Just a second.

3 So for a general-obligation bond, and
4 for each phase, since it's technically a separate
5 bond, does it have to meet -- again, the
6 general-obligation bond have to meet the
7 12 percent of adjusted market value test?

8 A. Correct, just the G.O. bonds.

9 Q. Just the G.O. bonds. And will each
10 phase for M3 extend approximately six years,
11 looking at a 30-year build-out and they talk about
12 five phases?

13 MR. FEREDAY: Objection. I think this is
14 beyond the scope of this witness' direct.

15 THE HEARING OFFICER: Mr. Thornton?

16 MR. THORNTON: I think what's important to
17 understand is how many bond issuances there may
18 need to be based on phases in terms of the ability
19 to market those bonds to private investors, public
20 or whatever. We're trying to find out
21 approximately what Mr. Froelich would think are
22 the number of phases. It seems to be already in
23 testimony that there's 30 years and five phases.
24 And I'm just trying to clarify that for
25 foundation.

1 THE HEARING OFFICER: Okay. Overruled, at
2 least for now. I don't know how far we want to go
3 into this.

4 THE WITNESS: I would just be speculating.
5 All -- we really look at the issuance of bonds
6 based upon the market. The market drives
7 everything as to the construction of
8 infrastructure. Therefore, everything would be
9 based on the dictates of the market.

10 Q. (BY MR. THORNTON): Okay. So in your
11 experience with CIDs, what will the status of the
12 phase, the building phase, the planning phase need
13 to be to meet this 12 percent of adjusted market
14 value requirements in order to issue bonds?

15 A. It -- here again, as getting back to
16 my earlier statement related to Estrella Mountain
17 Ranch, the first bond issue could be issued. Now,
18 here again, you have to make sure that the
19 12 percent only applies to general-obligation
20 bonds.

21 So it could be any status. It could
22 be raw land. It could be partially completed. It
23 could be partially completed with homes. It's
24 whatever the assessed valuation is as reported by
25 the county assessor. That is the only number

1 that, quite honestly, we're concerned with.

2 Q. Okay. So for the general-obligation
3 bonds, will it need to have all development work
4 completed?

5 A. No.

6 Q. What will either the lot sale, the
7 residence build-out need to be in order to start
8 issuing general-obligation bonds to help cover
9 some of the costs of this development?

10 A. Just responding the way I previously
11 did, it doesn't matter. The only thing that
12 matters is what is the assessed valuation of the
13 property contained within the boundaries of the
14 district.

15 Q. Okay. So what are the two payment
16 techniques for reimbursement of development
17 expenses in the CID Act as described in -- and if
18 you'd refer to the statutes 50-3108, paragraph (6)
19 and paragraph (7)?

20 Again, to restate the question as
21 you're finding that, what are the two payment
22 techniques for reimbursement of development
23 expenses in the CID Act?

24 A. 3108 -- I'm sorry. What were the
25 subsections?

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1 Q. 3108(6) and (7).
2 A. Okay. Is your question asking me to
3 just read this or --
4 Q. Yeah, if you could characterize, and
5 if you wish, you could refer to what is in the
6 statutes --
7 A. Uh-huh.
8 Q. -- what the payment techniques for
9 reimbursements, the criteria.
10 A. To simplify what the statute says,
11 there are generally two ways of acquiring or
12 paying for public infrastructure eligible by
13 statute.
14 The first is what we would call an
15 acquisition of public infrastructure, meaning the
16 developer has gone out, used third-party sources
17 or equity or internal cash flow to fund the
18 construction of the eligible improvements.
19 Once those facilities have been
20 completed, then they are, in essence, purchased by
21 the district through the issuance of bonds. They
22 are acquired by the district, and then turned over
23 to the political subdivision which will own and
24 operate that.
25 Assuming that we're annexed into the

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1 City of Eagle, the -- you know, the sewer will be
2 taken care of by the sewer district, roads by
3 ACHD, et cetera.
4 The second way to finance
5 infrastructure is through what we call a
6 construction district, whereby bonds are issued.
7 Those bonds are held by a trustee. There is a
8 contract that is entered into with a contractor to
9 build infrastructure. That contractor is awarded
10 the contract, begins to construct the facilities.
11 They submit a draw request to the district board.
12 The district board approves it and requests that
13 the trustee draw down on the bond funds to pay the
14 contractor and get a lien release for that
15 payment.
16 So those would be the two ways to
17 finance infrastructure through the CID statute.
18 Q. And this assumes that the project will
19 be annexed into the City of Eagle?
20 A. That assumes. But right now the
21 City -- right now the Eagle project could go
22 forward with a CID because it is currently within
23 the City's comprehensive planning area. So
24 technically, you could establish a CID within the
25 county and with the City's approval, and go

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1 forward and issue CID that way.
2 Q. Who are the directors on the boards
3 that oversee the various bonds?
4 A. It -- here again, it would depend on
5 which jurisdiction we're in. If we're in the city
6 it would be three members of the City Council. If
7 we're in the county, it would be the board --
8 three of the board of supervisors -- or board of
9 commissioners. Excuse me.
10 Q. Okay. And if you could go into No. 7
11 on that -- and perhaps, let's just say, in your
12 experience, which technique is generally followed,
13 of the two you described?
14 A. We've used both, technically, to go
15 forward. Here again, it depends on what state
16 we're in. Different states have different
17 preferences. And really, it's just a -- by
18 statute, we can go either way. We can do
19 construction or acquisition districts.
20 Q. So in a conservative state such as
21 Idaho and for public officials, what is your
22 experience in terms of which one they would likely
23 go with?
24 A. Generally, at least in the initial
25 phases of a development, and as new jurisdictions

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1 are learning how to utilize this financing
2 mechanism, in my opinion, they would opt for the
3 developer to build the infrastructure and then
4 have the bonds issued to reimburse the developer,
5 who would then take those proceeds and build more
6 infrastructure.
7 Q. And what type of public involvement
8 does that take in order to get these bonds --
9 involvement in terms of either the County
10 officials or City officials?
11 A. At some point the developer would go
12 before the board for the issuance of debt. They
13 would generally provide some indication as to what
14 type of bonds they would like to finance -- or
15 utilize, excuse me -- assessment, G.O., revenue,
16 et cetera -- what infrastructure they would like
17 to construct or acquire through the bond issuance,
18 what the security is, general-obligation bond, an
19 appraisal in case of a special assessment, what
20 the assessed valuation is, et cetera.
21 So it's really -- "Here's what we'd
22 like to do, board of directors." They review that
23 and approve it, at which point the underwriting
24 team is brought in to issue the debt.
25 Q. Okay. And is there a public

1 participation process in that for City of Eagle or
 2 Ada County?
 3 A. It -- generally what happens is that
 4 the -- the hearings, at least that I've been
 5 involved in, they're typically public. But the
 6 CID is operated under the terms of the district
 7 development agreement, which states how bonds are
 8 issued, what certain criteria has to be met,
 9 et cetera. And that's really the governing
 10 document in terms of bonds being issued.
 11 Q. Would you agree that even as far as
 12 we've gone so far, there's numerous steps one has
 13 to go through for CID creation?
 14 A. There are steps that we have to go
 15 through to form the district.
 16 Q. Okay. If you'd refer to your footnote
 17 on page 4 of your letter, Exhibit 83.
 18 A. Okay.
 19 Q. On page 4 there's a footnote.
 20 A. Uh-huh. Yeah.
 21 Q. And you use an average home price of
 22 400,000.
 23 A. Uh-huh.
 24 Q. What was that average home price,
 25 400,000, that was used for what purpose?

1 A. That is really attempting to derive
 2 the assessed valuation of the area contained
 3 within the CID upon completion. And it's used to
 4 determine our general-obligation bond sizing.
 5 Q. Okay. So the 400,000, is it important
 6 in terms of an average value out there to
 7 determine, again, the amount of money that you can
 8 get from the CID to help pay the price? Correct?
 9 A. Correct.
 10 Q. So now, for that \$400,000, is that
 11 amount -- and that is what M3 has told you appears
 12 to be an average value of a home out there?
 13 A. That was a value we were given. I
 14 can't refer to the time period in which we were
 15 given it.
 16 Q. Okay. And who gave you the price of
 17 400,000?
 18 A. It would have been a representative
 19 from M3.
 20 Q. Okay. And so is that amount, 400,000,
 21 is that before or after the homeowner's exemption
 22 of 104,000 --
 23 A. That's before.
 24 Q. -- which reduces --
 25 A. That's before. So we would reduce it

1 by the 100,938, and then base our bond sizing off
 2 of that number.
 3 Q. And that's approximately a 25 percent
 4 difference, then, \$400,000 house versus --
 5 A. We took the 400,000, then we reduced
 6 it by the assumption, then we determined our bond
 7 sizing.
 8 Q. Okay. All right. If the taxable
 9 value of a home was 400,000 at build-out, would
 10 the property tax bill for the CID
 11 general-obligation bonds be 2,000 per year?
 12 A. I didn't do the math, so I don't --
 13 unless I called it out here, I could get my
 14 calculator and calculate it.
 15 Q. Yeah, if you would look at your
 16 footnote in 3, it looks like the math is down
 17 there.
 18 A. My footnote on page 3?
 19 Q. Excuse me. At page 4. I apologize.
 20 A. Am I missing something? I may have
 21 a -- can I --
 22 THE HEARING OFFICER: What do you need?
 23 THE WITNESS: Yeah, I'm not seeing it.
 24 Q. (BY MR. THORNTON): Do you see a
 25 footnote?

1 A. I see a footnote.
 2 Q. Okay. So you had stated -- and is it
 3 correct that the general-obligation bond
 4 assumptions assumes a .005 ad valorem property tax
 5 increase?
 6 A. Correct.
 7 Q. Okay. And so what is that .005 times
 8 the \$400,000?
 9 A. Here again, that's not the taxable
 10 value. That's the sales value.
 11 Q. Okay.
 12 A. So you'd have to decrease that amount.
 13 Q. Okay.
 14 A. And what I need to point out is this
 15 is the information that we have provided for the
 16 target tax rate, whether that is -- yeah. So it's
 17 5 mills, correct.
 18 Q. Five mills. Correct. So
 19 approximately 2,000 per year for property tax?
 20 A. It's less than that.
 21 Q. So is it a \$300,000 home or a \$400,000
 22 home?
 23 A. Well, the assessed value would be
 24 closer to 300,000, so you're closer to 1500. I
 25 mean round numbers.

1 Q. Okay. Right. So could a
 2 general-obligation bond payment of maybe it's
 3 \$1,500 per year, be a different, and even possibly
 4 larger amount, during the build-out stage of this
 5 project?
 6 A. The -- the amount that a property
 7 owner would pay would be based upon the assessed
 8 value of their home. So to the extent their home
 9 was more than 400,000 sales price, it would be
 10 higher. To the extent it was less than that, it
 11 would be lower.
 12 Q. Okay. Please describe how the
 13 property tax mill levy rate is determined each
 14 year that the bonds are outstanding?
 15 A. It's determined upon the outstanding
 16 indebtedness of the district as it relates to
 17 general-obligation bonds.
 18 Q. In the same footnote on page 4,
 19 Exhibit 83, you mention special-assessment bonds
 20 as \$7,500 per unit.
 21 A. Uh-huh.
 22 Q. Is that correct?
 23 A. That's correct.
 24 Q. What would these be used for?
 25 A. Here again, any eligible

1 infrastructure pursuant to statute.
 2 Q. Okay. What would you expect the
 3 length and interest rate to be on the
 4 special-assessment bonds?
 5 A. We -- I think we used a 7 percent
 6 interest rate on these and a term of 30 years,
 7 which is a very conservative interest rate.
 8 Q. Okay. And what does that convert into
 9 an annual payment?
 10 A. Here again, I'd have to go in and do
 11 the math. I'm sorry. I didn't do that in
 12 preparation.
 13 Q. 30 years, 7 percent, 7500. I can't do
 14 that either.
 15 A. Yeah.
 16 Q. And Exhibit 83, again, on page 6, last
 17 page completed by Stanley Consultants --
 18 A. Uh-huh.
 19 Q. -- they've separated the various cost
 20 categories between those eligible for CID bonds
 21 and those to be paid by the developer; is that
 22 correct?
 23 A. That's correct.
 24 Q. Is this the best estimate of the
 25 allocation between the 217.3 million of costs that

1 are CID eligible and the 120.7 million that M3
 2 will need to finance by other means?
 3 A. I don't know if I can address your
 4 point as to the best estimate. I mean these are
 5 estimates that were prepared by a professional
 6 engineering firm.
 7 Q. And so you would -- you would assume
 8 these to be fairly representative?
 9 A. Yes, sir.
 10 Q. Okay. Have you seen a breakdown of
 11 the costs shown on Exhibit 83 on page 6 by phase
 12 and not the whole project?
 13 A. I may have been shown that at some
 14 point in time. Not recently.
 15 Q. Okay. Do you recall what the phase
 16 one amounts are by both the CID and developer
 17 components for phase one?
 18 A. No.
 19 Q. Do other states you work in have a
 20 standard similar to the 12 percent of market value
 21 standard for the issuance of general-obligation
 22 bonds that is in the state of Idaho?
 23 A. The state of Arizona does.
 24 Q. And what percent is that?
 25 A. You know, I can't recall. It has

1 never, ever, ever in my experience in the state of
 2 Arizona come into play. So it's never been an
 3 issue.
 4 Q. The use of 12 percent hasn't come into
 5 play or --
 6 A. The limitation in the state of Arizona
 7 in regards to the indebtedness that a community
 8 facilities district may issue in the state of
 9 Arizona.
 10 Q. Could that be --
 11 A. I want to say --
 12 Q. Oh, I'm sorry.
 13 A. -- it's 9 percent of the assessed
 14 valuation.
 15 Q. Okay. But you're not certain if it's
 16 9?
 17 A. I'm not certain if it's 9.
 18 Q. Okay.
 19 A. But I am certain that it has never,
 20 ever come into play.
 21 Q. Okay. In your opinion, when, during
 22 the approximately six-year period of phase one,
 23 would M3 project meet the 12 percent of market
 24 value in order to issue bonds for this phase one
 25 CID-eligible project costs?

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1 MR. FEREDAY: Objection. He's not
2 testified about the length of any particular
3 phase. So it's a characterization issue.
4 THE HEARING OFFICER: Sustained.
5 MR. THORNTON: Okay. That's fine.
6 THE HEARING OFFICER: Is this a good time
7 for a recess, Mr. Thornton?
8 MR. THORNTON: Yes, it would be great.
9 Thank you.
10 THE HEARING OFFICER: Okay. Let's come
11 back about 20 after.
12 MR. THORNTON: Okay.
13 (Recess.)
14 THE HEARING OFFICER: We're recording
15 again.
16 Mr. Thornton.
17 Q. (BY MR. THORNTON): Going back to your
18 Exhibit 83 on the page 6, I want to come to some
19 closure on our questioning.
20 A. Uh-huh.
21 Q. And it identifies an exhibit at
22 page 6, again the amount for the CID is
23 approximately 217 million, the amount of the
24 developer is about 126 million. It's stated in
25 your Exhibit 83 the approximate, I think, cost

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1 is -- or the project is about -- or am I wrong
2 here?
3 MR. ALAN SMITH: Page 2.
4 MR. THORNTON: Hold on here. Excuse me.
5 MR. JASON SMITH: Page 3.
6 Q. (BY MR. THORNTON): Yeah, on page 3 of
7 Exhibit 83 it says, "It is anticipated that a
8 general-obligation bond election of no less than
9 400 million will be held upon the establishment of
10 the M3 CID."
11 And that's a 400 million
12 general-obligation bond; is that correct?
13 A. That is correct.
14 Q. And for that 400 million, when I add
15 up on the back of page 6, Exhibit A, the amount of
16 the CID and the amount of the developer, I come up
17 with somewhere around 347 million.
18 I'm wondering where that additional
19 may be -- the difference, what appears to me to be
20 a different number, 400 million, versus those two
21 numbers adding up to about 337 million.
22 A. No, that's a good question. The
23 400 million general-obligation bond election is --
24 is a rough estimate as to -- I mean we're just
25 setting a floor, if you will, for the amount of

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1 G.O. bonds that can be issued.
2 The difference between the cost
3 estimates that Stanley has shown and the amount
4 that we are actually going to be requesting that a
5 general-obligation bond election be held stems
6 from the fact that this is a -- you know,
7 potentially a 30-year project.
8 Over time infrastructure costs will
9 increase more than likely. Chances are pretty
10 good that petroleum prices are going to go up from
11 where they are right now. That will affect
12 construction costs, labor costs will go up,
13 et cetera. So what we're trying to do is make a
14 cushion.
15 Additionally, there are other costs
16 that are eligible for CID financing. If you'd
17 take a look at the -- the eligible infrastructure
18 by statute, such as financing costs and real
19 property interests that Stanley hasn't taken into
20 account.
21 Q. Okay.
22 A. So the difference between the G.O.
23 bond election and the Stanley exhibit would be as
24 a result of cost inflation over 30 years and other
25 eligible infrastructure or costs that are

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1 potentially financeable through the CID.
2 Q. Okay. And so that 400 million, that
3 is an estimate for a ceiling, a higher amount, or
4 is that kind of the basement floor?
5 A. Well, I took that directly from the
6 CID documents that were presented to the City.
7 Q. Okay.
8 A. And the number had not been
9 determined. It was just determined it would not
10 be less than 400 million.
11 Q. Okay. And so currently the City and,
12 if not annexed, possibly the County would need to
13 be looking at over a time period of issuing -- or
14 being responsible for potentially \$400 million
15 worth of bonds?
16 A. That is incorrect. The -- and --
17 well, maybe before I jump to conclusions, you
18 said -- explain what you just told me.
19 Q. Okay. Is the \$400 million worth of
20 general-obligation bonds, that is, as I understand
21 your testimony, would be sanctioned by some board
22 of directors, City Council, or commissioners, or
23 did I misunderstand that?
24 A. You misunderstood. The
25 general-obligation bond election would be held.

1 The landowners and/or qualified electors residing
2 within the boundaries of the district would vote
3 to authorize the issuance of some number of G.O.
4 bonds.

5 Q. Okay.

6 A. That is just an authorization.
7 Whether they're actually issued or not would be
8 dependent upon eligible infrastructure costs and
9 the assessed valuation of the property at
10 build-out.

11 Q. Okay. So is it possible, then, to
12 have an additional -- an election for more bonds
13 if in fact you're not going to issue more than
14 400 million now?

15 MR. FEREDAY: Objection. I think this has
16 been asked and answered.

17 THE HEARING OFFICER: Overruled.

18 THE WITNESS: Could you repeat your
19 question just to make sure that I understood it
20 correctly?

21 Q. (BY MR. THORNTON): And I will do the
22 same. Just a second.

23 If you're going to issue more than
24 \$400 million in bonds, do you have to have an
25 additional election for a higher amount?

1 A. Assuming that the initial bond
2 election was for \$400 million and you wanted to
3 issue more general-obligation bonds in excess of
4 \$400 million, you would have to hold another
5 general-obligation bond election. The chances of
6 that passing at some point in the future are slim
7 to none.

8 Q. Okay. If you'd go to your Exhibit 83
9 letter and page -- excuse me -- page 4, second
10 paragraph, the last sentence. It states, "One of
11 the critical factors in reliance upon a water
12 permit for the full build-out -- one of the
13 critical factors is the reliance upon a water
14 permit for the full build-out of the project."

15 How do you see that in terms of if --
16 what effect would that have if you were granted
17 only a quarter of that water right or granted in
18 phases? What would that do to the issuance of
19 general-obligation bonds?

20 A. Well, in my opinion, it would be a
21 huge negative. One of the first questions that
22 we're asked by bond counsel, financial advisors,
23 and underwriters, "Does this project have water?"
24 And we have to be able to answer that in the
25 affirmative.

1 Now, this is a large, 6,000-acre
2 master-planned community. We're going to be
3 financing infrastructure in the first phase that
4 is sized to serve, you know, the last phase, the
5 last house that is built within the community.

6 Because we're building infrastructure
7 that is of the size and scope necessary to serve
8 the whole project, the -- it is important and
9 incumbent upon us to be able to demonstrate that
10 we have the ability to build out the project as
11 planned.

12 And in this instance we're talking
13 about 7100 units. And so it's very important.

14 Q. So where it states "One of the
15 critical factors is reliance upon the water permit
16 for the full build-out," do you agree that that is
17 speculative in nature?

18 MR. FEREDAY: Objection. I think it is
19 asking him to speculate.

20 THE HEARING OFFICER: Sustained,
21 Mr. Thornton. And I think it's the nature of the
22 way in which the question is being asked.

23 MR. THORNTON: Okay.

24 THE HEARING OFFICER: It really does call
25 for a legal conclusion, at least under the factors

1 that the Department needs to consider.

2 Q. (BY MR. THORNTON): Going ahead with
3 the project for full build-out with only a portion
4 of the water right, is that rather risky to
5 investors?

6 A. In my opinion, yes.

7 Q. What I'd like to go ahead and put in
8 front of you is actually one of M3's letters
9 that -- from CDK, June 22nd letter sent to
10 Mr. Brownlee and Department of Water Resource.

11 Do you have a copy of that in front of
12 you?

13 A. No, I don't.

14 Q. I'll give you that one. We have
15 another copy, if I can put that in front of you.
16 And I need to find a copy hopefully.

17 THE HEARING OFFICER: Do we have a copy of
18 this?

19 MR. FEREDAY: Mr. --

20 MR. THORNTON: If we would go off record
21 for just a minute moment while I find my copy.

22 MR. FEREDAY: Before we go off the record,
23 Mr. Hearing Officer, this letter is what we have
24 at least tentatively marked as Exhibit 87 of the
25 applicant's case. We do intend to introduce this

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1 through Mr. Brownlee during his testimony. So I
2 would just make that clarification. This is a
3 letter that we provided to the protestants earlier
4 this week.
5 MR. THORNTON: And we're perfectly fine
6 with having this as an exhibit, and realizing that
7 we would have liked to have had more time to
8 review it, but at the same time realizing that the
9 case is likely to be closed today, or the hearing.
10 THE HEARING OFFICER: So, Mr. Fereday, you
11 plan to introduce this particular letter?
12 MR. FEREDAY: We do.
13 THE HEARING OFFICER: Do you have any
14 objection to us using the document as it's been --
15 as you proposed its marking, stipulate to its
16 admission?
17 MR. FEREDAY: I have no objection, although
18 because it isn't being introduced through this
19 witness, I'm not sure that he has familiarity with
20 it or can testify to it. I suppose he can, to the
21 extent he can read it. But we would stipulate to
22 its entry as our Exhibit 87.
23 THE HEARING OFFICER: Is that fine,
24 Mr. Thornton?
25 MR. THORNTON: That's perfectly fine. You

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1 bet.
2 THE HEARING OFFICER: Mr. Smith?
3 Mr. Edwards?
4 MR. ALAN SMITH: Now, we're off the record,
5 are we not?
6 MS. GIBSON: No.
7 THE HEARING OFFICER: Oh, okay. We're
8 still recording?
9 MS. GIBSON: Yeah.
10 THE HEARING OFFICER: Okay. All right. So
11 let's just receive this into evidence as
12 Exhibit 87. Let's so mark it.
13 (Exhibit 87 marked and admitted.)
14 THE HEARING OFFICER: Mr. Thornton, you may
15 question Mr. Froelich about the letter.
16 MR. THORNTON: Okay. Thank you.
17 Q. Regarding the CIDs -- and again, the
18 page 6 on 83, Exhibit 83 -- there's a substantial
19 amount of money, is there not, that the developer
20 needs to come up with to help this project to be
21 complete?
22 A. Well, in looking at the exhibit, the
23 amount the developer is funding is 120 million, of
24 which approximately 77.6 million is related to
25 landscaping, community centers, golf courses

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1 et cetera, which are potentially discretionary.
2 But \$120 million is what the exhibit shows.
3 Q. But likely, if they don't have the
4 landscaping, is it not, and the golf courses, that
5 the people will not come?
6 A. Not necessarily.
7 Q. Okay. And I believe you testified
8 that in the initial phase of development, such as
9 for wastewater, you may not have used specifically
10 wastewater, even specifically potable water, but
11 there is a large, up-front infrastructure that is
12 needed to be put in place, is it not?
13 A. In my experience, the initial phases
14 require -- of developments require a substantial
15 amount of funding.
16 Q. Okay. And that substantial amount of
17 funding early in a project, is it not true that
18 that is -- not much of that can be funded through
19 CIDs?
20 A. That's incorrect. As I previously
21 testified -- maybe I was not very clear, but
22 generally the -- in the initial phases of a
23 development, the general-obligation bond is
24 generally a very small amount, unless we are
25 credit enhancing that, in which case it can be

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1 larger.
2 The assessment bonds that we are
3 planning on utilizing are more substantial in size
4 because we are basing those off of the market
5 value of the property as opposed to the assessed
6 value, and then applying the three-to-one
7 value-to-lien ratio. So in that initial example I
8 had given of Estrella Mountain where the first
9 G.O. bond issue was \$200,000, well, the first
10 assessment bond issue was in excess of
11 \$9.5 million. And that was used to offset and
12 fund construction of the initial phases.
13 Q. For --
14 A. The other thing --
15 Q. Oh, I'm sorry.
16 A. -- that makes the M3 project unique
17 and -- is that they have absolutely no debt on the
18 property as of today. So they're able to go out
19 and get additional institutional and third-party
20 funding to help fund the initial infrastructure
21 costs.
22 Q. Okay. And again, those infrastructure
23 costs are likely to be substantial?
24 A. Substantial. I don't have the number,
25 so I can't testify to the actual number.

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1 Q. Okay. So if you could refer, then, to
2 the CDK letter marked Exhibit 87.
3 A. Uh-huh.
4 Q. And if you'd go to -- in the first
5 paragraph, I think it's the next to the last
6 sentence, it states -- this is a letter from CDK
7 Realty advisor John Donahoe -- or -hue to
8 Mr. Brownlee and IDWR. It states, "Of no less
9 than an annual basis the Dallas Police Firemen's
10 Pension System and the company review and approve
11 the company's business plans and funding
12 requirements."
13 So do you read that to be that only on
14 an annual basis will potentially M3 be able to
15 have money from CDK and the Dallas Pension Plan?
16 MR. FEREDAY: Objection. The statement
17 itself makes it clear that that's not the case.
18 It speaks for itself.
19 THE HEARING OFFICER: Mr. Thornton?
20 Q. (BY MR. THORNTON): What --
21 THE HEARING OFFICER: No, there's an
22 objection that's been voiced.
23 MR. THORNTON: All right.
24 THE HEARING OFFICER: I need to rule on it.
25 Do you have a response?

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1 MR. THORNTON: I believe it's important to
2 fully understand that sentence in terms of the
3 certainty of financing for any longer than a year
4 for M3, of which they'd identified the pension
5 plan via CDK to get funding. I think it's very
6 important to understand what the certainty and
7 longevity of their funding is for. And I see this
8 to be only on an annual basis.
9 THE HEARING OFFICER: Overruled.
10 Q. (BY MR. THORNTON): So the question --
11 THE HEARING OFFICER: Do you recall the
12 question, Mr. Froelich?
13 THE WITNESS: You may want to repeat it,
14 sir.
15 Q. (BY MR. THORNTON): Can you -- do you
16 see anything in this letter -- I'll modify -- I'll
17 pull that one question or withdraw that one
18 question and ask another.
19 Okay. Do you see anything in the
20 letter in that paragraph that we just went over,
21 that sentence, that shows where M3 is guaranteed
22 any funding for longer than an annual basis?
23 A. In paragraph 1 specifically?
24 Q. Yes.
25 A. In that paragraph I don't -- nothing

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1 jumps out to me that would show that, other than
2 "And no less than on an annual basis the Dallas
3 Police and Fire Pension System and the company
4 will review and approve the business plans and
5 funding requirements."
6 And it's at that -- I can't speak
7 directly to the funding arrangements set up with
8 the pension fund and M3. I think Mr. Brownlee
9 would be better to address that issue.
10 Q. Okay. Two remaining questions.
11 Mr. Froelich, are you currently being
12 paid any commissions or fees for your services to
13 M3?
14 A. We are being paid time and
15 materials --
16 Q. Okay.
17 A. -- for professional services rendered.
18 Q. Okay. And if M3 is successful in
19 obtaining CID bond funds, will you receive a
20 commission or a fee on that?
21 A. No, sir.
22 Q. So you -- you receive just time and
23 materials for that?
24 A. That is correct.
25 MR. THORNTON: All right. I think that's

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1 all the questions. Thank you.
2 THE HEARING OFFICER: Mr. Smith?
3
4 CROSS-EXAMINATION
5 BY MR. ALAN SMITH:
6 Q. Yes, Mr. Froelich. Let's go to the
7 accountant's statement by Simek & Company. It's
8 Exhibit 85, second page.
9 Do you have that there?
10 A. Yes, sir.
11 Q. Does that not say that this is only a
12 review, the statements of income, tax basis, and
13 members' equity is all based on information
14 provided by the M3 Company?
15 MR. FEREDAY: Objection. This is asked and
16 answered, and it's -- and the document speaks for
17 itself and he's already testified to it.
18 THE HEARING OFFICER: Overruled.
19 Q. (BY MR. ALAN SMITH): In the first
20 paragraph --
21 A. I don't believe that is what it says.
22 I mean what it says is what's written down. And
23 if you would read it into the record, I think that
24 would be the best way to handle it.
25 Q. It says, "All information" -- in the

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1 last sentence in the first paragraph, "All
2 information is based on representations of the
3 management of M3 Eagle company."
4 A. Okay. That is correct.
5 Q. None of that has apparently been
6 verified.
7 A. Well, I think what you need to do is
8 take a look at the second paragraph.
9 Q. All right. We'll do that in a minute.
10 That's only for a three-month period,
11 too, is it not?
12 A. The financial statements are dated
13 March 31st, 2009. So it would be for that
14 three-month period, correct, sir.
15 Q. And in the second paragraph, in the
16 second sentence, it discloses that no audit has
17 been done.
18 A. It doesn't discuss an audit. It says
19 that a review -- it describes the procedures that
20 were performed on the financial information. And
21 one of the things I need to point out is that
22 generally CPAs are not doing bookkeeping work for
23 firms, generally speaking. So they are always
24 provided with financial information that was
25 prepared by the entity.

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1 Q. All right. And as that sentence
2 continues on, it states that -- in the last
3 sentence there, "We did not express any opinion."
4 MR. FEREDAY: Objection. It misquotes.
5 MR. ALAN SMITH: All right. Let's read it
6 all.
7 Q. "It is substantially less in scope
8 than an audit in accordance with generally
9 accepted auditing standards, the objective of
10 which is the expression of an opinion regarding
11 the financial statements taken as a whole.
12 Accordingly, we do not express such an opinion."
13 Is that not correct?
14 MR. FEREDAY: Objection.
15 THE HEARING OFFICER: Okay.
16 MR. FEREDAY: I was looking for a question.
17 THE HEARING OFFICER: Okay.
18 MR. FEREDAY: I withdraw the objection.
19 Q. (BY MR. ALAN SMITH): And the last
20 sentence, in the last paragraph, the only sentence
21 in that paragraph states, "We are not aware of any
22 modifications that should be made."
23 So this document appears to be hedging
24 all the way through, does it not?
25 A. Sir, you have to get back to the four

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1 types of financial statements that are out there:
2 internally prepared, compiled, reviewed, and
3 audited.
4 The review is the second highest, if
5 you will, opinion that a CPA can give to a
6 financial statement.
7 Q. And you're --
8 A. Here they have said that there are not
9 any material modifications that need to be
10 necessary, based upon their procedures enumerated
11 in paragraph 2.
12 Q. And you're willing to accept that as a
13 certified financial statement?
14 A. In my opinion, it is, yes, sir.
15 Q. Okay. Let's go to this bond matter
16 now. Those special-assessment bonds, the CID
17 district can levy those without any vote, can they
18 not?
19 A. Yes, sir.
20 Q. And the bond market I believe you said
21 is in a state of flux?
22 A. All financial markets are in a state
23 of flux, sir.
24 Q. And then we go to the fact that the
25 Dallas Police and Firemen's Fund is only committed

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1 on an annual basis to provide funding to M3?
2 A. Here again, sir, I would defer to
3 Mr. Brownlee to answer those specific questions
4 directly.
5 Q. So isn't this whole financial showing
6 by M3 based on a great deal of speculation and
7 conjecture?
8 A. In my opinion, sir, this project is
9 well positioned to build out in accordance with
10 its plan. It has a very, very strong financial
11 partner with \$2.5 billion in assets. It has a
12 large amount of acreage that is currently
13 unencumbered and available for security for
14 additional financing. And we're moving forward
15 with a CID.
16 To me, this project is absolutely well
17 set up. I mean it's probably one of the best
18 projects I'm working with around the country for
19 financing purposes.
20 Q. And the Dallas Police and Fire
21 Department has a 79 million combination of debt
22 and equity in the company?
23 A. You're referring to the M3, or you're
24 referring to the letter that I -- just was
25 received?

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1 Q. The CDK letter.
2 A. The CDK letter indicates that they
3 have -- or there has been invested \$79 million in
4 a combination of debt and equity in the company.
5 Q. And they can withdraw it any time?
6 A. Here again, sir, I would defer to
7 Mr. Brownlee as to the agreement he has with the
8 pension fund.
9 Q. And the M3 Company apparently has
10 liabilities of 64,284,000?
11 A. Sir, I think you were referring to the
12 member's equity, which is 64.2 million. The
13 current liabilities, as presented on the M3 Eagle
14 balance sheet as of March 31st, 2009, were
15 15,259 -- \$259,553.
16 MR. ALAN SMITH: I believe that's all the
17 questions I have.
18 THE HEARING OFFICER: Okay. Mr. Edwards?
19 MR. EDWARDS: I have no questions, but
20 thank you for your time.
21 THE WITNESS: Yeah. My pleasure. Thank
22 you.
23 THE HEARING OFFICER: Okay. Mr. Fereday,
24 redirect?
25 ///

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1 REDIRECT EXAMINATION
2 BY MR. FEREDAY:
3 Q. Mr. Froelich, with regard to
4 Exhibit 85, the letter from Simek & Company, is
5 the language in that letter the standard language
6 that's required by generally accepted accounting
7 principles?
8 A. In my recollection, yes, it is.
9 Q. With regard to the question of credit
10 enhancement, would you see the M3 project being in
11 a good position to receive credit enhancements
12 should that become necessary or desirable?
13 A. Should it become necessary or
14 desirable, absolutely. They've got a number of
15 different factors, as I alluded to earlier.
16 Number one, they have a strong
17 financial partner of \$2.5 billion in net assets as
18 of the end of 2008. They also have a large amount
19 of acreage that is unencumbered. And they also
20 have a very strong experience background.
21 So in my opinion, credit enhancement
22 should it be required and/or necessary or
23 desirable, it would be easily obtained.
24 Q. With regard to the questions from
25 Mr. Thornton about the average value of homes, the

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1 \$400,000 number --
2 A. Uh-huh.
3 Q. -- that was set forth in the
4 materials, is that value a value today or is it a
5 value calculated over some time period as an
6 average? Do you know?
7 A. Well, on the average -- here again, we
8 looked at the assessed valuation over a 30-year
9 period. This was the value that we had assigned
10 as an average over the 30-year period.
11 If you were to, say, inflate a
12 \$255,000 house today by 3 percent, within 15 years
13 you would get to that amount. And so it's more of
14 a midpoint.
15 Q. So do you know what the -- that number
16 would be in today's dollars?
17 A. Roughly, about 255,000, thereabouts.
18 Q. With regard to the fair-market value
19 calculation for setting bonding limits, is that
20 fair-market value based on the current state of
21 the property in a special-assessment bond, or is
22 it based on the value with improvements?
23 A. It's the value with improvements.
24 Q. In your opinion, can this project,
25 with or without bond financing, finance the

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1 19.8 million listed in the Exhibit 83 for the
2 water system?
3 A. It -- in my opinion, on a scale of 1
4 to 10, would it be able to finance this amount of
5 money without the CID financing? I would say it's
6 a 12 on the scale of 1 to 10. Absolutely.
7 Q. With regard to the home-value question
8 once again, if the city of Eagle's average home
9 value is somewhere in the neighborhood of \$400,000
10 today, would you say that your calculations, as to
11 the bonding assumptions for home values, are
12 conservative or aggressive?
13 A. Conservative. We always try to err on
14 the conservative side. We haven't -- for all
15 practical purposes, we haven't inflated the
16 commercial acreage and/or improvements, and we've
17 really, in our opinion, just picked a midpoint for
18 home values. So we're trying to err on the
19 conservative side.
20 MR. FEREDAY: No further questions.
21 THE HEARING OFFICER: Okay. Recross,
22 Mr. Thornton?
23 ///
24 ///
25 ///

1 RECCROSS EXAMINATION
 2 BY MR. THORNTON:
 3 Q. Is the water development system, the
 4 \$19 million, what is its value if the planned
 5 community does not materialize?
 6 A. You may need to expound on that
 7 question a little bit. Make sure I understand it.
 8 Q. There was a question that was
 9 presented that approximately \$19 million for a
 10 community water system.
 11 And did you identify that on a scale
 12 of 1 to 10 that the financing for that would be a
 13 12?
 14 A. Right. Absolutely.
 15 Q. The ability?
 16 A. Yeah.
 17 Q. What financing would be required to --
 18 what types of financing would the developer have
 19 to obtain that 19 million?
 20 A. Well, obviously they have a very
 21 strong financial partner that they could draw
 22 upon. But the important factor is that their land
 23 is free and clear. And they would be able to go
 24 out to an institutional lender and obtain some
 25 percentage of their -- of the value of that

1 property as improved.
 2 Q. You identified they're a strong
 3 lender.
 4 And is that Dallas Pension Plan or is
 5 that CDK?
 6 MR. FEREDAY: Objection. It was not a
 7 strong lender. It was a strong partner, I
 8 believe, was the testimony.
 9 THE WITNESS: Correct. It --
 10 THE HEARING OFFICER: Okay. All right.
 11 Rephrase the question.
 12 MR. THORNTON: I'll rephrase the question.
 13 Q. Is their strong partner -- I believe
 14 you identified that they had a strong financial
 15 partner.
 16 And is that CDK or is that Dallas
 17 Pension Plan?
 18 A. Dallas Pension.
 19 Q. And are you aware of anything longer,
 20 as identified in Exhibit 87, that CDK -- it does
 21 not say Dallas Pension Plan. I don't see that --
 22 has any more assurance than for on an annual basis
 23 for financing?
 24 MR. FEREDAY: Objection. Beyond the scope.
 25 THE HEARING OFFICER: Sustained.

1 Mr. Thornton.
 2 Q. (BY MR. THORNTON): You'd identified a
 3 strong partner as Dallas Pension Plan.
 4 Can you show me the evidence where
 5 Dallas Pension Plan is any more than a strong
 6 partner for a year -- more than a year at a time?
 7 A. Well, here again, I'm going to have to
 8 defer to the actual operating agreement between
 9 the Dallas Pension and M3 LLC, of which the Dallas
 10 Pension Fund is a member. So they're a member of
 11 this -- of this entity that owns a lot of dirt.
 12 And for them to hit, as they refer to
 13 in -- the investment advisor, CDK, discusses for
 14 them to hit their hurdles, they have to go through
 15 the build-out of this project in terms of return.
 16 So while it doesn't specifically call
 17 that out, one would think, at least dealing in my
 18 world, where they have investment hurdles that
 19 they have to hit, the only way they're going to
 20 get their money back and the only way they're
 21 going to hit their investment returns is if they
 22 build out this project.
 23 So in my opinion, that is inferred by
 24 this letter, as described in the second paragraph
 25 of this letter.

1 Q. And are you familiar with the Dallas
 2 Pension Plan?
 3 A. Other than as presented in the audited
 4 financial statements for December 31st, 2008, that
 5 is the extent of my knowledge.
 6 Q. Okay. Are you aware that they lost
 7 over \$800 million last year?
 8 A. I would say that any --
 9 MR. FEREDAY: Objection. This, again, is
 10 beyond the scope and requests information from an
 11 exhibit that has not been entered.
 12 MR. THORNTON: My comment would be he's
 13 talking about a strong financial partner. One
 14 would think he would have information on the
 15 strong financial partner.
 16 THE HEARING OFFICER: All right.
 17 Overruled. I'll allow some limited inquiry.
 18 MR. THORNTON: Okay.
 19 THE WITNESS: Now, to respond to your
 20 question, sir, the financial statements indicate a
 21 \$796,000 -- or excuse me, \$796 million loss. And
 22 as would be expected -- and I don't know of any
 23 financial institution, as reported on all the
 24 various news sources, that hasn't suffered
 25 significant losses as a result of the downturn in

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1 the stock market and real estate markets. So this
2 would be absolutely what somebody would expect to
3 see in a financial statement.
4 Q. (BY MR. THORNTON): So an approximate
5 20-some percent loss of their value; is that
6 correct?
7 A. I haven't done the math. But -- so
8 I'll rely on -- although I did bring my
9 calculator.
10 Q. Closer to 25 percent. Anyway...
11 CDK, how well did CDK perform last
12 year?
13 A. Here again --
14 MR. FEREDAY: Objection. Beyond the scope.
15 THE HEARING OFFICER: Sustained.
16 MR. THORNTON: Okay.
17 Q. So you've identified that the ground
18 is free and clear for M3; is that correct?
19 A. That is correct.
20 Q. Do you know how that land was
21 purchased and by who?
22 A. I will let Mr. Brownlee discuss the
23 specifics of that. I could speculate, but I'd,
24 here again, just be --
25 Q. Okay.

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1 A. -- speculating based upon the
2 knowledge I have of the transaction.
3 Q. So you're really not sure if it's free
4 and clear; is that true? You've just heard it's
5 free and clear?
6 A. Well, based upon my review of the
7 reviewed financial statements that are certified
8 by the accounting firm, they have indicated that
9 there's only -- the only debt on the property is a
10 \$15 million unsecured note.
11 Q. And the 79 million -- I may be
12 incorrect there. But the 70-plus -- \$79 million
13 in Exhibit 87 where they have invested \$79 million
14 to the Dallas Police and Fire Pension System,
15 who's paying Dallas Fire and Pension System back?
16 How is the land free and clear?
17 MR. FEREDAY: Objection. Beyond the scope.
18 THE HEARING OFFICER: Sustained.
19 MR. THORNTON: Okay. All right. No
20 further questions.
21 THE HEARING OFFICER: Okay. Mr. Smith?
22 MR. ALAN SMITH: No recross.
23 MR. EDWARDS: No.
24 THE HEARING OFFICER: Okay. Thank you,
25 Mr. Froelich.

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1 THE WITNESS: Thank you.
2 MR. FEREDAY: Could we call Mr. Brownlee,
3 Bill Brownlee.
4 THE HEARING OFFICER: Okay. Mr. Brownlee,
5 if you'll come forward, please.
6
7 WILLIAM BROWNLEE,
8 having been called as a rebuttal witness by M3
9 Eagle LLC and previously sworn, testified as
10 follows:
11
12 THE HEARING OFFICER: Please be seated.
13 I'll remind you you remain under oath.
14 THE WITNESS: Thank you.
15 THE HEARING OFFICER: Mr. Fereday.
16
17 DIRECT EXAMINATION
18 BY MR. FEREDAY:
19 Q. Mr. Brownlee, in response to questions
20 and comments in this hearing with regard to
21 financial status and financial capability, have
22 you obtained any additional information from your
23 accountants on this subject?
24 A. Yes, we have.
25 Q. Why did you wish to provide additional

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1 financial information?
2 A. For two reasons. One, the protestants
3 questioned the integrity and the quality of the
4 financial statements, so we obtained from Simek a
5 review of that statement. Simek has been the
6 accountant for the partnership since formation.
7 They do the tax returns on an annual basis.
8 And secondly, the Hearing Officer had
9 requested additional information, so we felt it
10 prudent to have a review completed of the
11 financial statement and have it brought up to the
12 most current quarter.
13 (Exhibit 86 marked.)
14 Q. (BY MR. FEREDAY): Mr. Brownlee, I'm
15 having handed to you a document that's been marked
16 as Exhibit 86, dated June 22nd, 2009. It's a
17 letter I see from -- signed by you and a Thomas
18 Cervino to Simek & Company.
19 Could you describe what this is,
20 please.
21 A. As part of the review, the
22 accountants, Simek & Company, requested this
23 letter be provided as part of the guidelines for
24 conducting such a review. And this letter sets
25 forth what our knowledge is of certain subjects

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1 that are being reviewed by the accountant.
2 Q. Who is Mr. Thomas Cervino?
3 A. He is a CPA and the chief financial
4 officer for our company.
5 Q. Is this an accurate description of the
6 matters described in the letter, Mr. Brownlee?
7 A. Yes, it is.
8 Q. And, Mr. Brownlee, to your knowledge,
9 was this letter made available to the protestants
10 in the last couple of days?
11 A. Yes, it was.
12 MR. FEREDAY: We offer Exhibit 86.
13 THE HEARING OFFICER: Okay. Mr. Thornton?
14 MR. THORNTON: Yeah, I guess we'll accept,
15 understanding that we have no other alternative in
16 terms of time allowed to review this in more
17 depth. So I guess we'll accept it.
18 THE HEARING OFFICER: Mr. Smith?
19 MR. ALAN SMITH: Well, we would still
20 object to it on the same basis that we had earlier
21 this morning. We haven't had five days' notice of
22 these documents. It's dated June 22nd. Where has
23 it been all of this time?
24 THE HEARING OFFICER: Okay. Well, I just
25 look at the content of the letter, and I don't --

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1 I guess I don't find, Mr. Smith or Mr. Thornton,
2 any significant data or information that's even
3 contained in this letter. It appears to me to be
4 a letter of transmittal of some type that's
5 representing certain, I guess I would say, general
6 facts about the way in which something was
7 submitted. And so I'm not sure what kind of
8 review would even be conducted with respect to
9 this particular document.
10 MR. THORNTON: My response is you may be
11 absolutely correct. But given the inadequate
12 time, we haven't been able to go ahead and touch
13 base with a couple of our folks that do have that
14 financial wherewithal for these types of letters.
15 So I feel we're at a disadvantage.
16 THE HEARING OFFICER: Okay.
17 MR. THORNTON: As I said, we cannot -- I'm
18 not objecting, but I'm just really concerned with
19 the lateness of this type of information when, you
20 know, this has been dated June 22nd. It's been
21 over a month.
22 THE HEARING OFFICER: Okay. The document's
23 received into evidence.
24 (Exhibit 86 admitted.)
25 Q. (BY MR. FEREDAY): Mr. Brownlee, what

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1 was the point of this letter?
2 A. It's my understanding that the review
3 has requirements in accordance with whatever
4 standard CPAs use that this type of letter is a
5 letter that goes through and makes a statement on
6 our behalf as the managers of the entity as to the
7 various items in 1 through 14.
8 And the other thing is I think it's
9 a -- I continue to sit through this hearing and
10 hear about the fact that we probably cooked the
11 books here for some reason. And I would point you
12 to paragraph 5, which basically says that "We're
13 not -- we have no knowledge of any fraud or
14 suspected fraud affecting the company involving
15 management or others where the fraud could have a
16 material effect on the financial statements,
17 including a communication received from
18 employees -- employees, former employees, or
19 others."
20 And so I think it's something that
21 we've signed that, as a manager of an entity, that
22 holds a certain level of fiduciary responsibility,
23 not only to this hearing, but also to our
24 partners.
25 Q. I note that in the very first

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1 paragraph of Exhibit 86 it states that you're
2 providing the letter in connection with the
3 March 31st, 2009 balance sheet.
4 Is that also a description of what
5 this letter's about, then?
6 A. That is correct.
7 Q. Have you had contact recently with the
8 Dallas Police and Fire Pension System or its
9 representatives about the pension system's
10 commitment to this project?
11 A. Yes, we have ongoing contact with CDK.
12 Q. And is Exhibit 87, which has been
13 admitted, the CDK letter to you, something in
14 response -- provided in response to that inquiry?
15 A. Yes, it was.
16 Q. And could you tell us what your
17 understanding is of your relationship with the
18 pension fund as -- either as expressed through
19 this letter or otherwise?
20 MR. ALAN SMITH: Object to that as calling
21 for hearsay.
22 THE HEARING OFFICER: Overruled.
23 THE WITNESS: CDK serves as a financial
24 advisor to the Dallas Police and Fire Pension
25 System, as noted by the signatory block on this

1 letter. Our structure is that we deal with CDK,
2 and then we also have meetings with the pension
3 fund themselves on a varying frequency.

4 This letter was requested because
5 there was inquiry the last time I testified about
6 who CDK was and what the commitment was and how
7 often we reviewed our business plans.

8 A question was asked of Mr. Froelich
9 about the business plan and the statement made in
10 the last sentence about the commitment only being
11 a one-year commitment.

12 We adopt business plans for these
13 projects that exceed one year. They may go up to
14 the completion of a phase, or typically what we do
15 is adopt a business plan that looks at the
16 completion of a project.

17 So DP&F's commitment isn't just a
18 one-year commitment. It's a funding commitment to
19 that adopted business plan.

20 Q. Now, DP&F refers to Dallas Police and
21 Fire Pension Fund System?

22 A. That is correct.

23 Q. And CDK has a role in DPF's approvals
24 of business plans; isn't that correct?

25 A. That is correct.

1 Q. Could you describe what it is.

2 A. Their role is to work with us as the
3 advisor to the fund to reach concurrence on a
4 business plan that is going to then be proposed to
5 be adopted by the board of the fund.

6 Q. Has the fund or DPF always funded in
7 accordance with approved business plans and -- for
8 your project?

9 A. Yes, they have.

10 Q. How many of these approvals have been
11 received from the fund?

12 MR. ALAN SMITH: Objection. Irrelevant and
13 immaterial.

14 THE HEARING OFFICER: Overruled.

15 THE WITNESS: We received the initial
16 approval on acquisition, and then we submit to
17 them on an annual basis for review a review of the
18 prior year's business plan and what is the needs
19 of the upcoming fiscal year.

20 Q. (BY MR. FEREDAY): And how many of
21 these approvals have been given?

22 A. I believe four.

23 Q. So that's over four years?

24 A. Yes.

25 Q. Based on your prior experience with

1 Dallas Police and Fire Pension System, do you have
2 any reason to believe that the fund will not
3 extend funding in the future in accordance with an
4 approved business plan?

5 A. No.

6 Q. What is the status of your current
7 business plan?

8 A. The process that we're currently in is
9 going through the entitlements process to finish
10 up a number of items that are required pursuant to
11 our development agreement with the City of Eagle,
12 to complete the annexation of the property into
13 the City, to form the CID that Mr. Froelich
14 testified to, and to work through the
15 design-related issues to determine phasing and
16 pricing of such phasing based upon changing market
17 conditions.

18 Q. When do you anticipate filing the next
19 business plan with Dallas Police and Fire, to seek
20 funding?

21 A. That would be at the end of this
22 fiscal year.

23 Q. And that is?

24 A. December 2009.

25 Q. How unusual is it, Mr. Brownlee, for a

1 planned community to develop or to have a
2 financial partner like Dallas Police and Fire
3 Pension Fund System and to own the property free
4 and clear?

5 A. Well, I can't speak to how unusual it
6 is to have an institutional partner such as DP&F.
7 Several projects have institutional partners, be
8 it an insurance company or a pension system.

9 The unique portion of our structure, I
10 think, is evident in today's marketplace, and we
11 see this all the time, is that we intentionally
12 structured this deal with no leverage. And the
13 reason for that is it gives us flexibility in how
14 to finance the infrastructure of this project
15 going forward.

16 So from our perspective, the -- just
17 to summarize, it's not unusual to have a partner
18 that's an institutional partner. It's unusual to
19 have a structure with no leverage on a
20 master-planned community of this scale.

21 Q. By "leverage," you mean debt?

22 A. Debt.

23 Q. Have you ever had a project in all the
24 projects that you've done that is in financial
25 shape as strong, if I can put it that way, as the

1 shape of this project?
 2 A. Yes.
 3 MR. ALAN SMITH: Objection. Irrelevant and
 4 immaterial.
 5 THE HEARING OFFICER: Overruled.
 6 THE WITNESS: Yes, we're currently
 7 developing one, which is Wickenberg Ranch. That
 8 project has had a very similar structure to this.
 9 The land was acquired for cash. Our partner in
 10 that transaction is not an institutional person --
 11 or institutional entity. It's a private
 12 individual.
 13 And we've expended approximately
 14 \$80 million in infrastructure investment since
 15 acquisition of the project in 2007 to date in
 16 cash.
 17 Q. (BY MR. FEREDAY): How does the M3
 18 Eagle project compare to other projects other than
 19 that in terms of its financial position? Is it
 20 stronger? weaker? How would you characterize it?
 21 A. It -- the Wickenberg project would be
 22 the equivalent of one-third the size of this
 23 project. So it would be similar to a potential
 24 phase of this project.
 25 So they do have a corollary. And the

1 benefit of being in this type of position and
 2 doing structures such as this is that it gives you
 3 the ability to weather the storm, so to speak, in
 4 changing market conditions, like we're in right
 5 now.
 6 Q. If DPF does not fully fund the
 7 project, then what?
 8 A. We have the ability to bring in
 9 third-party debt or equity. And the debt could be
 10 either institutional debt, such as bank financing,
 11 or financing from a life insurance company or
 12 someone of that sort, or utilizing the CID
 13 financing that Mr. Froelich described.
 14 Q. You don't anticipate, do you, using
 15 DPF for full funding in any event, do you?
 16 A. No, we do not.
 17 Q. With regard to the community
 18 infrastructure district, Mr. Froelich testified at
 19 some length, but do you have anything to add to
 20 his testimony that's relevant to the funding of
 21 your project through the community infrastructure
 22 district technique that would help the Hearing
 23 Officer?
 24 MR. ALAN SMITH: Objection.
 25 Q. (BY MR. FEREDAY): And I'm handing you

1 Exhibit 83, which --
 2 MR. ALAN SMITH: It calls for a
 3 narrative-form answer of the witness. We'd like
 4 specific questions so we have an opportunity to
 5 object and not a question like "Do you have
 6 anything to add?"
 7 MR. FEREDAY: I'll withdraw the question.
 8 Q. I've handed you the Carter Froelich
 9 letter dated July 21st, 2009. It's Exhibit 83.
 10 Does this letter accurately describe
 11 what you understand your CID to be seeking?
 12 MR. ALAN SMITH: Objection. The exhibit
 13 speaks for itself.
 14 THE HEARING OFFICER: Overruled.
 15 THE WITNESS: Yes, it does.
 16 Q. (BY MR. FEREDAY): Could you describe
 17 what your understanding is of how the CID is going
 18 to be put forward, Mr. Brownlee?
 19 MR. ALAN SMITH: Objection to what his
 20 understanding may be. He can testify to facts,
 21 not what his understanding is.
 22 THE HEARING OFFICER: Overruled.
 23 THE WITNESS: The CID is going to be used
 24 to finance public-related infrastructure such as
 25 the water, sewer, streets.

1 The exhibit on the back of this letter
 2 sets forth the various job categories and the
 3 amount that is eligible to finance utilizing the
 4 CID.
 5 It's our intention to prioritize that
 6 for items such as the sewer and the water within
 7 the community and the roads, but particularly
 8 utilizing the CID to finance off-site
 9 infrastructure such as roadway and intersection
 10 improvements that have the ability to be financed
 11 utilizing impact fees over an extended period of
 12 time, but may require improvements at the earlier
 13 phases of a project.
 14 One of the reasons that we hired
 15 Carter's firm to work with others to create the
 16 CID legislation was that we saw a disconnect on
 17 the ability in this community to fund improvements
 18 that were incrementally being funded by impact
 19 fees or having the ability to finance large-scale
 20 improvements such as a water or wastewater system
 21 that benefits a build-out of a community over a
 22 20- or 30-year period.
 23 Q. (BY MR. FEREDAY): Do you agree with
 24 the characterization in Mr. Froelich's letter that
 25 the CID technique is a way to have growth pay for

1 itself?
 2 A. Yes, it is.
 3 Q. Do you have to experience establishing
 4 special taxing districts to help fund
 5 infrastructure in any projects you've done in the
 6 past?
 7 A. We've utilized financing districts to
 8 a limited extent. We established the framework
 9 for the first front-end financed improvement
 10 district in the city of Phoenix in the early '80s.
 11 And the reason for that was the way
 12 that the districts were being utilized at that
 13 time was cumbersome and required an addition of a
 14 large amount of expense to a bond offering to
 15 finance related infrastructure.
 16 So we worked with the City of Phoenix
 17 to establish that financing mechanism that at that
 18 time was being utilized by other municipalities
 19 throughout the country.
 20 Most of our deals, though, we have not
 21 utilized this because we've had partners such as
 22 DP&F, and we've elected to pay for the
 23 infrastructure in cash.
 24 Q. Can you describe any facilities that
 25 have been built under your sponsorship on the CID

1 them as well as Jeremy Pisca, a local lawyer that
 2 is working on the CID for us.
 3 They are working through the
 4 organizational documents, which I think are
 5 delineated in Carter's letter. Mr. Froelich's
 6 letter on the last page on page 5, paragraphs A
 7 through E, we are pushing to have the district
 8 formed to be able to utilize the district at the
 9 end of next year, or certainly at the commencement
 10 of construction, which is anticipated for 2011.
 11 Q. Now, Mr. Froelich's letter lists
 12 several documents.
 13 But those have not been offered as
 14 exhibits, have they?
 15 A. No, they have not.
 16 Q. Are those available if the Hearing
 17 Officer wishes to see them? Do you know?
 18 A. Yes, they are.
 19 Q. Do you believe that M3 Eagle qualifies
 20 as the type of entity that can establish a
 21 community infrastructure district, based on what
 22 you've learned from Mr. Froelich and from your own
 23 experience?
 24 A. Yes, I do.
 25 Q. In your opinion, is there a reasonable

1 or similar special taxing district?
 2 A. We have not utilized a CID.
 3 Q. How about in other states, a special
 4 taxing district, are there any facilities that you
 5 could point to?
 6 A. We've built roadways and
 7 infrastructure utilizing improvement district
 8 financing.
 9 Q. Okay.
 10 A. We built Jesse Owens Parkway, for
 11 example, in the city of Phoenix, which was a
 12 roadway of about 2 miles in length and had other
 13 major infrastructure involved for water, sewer
 14 improvements that went through a hospital campus
 15 as well as a small community, primarily mixed-use
 16 community that we developed.
 17 Q. And was that experience with that
 18 special taxing district a success?
 19 A. Yes.
 20 Q. You have had what kind of contact with
 21 the City of Eagle, Mr. Brownlee, in terms of
 22 getting this CID established for the M3 project?
 23 A. We've been working mostly with the law
 24 firm for the City of Eagle in talking with them
 25 about the formation. Carter has been meeting with

1 probability that M3 Eagle will be able to obtain
 2 approval for and implement a CID in your case?
 3 A. Yes.
 4 Q. Protestants have raised the issue of
 5 financial assurances in various ways in their
 6 questioning.
 7 Are there mechanisms, other than those
 8 that have already been testified to, whereby
 9 financial assurance is required for the M3 Eagle
 10 development?
 11 A. The development agreement with the
 12 City of Eagle requires us to file financial
 13 assurances on a phase-by-phase basis for the
 14 infrastructure that is going to be
 15 publicly-related infrastructure.
 16 So in that instance we would either
 17 have to provide financial assurance through some
 18 form of bonding mechanism or some form of a letter
 19 of credit.
 20 Q. Are there other entities that will
 21 require financial assurance?
 22 A. We're currently working with the Eagle
 23 Sewer District to be the operator of the sewer
 24 facility. So I would assume that in that
 25 structure there would be some form of financial

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1 assurance. And then you will have financial
2 assurance requirements with ITD and ACHD.
3 Q. "ITD" being Idaho Transportation
4 Department?
5 A. That's correct.
6 Q. Are some of these entity's
7 requirements likely to be met with anticipated CID
8 funding?
9 A. Yes, they are.
10 Q. Okay. If you do not provide financial
11 assurances, what will be the result?
12 A. We won't get a building permit.
13 Q. And this would mean no water would be
14 diverted; correct?
15 A. That is correct.
16 Q. As the developer of a master-planned
17 community, what typically do you build,
18 particularly at the front end?
19 A. We build what we call the backbone
20 infrastructure of a community and also do the
21 grading work to establish super-pads. A super-pad
22 by definition can be a parcel of property that's
23 from 1 acre to hundreds of acres in scale.
24 What that is is grading the pad to
25 plus or minus 6/10ths of a foot in finished

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1 elevation so that a home builder then would come
2 in and buy that parcel and subdivide that into
3 further lots, would not be doing the heavy-duty
4 lifting, so to speak, of grading within the
5 master-planned community, but would actually be
6 buying it and doing the grading to develop the
7 on-site improvements.
8 We will build the main arterial and
9 collector roads within the community, and the
10 infrastructure that's related to that, such as the
11 water, sewer, dry utilities. And we will develop
12 some amenities.
13 I know one of the references that was
14 made was on the back of the DP&F -- or DPF&G
15 schedule, Exhibit A, page 6, to the landscape and
16 amenities of 77 million, that number includes an
17 estimate for two equestrian centers, two golf
18 courses, two clubhouses, and one athletic club.
19 To put it in scale, a typical golf course and
20 clubhouse is about \$20 million.
21 So the development of those amenities
22 can be tied to either the development of an
23 individual community, and it's all dependent upon
24 how the community's marketed. So for instance, if
25 we are not going to sell individual super-pads or,

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1 say, for example, improved lots within an area in
2 the master-planned community and we're going to
3 sell that to a developer such as a Pulte Homes who
4 develops a Del Webb based community or their own
5 community, they would incur the cost to construct
6 those amenities. We would not incur the cost.
7 So what we wanted to do here was set
8 forth the full scale of amenities that we would be
9 building as part of the planned backbone
10 infrastructure in the community. Whether we
11 develop all those or not is subject to how the
12 ultimate sale and disposition of the property
13 occurs.
14 Q. So would it be accurate to say that
15 your portrayal of costs such as that that is
16 included on Exhibit A, the Stanley Consultants
17 spreadsheet on Exhibit 83, is -- sets out high --
18 conservatively high numbers? Would that be
19 accurate with regard to the financing question?
20 A. Yes, because these numbers were
21 developed last year. And as you've seen through
22 the ITD improvement estimates, I mean they've seen
23 estimates today that are 40 to 60 percent less
24 than the budgets that were established last year.
25 But the intent of this is not to look

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1 at it in a snapshot of a one-year time frame. The
2 intent of this is to look at this over a 30-year
3 time frame.
4 Q. How has the financial downturn in the
5 general world economy affected your ability to
6 finance this project?
7 A. Well, the -- that question needs to be
8 elaborated on. First of all, financing of
9 master-planned communities or any real estate
10 project is dependent upon market demand.
11 In today's world there's an imbalance.
12 The existing supply of built housing and the
13 valuation of that housing in today's market, what
14 someone could go buy it for today from a
15 third-party seller, in a lot of instances doesn't
16 warrant building new infrastructure or developing
17 a new master-planned community.
18 So in today's world, a prudent
19 business person wouldn't be going out and building
20 or trying to sell bonds in the instance of this
21 CID to start development of this project today.
22 That's why we are looking at starting development
23 of this project, subject to improving market
24 conditions, at the first quarter of 2011.
25 The only way that these types of

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1 things work is that you have to have a check and
2 balance. The check is you have to have demand.
3 The balance is building the right amount of
4 infrastructure to meet that demand. If those
5 checks and balances get out of skew, then you're
6 going to have an issue in developing a community
7 of this scale.
8 So to answer your question in a
9 roundabout way, we wouldn't be borrowing money in
10 2009 to develop any of this infrastructure. It's
11 not -- not the best opportune time to do that and
12 utilize that form of financing.
13 Q. Based on your 28 years of development
14 experience -- I think you testified to that
15 number -- financing projects like this, do you
16 believe it to be reasonably probable that you'll
17 be able to finance the project through a
18 combination of the sources that you've testified
19 to?
20 A. Absolutely.
21 Q. I'd like to turn now to the question
22 of annexation of your project to the City of Eagle
23 and how that relates to the question of financing,
24 including the CID.
25 What has M3 Eagle done to pursue

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1 annexation into the City of Eagle?
2 MR. ALAN SMITH: We would object to this as
3 beyond the scope of proper rebuttal. No evidence
4 was presented by the protestants that had anything
5 to do about annexation.
6 THE HEARING OFFICER: Mr. Fereday?
7 MR. FEREDAY: We believe that annexation is
8 relevant to the question of city approvals of
9 various types, and to the financial questions that
10 have been inquired into in this matter, and
11 including its relevance to the CID.
12 MR. ALAN SMITH: That should have been
13 presented in their case-in-chief, not as rebuttal
14 evidence.
15 THE HEARING OFFICER: Okay. I'll allow
16 some inquiry. Overruled.
17 THE WITNESS: Can you restate your
18 question, please?
19 Q. (BY MR. FEREDAY): What has M3 Eagle
20 done to pursue annexation into the City of Eagle?
21 A. Well, initially -- I believe there's
22 an exhibit -- I can't recall the exhibit number --
23 54; is that correct? -- for the development
24 agreement.
25 Q. I believe it's 58.

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1 A. Or 58. The pre-annexation and
2 development agreement establishes a process by
3 which annexation will occur. So the
4 pre-annexation and development agreement
5 essentially says that the City will work with the
6 developer to annex the property when it's
7 contiguous to its boundaries.
8 We recently filed annexation documents
9 for the property that's known as the Hansen
10 property. The Hansen property creates contiguity
11 with the BLM.
12 And the City of Eagle has filed a
13 request with BLM for the annexation of its land.
14 So that would give us contiguity to the city
15 boundary, thereby causing our property to be
16 annexed, which would then take the pre-annexation
17 and development agreement and convert it into a
18 development agreement, and all of the requirements
19 for both parties would be fully enforceable at
20 that point.
21 Q. And to your knowledge, would that then
22 further the pursuit of the community
23 infrastructure district as well --
24 A. As Mr. --
25 Q. -- by the City?

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1 A. That is correct. The City would then
2 be the jurisdiction within which the district
3 would be established.
4 Q. Mr. Brownlee, I've had delivered to
5 you what's been marked as Exhibit 88, which is a
6 June 26th, 2009 letter from Gerald Robbins of your
7 company to the City of Eagle planner,
8 Mr. Williams.
9 Can you tell us what that is, please.
10 A. This is the letter requesting
11 annexation of the Hansen property that I
12 described.
13 Q. Are you an owner -- or excuse me, is
14 M3 Eagle an owner of the Hansen property?
15 A. M3 Eagle has the approximately
16 12 acres of the Hansen property in escrow and will
17 be acquiring that property this year.
18 Q. In your opinion, is there any question
19 that you will be annexed into Eagle in response to
20 the annexation application that you've submitted?
21 A. No.
22 MR. FEREDAY: We offer Exhibit 88.
23 THE HEARING OFFICER: Let's mark this, if
24 we can.
25 (Exhibit 88 marked.)

1 MS. GIBSON: Could we stop for just a
2 second while we change tapes too?

3 THE HEARING OFFICER: Yeah.
4 Okay. We are recording.

5 Mr. Fereday's asked for admission of
6 this document.

7 Mr. Thornton?

8 MR. THORNTON: Well, I guess the statement,
9 I guess, first is, again, just an ongoing
10 frustration with all of this information.

11 This letter here being available for a
12 month prior, why does it all of a sudden come to
13 our doorstep Tuesday afternoon? That's quite
14 frustrating to us and to me, and does not show
15 that they're being forthright with their
16 information until pressed.

17 They seem to me to try to get by with
18 the least amount of information ahead of time to
19 limit their exposure to tough and appropriate
20 questions. I just wonder why that is so late in
21 the game.

22 THE HEARING OFFICER: Mr. Smith?

23 MR. ALAN SMITH: We have the same objection
24 that we stated earlier this morning, in that some
25 of these documents are dated clear back in March,

1 THE HEARING OFFICER: It's received into
2 evidence.

3 (Exhibit 88 admitted.)

4 Q. (BY MR. FEREDAY): Mr. Brownlee, with
5 regard to your qualification as a municipal
6 provider of water, does your company have
7 experience in providing municipal water supplies?

8 A. Yes, it does.

9 Q. Could you explain, please.

10 A. We have two projects in which we've
11 originated the water system.

12 One was an improvement district within
13 Yavapai County where we established the system,
14 went through and obtained the adequacy statement
15 from the Department of Water Resources in the
16 state of Arizona, developed the system, financed
17 the system, and provided the system to the water
18 improvement district, which is now being operated
19 by a board of directors for the community.

20 The second is a public water system
21 that is being regulated by the Arizona Corporation
22 Commission for the Wickenburg Ranch project. We
23 have went through and established the certificated
24 area, which was established when we bought the
25 project. We have gotten the rate case approved by

1 June, and July, and these should have been offered
2 in their case-in-chief, not as rebuttal evidence.
3 Again, they're playing "hide the ball" with us and
4 with the Department and with you.

5 THE HEARING OFFICER: Okay. Mr. Edwards?

6 MR. EDWARDS: I concur with Mr. Smith.

7 THE HEARING OFFICER: Mr. Fereday?

8 MR. FEREDAY: Mr. Hearing Officer, I'll
9 remind the protestants and the Hearing Officer
10 that Mr. Brownlee took the stand in our
11 case-in-chief back in I believe it was April, well
12 before these were out.

13 The purpose of these documents such as
14 this June 26th, 2009 letter and the application,
15 which I will point out are public documents in the
16 City of Eagle, are to respond to questions by the
17 protestant and the Hearing Officer pertaining both
18 to financial capability and to M3's qualification
19 as a municipal provider under the statute. That's
20 the reason that these are being offered.

21 We did not anticipate exactly the
22 rebuttal testimony that we would be putting on
23 until quite recently, in fact after this letter
24 was out. So that's why it has only been recently
25 provided.

1 the Corporation Commission, and we are in the
2 process of going through hearings on tariffs.
3 That system will serve approximately up to 5,000
4 residential units within the certificated area.

5 MR. FEREDAY: No further questions.

6 THE HEARING OFFICER: Mr. Thornton?

7 MR. THORNTON: Yeah, if we can just have a
8 minute to figure out our approach, where we want
9 to go in terms of questioning with Mr. Brownlee.

10 THE HEARING OFFICER: Okay. I have one
11 question for Mr. Brownlee prior to that.

12 MR. THORNTON: Okay.

13 EXAMINATION

14 BY THE HEARING OFFICER:

15 Q. Mr. Brownlee, when you say "we are
16 supplying," when you say "we," who are you
17 referring to?

18 A. I apologize for that. It is the
19 Wickenburg Water Company.

20 Q. And that is not M3 Eagle LLC; correct?

21 A. That is correct.

22 Q. Okay.

23 A. I'm sorry for the confusion.

24 THE HEARING OFFICER: All right. Thank
25

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1 you.
2 MR. THORNTON: Okay. Just a minute.
3 THE HEARING OFFICER: Okay. Let's go off
4 the record.
5 (Recess.)
6 THE HEARING OFFICER: We're recording
7 again.
8 Mr. Thornton.
9
10 CROSS-EXAMINATION
11 BY MR. THORNTON:
12 Q. In your testimony today, Mr. Brownlee,
13 you testified that there was an appearance -- I
14 don't know if it was an accusation, but an
15 appearance or affirmations by the protestants that
16 they were thinking that you guys "cooked the
17 books."
18 A. Uh-huh.
19 Q. Did you state that?
20 A. Yes, I did.
21 Q. Could you give me one example of where
22 we stated you either cooked the books or did not
23 trust what was stated in these letters?
24 A. The questioning that you guys posed
25 and the lack of trust and credibility that you put

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1 in the documentation that we provided is what has
2 led me to state that.
3 We have provided the financial
4 statement dated 12/31/08. You requested and
5 stated that it wasn't a certified financial
6 statement, you and Mr. Smith.
7 We then took it upon ourselves to go
8 back and have the accountants review it to provide
9 you a level of assurance for that, which seems to
10 be unacceptable and still not meeting your
11 standards.
12 You have implied through the
13 questioning that you've put forth that the
14 statements that we're providing are not genuine in
15 character and in reference to the true financial
16 capability of this entity or this project. So
17 that is what led me to make that statement.
18 Q. Have you heard us state that we
19 thought that the -- myself in asking questions,
20 that I thought any of the information provided was
21 in error or inaccurate or cooked books? Have you
22 heard me say that?
23 A. The term "cooked books" is a term that
24 I used. You did not use that term. But I would
25 think that -- I don't have a specific example, but

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1 I think if a third party would read the
2 questioning that you have put forth and the lack
3 of credibility that you have placed over the
4 financial statements of this project and this
5 entity or its ability to perform, I would think
6 that someone would question that as not being
7 acceptant of the information that has been
8 provided by the applicant.
9 Q. Would you say that we didn't accept
10 the information or did we ask the question, "Was
11 it certified?" which is a term used in the Idaho
12 statutes, to have certified copies?
13 A. I believe that Mr. Froelich testified
14 multiple occasions today that the documentation
15 that has been submitted is the second highest
16 level of review possible in CPA standards. And
17 there was a -- several questions that were asked
18 of him, essentially stating that those documents
19 were not considered to be, quote, "certified."
20 Q. And can you point anywhere on those
21 documents where they say they're certified?
22 A. The document is a reviewed document.
23 The wording, as I understand it from the cover
24 letter of Simek, is wording that is mandatory in
25 nature relative to GAAP accounting standards from

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1 a CPA's perspective.
2 The document for someone that is in
3 the industry and understands that, such as
4 Mr. Froelich who is a CPA, testified to the fact
5 that this is considered to be a certified
6 statement as a certified public accountant
7 reviewing that statement.
8 So I don't know what more we can give
9 you than the testimony of an expert who is a CPA.
10 Q. Once again, was there a certified
11 statement, a certified audit completed?
12 MR. FEREDAY: Objection. Asked and
13 answered.
14 THE HEARING OFFICER: Sustained.
15 Q. (BY MR. THORNTON): You've stated that
16 on the annexation question -- and I'm not even
17 sure what -- Exhibit 88, the letter from M3 to
18 Mike Williams of the City of Eagle signed by
19 Mr. Robbins, that -- does that not put out a
20 template for which M3 to be annexed in by the City
21 of Eagle?
22 A. I don't --
23 Q. Is this a process in terms of
24 identifying a process for M3 to become annexed by
25 the City of Eagle?

1 A. In order for M3 Eagle to be annexed
2 into the City of Eagle, you have to have
3 contiguity. This property provides contiguity to
4 an existing city boundary.

5 Q. Okay. And that goes by -- the
6 Hansens' property, is it not, adjoins Eagle city
7 property, I think as stated in this document; is
8 that correct?

9 A. Correct.

10 Q. Okay.

11 A. It adjoins the Terraview property,
12 which was recently annexed.

13 Q. Okay. And then the Hansen property is
14 interfaced with BLM; is that correct?

15 A. That is correct.

16 Q. And then the hope is for a proposal
17 for the BLM to become owned by the City of Eagle;
18 correct?

19 A. There is currently a filing that the
20 City has made under the Recreational Public
21 Purposes Act to lease that property from BLM as a
22 regional park, with ultimate disposition being the
23 City buying it, yes.

24 Q. Okay. And are you familiar with the
25 requirements of the BLM in terms of their analysis

1 city boundaries to be annexed into the city that
2 they have contiguity with.

3 Q. Okay. Are you familiar with the 2006
4 congressional law titled the Idaho Enhancement Act
5 specifically for the state of Idaho that allows
6 the City of Boise to not get the lands, not
7 acquire lands for the BLM or the Forest Service,
8 but for the Forest Service to purchase additional
9 lands for the long-term recreational needs of the
10 City of Boise? Are you familiar with that act?

11 MR. FEREDAY: Objection. It's certainly
12 beyond the scope. We're not talking about any --
13 any city acquiring federal lands or any federal
14 land augmentation. We're simply talking about
15 annexation across federal lands, which is, as he's
16 testified, is common. So I would object.

17 THE HEARING OFFICER: Overruled.

18 THE WITNESS: No, I'm not.

19 Q. (BY MR. THORNTON): Are you aware that
20 the BLM and the Forest Service has acquired in the
21 orders of a few thousands of acres of private land
22 and state land used for the long-term benefit of
23 the City of Boise?

24 A. No, I'm not. I'm not sure how it's
25 relevant to this hearing.

1 in terms of the BLM potentially going to the City
2 of Eagle?

3 A. Somewhat, yes.

4 Q. Okay. And could you describe to me
5 what stage in the process the Bureau of land
6 management is currently in in terms of evaluating
7 that proposal?

8 MR. FEREDAY: Objection. Beyond the scope.

9 THE HEARING OFFICER: Overruled.

10 THE WITNESS: A letter was submitted by the
11 mayor of the City of Eagle to the local district
12 office stating that the City has intentions of
13 annexing the BLM lands into its City boundaries.

14 It is typical of BLM or state lands,
15 or federal lands for that matter, to be annexed
16 into the city which has contiguity to those lands.

17 Q. (BY MR. THORNTON): And then I believe
18 I just heard you state that it was typical for the
19 BLM to allow land to go to the city; is that
20 correct?

21 A. I didn't state that, no.

22 Q. Okay. And so could you restate it
23 again for the record.

24 A. I said it's typical for lands that
25 have contiguity or that are -- that are within

1 Q. You just stated that it is typical for
2 a federal land manager, such as the BLM, when they
3 have land adjoining a city to allow them to
4 potentially acquire that land. This is the exact
5 opposite that's occurring in the city of Boise.

6 MR. FEREDAY: Objection.

7 Q. (BY MR. THORNTON): So is that that
8 typical?

9 MR. FEREDAY: Objection. I don't -- I
10 think the question is vague. He doesn't describe
11 who "them" is. And again, I object based on
12 relevance because it's not having to do -- his
13 question has to do with land acquisition, which is
14 not even on the table here.

15 THE HEARING OFFICER: Okay. Well, let me
16 see if I can sort this out.

17 MR. THORNTON: Okay.

18 THE HEARING OFFICER: I think land
19 acquisition is on the table because --

20 MR. THORNTON: Sure.

21 THE HEARING OFFICER: -- I think
22 Mr. Brownlee testified about the City of Eagle
23 acquiring the BLM land.

24 On the other hand, I think
25 Mr. Brownlee's already testified that he doesn't

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1 know any facts related to these acts and their
2 operation.
3 And, Mr. Thornton, you essentially
4 testified and put the evidence into the record of
5 your own knowledge and said, "Do you know anything
6 about that, Mr. Brownlee?" He's already said he
7 doesn't. I think you can testify about those
8 matters yourself on surrebuttal.
9 I'll sustain the objection. Let's
10 move on.
11 MR. THORNTON: Okay.
12 Q. So what is the length of the process
13 that would be for the BLM to go through the
14 National Environmental Policy Act, public
15 meetings, evaluation of data of public concerns in
16 terms of making a decision, either to or not to
17 grant that parcel of BLM land to go to the City of
18 Eagle? What's the time frame on that?
19 A. The -- I'm not aware of that. But
20 that has no bearing on our annexation.
21 Q. Could you then describe to me how you
22 would be annexed into the City of Eagle without
23 the BLM land. Perhaps I missed something.
24 A. The BLM -- the City is not proposing
25 to acquire the BLM land in order to annex it.

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1 They're just going to annex it with BLM still
2 owning the land. The Recreational Public Purposes
3 Act that you had inquired whether the City was
4 acquiring the property is a totally separate
5 process and has absolutely nothing to do with the
6 annexation of the BLM lands.
7 Q. So without the RPP for the City of
8 Eagle for that BLM land, can M3 be annexed into
9 the City?
10 A. Yes, it can.
11 Q. And could you describe that to me.
12 A. The City of Eagle files a letter with
13 BLM requesting to annex BLM's lands with BLM still
14 owning the land. And the City then annexes the
15 BLM lands into the City of Eagle in conjunction
16 with the Hansen annexation. We are contiguous at
17 that point.
18 Q. So I guess maybe I'm a little
19 confused, and I apologize for that.
20 I believe I heard you say that the BLM
21 land would be annexed into the City of Eagle?
22 A. That's correct.
23 Q. And that the RPP does not require the
24 BLM to give that land to the City over a period of
25 a few years?

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1 A. The two processes have nothing to do
2 with each other. You're confusing the
3 Recreational Public Purpose Act process with the
4 annexation of the BLM lands. They are two
5 separate processes.
6 Q. All right. And thank you. I would
7 agree that they are two separate processes.
8 And those two separate processes, what
9 time periods have you been told by Rosey Thomas, a
10 BLM district officer, what kind of time period
11 that would be?
12 A. The BLM --
13 MR. FEREDAY: Objection. The question is
14 vague. It doesn't ask -- it doesn't pin down what
15 process he's referring to, the question is
16 referring to.
17 THE HEARING OFFICER: Sustained,
18 Mr. Thornton. I'll allow you some inquiry.
19 MR. THORNTON: Okay.
20 THE HEARING OFFICER: But when you start
21 referring to Rosey Thomas and other subjects which
22 Mr. Brownlee has not testified at all to, I can't
23 let that question stand.
24 Q. (BY MR. THORNTON): Okay. Do you know
25 Ms. Rosey Thomas with the BLM?

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1 A. Yes, I do.
2 Q. And have you had a number of meetings
3 with her, maybe private and public?
4 A. Yes, we have.
5 Q. Okay. Has she stated to you what time
6 period is likely for the RPP to occur, through the
7 whole public scoping process?
8 A. The RPP is not a process that we're
9 controlling. That's between the City of Eagle and
10 the BLM. And the process -- I'm not familiar with
11 the timelines for that process.
12 Q. With all the meetings you've had,
13 you've never heard them state the time frame for
14 that process?
15 MR. FEREDAY: Objection. Asked and
16 answered.
17 THE HEARING OFFICER: Overruled.
18 THE WITNESS: Yeah, but it varies based
19 upon what the -- the City's plan is, how diligent
20 the City is in processing that plan.
21 It can go anywhere from 12 months to
22 more than 12 months, depending upon how effective
23 the City is in processing its application.
24 Q. (BY MR. THORNTON): And are you aware
25 of the current status with the City of Eagle of

1 individuals working on that process in light of
2 their budget shortfalls for the City of Eagle?

3 A. All that I am aware is that the City
4 of Eagle has filed the necessary documentation to
5 move to the next step with that plan. Where it
6 stands and who's working on that within the City,
7 I'm unfamiliar with that. But it has no bearing
8 on our ability to annex.

9 Q. Would you not agree that there's
10 several steps, both for M3, for the City of Eagle,
11 for the BLM, as well as a public process for you
12 to be annexed into the City of Eagle?

13 A. No, I wouldn't. I know that there's a
14 public process. But the public process is pretty
15 well defined by statute. And the public hearing
16 process, as I understand it, will have us fully
17 annexed by December of this year.

18 Q. Okay. Is there a date in the
19 development agreement in terms of when annexation
20 must occur?

21 A. The development agreement has a
22 provision -- the development agreement was set up
23 with a provision for a two-year period -- I
24 believe it's mid-December -- that we have the
25 ability in the event that we are not annexed to

1 cancel the agreement. But we also have the
2 ability as parties to the agreement to extend it
3 as well.

4 Q. So I believe I heard you -- how then
5 can you testify with any certainty that you are --
6 feel strongly that M3 will be annexed into the
7 City with all these unknowns?

8 A. Can you describe what unknowns you're
9 talking about?

10 Q. The RPP process.

11 A. Has nothing to do with annexation.

12 Q. The BLM being annexed into the City of
13 Eagle?

14 A. The City of Eagle has filed a letter
15 with the intentions to annex property giving its
16 powers as a city within the state of Idaho.

17 Q. And have you any knowledge from the
18 BLM as to a date when they would have a decision
19 out on that process?

20 A. The process is that the City files a
21 notice to annex. There is a waiting period, and
22 then the City actually files the annexation on
23 behalf of the BLM.

24 Q. And are you aware of the concerns with
25 numerous citizens on that process that will be

1 voicing opposition to that?

2 A. Well, not unlike all processes,
3 there's numerous concerns voiced by citizens.

4 MR. THORNTON: Okay. If we can hold on
5 just for a minute to go through the next question.

6 MS. GIBSON: Stop?

7 THE HEARING OFFICER: Yeah.

8 (Recess.)

9 THE HEARING OFFICER: How many more
10 questions do you have, Mr. Thornton?

11 MR. THORNTON: Well, I've got probably 40
12 here. What we're going to work on very hard,
13 Mr. Hearing Officer, is to make sure we're not
14 trying to ask redundant questions that we had
15 asked of Mr. Froelich. So there will be some time
16 when I'm going "Okay. I don't want to ask that
17 question." But I would say we probably got 40
18 questions.

19 THE HEARING OFFICER: Okay. Well, let's
20 break for lunch. It's just shortly before the
21 lunch hour, a couple minutes. We'll be back at
22 1:00.

23 MR. JASON SMITH: One o'clock?

24 THE HEARING OFFICER: Yeah.

25 (Lunch recess.)

1 THE HEARING OFFICER: We're recording
2 again.

3 Mr. Thornton.

4 Q. (BY MR. THORNTON): Mr. Brownlee, what
5 portion of the M3 project development costs do you
6 expect to fund with the CID bonds?

7 MR. FEREDAY: Objection. Asked and
8 answered.

9 THE HEARING OFFICER: Overruled.

10 THE WITNESS: Well, that will vary,
11 depending upon market conditions, the velocity of
12 sales in the project. But currently what we'd
13 asked Mr. Froelich's firm to do was to try to
14 anticipate what a reasonable amount of funding
15 would be. And I believe that's the
16 \$217.3 million.

17 Q. (BY MR. THORNTON): Okay. And in the
18 letter from Mr. Froelich, Exhibit 83, sent to you
19 and Department of Water Resource, on page -- let's
20 see. I thought it was 3.

21 Could you describe on page 3 of
22 Exhibit 83 the paragraph underneath the caption
23 "Status of the M3 Eagle CID," where there's a
24 statement about midway through, a sentence that
25 says "It is anticipated that a general-obligation

1 bond election of no less than 400 million will be
 2 held upon the establishment of the M3 CID."
 3 So how does that 217 million compare
 4 to what is stated in this letter, 400 million?
 5 How do I better understand what appears to be two
 6 different numbers?
 7 A. Well, I believe that's the same
 8 question you asked Mr. Froelich earlier today.
 9 And the answer to that is is that's the initial
 10 election that is held to establish the maximum
 11 amount of funding that will be utilized as
 12 general-obligation bonds within the district. It
 13 has no relevancy to the amount that we anticipate
 14 funding.
 15 Q. But still potentially you'll be asking
 16 for an election of \$400 million worth of bonds; is
 17 that correct?
 18 A. The -- what we would be doing is
 19 establishing at the initial establishment of the
 20 district a maximum of \$400 million -- or no less
 21 than \$400 million would be held upon the
 22 establishment of the district. I think it speaks
 23 for itself.
 24 Q. Okay. If you'd refer to Exhibit 83,
 25 page 6, completed by Stanley Consultants.

1 Is the breakout of expenses between
 2 the CID and the developer portions of development
 3 expenses a reasonable estimate of the anticipated
 4 proration of cost?
 5 A. Well, the way that was derived was to
 6 review each one of those categories and determine
 7 what would be eligible to finance under the CID.
 8 So yes.
 9 Q. Okay. And then considering the
 10 current economic environment, do you anticipate
 11 that the M3 CID bonds will require some form of
 12 credit enhancement?
 13 A. No.
 14 Q. Would that be at any phase in the
 15 early phase or the later phase, would that still
 16 be "no" for credit enhancement?
 17 A. I have no idea. Typically, credit
 18 enhancement gives you a better rating on the bond
 19 and a better interest rate on the bond. It
 20 doesn't really have to do with the saleability of
 21 the bonds. The saleability is based on the lien
 22 to fair-market value ratios of the district.
 23 Q. Okay. Do you anticipate issuing CID
 24 bonds throughout the life of the project?
 25 A. Yes.

1 Q. How long do you think the project,
 2 phase one, will take to complete?
 3 A. Well, it depends on what the ultimate
 4 phase one is. But if it's similar to what's been
 5 provided as our phasing plan, we think those will
 6 take somewhere between a three- and six-year
 7 period per phase, depending on market conditions.
 8 Q. Okay. So at what point in the
 9 development will the actual value or adjusted
 10 market value for assessment purposes be sufficient
 11 to issue CID -- CID bonds to recover the initial
 12 infrastructure cost?
 13 A. Depends on how you phase the project
 14 and what those costs are. As Mr. Froelich
 15 testified, there's two types of bonds.
 16 One would be a G.O. bond that would
 17 have a growing issuance value based upon the
 18 increasing fair-market value of the property or
 19 the assessed value of the property.
 20 The special-assessment bonds would be
 21 based on the fair-market value of the completed
 22 improvements within that phase.
 23 So I think through that combination
 24 you would allocate those resources as they came in
 25 to the infrastructure that you elect to finance

1 with it, in each phase.
 2 Q. So are the special-assessment bonds
 3 associated with the -- what is identified in
 4 Mr. Froelich's letter to you, Exhibit 83, as
 5 \$7,500 per home? Is that --
 6 A. Can you direct me to where it says
 7 \$7,500 per home?
 8 Q. Yeah, if you would bear with me. I
 9 think it's on the footnote on page 4.
 10 A. Okay.
 11 Q. And in about the -- I think it's the
 12 third sentence, "special-assessment bonds assume
 13 an average assessment of 7500 per unit, one year
 14 of capitalized interest, 4 percent cost of
 15 issuance, 2 percent underwriter discount, and then
 16 10 percent reserve fund."
 17 Is that the special assessment that
 18 you're talking about to help pay for the up-front
 19 capital improvement cost?
 20 A. Correct.
 21 Q. And so will not the completion or the
 22 installation, initial development of the water
 23 system and the wastewater system have to be paid
 24 for before you have one home to put the
 25 special-assessment tax on?

1 A. Well, the technicalities of how the
2 districts operate are a question you should have
3 directed to Mr. Froelich. That's not my field of
4 expertise.

5 So the -- the way with which bonds are
6 sold, the amount of revenue that can be sold per
7 phase is not something that I feel comfortable
8 testifying to.

9 Q. Okay. So you don't know if the
10 special-assessment revenue that is attached to
11 each sale of each home will in fact be available
12 to help pay for the initial cost of the
13 infrastructure; is that correct?

14 A. The ability to sell bonds and the
15 total capacity of the bond financing is set forth
16 in Mr. Froelich's testimony and his letter at
17 217.3 million.

18 They've done an analyses for us that
19 says that they have confidence that they can sell
20 that amount of bonds based on the assessed
21 valuation of not only the residential but the
22 commercial that will be developed within the
23 community.

24 How that cash flow flows and how we
25 either finance against the final sell of those

1 bonds or utilizing the bond funding proceeds
2 themselves to develop the infrastructure will be
3 dependent upon the size of the phase, the timing
4 of the phase, and the velocity that exists in the
5 marketplace.

6 Q. So what development cost would have
7 been incurred at the point where you can utilize
8 CID bonds or general-obligation bonds, what point
9 in the project and what associated development
10 costs will there be, and how many lot sales with
11 the accompanying homes will have been completed
12 before you can start using general-obligation
13 bonds to pay for the up-front development cost?

14 MR. FEREDAY: I'm going to object. I think
15 it's a very complex, compound question. I'm not
16 sure it asks a discrete question. That's the
17 basis for my objection.

18 MR. THORNTON: And I can try to --

19 THE HEARING OFFICER: Sustained. You need
20 to separate out all of the...

21 MR. THORNTON: Thank you. And I'll try to
22 do that.

23 Q. What are the anticipated costs for the
24 development of the water system and the wastewater
25 system identified on Exhibit A, page 6, of

1 Exhibit 83?

2 MR. FEREDAY: Objection. This was covered
3 in Mr. Froelich's testimony and the exhibit speaks
4 for itself.

5 THE HEARING OFFICER: It's a preliminary
6 question. I'll allow it to stand.

7 Mr. Brownlee, you may answer.

8 THE WITNESS: The sewer system says
9 33,828,000, and the water system says 18,733,000.

10 Q. (BY MR. THORNTON): All right. And
11 prior to being able to use the CID bonds, what
12 up-front cost will the developer, M3, have to come
13 up with prior to them being able to get any CID
14 bonds?

15 A. Well, the up-front costs that we've
16 come up with to date is about \$79 million. So
17 there's additional costs that need to be incurred
18 prior to the commencement of construction, which I
19 believe our anticipated budget for that is
20 somewhere in the neighborhood of about \$8 million.

21 Q. Okay. And then what has to be an
22 approximate assessed value for you to come up with
23 those general-obligation bonds of what is in
24 place?

25 A. I don't have those calculations.

1 Q. Would you look -- have you seen that
2 that's approximately somewhat over \$400 million in
3 assessed values?

4 A. I have no way to verify or discuss
5 those calculations.

6 Q. And you're aware of the 12 percent, I
7 guess, criteria that is used for the
8 general-obligation bonds?

9 MR. FEREDAY: Objection. I think that's a
10 vague question. I don't know what the question
11 is.

12 THE HEARING OFFICER: I think I -- go ahead
13 Mr. --

14 MR. THORNTON: I'm sorry for interrupting,
15 Mr. Hearing Officer. Go ahead.

16 THE HEARING OFFICER: I understand the
17 question. I'll allow it to stand.

18 Mr. Brownlee.

19 THE WITNESS: The 12 percent, is that the
20 question?

21 Q. (BY MR. THORNTON): Yes.

22 A. I'm not sure whether the 12 percent's
23 applicable to the special assessment or the G.O.
24 bonds.

25 Q. It's to the G.O. bonds --

1 A. Okay.
 2 Q. -- I would state.
 3 A. I would think that a large portion of
 4 the infrastructure in this project will be
 5 financed with special-assessment bonds. And the
 6 G.O. bonds would be an add-on over time.
 7 Q. And how are you going to come up -- or
 8 how is M3 going to come up with monies for the
 9 special-assessment bonds?
 10 A. Well, we'll either sell the bonds or
 11 in the instance of DP&F, they may elect to
 12 purchase the bonds, depending upon what the rate
 13 of interest on those bonds are. We may finance
 14 against the ultimate sale of the bonds after we
 15 complete construction. There's a number of ways
 16 with which to do that. It's not uncommon to our
 17 industry.
 18 Q. So how will you finance the initial
 19 startup phase of putting in the infrastructure for
 20 wastewater and water, not even talking about roads
 21 and arterials and all that stuff? How are you
 22 going to finance that?
 23 A. Well, I think we've -- we've covered
 24 this road no less than a half a dozen times, that
 25 we will either utilize debt from third-party

1 institutional investors; DP&F, as evidenced by the
 2 CDK letter, will either put in I believe that it
 3 says -- last line, "Additional requirements for
 4 funding for the company in accordance with an
 5 approved business plan will be funded as direct
 6 equity or debt investments from DPFPS or through
 7 institutional debt."
 8 Q. Okay. What was the market value for
 9 assessment purposes of M3 planned community
 10 project as of December 31st, 2008?
 11 A. I don't know. We didn't do an
 12 assessment of market value.
 13 Q. Did not the County do an assessment
 14 for the value of your property?
 15 A. The property's assessed as ag land
 16 right now.
 17 Q. And what was the market value
 18 assessment for that?
 19 A. I have no idea.
 20 Q. So what do you expect the market value
 21 for assessment purposes of the M3 planned
 22 community project to be at the end of this fiscal
 23 year, December 31st, 2009?
 24 A. I have no idea. It has no bearing on
 25 where I sit today.

1 Q. Is not the bearing -- is not the
 2 bearing based on the general-obligation bonds
 3 being -- having -- being 12 percent of the
 4 assessed value, that's what you can potentially --
 5 A. That would have a bearing on the
 6 general-obligation bond. But it wouldn't have any
 7 effect on -- on the special-assessment bonds or
 8 the utilization of other types of financing.
 9 That's based upon fair-market value of the land
 10 and improvements upon completion.
 11 Q. Okay. And I'll call your attention
 12 the last time again to Exhibit 83, page 3. The
 13 paragraph underneath "Status of M3 Eagle CID"
 14 where it again states that "It is anticipated that
 15 a general-obligation bond election of no less than
 16 400 million will be held upon the establishment of
 17 the M3 CID."
 18 How does that -- how do you -- with
 19 that sentence there, how do you state that you're
 20 looking at using special-assessment bonds and not
 21 general-obligation bonds?
 22 A. I'm confused by your question.
 23 Q. Well, I am too. But I see in the
 24 statement there, help me --
 25 THE HEARING OFFICER: Okay. Are you

1 retracting the question?
 2 MR. THORNTON: I'll retract. Yes. Thank
 3 you.
 4 Q. It states on page 3 of Exhibit 83
 5 underneath the paragraph that's titled "Status of
 6 M3 Eagle CID," it says, "It is anticipated that M3
 7 Eagle will be established -- or the M3 Eagle CID
 8 will be established upon the annexation of the
 9 project into the city boundaries, which we
 10 anticipate being completed by December 2009. This
 11 will allow M3 CID to issue special-assessment
 12 bonds, general-obligation bonds, and revenue bonds
 13 to finance the construction and/or acquisition of
 14 public improvements pursuant to the Act."
 15 The question I have -- it states in
 16 the next sentence, "It is anticipated that a
 17 general-obligation bond election of no less than
 18 400 million will be held upon the establishment of
 19 the M3 CID."
 20 I ask the question again, where are
 21 you going to come up with the funding without a
 22 letter of irrevocable credit with certainty to
 23 take care of the infrastructure, that will be
 24 needed in phase one especially, for the water,
 25 potable water, and the wastewater?

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1 MR. FEREDAY: Objection. The question's
2 been asked and answered. Furthermore, it lacks
3 foundation with regard to the statement about
4 certainty.
5 THE HEARING OFFICER: Sustained.
6 Q. (BY MR. THORNTON): So if you could
7 turn to the Idaho statutes, which I believe is
8 somewhere on the table in front of you, describing
9 the CID --
10 A. I don't have one.
11 Q. -- bonds -- the CID, the districts.
12 A. Thank you.
13 Q. And if you could turn to the statute
14 50-3115. And it's close to the bottom and not --
15 okay. No, it's not. Strike that. We've got a
16 different copy here.
17 So when you get to 3115(1).
18 A. Okay.
19 Q. And No. 2, does this cover address the
20 requirements for disclosure to potential buyers of
21 the impact of various special assessments and
22 other bonds?
23 MR. FEREDAY: Objection. I believe that
24 calls for a legal conclusion. If he knows, I
25 suppose he can answer. But to the extent he's

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1 being asked to interpret the statute, I would
2 object.
3 THE HEARING OFFICER: Overruled.
4 Mr. Brownlee, you may answer if you
5 can.
6 THE WITNESS: Well, I think the statute
7 speaks for itself. I mean that specifically
8 states in there and quotes the CID tax and
9 special-assessment district -- it says,
10 "special-assessment disclosure notice," unquote.
11 And specifically and conspicuously set forth,
12 quote, "You are purchasing real property that is
13 included within the boundaries of a community
14 infrastructure district," end quote. So I think
15 it pretty clearly says what the intent of it is.
16 Q. (BY MR. THORNTON): Okay. So have you
17 drafted the language of these disclosures and
18 estimated the various amounts to be disclosed for
19 your potential buyers?
20 MR. FEREDAY: Objection. Beyond the scope.
21 THE HEARING OFFICER: Overruled.
22 THE WITNESS: There are several documents
23 that DPF&G has listed in their submittal that are
24 being drafted and worked through with the City.
25 And we can specifically refer to those. And I do

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1 not believe that the documents listed in
2 Exhibit 83, page 5, set forth that that document
3 has been drafted.
4 Q. (BY MR. THORNTON): And so what would
5 be the intent of those disclosures by M3 to
6 potential buyers when you will be using the
7 financial mechanisms of either special-assessments
8 and general-obligation bonds?
9 MR. FEREDAY: Objection. The question is
10 vague. Once again, he's asking either one item
11 and another. I'm not sure what he's being asked.
12 THE HEARING OFFICER: Sustained.
13 Mr. Thornton.
14 MR. THORNTON: Okay.
15 Q. And could you describe what are the
16 purpose of those disclosures that are identified
17 as a requirement in the statutes to the potential
18 buyers? What's the purpose?
19 MR. FEREDAY: Objection. Asks for a legal
20 conclusion or interpretation of the statute. The
21 statute speaks for itself.
22 THE HEARING OFFICER: Sustained.
23 Q. (BY MR. THORNTON): How do you
24 anticipate financing the developer portion of the
25 non-CID eligible costs shown on the Stanley

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1 Consultants exhibit, page 6, Exhibit 83, of
2 approximately 130 million?
3 A. Through equity, institutional debt, or
4 cash flow from sales of the project.
5 Q. Okay. We'll go to an exhibit we
6 haven't been to for a while. It's Exhibit 54,
7 page 1.
8 A. 54.
9 Q. I believe that is one of the original
10 documents that M3 provided with some of the
11 financial statements.
12 A. Uh-huh.
13 Q. Do you see on page 1 -- are you -- so
14 on page 1 of Exhibit 54 it reflects members'
15 equity of \$64 million.
16 What is the source of this equity
17 injection, by which individuals, or which
18 entities? Where is the \$64 million coming from?
19 MR. FEREDAY: Objection. This exhibit was
20 not discussed in his direct. So we don't think
21 it's an appropriate inquiry into it here.
22 MR. THORNTON: Mr. Hearing Officer --
23 THE HEARING OFFICER: Overruled.
24 MR. THORNTON: And if I could add to
25 that --

1 MR. PURVIS: He overruled it.
 2 MR. THORNTON: Okay.
 3 THE WITNESS: The question is where did the
 4 64,265,983 come from?
 5 Q. (BY MR. THORNTON): Yes.
 6 A. Well, there's been a lot of testimony
 7 that the 79,750,866, which is the total investment
 8 that Dallas Police, Fire and Pension Fund has made
 9 in M3 Eagle LLC.
 10 Q. Okay. Has the \$15 million unsecured
 11 note described in your Exhibit 54 been renewed
 12 since its maturity date of February 25th, 2009?
 13 A. Yes.
 14 Q. Okay. And in what form is that today?
 15 A. It's bearing the same form that it had
 16 when we borrowed the funds. We pay the interest
 17 on it monthly.
 18 Q. Okay. And could you describe the
 19 credit enhancement associated with the interest
 20 that is payable monthly?
 21 A. Can you refer to something specific
 22 you're talking about?
 23 Q. Yeah, if you can go to again, on
 24 note -- okay. We go to Exhibit 54 again, page --
 25 I think it's note 3. And on the back, is it the

1 last page of Exhibit 54 underneath note 3, the
 2 second paragraph identifies "Facility and
 3 unsecured note with base interest payable monthly
 4 at a rate of LIBOR, plus 40 basis points, plus
 5 credit enhancement. Interest payable monthly of
 6 500 basis points maturing on that date."
 7 Could you describe what the credit
 8 enhancement vehicle is.
 9 A. That's just the spread that Dallas
 10 Police and Fire earns over the cost of their
 11 funds.
 12 Q. Okay. And so currently is this credit
 13 enhancement vehicle still in place on that
 14 \$15 million note?
 15 A. Yes.
 16 Q. Okay. And what period does the new
 17 note cover?
 18 A. It's annual.
 19 Q. And do you have any evidence to show
 20 that this will be carried into the future?
 21 A. Not that we can put into the record.
 22 But I don't know what bearing that has on what
 23 we're doing here today.
 24 Q. Are there any M3 parent company or
 25 owner guarantees or pledges that support the

1 credit that has been granted to date?
 2 A. No.
 3 Q. And do you presently have an
 4 irrevocable letter of credit or a financing
 5 commitment in an amount sufficient to complete
 6 this 30-year project?
 7 MR. FEREDAY: Objection. Asked and
 8 answered.
 9 THE HEARING OFFICER: Overruled.
 10 THE WITNESS: No, but that's just not
 11 really relative to developing a master-planned
 12 community or any project that has a time frame of
 13 30 years.
 14 Q. (BY MR. THORNTON): And if we could
 15 refer you to -- I believe it's been entered and we
 16 wrote it down on one of our copies. It's a CDK
 17 letter from CDK to Mr. Brownlee to the Department
 18 of Water Resource dated June 22nd. Exhibit 87.
 19 So why is this letter from CDK Realty
 20 Advisors and not from the Dallas Police and Fire
 21 Pension System?
 22 A. Because the -- as the signature block
 23 represents, they are the authorized representative
 24 of the Dallas Police and Fire Pension System.
 25 Q. Could you describe to me where on that

1 signature block it's clear that they are the
 2 authorized, I guess, spokesperson or whatever for
 3 the Dallas Police and Fire Pension System.
 4 A. It's right there. It says, "its
 5 authorized representative."
 6 Q. And so that tells you that they're
 7 authorized, apparently?
 8 A. Well...
 9 Q. Okay. Who do you review and get
 10 approval from your annual business plan and
 11 funding requirements?
 12 A. As I described earlier, the process is
 13 that we work directly with CDK Advisors. And when
 14 we have a plan that we both agree on, then the
 15 plan is taken to the board of directors for the
 16 Dallas Police and Fire Pension System or reviewed
 17 by the administrative officer for the fund.
 18 Q. And so you work with Mr. John Donahue
 19 on that; is that correct?
 20 A. That's correct.
 21 Q. Okay. Who do you work with at the
 22 Dallas Pension Plan?
 23 A. We have -- my partner, Scott Schirmer,
 24 is more directly involved with the members of
 25 Dallas Police and Fire Pension System than I am.

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1 But we have meetings occasionally with board
2 members or with the directors of the Dallas Police
3 and Fire Pension System. So it's a various number
4 of different people.
5 Q. Do you work with Mike Taylor?
6 A. No, I don't work directly with Mike
7 Taylor.
8 Q. Do you work with Richard Tentamant,
9 the pension system administrator?
10 A. Sometimes, yes.
11 Q. Do you believe that IDWR should get a
12 copy of the annual authorization from CDK and/or
13 Dallas Pension Plan?
14 MR. FEREDAY: Objection. That asks for him
15 to speculate about something he's not qualified to
16 testify about.
17 THE HEARING OFFICER: Sustained.
18 Q. (BY MR. THORNTON): Does IDWR get a
19 copy of the annual authorization from CDK and/or
20 the Dallas Pension Plan?
21 A. Do they?
22 Q. Do they?
23 A. We have never submitted anything like
24 that to IDWR.
25 Q. Okay. Is CDK a public or private

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1 entity?
2 A. Private.
3 Q. Doesn't the Dallas -- does the Dallas
4 Pension Plan review CDK's overall performance?
5 MR. FEREDAY: Objection. It asks this
6 witness to testify on something beyond the scope
7 of direct, and also something beyond what he
8 clearly is qualified to testify about.
9 THE HEARING OFFICER: Sustained.
10 Q. (BY MR. THORNTON): Does the Dallas
11 Pension Plan review the performance of M3?
12 A. Of course, they would.
13 Q. Do they review the performance of CDK?
14 A. I have no idea what their performance
15 standards between CDK and the fund are.
16 Q. Do you know how many other realty
17 investments CDK manages?
18 A. As I said, I have no inner working
19 knowledge of CDK's investments, management
20 structure, or relationship with the Dallas Police
21 and Fire Pension System.
22 Q. So do you know what portion of M3's
23 investment is in terms of the entire Dallas
24 Pension Plan?
25 MR. FEREDAY: Objection. This goes beyond

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1 the direct scope, and it's already an area in
2 which the Hearing Officer has ruled that we
3 aren't -- that isn't relevant to this case.
4 THE HEARING OFFICER: Sustained.
5 Q. (BY MR. THORNTON): Does M3 have other
6 investments managed by and/or through CDK?
7 A. Yes.
8 Q. Is the Camel Square Office Park in
9 Phoenix one of these CDK projects?
10 A. Yes.
11 Q. And what is the status of that
12 project, of the Camel Square Office Park project?
13 A. It's --
14 MR. FEREDAY: Objection. Beyond --
15 irrelevant.
16 THE HEARING OFFICER: Sustained.
17 Q. (BY MR. THORNTON): Have you given
18 testimony as to a number of other M3 projects that
19 are financially doing well?
20 A. I gave testimony to other projects.
21 Q. Can you give us testimony to one of
22 M3's projects for Camel Square Office Park and how
23 it is doing financially and how it is -- well,
24 that question first.
25 MR. FEREDAY: Objection. Irrelevant.

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1 THE HEARING OFFICER: I think Mr. Brownlee
2 has testified about success with other projects,
3 even in his rebuttal testimony. I'll allow the
4 question to stand.
5 Mr. Brownlee.
6 THE WITNESS: Could you ask me the
7 question, please? Could you re-ask the question,
8 please?
9 THE HEARING OFFICER: Mr. Thornton.
10 Q. (BY MR. THORNTON): Yes. For the
11 Camel Square Office Park in Phoenix, what is the
12 status of that project in terms of financial
13 status?
14 A. When you say "financial status," can
15 you be specific about your question? That's a
16 vague question.
17 Q. Okay. I'll re-ask the question.
18 A. Thank you.
19 Q. The plan for Camel Square Office Park,
20 was this plan approved by the City Council?
21 A. No, it was not.
22 Q. Okay. And what is the financial
23 impact to M3 because of the failure of that
24 project?
25 A. The project didn't fail. We withdrew

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1 the zoning case. It was approved at planning
2 commission. We withdrew the zoning case, which
3 was seeking a total redevelopment of the site.
4 The project is being managed as an office project.
5 The Dallas Police and Fire Pension System own the
6 project free and clear. We office at the project.
7 Q. So based on your many years of
8 development experience in different markets and
9 time, what is the probability of a planned
10 community losing its funding over the course of,
11 say, five or ten years?
12 A. Well, the probability is dependent
13 upon structure of financial -- the financial
14 structure of the community. So if you're a highly
15 leveraged community and you run into an economic
16 downturn such as the one we've had in the markets
17 over the last two years, the probability is high.
18 If you're a well-capitalized, low or
19 no leverage community, you have the ability to go
20 through the ups and downs that occur in a
21 marketplace. There is going to be several cycles
22 within a real estate market in the lifetime of a
23 master-planned community.
24 Q. And are you aware that this exact
25 circumstance occurred at the only other water

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1 right ever issued in Idaho under the future needs
2 and long horizon planning statute, which is the
3 Tamarack Resort?
4 MR. FEREDAY: Objection.
5 THE HEARING OFFICER: Sustained.
6 Q. (BY MR. THORNTON): Did you know that
7 after investing nearly \$400 million in Tamarack
8 their whole project went into bankruptcy because
9 the credit agreement of over 300 million with
10 Credit Suisse was called due and payable and left
11 them with no ability to go forward?
12 MR. FEREDAY: Objection. Relevancy.
13 THE HEARING OFFICER: Sustained. And I
14 guess I don't want any more questions or
15 discussions about the Tamarack project here.
16 Mr. Thornton.
17 MR. THORNTON: Okay. That's all of our
18 questions, Mr. Hearing Officer.
19 Thank you, Mr. Brownlee.
20 THE HEARING OFFICER: Okay. Mr. Smith?
21
22 CROSS-EXAMINATION
23 BY MR. ALAN SMITH:
24 Q. Mr. Brownlee, I believe you said on
25 cross-examination that "cooking the books" was

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1 your term and not anything that any of the
2 protestants have ever used?
3 A. What I believe I said is that that was
4 a reference that I used. And it was my term, yes.
5 Q. And the term "fraud," is that also
6 your term?
7 A. No. What -- "fraud" was mentioned
8 relative to paragraph 5 of I believe Exhibit --
9 Q. 86.
10 A. Paragraph 5 of Exhibit 86 has the word
11 "fraud" in it. And I read that verbatim into the
12 record.
13 Q. But you've never heard any protestant
14 use the word "fraud," have you, during all of
15 these proceedings?
16 A. No.
17 Q. Are you aware that the statute, the
18 administrative water appropriation rules, require
19 a certified financial statement and a commitment
20 letter from a lender?
21 MR. FEREDAY: Objection. That is not what
22 is required in the rules. We've been through this
23 before.
24 THE HEARING OFFICER: Sustained.
25 Q. (BY MR. ALAN SMITH): I have the rule

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1 right here in front of me. It says, "The
2 applicant shall submit a current financial
3 statement certified and a financial commitment
4 letter along with the financial statement of the
5 lender."
6 MR. FEREDAY: "Or."
7 THE HEARING OFFICER: Yeah, we've been
8 through this language, Mr. Smith, and it's not
9 something that we can explore with Mr. Brownlee.
10 Please move on.
11 Q. (BY MR. ALAN SMITH): Are you aware
12 that Title 42 requires the applicant to make the
13 application in good faith?
14 A. I would assume any application that
15 you would make should be in good faith.
16 Q. And that, in fact, is all the
17 protestants have been asking about, isn't it --
18 MR. FEREDAY: Objection.
19 Q. (BY MR. ALAN SMITH): -- with these
20 questions regarding your financial condition?
21 MR. FEREDAY: Objection. It asks him to
22 assume what's in the protestants' minds.
23 THE HEARING OFFICER: Sustained.
24 MR. ALAN SMITH: That's all I have.
25 THE HEARING OFFICER: Okay.

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1 MR. EDWARDS: I have no questions.
2 THE HEARING OFFICER: Redirect?
3
4 REDIRECT EXAMINATION
5 BY MR. FEREDAY:
6 Q. Mr. Brownlee, with regard to
7 Mr. Thornton's questions of you concerning
8 annexation, the question of the public process for
9 annexation was discussed.
10 Do you recall that?
11 A. Yes.
12 Q. That public process is a City of Eagle
13 public process; isn't that correct?
14 A. That's correct.
15 Q. With regard to a question about
16 Exhibit 83, footnote 1 that Mr. Thornton inquired
17 into, the \$7,500 number in that footnote is a
18 total fee, is it not, not an annual fee; correct?
19 A. That is correct.
20 MR. FEREDAY: No further questions.
21 THE HEARING OFFICER: Okay. Mr. Thornton,
22 within the scope of the redirect?
23 MR. THORNTON: No, no questions.
24 THE HEARING OFFICER: Okay. Mr. Smith?
25 MR. ALAN SMITH: No questions.

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1 THE HEARING OFFICER: Mr. Edwards?
2 MR. EDWARDS: No questions.
3 THE HEARING OFFICER: Okay. Thank you,
4 Mr. Brownlee.
5 THE WITNESS: Thank you.
6 THE HEARING OFFICER: Further witnesses,
7 Mr. Fereday?
8 MR. FEREDAY: We have no further witnesses.
9 THE HEARING OFFICER: Okay.
10 Mr. Thornton, do you wish to call
11 witnesses on surrebuttal?
12 MR. THORNTON: Yeah. And excuse me,
13 "surrebuttal," I've heard that term.
14 THE HEARING OFFICER: Okay.
15 MR. THORNTON: And I probably should better
16 understand it, but if you could --
17 THE HEARING OFFICER: I'm sorry.
18 MR. THORNTON: -- let me know what that
19 means, please.
20 THE HEARING OFFICER: It just means that
21 Mr. Fereday and M3 Eagle LLC have offered their
22 rebuttal testimony. And now you have an
23 opportunity to rebut the information that they
24 have submitted. So that really is what
25 surrebuttal is.

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1 MR. THORNTON: Okay.
2 THE HEARING OFFICER: Oh, and beyond
3 that --
4 MR. THORNTON: I'm sorry?
5 THE HEARING OFFICER: Beyond that, there
6 was also rebuttal testimony that was also offered
7 by the Department witnesses, which you may also
8 rebut.
9 MR. THORNTON: Yeah, the only surrebuttal
10 witnesses we'd like to call up briefly would be
11 Mr. Dennis Owsley and Mr. Sean Vincent. So
12 we'd -- is that -- I think that's all that we have
13 left.
14 THE HEARING OFFICER: Sure. Now, did you
15 say that you did not want to recall Mr. Vincent
16 because of his previous testimony?
17 MR. THORNTON: Not Mr. Vincent. Mr. McVay,
18 I believe, that's -- if he --
19 THE HEARING OFFICER: Oh, thought I heard
20 you say Mr. Vincent.
21 MR. THORNTON: Well, I would like to call
22 Mr. Vincent and Mr. Owsley for a few questions.
23 THE HEARING OFFICER: Okay.
24 MR. THORNTON: Maybe I'm not making myself
25 clear. I apologize.

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1 THE HEARING OFFICER: Okay. Who first?
2 MR. FEREDAY: And, Mr. Hearing Officer,
3 before we start, I would just like to interpose an
4 objection to surrebuttal by these witnesses
5 which -- who have already testified in a rebuttal
6 mode.
7 And I recognize that you indicated
8 that you would entertain their being recalled
9 under certain circumstances. And perhaps I'm just
10 not clear on what those circumstances are.
11 However, I don't believe that under
12 the circumstances that surrebuttal by them, who
13 have not -- who have not been -- who did have an
14 opportunity to testify on rebuttal, is proper. I
15 recognize that you likely are going to have them
16 testify. But we would just like a continuing
17 objection.
18 THE HEARING OFFICER: Okay. The continuing
19 objection is granted.
20 There was examination of expert
21 witnesses regarding -- of a technical nature, and
22 to the extent that protestants want to explore
23 those subjects with the Department witnesses, I'll
24 allow that to happen.
25 So who first, Mr. Thornton?

1 MR. THORNTON: Mr. Owsley. Either would be
2 fine. Mr. Owsley.

3 THE HEARING OFFICER: Mr. Owsley, come
4 forward, please.

5
6 DENNIS OWSLEY,
7 having been called as a surrebuttal witness by
8 North Ada County Groundwater Users Association and
9 previously sworn, testified as follows:

10
11 THE HEARING OFFICER: You're under oath.
12 THE WITNESS: Okay.

13
14 DIRECT EXAMINATION
15 BY MR. THORNTON:

16 Q. Thank you, Mr. Owsley, for your time.
17 Have you participated in the majority
18 of the hearings where various experts from M3 were
19 critiquing your work that was identified in
20 Exhibit 50, which is your -- the staff memorandum
21 as well as Exhibits 903 and 904?

22 A. Yes, I was present.

23 Q. Okay. And did that time, over several
24 days, did the several days of critiquing your
25 technical reports give you time to reflect on the

1 accuracies and inaccuracies that were provided
2 both in Exhibit 50 and Exhibit 903 and 904?

3 A. Yes.

4 Q. Okay. Based on that time to reflect
5 and to hear lots of expert witness testimony on
6 that, what are any substantial -- any changes that
7 you would offer in terms of a change from your
8 position in either your original Exhibit 50 and/or
9 Exhibit 903 or 904?

10 MR. FEREDAY: Objection. We believe that
11 this witness can testify specifically and very
12 narrowly to points made by our rebuttal witnesses,
13 which in turn were directed in the main at
14 specific statements in the transcript or specific
15 statements in Exhibit 50 or their slides.

16 So we believe that an open-ended
17 question such as that is not within the scope, as
18 set down by the Hearing Officer.

19 THE HEARING OFFICER: Sustained.
20 Mr. Owsley already had an opportunity to go
21 through and generally narrate the -- based on the
22 question that you have asked, Mr. Thornton.

23 MR. THORNTON: Okay.

24 THE HEARING OFFICER: I don't want to
25 rehash that. I want specific questions.

1 MR. THORNTON: Okay. And our intent, if I
2 could, Mr. Hearing Officer, was to not necessarily
3 go through 40, 50, 60 specific questions in the
4 interest of time. So let me see if I can -- with
5 due respect to the Hearing Officer, see if I can
6 rephrase that, and maybe it will be acceptable.

7 THE HEARING OFFICER: Okay.

8 Q. (BY MR. THORNTON): The specific
9 testimony that you had heard from M3 expert
10 witnesses and questioning of yourself, is there
11 any specific item that you have now changed your
12 thought on that you were asked specifically?

13 MR. FEREDAY: Objection. Again, I think
14 the questioner must refer to a specific point that
15 was made by one of our specific witnesses and ask
16 Mr. Vincent -- or excuse me, Mr. Owsley about his
17 position on that.

18 THE HEARING OFFICER: Sustained.

19 MR. THORNTON: I'm just trying to think how
20 to rephrase it.

21 THE HEARING OFFICER: Well, Mr. Thornton, I
22 think you need to focus on specific testimony
23 offered by the applicant in rebuttal or specific
24 testimony of Mr. Owsley that he offered that you
25 want to explore and ask questions about.

1 MR. THORNTON: Okay. Could we have a
2 couple minutes to change our strategy here a bit?

3 THE HEARING OFFICER: Okay. Let's go off
4 the record.

5 (Recess.)

6 THE HEARING OFFICER: We're recording
7 again.

8 Mr. Thornton.

9 Q. (BY MR. THORNTON): Okay. Mr. Owsley,
10 would you agree that the hydrologic boundaries and
11 recharge mechanisms are well -- are not well
12 defined for the target aquifer, the PGSA?

13 MR. FEREDAY: Objection. This was not tied
14 to any specific testimony of our rebuttal
15 witnesses. And this has been asked and answered.

16 THE HEARING OFFICER: Mr. Thornton,
17 response?

18 MR. THORNTON: Maybe my lack of
19 understanding of being specific, I apologize for
20 that lack of understanding, but as I understand,
21 Mr. Owsley was asked specific -- many questions
22 about the hydrologic boundaries and recharge
23 mechanisms and how well they were understood.

24 THE HEARING OFFICER: Okay. Overruled, at
25 least now.

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1 Mr. Owsley.
2 THE WITNESS: In my opinion, they're not
3 fully understood.
4 Q. (BY MR. THORNTON): Do you believe
5 that there still remains line of evidence that
6 suggest that the long-term sustainability of the
7 PGSA aquifer is limited?
8 MR. FEREDAY: Objection. Once again,
9 there's no reference to what he's being asked to
10 provide surrebuttal to. These are open-ended
11 questions. And by the way, both of these topics
12 he testified to in his narrative testimony, and
13 then again in his narrative rebuttal testimony.
14 THE HEARING OFFICER: Yeah, sustained,
15 Mr. Thornton. It's too general.
16 Q. (BY MR. THORNTON): Do you believe
17 that -- based on the nine-day aquifer test, was
18 originally proposed by M3 a longer test than what
19 resulted in the nine-day aquifer test?
20 MR. FEREDAY: Objection. Again, same
21 objection. There is no reference here to what
22 testimony he is being asked to provide rebuttal to
23 or what fact. It's just giving -- "Please give me
24 your opinion about a topic." And by the way, he's
25 testified on this topic.

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1 THE HEARING OFFICER: Okay. A question has
2 not yet been asked, Mr. Fereday. There was
3 testimony from Dr. Osiensky, at least from
4 Dr. Osiensky, about the adequacy of the test and
5 the nine-day aquifer test. I think this is a
6 subject Mr. Thornton can explore. Overruled.
7 Go on, Mr. Thornton.
8 Q. (BY MR. THORNTON): Originally did M3
9 propose to the Department of Water Resource a
10 substantially longer aquifer test than what was
11 finally carried out?
12 MR. FEREDAY: Objection. The Hearing
13 Officer has just given Mr. Thornton a road map for
14 how he can ask a proper question, but this is not
15 it.
16 THE HEARING OFFICER: Overruled, at least
17 for now.
18 You can answer.
19 THE WITNESS: The original time frame was
20 not specified in the Aquifer Test Prospectus.
21 Q. (BY MR. THORNTON): Okay. Your --
22 would the -- a longer aquifer test, in your expert
23 opinion, had better defined the characteristics
24 and sustainability of the PGSA aquifer?
25 MR. FEREDAY: Objection. This witness has

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1 not been qualified as an expert in aquifer
2 testing.
3 THE HEARING OFFICER: Overruled.
4 THE WITNESS: I believe a longer test could
5 show additional information regarding boundary
6 effects.
7 Q. (BY MR. THORNTON): Were you present
8 at Dr. Osiensky's testimony?
9 A. Yes, I was.
10 Q. Okay. Do you remember hearing
11 Dr. Osiensky testify to the fact that if the PGSA
12 aquifer dropped 3 feet that the shallower aquifers
13 above would also drop 3 feet?
14 A. I remember similar testimony. I don't
15 remember exactly 3 feet, but I remember testimony
16 regarding the upper and lower aquifers.
17 Q. Do you remember Dr. Osiensky saying
18 that an aquifer drop in the PGSA would correspond
19 to an equal amount of drop in the aquifer in the
20 overlying aquifers?
21 MR. FEREDAY: Objection. Asked and
22 answered. Furthermore, I think that
23 mischaracterizes Dr. Osiensky's testimony.
24 THE HEARING OFFICER: Well, I'll allow
25 Mr. Owsley to answer the question under his

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1 remembrance.
2 THE WITNESS: I don't remember the
3 testimony to that. But several of the M3 --
4 MR. FEREDAY: Objection. If --
5 THE HEARING OFFICER: Sustained.
6 Q. (BY MR. THORNTON): Do you remember
7 the discussions with the questions being asked of
8 Mr. Ed Squires relating the characterization of
9 the M3 No. 1, the M3 No. 3 wells in terms of the
10 characterization that the well driller's log
11 identified versus what was identified by Hydro
12 Logic in their geophysical characterizations, that
13 discussion?
14 A. I remember that, yes.
15 Q. Does -- does it -- in your opinion,
16 are the well driller's logs' lithologic
17 characterizations grossly in error in terms of how
18 they're describing the -- the stratigraphy in that
19 well?
20 MR. FEREDAY: Objection. Leading question,
21 and also not related to any particular testimony
22 of Mr. Squires.
23 THE HEARING OFFICER: Overruled.
24 THE WITNESS: My opinion would be that it
25 would be on a driller-by-driller basis. Some

1 drillers are probably better than others.
 2 Q. (BY MR. THORNTON): All right. So do
 3 you find any evidence in the testimony presented
 4 by M3 to suggest the PGSA aquifer water table is
 5 increasing?
 6 A. The testimony from Roger Dittus
 7 indicated that his PGSA wells were increasing.
 8 Q. Okay. Do you know of yourself any
 9 evidence to suggest the potential decline in that
 10 PGSA water level table?
 11 MR. FEREDAY: Objection. Once again, we're
 12 not tying this to any particular rebuttal
 13 testimony.
 14 THE HEARING OFFICER: Overruled.
 15 THE WITNESS: Just the figure that I
 16 pointed out in my rebuttal testimony.
 17 MR. THORNTON: Okay. No further questions.
 18 THE HEARING OFFICER: Okay. Mr. Smith?
 19 MR. ALAN SMITH: I have no questions.
 20 THE HEARING OFFICER: Okay. Mr. Edwards?
 21 MR. EDWARDS: I have no questions.
 22 THE HEARING OFFICER: Questions for
 23 Mr. Owsley, Mr. Fereday?
 24 MR. FEREDAY: No questions.
 25 THE HEARING OFFICER: Okay. Thank you,

1 Mr. Owsley.
 2 THE WITNESS: Thank you.
 3
 4 SEAN VINCENT,
 5 having been called as a surrebuttal witness by
 6 North Ada County Groundwater Users Association and
 7 previously sworn, testified as follows:
 8
 9 THE HEARING OFFICER: Mr. Vincent, you're
 10 under oath.
 11 THE WITNESS: Okay.
 12 MR. THORNTON: And, Mr. Hearing Officer, if
 13 I could just have a minute in terms of a different
 14 strategy that we were needing to follow, just to
 15 be off record for a minute or two, if I could,
 16 please.
 17 THE HEARING OFFICER: Okay.
 18 (Recess.)
 19 THE HEARING OFFICER: We're recording
 20 again.
 21 Mr. Thornton.
 22 MR. THORNTON: And again, I'll just up
 23 front apologize to the Hearing Officer if I ask
 24 not specific enough questions. I did not realize
 25 we needed to do that.

1 DIRECT EXAMINATION
 2 BY MR. THORNTON:
 3 Q. Mr. Vincent, did you provide testimony
 4 as to the adequacy and the length of the aquifer
 5 tests that was completed by M3?
 6 MR. FEREDAY: Objection. I don't believe
 7 he -- that this question was raised with
 8 Mr. Vincent, and therefore I don't think it's
 9 properly within the scope. If I'm wrong, then
 10 maybe he can refer me to some specific reference
 11 or question.
 12 THE HEARING OFFICER: Overruled.
 13 Mr. Vincent.
 14 THE WITNESS: I believe in my narrative
 15 testimony I spoke to those issues, and perhaps in
 16 my rebuttal testimony spoke to the fact that a
 17 longer term test might be beneficial in terms of
 18 assessing aquifer boundary conditions.
 19 THE HEARING OFFICER: Okay. Would you
 20 speak up, please, Mr. Vincent, as you testify.
 21 Thanks.
 22 Q. (BY MR. THORNTON): In your opinion,
 23 would a longer aquifer test had better described
 24 the boundary conditions?
 25 MR. FEREDAY: Objection. That was what he

1 just testified to.
 2 THE HEARING OFFICER: Sustained.
 3 Q. (BY MR. THORNTON): Was there evidence
 4 of any boundary conditions identified by the
 5 aquifer test?
 6 A. Yes, I believe there was. And with
 7 respect to the testimony that I provided last
 8 week, I think I would like to clarify an answer
 9 that I gave to Mr. Fereday.
 10 He asked me whether I saw evidence of
 11 boundary conditions in the aquifer test data, and
 12 I provided a succinct, one-word answer, which was
 13 "No." And upon reflection, I think that's kind of
 14 an inadequate and incomplete answer.
 15 There were two different aquifer tests
 16 performed by HLI with drawdown and recovery
 17 monitored in both the pumping wells for those
 18 respective tests and the observation wells. And
 19 while it's true that for many of the well plots
 20 boundary conditions were not evident.
 21 There was indication of -- well,
 22 I'll -- deviation from Theis behavior, which would
 23 be consistent with negative hydraulic boundary
 24 conditions in some of those plots.
 25 I didn't see anything to suggest a

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1 negative hydraulic boundary in the pumping test
2 data for the Kling aquifer test. I didn't
3 interpret the observation well data from the Kling
4 aquifer test, but HLI evaluated it with a
5 hydraulic boundary package of Aqtesolv, so
6 apparently they thought there was some indication
7 there.
8 With regard to the longer term SVR-7
9 test, the nine-day test, the pumping test data
10 themselves were pretty noisy. And I wouldn't
11 really offer an opinion as far as that goes.
12 As discussed quite a bit, there was
13 what appeared to be possibly incomplete recovery,
14 which might suggest a lack of recharge in the Big
15 Gulch stock well, which is the only obs well where
16 there was drawdown that I would consider to be
17 significant, you know, more than a foot.
18 It looked like there was something
19 going on at the end of the test which was
20 consistent with there being a negative hydraulic
21 boundary.
22 The other observation well data, I
23 wouldn't -- I'd hesitate to try to interpret those
24 data, because of the lack of drawdown.
25 Q. Okay. If you'd refer to your

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1 exhibit -- well, Exhibit 901, and that probably is
2 not in the binders. It was your handout of slides
3 and narratives. And if you would turn to -- what
4 page? These weren't numbered. Oh, my gosh. May
5 be on a little bit of a -- try to find it. About
6 a good third of the way into that document -- I
7 don't see any page numbers -- the top slide says
8 "Complex stratigraphy," and underneath is a slide
9 for Exhibit 27.
10 MR. FEREDAY: Excuse me. But I'm sorry,
11 which page are you on?
12 MR. THORNTON: There's no page numbers, to
13 my knowledge. And if you have page numbers, we
14 don't.
15 Do you have page numbers?
16 MR. FEREDAY: Yes.
17 MR. THORNTON: I'm not sure why we don't.
18 MR. FEREDAY: You mean in Exhibit 902?
19 MR. THORNTON: 90- -- excuse me?
20 MR. FEREDAY: 901, 902.
21 THE HEARING OFFICER: Is your
22 exhibit numbered, Mr. --
23 THE WITNESS: Mine is not.
24 I recall when I first gave this, I
25 provided interested parties with this nonnumbered

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1 handout. But then subsequent to that, and posted
2 on the website, is one that includes the actual
3 narrative and has numbered pages.
4 Q. (BY MR. THORNTON): Again, I apologize
5 I don't have it.
6 They were likely in the same order; is
7 that correct?
8 A. Yes, I believe so. Same slides.
9 Q. Okay.
10 THE HEARING OFFICER: Okay. So let's refer
11 to Exhibit 902.
12 MR. THORNTON: Yeah. And it's page 30 --
13 go to page 35 -- excuse me, 36.
14 THE HEARING OFFICER: So is that
15 Exhibit 902 instead of 901?
16 MR. FEREDAY: I think it's 902.
17 THE HEARING OFFICER: Yeah. I have -- I
18 think this is a subsequent document with the
19 narrative.
20 MR. THORNTON: Yeah, that's the one. Okay.
21 Thank you.
22 Q. So on the slide titled "Exhibit 27" on
23 page, I believe, 36, there are three kind of
24 oblique circles/ovals in red that are identified
25 as "No geologic correlation between boreholes."

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1 MR. FEREDAY: Mr. Hearing Officer, I hate
2 to interrupt here, but this exhibit was not
3 discussed in our rebuttal. And I believe it is
4 beyond the scope of surrebuttal, nor was it
5 discussed by Mr. Vincent in his rebuttal
6 narrative, or nor was he questioned about it on
7 cross-examination. Therefore, it is beyond the
8 scope. If we're going to end this, we need to, I
9 believe, hold to what the rule is here as to scope
10 of testimony.
11 THE HEARING OFFICER: Well, I want to
12 narrow the subject matter as much as I can,
13 Mr. Fereday. I don't think that I can narrow it
14 to a question of whether they -- this particular
15 exhibit or this document was referred to. But
16 more broadly, whether the subject matter that this
17 is intended to address was discussed during
18 surrebuttal, and I think that the complexity or
19 uniformity or homogeneity was part of a
20 discussion. I'll allow the question -- or the
21 line of questions, and let's see where it goes.
22 Mr. Thornton.
23 Q. (BY MR. THORNTON): So, Mr. Vincent,
24 through the evidence that you reviewed in leading
25 up to Exhibit -- the slide on page 36 titled

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1 "Exhibit 27," has there been any additional expert
2 testimony, in your opinion, to better correlate
3 the stratigraphies between the various
4 cross-sections presented in this exhibit?
5 A. If I understand your question, I do
6 believe that Dr. Wood spoke to the ability or
7 inability to correlate between boreholes, as did
8 Drs. Ralston -- I don't know about Dr. Osiensky.
9 I only was here for a portion of his testimony.
10 Q. Okay.
11 A. But I believe that subject was
12 addressed by those individuals, perhaps
13 Mr. Squires as well. I don't recall exactly.
14 Q. Okay. Have you been provided any
15 additional information or expert witness opinions
16 from other than yourself to agree that there is
17 good correlation between the various boreholes
18 that are described by the various geophysical well
19 logs?
20 MR. FEREDAY: Objection. This asks for
21 hearsay or for him to repeat what others have
22 given him, not from his own expert opinion. I
23 think he's already testified that he's not an
24 expert in geophysics.
25 THE HEARING OFFICER: Sustained.

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1 MR. THORNTON: Okay.
2 Q. Were you here during the testimony of
3 Dr. Osiensky when he stated if you have two
4 hydrogeologists in the room you'll have two
5 differences of opinion?
6 A. Actually, I think I was not here for
7 that.
8 MR. THORNTON: It was rather comical.
9 I don't think we have any more
10 questions.
11 THE HEARING OFFICER: Okay. Mr. Smith?
12 MR. ALAN SMITH: I have no questions.
13 THE HEARING OFFICER: Mr. Edwards?
14 MR. EDWARDS: I have no questions. Thank
15 you for your time.
16 THE HEARING OFFICER: Mr. Fereday?
17 MR. FEREDAY: Could we take a short break
18 and come back?
19 THE HEARING OFFICER: Yeah. Let's come
20 back at 2:30.
21 (Recess.)
22 THE HEARING OFFICER: Mr. Fereday?
23 MR. FEREDAY: We have no questions.
24 THE HEARING OFFICER: Okay.
25 Thank you, Mr. Vincent.

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1 Further witnesses, Mr. Thornton?
2 MR. THORNTON: Any further witnesses? Was
3 that the question?
4 THE HEARING OFFICER: Yes.
5 MR. THORNTON: No.
6 THE HEARING OFFICER: Mr. Smith, further
7 witnesses?
8 MR. ALAN SMITH: We have no surrebuttal
9 witnesses --
10 THE HEARING OFFICER: Okay.
11 MR. ALAN SMITH: Either Eagle Pines --
12 THE HEARING OFFICER: Okay. Mr. Edwards?
13 MR. ALAN SMITH: -- or either of the
14 individual protestants.
15 THE HEARING OFFICER: Okay. That completes
16 the presentation of testimony.
17 Let's talk about where we go in
18 timing.
19 Mr. Thornton?
20 MR. THORNTON: Question. We do have a
21 closing statement, though, that --
22 THE HEARING OFFICER: Oh, okay.
23 MR. THORNTON: -- we would like to address,
24 if that's proper to do at this time.
25 THE HEARING OFFICER: I think that's fine.

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1 I neglected to offer closing argument.
2 MR. THORNTON: I do not know if anyone else
3 has that or not.
4 THE HEARING OFFICER: Mr. Fereday, do you
5 wish to offer closing argument?
6 MR. FEREDAY: I'm prepared to provide a
7 brief closing statement here verbally. However,
8 as I think -- as I believe we discussed so many
9 weeks ago, it might also be appropriate to provide
10 closing argument in the form a post-hearing brief.
11 And we do intend to do that, or would at least ask
12 leave of the Hearing Officer to submit such a
13 brief, making the legal arguments that we've
14 discussed, reviewing the testimony as to the
15 elements of proof for a water right, the standard
16 of proof and so forth.
17 So we would anticipate filing that,
18 and we would hope that we could get a schedule set
19 forth today for that purpose.
20 But yes, I'd be able to provide a
21 brief statement today after the protestants.
22 THE HEARING OFFICER: Okay. Well, I guess,
23 Mr. Fereday, normally, I would -- in closing
24 arguments, I would assume you would go first, and
25 then follow -- and then the protestants, and then

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1 you would follow up.
2 So how do you want to proceed?
3 MR. FEREDAY: I can go first.
4 THE HEARING OFFICER: Okay.
5 MR. ALAN SMITH: We do have a motion at
6 this time, Judge --
7 THE HEARING OFFICER: Okay, Mr. Smith.
8 MR. ALAN SMITH: -- on this financial
9 information, even going to the other part of it,
10 or other evidence to show that it is reasonably
11 probable.
12 We think the preponderance of the
13 evidence has not been met. That means it's more
14 likely than not. I think all they've shown is
15 that it's a possibility.
16 It all hinges on formation of a CID,
17 and it hinges on annexation by the City of Eagle,
18 and if not the City of Eagle, then it's up to the
19 County. And we think it's all just speculation
20 and conjecture, and only a mere possibility.
21 THE HEARING OFFICER: So your motion is?
22 MR. ALAN SMITH: To dismiss, the same
23 motion that we've made -- renewing the motion to
24 dismiss.
25 THE HEARING OFFICER: Okay. And rather

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1 than have further arguments on this subject,
2 Mr. Smith, I'll deny the motion. And the issues
3 can be raised and argued in post-hearing briefs.
4 MR. ALAN SMITH: Very well.
5 THE HEARING OFFICER: I'll consider it as
6 part of the decision.
7 Mr. Thornton.
8 MR. THORNTON: Clarification for me. And a
9 post-hearing brief, that is basically a written
10 statement including facts or whatever in terms of
11 a variety of different points that we would like
12 to address; is that correct?
13 THE HEARING OFFICER: That would be a
14 memorandum of points and authorities, primarily.
15 MR. THORNTON: Okay.
16 THE HEARING OFFICER: I'm interested more
17 in argument about the law than perhaps a complete
18 regurgitation of facts from the hearing.
19 MR. THORNTON: Okay.
20 THE HEARING OFFICER: But as Mr. Fereday
21 said, some representation of facts as they pertain
22 to specific legal issues, and we'll talk maybe a
23 little bit about what those legal issues might be.
24 MR. THORNTON: Okay.
25 THE HEARING OFFICER: But I don't know

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1 whether you want to do that prior to or after
2 argument. But I think we'll let argument go
3 forward, and then we can talk about the briefing
4 schedule. Okay.
5 Mr. Fereday.
6
7 CLOSING ARGUMENT
8 BY MR. FEREDAY:
9 Okay. Thank you, Mr. Hearing Officer.
10 It's been a lengthy process, and I appreciate your
11 patience throughout. It's also been a process
12 that's been made more challenging perhaps by the
13 fact that we have had pro ses on the opposite
14 side.
15 However, I would like to say how much
16 I do appreciate their participation. I think
17 they've done a credible job, and I appreciate your
18 solicitousness for their participation, and I
19 think it's what these hearings are supposed to be
20 about. Perhaps it's taken longer, but in any
21 event, we appreciate this opportunity to have been
22 before you for these now 15 or 16 hearing days.
23 But to summarize this case, I think
24 the primary consideration to keep in mind can be
25 summed up in the phrase "preponderance of the

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1 evidence." The standard of proof in this case is
2 a preponderance of the evidence. It's not clear
3 and convincing evidence. It's not beyond any
4 uncertainty. It's not beyond any reasonable doubt
5 or some other standard. It's a preponderance
6 standard in these proceedings.
7 And I submit that M3 Eagle has met --
8 more than met that standard of a preponderance
9 with regard to every element needed to be proven
10 in this case.
11 We have the technical case, the
12 science, the sufficiency of water, if you will.
13 We have that piece of the case. The preponderance
14 clearly was met there.
15 We have the nontechnical element, such
16 as financial capability and what that means. And
17 I'll speak more to that in a minute. We have the
18 question that's been raised as to the
19 interpretation of the municipal provider statute
20 and whether this applicant can even apply for a
21 reasonably anticipated future needs water right.
22 We recognize that the Hearing Officer
23 has ruled that there is no question that they can
24 apply for a municipal water right, the question is
25 the future needs element. We feel that we have

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1 shown that we do qualify, although we will be
2 providing a brief in some detail on that point.
3 With regard to the nontechnical issue
4 of good faith and conservation of water resources,
5 again, we think there can be no reasonable
6 question about this applicant's good faith in
7 pursuing this application in this planned
8 community.
9 It's been working on it now for more
10 than two years. It's been putting a lot of effort
11 into it. It is very serious about doing this
12 project and doing it right.
13 With regard to the conservation of
14 water resources, this applicant is, we submit,
15 putting forth as progressive a water conservation
16 program as the state has seen for a development of
17 this type.
18 We think it's -- my view is it's more
19 progressive. Among other things, it intends to
20 meter the water to every one of these residents,
21 which, of course, is a terrific incentive for
22 conservation.
23 But the zeroscaping and the other
24 conservation measures, which they've paid a lot of
25 attention to and taken very seriously, also play

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1 into this.
2 With regard to the -- with regard to
3 the question of phasing, which the protestants
4 have repeatedly raised, we suggest that this, too,
5 is a subject that we will address in our closing
6 brief. However, a few points about phasing.
7 First of all, the testimony from those
8 who have to make this project work is that giving
9 a water right in pieces would hamper their
10 ability, if not completely hamstringing their ability
11 to finance this project for the long term, to
12 plan, and to build the kind of front-end
13 infrastructure that isn't built just for the first
14 phase, that's built for every phase.
15 Of course, this project will be
16 phased. Every project of any kind is phased,
17 certainly a project involving a planned community
18 of residential and commercial developments.
19 The problem with phasing is that it
20 would hurt this developer. Another problem with
21 phasing is that it is not authorized in our law.
22 The water law does not look to
23 granting a water right but saying "But we'll only
24 give you 5 cfs or 2 cfs for the first few years,
25 then you come back to us, and we may give you

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1 another piece of the water right." That's not
2 what the application asks for, and it is not what
3 we believe the water right would allow.
4 Let's consider as well the practical
5 effect of phasing. Granting an entire water right
6 is what the water law calls for. Granting or
7 denying. It certainly can be conditioned. We
8 recognize this. But we don't believe it can be
9 conditioned out of partial existence.
10 But if the water right is granted in
11 full, and then down the road it is shown that
12 there is injury occurring due to the exercise of
13 that water right -- we don't think that's going to
14 happen here. We think the evidence is very clear
15 on that.
16 But even hypothetically if that were
17 the case, then the fact that the water right
18 holder holds that entire water right, then allows
19 the prior appropriation doctrine, especially as
20 it's been developed through things like the
21 conjunctive management rules, to really operate,
22 because then holding that water right that
23 developer need not necessarily just stop pumping
24 or go out of business or what have you.
25 That developer then with that water

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1 right would be able to engage in mitigation and,
2 if necessary, pump out of priority and make whole
3 those who are injured. I mean the director
4 understands this very well as to how this works.
5 But without that water right, no
6 mitigation can be offered. No remedy would be
7 offered -- would be possible for that water right
8 holder.
9 Our water law -- part of the elegance
10 of our water law is that it is self-correcting
11 with regard to concepts of injury. If there is
12 injury, then there is a clear remedy.
13 We don't need to try to project at the
14 front end at great cost to the development of our
15 water resources and at great cost to good
16 developments or any kinds of -- any kind of
17 economic development, we don't need to project,
18 "Well, you may potentially someday injure
19 somebody, therefore we're going to do something to
20 you now that turns out to hamstringing the
21 development and maybe causes it not to happen."
22 That's not the way our water law is
23 supposed to work. It's a self-correcting system.
24 We submit that it should be allowed to work that
25 way.

1 With regard to the technical case, to
2 move back to that, I guess that biggest issue, the
3 biggest issue, the sufficiency of water for this
4 project, a few points.

5 First of all, how much water are we
6 talking about? 6535 acre-feet of pumping -- not
7 even of consumptive use. Slightly less than that
8 of consumptive use -- of pumping annually.

9 Despite all of the testimony and
10 studies and money spent with regard to proving up
11 that number, it's not very big, really. It's --
12 what? -- 2,000 acres of alfalfa, whatever. It's
13 not very much water in the grand scheme of things,
14 particularly when you calculate it being developed
15 out over a very moderate, even slow time frame of
16 20 to 30 years.

17 Mr. Squires testified about how
18 monitoring is the -- I'll use my term here -- the
19 gold standard for understanding what's going on in
20 our aquifers.

21 M3 Eagle has proposed a very thorough
22 monitoring program through the testimony so far.
23 We very likely will be flushing that out further
24 in our post-hearing briefing.

25 We are willing to accept conditions

1 And in fact, has reoriented what we
2 know about our Ada County, north Ada County
3 groundwater. And the news is particularly good.
4 It's good not just for M3. It's good for the City
5 of Eagle, the City of Meridian, the City of
6 Caldwell, Nampa, Star. It's good for our
7 community.

8 We think that the evidence is
9 overwhelming, and really not controverted, that
10 there is substantial water in the Pierce Gulch
11 Sand Aquifer.

12 We submit that the testimony of these
13 experts has shown that there is a hugely reduced
14 amount of uncertainty respecting our aquifer in
15 this area, and it's a very large, regionally
16 extensive aquifer, which shows no signs of stress
17 at this point.

18 It shows, as Mr. Dittus testified and
19 as Mr. Owsley just acknowledged, that we have
20 stable or even rising water levels in the really
21 reliable monitoring wells there.

22 Yes, it's true there are four
23 monitoring wells far upgulch on the M3 property
24 over the last 18 months that have shown a very
25 slight decline, half a foot or something, but

1 pertaining to monitoring. We already have, we
2 submit, instituted a monitoring program that is
3 more thorough, more carefully calibrated, and more
4 thoroughly implemented than any that has yet been
5 done in this valley, perhaps in this state.

6 The monitoring wells that have been
7 installed by M3 Eagle are top-notch, fully-sealed,
8 very carefully constructed wells with full-time,
9 24-hour data loggers installed. This is a -- this
10 is a new standard for this state, we submit.

11 We sincerely hope that this Hearing
12 Officer will recognize what has been done here and
13 not send a message to other would-be appropriators
14 that it doesn't matter how much you do, the answer
15 is no.

16 So the technical case, aside from
17 monitoring is, we submit, an overwhelmingly clear
18 and thorough case. Mr. Squires' work in this and
19 the many studies that he and his colleagues have
20 done, including work that's been participated in
21 by Dr. Wood, Dr. Osiensky, Mr. Glanzman is the
22 kind of work that, frankly, we're proud of and we
23 think has shown that there is sufficient
24 groundwater here, more than sufficient groundwater
25 for this project.

1 those, we submit, are affected more by precip
2 recharge and they track perfectly with the precip
3 downtrend that we've been seeing. Besides, those
4 wells haven't been monitored long enough to
5 establish a trend.

6 On the other hand, Floating Feather,
7 State and Linder, State Street well, otherwise
8 known as TVHP No. 1, have been monitored, and they
9 are high-quality monitoring wells that are fully
10 sealed.

11 So what we see and what we have
12 presented here is an overwhelming amount of
13 testimony to show the sufficiency of this
14 resource.

15 Even Dr. Ralston's testimony, we
16 submit, did not really question the fundamentals
17 of this picture. He questions whether there is
18 enough information to prove aquifer continuity to
19 the Payette Valley.

20 We submit that the testimony of
21 Dr. Osiensky, certainly of Dr. Wood, who is the
22 expert on the area's geology, the testimony of
23 Mr. Squires has shown that the aquifer is
24 extensive over there. And why wouldn't it be?

25 That's a lower part of the basin,

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1 water's going to flow that direction, the sands
2 clearly are shown in the most effective way that
3 they can be shown, given that they're below ground
4 surface, and that way, of course, is with
5 geophysics, actual geophysics, not with driller's
6 logs, although the driller's logs are certainly
7 corroborative. But the geophysics are what show
8 the continuation of this aquifer over that
9 direction.
10 It goes there. It flows downhill. It
11 flows downgradient from areas of high head to low
12 head, and that is what has been repeatedly shown
13 in this case.
14 The staff's testimony has been quite
15 interesting in this case. I have not seen such
16 extensive testimony by staff in any water case
17 that I've seen before. And I guess I can
18 understand, this is perceived as a large
19 application. It is. And it's perceived as one
20 that has opposition from a number of local folks,
21 such as the people associated with the North Ada
22 County Foothills Association and the North Ada
23 County Groundwater Users Association represented
24 here today. So I understand that there's some
25 controversy there.

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1 However, the staff, with all due
2 respect, has done no studies of their own, with
3 the exception of a few minor model runs, such as a
4 Theis -- running a Theis equation and Mr. McVay's
5 work.
6 But we submit that their testimony,
7 which has been, we believe, offered in good faith,
8 but has been -- we believe it has been
9 overshadowed by the testimony on direct and
10 through rebuttal by M3 Eagle's experts.
11 Furthermore, we find it interesting
12 that the staff really has -- has not, in our view,
13 held too many of their claims of uncertainty
14 through to the end here. We read their testimony
15 as being much less critical than it may have
16 appeared on Day One.
17 Nevertheless, we believe that the
18 preponderance of the scientific evidence and the
19 science is science to a reasonable degree of
20 scientific certainty. That, too, is the legal
21 standard by which a preponderance is established.
22 We believe the science is clearly in our favor.
23 With regard, finally, to financial
24 capability, as I indicated this morning in my
25 brief remarks, we will be briefing this. But the

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1 standard is a -- it is not a high standard. It is
2 not really the Department's role to be delving
3 very deeply, I suggest, into financial feasibility
4 of projects.
5 However, the statute does give the
6 director -- it does require the submission of
7 financial information and does give the director
8 discretion as to how that information is
9 evaluated.
10 The rules, as you well know, state
11 that the standard that the Department is looking
12 to is a reasonably probable standard. We believe
13 we've met that standard.
14 This applicant has proven that they
15 can raise and expend toward a planned community,
16 including its water right analyses, substantial
17 sums of money. Very few applicants come before
18 this Department having spent upwards of \$2 million
19 just in hydrogeologic studies getting ready for
20 their application. This one has. That alone
21 suggests financial probability.
22 Furthermore, the fact that the land is
23 held free and clear, the fact that there is a very
24 substantial financial partner, which again I
25 submit is unusual in these cases.

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1 And the fact that they have a long and
2 very successful track record doing these kinds of
3 projects, again, suggests that reasonable
4 probability has been shown in this case.
5 I would add to that the fact that the
6 record clearly reflects the close work and close
7 connection that the M3 Eagle project has with
8 local government permitting, with other state
9 permitting, with DEQ, with the City of Eagle, with
10 ACHD, with other entities with whom it needs to
11 reach accommodations so that this project can go
12 forward.
13 These are not the actions of someone
14 who is speculating or someone who lacks the
15 financial capability to move forward.
16 So in summary, I would ask that in
17 this case the preponderance has been met on every
18 element, and I respectfully request that this
19 application be granted and that the right kind of
20 signal be sent in this case for the right kinds of
21 projects.
22 A negative in this case would
23 certainly, in our view, send the kind of signal
24 that the bar is just too high to cross. I don't
25 think that the Department has ever been in a

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1 position of doing that, and I don't suspect that
 2 it would do it in this case.
 3 But we respectfully request that this
 4 application be granted. Thank you.
 5 THE HEARING OFFICER: Thank you,
 6 Mr. Fereday.
 7 Mr. Thornton.
 8
 9 CLOSING ARGUMENT
 10 BY MR. THORNTON:
 11 Thank you, Mr. Hearing Officer, for
 12 allowing the North Ada County Groundwater Users
 13 Association to provide a closing statement.
 14 As the hearing phase in the M3
 15 municipal water right application draws to a close
 16 after nearly a year of preparation, 17 full days
 17 of hearings, a collective effort of thousands of
 18 hours conducting research, assembling data,
 19 fundraising, public education, presentation
 20 creation, copy distribution, and in the end
 21 spending over \$80,000, we, the 37 protestants,
 22 known as the North Ada County Groundwater Users
 23 Association rest our case and thank you for the
 24 opportunity to be heard in this matter.
 25 We appreciate the important and

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1 difficult responsibility you have in both the
 2 protection of and the provision of water rights
 3 for the citizens of this great state. We
 4 appreciate your patience with our pro se protest.
 5 Thank you, Mr. Hearing Officer.
 6 As put forward in our protest
 7 notification and again in our opening statement in
 8 April, we formed our association out of mutual
 9 concern for the long-term sustainability of the
 10 groundwater resources in north Ada County.
 11 We are not an antidevelopment group,
 12 as M3 has stated a number of times during these
 13 hearings. This is evidenced by our open and
 14 consistent concerns about groundwater that began
 15 back in January of 2006, 11 months prior to the
 16 filing date of the original M3 Eagle water right
 17 application.
 18 At that time we petitioned the
 19 governor and the director of the Department of
 20 Water Resources to fund an independent study of
 21 the aquifers north of Eagle and Star. And we
 22 commend the former Director Tuthill and the
 23 Department for their decision in 2007 to go
 24 forward with the north Ada County groundwater
 25 study.

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1 This work, as well as the IDWR-funded
 2 Cosgrove study, have been conducted by scientists
 3 with no financial interest in north Ada County
 4 groundwater, and final reports on these works are
 5 expected to be completed in the next six months.
 6 We would ask the Department of Water
 7 Resource to include the results of these studies
 8 in the deliberations of granting such a large
 9 water right as requested by M3 Eagle LLC.
 10 From the outset we have stated that M3
 11 would be eligible for a phased water right that
 12 would allow their development to begin, but not so
 13 much water that could be injurious to
 14 approximately 2,000 senior water right holders in
 15 the impact area.
 16 M3 Eagle acknowledged a phasing of
 17 their water right in their letter from Jeff
 18 Fereday of Givens Pursley, LLC, to IDWR Director
 19 Dr. David Tuthill, dated March 23rd of 2007,
 20 Exhibit 55, on the second page, second paragraph,
 21 titled "The concept of phasing." The 13th line.
 22 Phil noted, and we agree, that if some
 23 type of phasing were used, it would have to
 24 protect the applicant's overall priority in the
 25 context of the municipal statute.

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1 With a conservative decision on water
 2 quantity and an effective monitoring program, we
 3 believe the Department is serving the needs of
 4 both the applicant and the protestants. We
 5 believe in the private property rights, the need
 6 for economic development, and the beneficial use
 7 of water in our area.
 8 But we have also been consistent in
 9 stating that development needs to be predicated on
 10 sustainable growth principles. And in this very
 11 important case, that means sustainable aquifers
 12 that support existing senior water users, as well
 13 as renewable and reasonable new demand on
 14 groundwater resources.
 15 As you're aware, this area consists
 16 nearly -- contains nearly 2,000 wells in a
 17 majority of households, small farms, and ranches
 18 depend 100 percent on these wells as their only
 19 source of water.
 20 If their wells go dry, there is simply
 21 no easy or affordable remedy short of drilling a
 22 new well at great expense.
 23 In these hearings we have heard
 24 testimony from folks like Greg Taylor, Chuck
 25 Roberts, Tom Sorge, and others, who along with

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1 several of their neighbors in the Homer Road area
2 north of Eagle have had to drill new deeper wells
3 in the past few years to reach down to a declining
4 water table.
5 While we have heard testimony from M3
6 Eagle about the enormous size and the expense of
7 their groundwater study in this exact area, why
8 have we not seen a single graph or chart that
9 explains this real-life circumstance occurring
10 just a mile or two from the M3 property.
11 These recent dry wells are alarming
12 when one considers we have reasonable snowpack in
13 the past few years and no significant development
14 has taken place near this location.
15 The Department of Water Resources' own
16 technical experts have testified that there is a
17 line of evidence that suggests there may be
18 presently a declining water table, as identified
19 in the IDWR staff report, Exhibit No. 50.
20 One has to ask what the effect will be
21 when the M3 Eagle planned community begins
22 withdrawing millions of gallons of ground water
23 every single day just to the north of these
24 declining local wells.
25 Is it fair to subject the citizens and

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1 senior water right holders to such uncertainty and
2 risk all for the potential benefit of real estate
3 development and its owners.
4 We're asking the Department to take a
5 proactive approach that looks into the future and
6 uses scientific methods to develop a groundwater
7 management plan for the growing areas like north
8 Ada County before committing to large, closed-end
9 water rights as proposed by M3 Eagle.
10 We have heard repeatedly in testimony
11 that M3 Eagle has invested \$2 million in this
12 water right application.
13 While this may sound substantial, in
14 NACGUA's testimony we have shown that this number
15 equates to less than \$300 per residential lot,
16 approximately 7100 homes, not inclusive of
17 commercial and recreational development within M3
18 Eagle's planned community.
19 We believe the significant risk and
20 potential cost to owners of senior water rights is
21 far greater than that of M3 Eagle's investment
22 when considering that 2,000-plus existing well
23 owners may be injured.
24 In the testimonies given here by Greg
25 Taylor and Chuck Roberts, we learned of their

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1 recent necessity to replace their wells due to
2 declining water level near the M3 property at an
3 average expense of approximately \$21,000 each.
4 Using this conservative figure for
5 replacement, this would equate to a total risk
6 factor to existing local well owners of nearly
7 \$42 million.
8 As big as that figure sounds, it is
9 important to note that this number would be
10 negligible when contrasted with a potential
11 decline in property values that could be
12 precipitated by the knowledge of a declining water
13 level in the area.
14 We believe there is insufficient data
15 or evidence to determine whether the groundwater
16 supply is sufficient to support M3's proposed
17 groundwater withdrawal and that they will not
18 adversely affect the local economy or the
19 watershed.
20 Over the course of the past year, and
21 especially during these hearings, we have been
22 exposed to a mind numbing amount of testimony
23 about an aquifer system described as the Pierce
24 Gulch Sand Aquifer.
25 We have heard it described as robust

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1 and dynamic. We have also been told of extensive
2 modeling to document the water quality -- the
3 water-bearing qualities of this presumed aquifer
4 system, yet the proponents of this system cannot
5 tell us in any detail where the water comes from,
6 nor where it goes, and how much there really is.
7 Mr. Ed Squires, chief hydrologist for
8 M3 Eagle, has testified that it's not even M3's
9 responsibility to determine where the water comes
10 from and goes to.
11 Mr. Fereday referred to the issue of
12 recharge and discharge as a red herring. We
13 believe the issues of recharge and discharge
14 creates a huge uncertainty in the very models used
15 to predict drawdowns that will surely occur to
16 thousands of well owners between the M3 Eagle
17 proposed development and the Boise River.
18 We want to be sure that Mr. Fereday's
19 red herring is not somewhere near the bottom of
20 our wells.
21 The conceptual model for the Pierce
22 Gulch Sand Aquifer assumes that a large portion of
23 the outflow goes to the Payette River Basin, but
24 that is based, in large part, on connecting the
25 dots between two data points some 18 to 23 miles

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1 apart.

2 That sort of great uncertainty in the

3 conceptual model leads to similar uncertainty in

4 the detailed model that ultimately tells us the

5 nearby wells in the upper aquifers will not be

6 significantly harmed.

7 When serious questions were raised by

8 NACGUA and IDWR staff about the feasibility of the

9 discharge going to the Payette, it was stated by

10 M3 Eagle expert witnesses that it really doesn't

11 matter where the discharge goes.

12 Later in the hearing Mr. Squires and

13 Mr. Utting both testified that a model set has

14 been made with a no-flow boundary and no water

15 going to the Payette River Basin. And it really

16 didn't make much difference in predicted drawdown

17 values.

18 However, we were never shown any

19 documentation of that model set. Mr. Squires has

20 testified that in his career he has only seen a

21 couple of wells actually going dry due to water

22 level declining.

23 This seems a bit odd in light of

24 several personal testimonies we have heard during

25 the hearings that involved dry wells just in the

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1 past few months. Mr. Squires has also testified

2 that any potential drawdown in the shallower

3 aquifer above the Pierce Gulch Sand Aquifer will

4 not be caused by pumping from the Pierce Gulch

5 Sand Aquifer.

6 We would beg to differ on this

7 important point, as we are not all convinced that

8 pumping large quantities of water from the Pierce

9 Gulch Aquifer will not negatively affect

10 2,000-plus wells with senior water rights between

11 the Boise River and the M3 project.

12 We understand that there are areas in

13 hydrogeology that are not completely predictable,

14 despite many important improvements in computer

15 modeling and instrumentation, but we would suggest

16 that gravity is one of the unknowns -- is not one

17 of the unknowns.

18 As identified in Exhibit No. 16,

19 pages 32 and 33, prepared by Hydro Logic on

20 November 26th, 2008, titled "Modeling of

21 groundwater flow in the Pierce Gulch Sand Aquifer,

22 five models, history, updates, and predictions of

23 impacts caused by pumping at the M3 Eagle planned

24 residential community, Ada County, Idaho," it

25 states in section "M3 model prediction of

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1 impacts," "Because the model" -- and I quote,

2 "Because the model was not directly calibrated to

3 the shallow aquifer, these drawdown predictions

4 can only be considered an approximation. These

5 predictions can only serve as guidelines until

6 long-term monitoring is implemented. Direct

7 monitoring of the shallow aquifer, currently in

8 process, will likely be a much better indication

9 of how the shallow aquifer responds to pumping

10 from one Pierce Gulch Sand Aquifer."

11 Continuing on page 33 of Exhibit 16 in

12 the section entitled "M3 model overview of

13 results," it states, quote, "However, because the

14 M3 model was not calibrated to aquifers other than

15 the Pierce Gulch Sand Aquifer, it cannot be used

16 to accurately predict aquifer response from

17 pumping in any aquifer the size of Pierce Gulch

18 Sand Aquifer. Additional aquifer testing to

19 generate calibration data followed by specific

20 calibration for the Willow Creek Aquifer, the

21 shallow unnamed aquifer, and the aquifers in the

22 Payette River Valley would be necessary to use the

23 M3 model for predictions in these aquifers."

24 Based on M3 Eagle's and Hydro Logic's

25 own technical reports and testimony in this

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1 hearing, they have essentially admitted they do

2 not have any prediction and degree of certainty as

3 to the impact from the majority of the 2,000-plus

4 well owners that draw their water from the

5 shallower depths above the presumed Pierce Gulch

6 Sand Aquifer.

7 We believe there is potential for

8 significant adverse effect to our senior water

9 rights, and that there is insufficient data or

10 evidence that M3's proposed withdrawals will not

11 conflict with the local public interest as

12 identified in Idaho Code 42-202(b), subpart (3),

13 as is required by Idaho Code 42-203(a).

14 Dr. Dale Ralston, one of the

15 preeminent groundwater experts in the Northwest,

16 has provided expert reports and testimony in these

17 hearings regarding serious doubts about M3's

18 technical conclusion due to many flaws, errors,

19 and uncertainties in the conceptual, analytical,

20 and numeric model developed by M3 Eagle defining

21 the Pierce Gulch Sand Aquifer.

22 In his hydrologic analysis of the M3

23 Eagle site dated January 29th, Dr. Ralston states,

24 quote, "I have not been able to find either

25 geologic depositional information or geologic

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1 information from wells to support the presumption
2 that the Pierce Gulch Sand Aquifer extends to the
3 northwest of the M3 Eagle site beyond the
4 Willowbrook irrigation well."
5 He goes on to state in the same
6 document, quote, "I believe that postulated
7 groundwater flow through a laterally-continuous
8 sand aquifer from the Boise River Valley to the
9 Payette River Valley is not supported by field
10 data. Thus, I believe the drawdown values
11 predicted either by the analytical methods or the
12 numerical model has a high degree of uncertainty,"
13 end quote.
14 In his March 31st, 2009 memo to the
15 North Ada County Groundwater Users Association,
16 Dr. Ralston states, quote, "In my opinion, the
17 conclusions within the IDWR staff memo are closely
18 aligned with my comments. The summary statement
19 in my November 6th, 2008 memo is as follows, on
20 per -- page 5. I conclude that the
21 characterization of the target aquifer system,
22 including predevelopment water balance, has not
23 been complete enough to support an analysis of
24 impacts from full project development."
25 Dr. Ralston continues, quote, "The

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1 IDWR staff memo, Exhibit No. 50, provides
2 additional detail relative to the hydrogeological
3 conceptual model, the prediction of groundwater
4 flow, development and operation of the numerical
5 and prediction of water level responses."
6 In each case Mr. Owsley and
7 Mr. Vincent raise questions relative to the
8 completeness and accuracy of the M3 Eagle
9 information provided in various hydrologic
10 reports.
11 In short, the work done by Dr. Ralston
12 and the staff hydrologists at IDWR mirrored the
13 same point of concern regarding assumptions,
14 inconsistencies, inaccuracies, and errors in the
15 data collected and used for different models
16 defining the aquifer underlying the north Ada
17 County foothills.
18 We believe, based on a close scrutiny
19 of the M3 Eagle data and expert testimony that we
20 have heard in these hearings from a number of
21 geologists, engineers, and other scientists that
22 there is a serious and credible doubt regarding
23 the ability of the Pierce Gulch Sand Aquifer to
24 produce large quantities (sic) of water on a
25 long-term basis without causing injury to

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1 thousands of wells in the area of senior water
2 rights, whether they are in the upper or lower
3 aquifer, as defined by Mr. Squires and other M3
4 Eagle expert witnesses.
5 In these hearings there has been a lot
6 of testimony outlining the fact that actual uses
7 and demand will be significantly less than the
8 23.18 cfs being applied for.
9 Under oath Dr. Steve Holtman testified
10 that an average water use for the project at
11 build-out would be 9 cfs, or 5.8 million gallons,
12 per day. Why then is M3 Eagle asking for almost
13 15 million gallons per day?
14 Regardless of their claims to justify
15 this astonishing number, the fact remains that the
16 water right application is for 23.18 cfs.
17 Should the Department provide such
18 large margins when actual beneficial use appears
19 to be less than 10 cfs?
20 We believe that the Hearing Officer
21 and the Department should also be looking at the
22 amount of other water right applications in their
23 cumulative cfs in queue before the decision on the
24 M3 Eagle Water right application is rendered.
25 Our experts, Norm Young and Paul

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1 Drury, determined that there was over 90 cfs
2 applied for in the Boise Valley in front of the M3
3 Eagle application, Exhibit 821.
4 THE HEARING OFFICER: Okay. Mr. Thornton,
5 I don't recall that evidence coming into the
6 record. And it's evidence that you're now reading
7 into the record.
8 MR. THORNTON: The evidence was accepted by
9 you in terms of the Department of Water Resource
10 records that we entered into the record that added
11 up over 90 cfs, and that was one of the exhibits
12 that was received.
13 MR. HEAD: Was the exhibit number there
14 listed, John?
15 MR. THORNTON: 821. Exhibit 821.
16 THE HEARING OFFICER: Was it received into
17 evidence?
18 MR. THORNTON: I think it's 821. Or also I
19 heard 282.
20 MR. JASON SMITH: I think that's right.
21 MR. THORNTON: He's got a better memory
22 than me.
23 MR. LAWRENCE: The document that was
24 admitted was actually document -- or Exhibit 850.
25 THE HEARING OFFICER: Okay. Well,

1 Mr. Thornton, I have a document that shows water
2 right summaries prepared through a search
3 capability. And I recognize the form has come
4 through the Department's website.

5 I don't have anything in the record
6 about Mr. Young or Mr. Drury or anybody else
7 prepared this, nor did they testify.

8 So again, I hate to interrupt your
9 oral argument, but I think you need to stay well
10 within the facts that were presented in the
11 hearing. Okay?

12 Go ahead.

13 MR. FEREDAY: And Mr. -- I'm sorry to
14 interrupt too. I didn't want to interrupt, but
15 since we're at an interregnum here.

16 THE HEARING OFFICER: Yeah.

17 MR. FEREDAY: Mr. Thornton has that
18 statement about Drury and Young and the statements
19 about dry wells, if this were in a court of law
20 and he were a licensed member of the Bar, I would
21 be on my feet objecting because it is improper
22 argument to mischaracterize the record.

23 THE HEARING OFFICER: Okay. Well, go
24 ahead, Mr. Thornton.

25 MR. THORNTON: My intention is not to

1 mischaracterize the reference at all, and I guess
2 I would usually have -- and I do have usually the
3 same feelings. I've listened to Mr. Fereday's
4 summary. So the last thing I'm trying to do is
5 mischaracterize the reference.

6 THE HEARING OFFICER: Okay. Go ahead.

7 MR. THORNTON: Okay. And this, meaning the
8 90 cfs, applied for in queue prior to M3's
9 application did not even include a single domestic
10 well.

11 In an interagency report by the U.S.
12 Bureau of Reclamation and the Idaho Department of
13 Water Resource Planning Bureau dated January 28th
14 titled "A distributed parameter water budget
15 database for the Lower Boise Valley,"
16 Exhibit No. 217 on page 94, identifies the
17 following:

18 Quote, "Over the course of an average
19 year in the Boise Valley as a whole there is an
20 aquifer storage deficit of about 73,000
21 acre-feet," end quote.

22 This document goes on to state on
23 page 95, "The net groundwater recharge/discharge
24 balances in areas associated with municipal supply
25 wells for a groundwater discharge is concentrated

1 in urban centers, results in large net groundwater
2 losses."

3 Even without accounting for the
4 combined withdrawals of all new residential wells
5 that will come online with natural growth rates,
6 we could have a fully appropriated basin with no
7 room for additional growth of existing cities or
8 other planned communities in the future if much of
9 the current queue along with M3 Eagle is approved.

10 We are concerned that the large
11 groundwater withdrawals needed to supply the M3
12 Eagle development there will be drawn-down effects
13 on the existing aquifer, which will harm existing
14 well owners.

15 And while Idaho Code provides some
16 remedy for a senior water right owner that is
17 harmed by a junior pumper, our concern lies in the
18 unpredictable and nonobjective nature of the,
19 quote, "reasonable pumping level" language that is
20 employed in contested dry well circumstances.

21 This becomes critical when a large
22 group of citizens with private wells find
23 themselves in the impact area of high-capacity
24 wells like M3 Eagle, and each case is based on a
25 subjective process that is open to such a wide

1 range of interpretations.

2 With the potential risk that existing
3 wells will be affected by the M3 Eagle water
4 right, we ask that the Department create a more
5 objective standard with language that creates
6 certainty and protection for the individual well
7 owner in the impact area whose property value and
8 quality of life may be severely impacted.

9 In the matter of application for
10 permit No. 63-32576 we, the protestants, ask the
11 Idaho Department of Water Resource to consider the
12 following, what has been previously identified in
13 an order to dismiss.

14 Idaho Code Section 42-202 refers to an
15 applicant for a public water right to be a
16 municipal provider. M3 Eagle LLC is a proposed
17 planned community that is not located in or
18 contiguous to the city of Eagle.

19 M3 Eagle LLC has not applied for or
20 been approved for any status as a planned
21 community, incorporated city, or any other
22 municipal function within Ada County.

23 M3 Eagle has testified that they
24 currently are not and do not intend to become a
25 municipal water provider. Therefore, we would ask

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1 that the Hearing Officer strictly consider current
2 Idaho Code in determining the legal viability of
3 M3 Eagle's LLC application for a water right as a
4 municipal provider before this key decision is
5 rendered.

6 It would appear that how the
7 Department of Water Resources chooses to define a
8 municipality could result in the Department
9 inadvertently casting itself into the role of the
10 key public entity determining winners and losers
11 on key issues such as where and how future growth
12 will occur, who will benefit, who will be
13 negatively impacted, what is the proper mitigation
14 for those claiming harm, and what competitors may
15 be precluded.

16 By virtue of the nonphased, large
17 magnitude decision on this water right, IDWR may
18 be unintentionally fostering more land and growth
19 speculation of these types of large planned
20 communities.

21 In the matter of application for
22 permit No. 63-32576, we, the protestants, ask the
23 Department of Water Resource to consider the
24 following that has been previously identified in
25 an order to dismiss.

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1 To date, M3 Eagle LLC has not provided
2 the financial information that is required of an
3 applicant attempting to obtain a municipal water
4 right as stated in Idaho Code Section 42-203(a).

5 We believe the intent of this statute
6 in this case is to put the burden of proof on the
7 applicant, M3 Eagle, to show the State of Idaho
8 and the Hearing Officer that they have financial
9 resources, financial commitments and capabilities
10 to successfully finance, develop, and put to
11 beneficial use groundwater owned by the State of
12 Idaho.

13 M3 has provided virtually no
14 documentation demonstrating financial wherewithal
15 and is completely lacking in satisfying this
16 important burden of proof.

17 The economy, capital markets, in
18 general, and the real estate markets in particular
19 have dramatically negatively changed since M3
20 filed this application in 2006 and may stay
21 impaired for some time.

22 IDWR and interested parties have no
23 idea how these conditions may have or will impact
24 M3's financial capabilities.

25 Other events outside of M3's control,

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1 such as severe or protracted general economic
2 conditions or poor performance of other
3 investments in the pension plan supplying M3's
4 equity capital may impact M3's ability to finance
5 or complete the project as envisioned.

6 It is important that the citizens of
7 Idaho and the Idaho Department of Resource know
8 who it is doing business with. M3's financial
9 viability, financing sources, capability and
10 contingency plans, and how each may be impacted by
11 continued stressed economic conditions should be
12 thoroughly understood.

13 The internal unaudited selective
14 financial statements provided to IDWR are for M3
15 Eagle LLC and not the parent company M3 Companies.
16 Why is this?

17 IDWR and the protestants and the
18 public need a comprehensive understanding of who
19 we may be entering into a long-term relationship
20 with.

21 M3 Eagle needs to provide detailed,
22 certified, audited financial information for the
23 parent company as well as financing and other
24 operating plans and contingency plans and proof of
25 financing commitments demonstrating capability to

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1 reasonably complete a project or portion of a
2 project of this magnitude, as well as the
3 potential impact on the community.

4 We believe that IDWR should not grant
5 any water right to M3 for a longer term than M3's
6 ability to demonstrate by providing written
7 irrevocable financing commitments from a reputable
8 financial institution in an amount and for a term
9 adequate to complete whatever portion, if any, of
10 the requested water right IDWR may choose to
11 grant.

12 M3 Eagle LLC is requesting a water
13 right for a 30-year residential development plan,
14 when the Department should only be considering a
15 water right amount for M3 and that they can put to
16 beneficial use in the reasonably foreseeable
17 future in accordance with Idaho Code 42-202(b)(3).

18 While this provision was enacted for
19 the purpose of assisting a city or municipality in
20 its long-term planning, it has, in reality, turned
21 out to be an imperfect statute that creates more
22 problems than it was meant to solve.

23 Some of the unintended consequences
24 can be speculation on the part of developers of
25 large planned communities like M3 Eagle or the

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1 chaos that follows an entity that is awarded this
2 type of water right and then is not able to
3 complete its 20- to 30-year plan, as in the recent
4 case as a nonmunicipal entity like the bankrupt
5 Tamarack Resort.
6 M3 has stated the need for a full
7 water right appropriation under the 1996 future
8 needs and planning horizon statute to assist in
9 the economic viability of their planned community.
10 They have not demonstrated, other than
11 for speculative economic purposes, the need for
12 the entire 23.1 cfs for the first, second, or
13 third or fourth phase of the project.
14 M3 has testified that they will be
15 building in five phases over 30 years -- over a
16 30-year planning horizon.
17 M3 has testified to the fact that
18 each -- that as each phase is completed, they will
19 convey the water right amount and associated water
20 supply system to the City of Eagle for the
21 developer and the City to determine its use on M3
22 Eagle property as well as other project areas --
23 refer to Exhibit No. 58.
24 In our judgment, the pre-annexation
25 agreement between the City of Eagle and M3 Eagle

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1 LLC has many loopholes for allowing the use of the
2 M3 water right to be used on other properties
3 outside of the M3 development.
4 M3 has stated under oath in these
5 hearings that they will confer any water rights
6 they may acquire be permitted to the City of Eagle
7 for the completion of certain aspects of their
8 development per their pre-annexation and
9 development agreement with the City of Eagle,
10 Exhibit No. 58.
11 We have also heard under oath the
12 testimony of former Eagle City Council member
13 Scott Nordstrom and Stan Bastian and their
14 assertion of the same understanding. But when
15 asked under oath about who will bear the
16 responsibilities and liabilities that will be
17 conferred to the citizens of the city of Eagle for
18 the cost of the long-term monitoring sites as well
19 as cost of mitigation for senior water right
20 owners that may be injured as a result of M3 Eagle
21 pumping, neither M3 Eagle or former council
22 members Nordstrom or Bastian could provide an
23 answer.
24 This would leave one to believe a
25 large cost and liability may be awaiting future

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1 council members and the City of Eagle.
2 As we stated at the opening day of the
3 hearings in April, the intention of our group has
4 been to work with all parties in an open and
5 honest manner to obtain a practical way for
6 current well owners and the M3 Eagle development
7 to go forward in a way that serves both with no
8 injury -- with injury to none.
9 When we filed our protest paperwork,
10 we stated that we would be willing to resolve our
11 protest with M3 Eagle if they could offer up
12 competent, unbiased and peer-reviewed evidence to
13 show that M3's groundwater withdrawals would not
14 injure our senior water rights.
15 In the same public document, we
16 offered to resolve our protest if a combination of
17 well monitoring and phasing of groundwater
18 withdrawals of no more than 5 cfs were granted at
19 any one time.
20 This type of resolution model has
21 worked for several other large developers as they
22 work to mitigate differences with well owners in
23 the north county area. Why not M3?
24 In summary, we are not convinced that
25 the underlying aquifers in north Ada County are

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1 characterized adequately enough to understand key
2 factors like where and how much recharge is taking
3 place, where and how much inter-aquifer
4 communication impact there is, and how much
5 long-term capacity there will be for well owners
6 of both shallow and deep wells.
7 We believe the Department has done a
8 great job with the human and technical resources
9 available to present the problems of so many
10 unknown aspects of the aquifers in this area.
11 We appreciate the opportunity to have
12 presented information that we believe is important
13 for the Department to consider and that we believe
14 is relevant and important in the protection of not
15 only the senior water rights of the 37
16 protestants, but for the good and protection of
17 the several thousand well owners in north Ada
18 County that depend on their wells to provide water
19 to sustain their homes and livelihoods every day.
20 Thank you. North Ada County
21 Groundwater Users Association's David Head and
22 John Thornton.
23 THE HEARING OFFICER: Okay.
24 MR. THORNTON: And, Mr. Hearing Officer,
25 what I would like to do is to have our closing

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1 statement as well as actually our opening
2 statement, which I failed to do, to have entered
3 in as exhibits, if I could, to the record.
4 THE HEARING OFFICER: Well, normally that
5 would not be the case, Mr. Thornton. I think what
6 I would do is if you want to submit it as an
7 attachment to the closing brief, I'll allow you to
8 do that.
9 MR. THORNTON: And that would be fine.
10 Both the opening and closing?
11 THE HEARING OFFICER: Well, whatever
12 information you want to submit with that brief.
13 MR. THORNTON: Okay. Thank you.
14 THE HEARING OFFICER: Okay.
15 Mr. Smith, closing arguments?
16
17 CLOSING ARGUMENT
18 BY MR. ALAN SMITH:
19 Thank you, sir.
20 I'm not going to tell you that I can
21 be brief. Nothing about this hearing has been
22 brief. And maybe when you compare my final
23 argument to the 16 or 17 days and four months
24 we've been here, it will look brief.
25 If I misstate anything -- and I don't

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1 recall all of this over four months, three or four
2 months and 17 -- 16, 17 hearings, but you take
3 your memory of it and your recollection and
4 disregard what I say, because I want you to decide
5 this on what you recall, not what I may say.
6 I appreciate the opportunity to appear
7 before you. I'm honored to have the chance to
8 present my views and those views of many of the
9 protestants.
10 This extended hearing has been more
11 stress, I admit, on a 76-year-old man than he
12 needs. I've enjoyed the opportunity to meet lots
13 of very likeable and interesting people on both
14 sides of the fence, and also among those just
15 observing.
16 I think IDWR has some fine, young
17 staff hydrologists, Messrs. Vincent, Owsley, and
18 McVay. I hope you can keep them with the
19 legislature not wanting to give much in the way of
20 salary raises, and even sometimes talking about
21 cutting salaries due to budget constraints.
22 I do believe some of the best evidence
23 you had before you is from your own staff. They
24 are the only expert witnesses not being paid.
25 These protestants, unlike M3, are not

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1 in this for profit. In fact, the time, effort,
2 and substantial amount of money expended by the
3 protestants has been an economic detriment.
4 I only speak for the Eagle Pines
5 group, however, I think I also speak for the North
6 Ada County group when I state as follows: The
7 protestants want what is right here. It is not
8 right that local property owners with domestic and
9 irrigation wells and senior water rights be put to
10 the insensible, unfeeling, and unreasonable
11 economic and emotional detriment of having to
12 deepen or replace wells. And once may not be
13 enough if we become involved in a race to the
14 bottom of the aquifer.
15 These protestants do not have large
16 investment funds backing them as does the
17 applicant. These protestants are undertaking all
18 of this to protect their homes and their property
19 values and their water rights. We do not wish to
20 see our property decline in value because of
21 another groundwater crisis like we have on the
22 Snake River Plain.
23 Nevertheless, we understand where
24 Mr. Brownlee is coming from when he says taking
25 water rights in phases causes M3 planning

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1 concerns.
2 However, we feel that is totally
3 insignificant when you consider the impacts on
4 other well owners and on the aquifers, both
5 shallow and deeper. Any economic benefit from the
6 M3 project must be balanced against the economic
7 detriment that some 2,000 well owners with senior
8 water rights may and will suffer because of the M3
9 project, and certainly what potential detriment
10 can occur to the shallow and deeper aquifers and
11 eventually to the entire north Eagle groundwater
12 area.
13 There would very likely be a lot more
14 protestants if they had not been led to believe by
15 M3 PR work that this project would not affect
16 them. IDWR and the Idaho citizen well owners have
17 been told that groundwater to be withdrawn by M3
18 Eagle will be from subsurface flow that has
19 already departed the Boise Basin on its way to the
20 Payette Basin so the impacts to existing area
21 water users near Eagle are predicted to be small.
22 The key qualifier in that quote is, quote, "are
23 predicted," unquote, to be small.
24 We know from several other
25 hydrologists, including Petrich, Urban, Ralston,

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1 Benson, and Owsley that the Payette flow theory
 2 may not be true and correct. Nevertheless, this
 3 statement about water flow from the Boise Basin to
 4 the Payette Basin was used to convince concerned
 5 well owners, both domestic and irrigation, that
 6 they need not be concerned even though there was
 7 very little data to support a theory that was
 8 represented to be factual to the well owners and
 9 also to IDWR.

10 Is this not a bit disingenuous to the
 11 citizens of Idaho and to the Idaho Water Resources
 12 Department? This red herring, as M3 now calls the
 13 Payette River flow, was not an issue raised by the
 14 protestants. It was first raised by M3 back in
 15 May of 2007.

16 How do we square these assurances that
 17 impacts to other well owners will be small,
 18 slight, or of no effect with other statements,
 19 including: One, drawdowns will reduce or
 20 eliminate artesian flows; two, wells closer to the
 21 M3 site would be impacted to a larger extent;
 22 three, water levels would likely be lowered in
 23 some of the domestic wells under long-term
 24 pumping. That's -- this is all from the second
 25 amended application, tab 4.

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1 It goes on, item 4, some wells will
 2 have to be deepened or replaced. Item 5, it may
 3 take months to decades for large drawdowns to
 4 appear. Item 6, pumping from the deeper aquifer
 5 will eventually affect the shallow aquifers and
 6 vice versa. Seven, the PGSA water levels appear
 7 stable at the current level of groundwater
 8 withdrawal in the Eagle area. However, M3 plans
 9 to change the current level of groundwater
 10 withdrawal substantially.

11 No. 8, the actual extent of any future
 12 impacts cannot be truly known until actual pumping
 13 wells are in place. Is that not a little bit
 14 late? Once these high-capacity wells are pumping,
 15 it's all over. We know from our own experience
 16 these pumps, and the high capacity pump
 17 especially, take all the water they are designed
 18 to handle and other water users get whatever's
 19 left.

20 Now, M3 says they will protect our
 21 senior water rights, they will monitor groundwater
 22 levels in wells, well flow rates, and total
 23 volume. Isn't this somewhat like putting the fox
 24 in charge of the henhouse?
 25 M3 will absolutely mitigate any

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1 unreasonable damaging effects resulting from its
 2 water development, such as lowering a pump or
 3 deepening the well. Again, we have a key
 4 qualifier here, quote, "unreasonable damage,"
 5 unquote.

6 Disputes about what is unreasonable
 7 damage, who's going to decide that? "Unreasonable
 8 damage" is whatever a judge decides it is. So you
 9 end up in court.

10 M3 will also, one, limit the size of
 11 swimming pools; two, regulate watering days;
 12 three, limit the size of yards; four, require
 13 water-smart homes; five, control water use through
 14 water budgets and water rates as an incentive to
 15 use less.

16 There are a couple of catches to all
 17 of this, however: One, M3 will seek an additional
 18 water -- groundwater right to water vineyards;
 19 two, the reuse water stored in these ponds will be
 20 supplemented from groundwater diversions from
 21 wells as necessary.

22 And we would submit that until this
 23 project gets close to full build-out where there
 24 is a substantial amount of reuse water, there's
 25 going to be a lot of it, a lot of supplementation

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1 of these ponds.

2 Another question we have is who
 3 controls all of this once M3 sells off the
 4 property to developers or homeowners and takes its
 5 profits and goes back to Arizona?

6 M3 intends to convey its water right
 7 to the City of Eagle, if annexed, or to contract
 8 with another appropriate water provider, such as a
 9 private utility to actually own or operate this
 10 water right.

11 Here are the things we don't know:
 12 What happens to all these M3 commitments once they
 13 are gone? Two, are any of them binding on M3's
 14 successors and assigns, including the City of
 15 Eagle, any other water providers, or any
 16 homeowners' associations? Three, will any
 17 restrictions on conditions placed on the water
 18 right by IDWR be strictly enforced?

19 Will IDWR take over monitoring of how
 20 much groundwater volume is being sucked from the
 21 aquifer after M3 is no longer there?

22 What happens if it becomes clear that
 23 the aquifer is being mined? Will pumping be
 24 curtailed? And will it be enforced? How many
 25 wells will be on the M3 property?

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1 We have heard from 4 to 15, plus the
2 12 existing wells that are already there. Can
3 this aquifer stand it?
4 And this is in addition to the other
5 water rights, and from Farmers Union Canal and so
6 forth.
7 What size of well casings will be
8 installed there? What capacity of pumps? What is
9 the peak diversion and for how long? What will be
10 the effects of long-term pumping by high-capacity
11 wells and deeper wells, what will that effect be?
12 Are we going to find ourselves in a race to the
13 bottom of the aquifer?
14 This vital and critical recharge is
15 like the Loch Ness monster; if it's there, nobody
16 has found it.
17 We have evidence that this aquifer is
18 almost exclusively ancestral river water from
19 Glanzman and Squires and that it may be
20 thousands -- tens of thousands of years old.
21 Here's what we do know. This north
22 Eagle area is replete with faults under the
23 ground. The hydrological impact of these faults
24 is poorly understood, but are an important
25 influence on groundwater flows in the Boise area

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1 aquifers. That's from Hutchings and Petrich in
2 2002 at page 2.
3 The north Eagle subsurface area is
4 complex, according to Owsley and Vincent. Water
5 levels in the north Eagle area are declining,
6 according to Owsley, Vincent, and McVay.
7 Pumping in the PGSA will likely
8 eventually impact the majority of area well
9 owners. Full impacts on other water users, many
10 with senior water rights, is not known. The
11 effects of long-term pumping by high-capacity
12 wells is not known, according to Mr. Ralston.
13 The long-term sustainability of the
14 aquifer is not unlimited, and we don't believe it
15 is or we wouldn't be here. Without recharge,
16 groundwater withdrawals at even a modest rate will
17 result in aquifer mining. That should be clear to
18 anybody. Owsley and Vincent mentioned that in
19 their memo.
20 The recharge mechanisms are not well
21 defined. Recharge rates to the deeper regional
22 aquifers are limited. Most recharge is to the
23 shallower aquifer zones, and it does not reach the
24 lower zones, according to Petrich and Vincent and
25 Owsley.

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1 Groundwater originates almost
2 exclusively from ancestral Boise River water. It
3 is difficult to distinguish the PGSA from alluvial
4 aquifers and aquitards. The Boise Basin to
5 Payette Basin flow is not certain, Owsley,
6 Vincent, Newton, Urban, Ralston.
7 In conclusion, and I'm sure you
8 thought I'd never get there, so much of these
9 studies of the aquifer are based on assumptions,
10 presumptions, calculations, estimates, and
11 outright conjecture and speculation that one
12 cannot reach any sure conclusion about the impact
13 on other water users and on the aquifers caused by
14 long-term pumping with high-capacity wells as
15 proposed in the M3 application.
16 Some of the data may be great, but
17 often it's the subjective conclusions you draw
18 from that data that may be flawed. The recharge
19 is not known, only M3's --
20 THE HEARING OFFICER: Just a minute,
21 Mr. Smith. We need to change the tape. Sorry to
22 interrupt your chain of thought.
23 MR. ALAN SMITH: I don't have one. At my
24 age, it varies from minute to minute.
25 THE HEARING OFFICER: Okay. We are

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1 recording.
2 MR. ALAN SMITH: The recharge is not known.
3 Only M3's paid experts, Utting and Squires, have
4 described the recharge as robust.
5 Now, Dr. Wood did somewhat
6 uncomfortably describe it as robust on rebuttal
7 evidence. None of the other experts would even
8 hazard a guess, and at first neither did Dr. Wood.
9 There is so much uncertainty about
10 this application that the Water Resources
11 Department must proceed cautiously in granting any
12 water right to this applicant or any others.
13 We believe this aquifer is already
14 under stress, and we do not want to see another
15 Snake River Aquifer problem. The only prudent
16 path is one lined with caution.
17 We can disagree all day long about
18 whether wells have gone dry or not. These well
19 owners out in this north Eagle area, who also hold
20 senior water rights, they know what's going on out
21 there. We are seeing wells that are having to be
22 replaced at a rate we've never seen before.
23 Now, you can say it's all because
24 these wells are 30-years-plus old, but you can't
25 convince us that that's what the problem is.

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1 Let's go to this hot weather in the
2 summer. 20 days of 90 degrees. At M3's peak
3 demand, that's 20 days, that's 400 of these tanks
4 (indicating). 30 days, that's 600 of these tanks.
5 Would that aquifer stand that, and if so, for how
6 long?
7 This entire M3 application process has
8 not been made in good faith. M3 has played "hide
9 the ball" all through this hearing, not only to
10 the protestants, but also to the Department of
11 Water Resources. This financial information is
12 just one of those.
13 They have ignored the municipal
14 provider concept and presented absolutely no proof
15 to show that M3 is a municipal provider because
16 they have none.
17 Next, M3 has ignored the Department
18 water appropriation rules by failing to file any
19 certified financial statement or present any proof
20 in their case-in-chief about their financial
21 situation.
22 Is this in the spirit of fairness and
23 good faith? M3 has attempted to skirt around the
24 municipal provider requirements and the financial
25 requirements that it knows it cannot measure up

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1 to. Speculation and conjecture is apparent with
2 the financial information. If this does not
3 demonstrate bad faith, then I can't imagine what
4 does.
5 Section 42-201 of the Idaho Code
6 contains 22 pages, over 9,000 words, but M3 wants
7 you to take four words from that blathering
8 statute and conclude that these four words, quote,
9 "reasonably anticipated future needs," throws the
10 door wide open to anyone and everyone and any type
11 of entity, developer, or community -- planned
12 community.
13 You and the Department cannot do that
14 and expect it to stand. Courts have repeatedly
15 held that statutes must be viewed as a whole, and
16 especially so if you're trying to determine
17 legislative intent. And to draw four words out of
18 a 9,000-word statute and say that gives you the
19 right and throws the door wide open is ridiculous.
20 It is clear to us, and it should also
21 be to IDWR, that M3 Eagle is not entitled to a
22 municipal water right under 42-202(b)(5)(A), (B),
23 or (C). They cannot and do not qualify as a
24 municipal provider.
25 And also, the law places some

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1 heavily -- heavy statutory duties on the
2 Department when it states it shall be the duty of
3 the Department to carefully examine all of the
4 evidence in relation to such final proof. And if
5 the Department is satisfied that the law has been
6 fully complied with and the director determines
7 the use otherwise satisfies the definitions and
8 requirements specified in this chapter for such
9 use.
10 I have here a copy of Baron versus
11 Idaho Water Resources, 135 Idaho, where the Idaho
12 Supreme Court thoroughly discusses the statutory
13 duties of the director and the Department.
14 This statutory language again states
15 that it is the duty of the Department to examine
16 all of the final proof and the definitions and
17 requirements of Title 42 and to be sure that all
18 of those requirements have been met.
19 If we are looking to legislative
20 intent, we will find a pretty clear indication of
21 what that is by examining 42-222 of the Idaho
22 Code, which deals with the application to change
23 the permit over to a municipal purposes use.
24 It states, "The municipal provider
25 shall provide the Department sufficient

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1 information and documentation to establish that
2 the applicant qualifies as a municipal provider,
3 consistent with the definitions and requirements
4 specified in this chapter." Those definitions and
5 requirements are set out in 42-202(b)(5)(A), (B),
6 and (C).
7 That Section 42-222 (sic) goes on to
8 state that "The director shall examine all of the
9 evidence and shall approve the change in whole or
10 in part, provided no other water rights are
11 injured thereby, and it is in the local public
12 interest as defined in 42-202(b) of the Idaho
13 Code."
14 We do not feel M3 Eagle qualifies as a
15 municipal provider. They are nothing more than a
16 planned community, which is totally separate and
17 miles away from the nearest municipalities of
18 Eagle, Star, or Emmett.
19 The only sensible and logical
20 conclusion of law that the Department can make is
21 to deny a municipal water right, grant a small
22 water right, 5 cfs, with five years to put that
23 water right to a beneficial use, and maybe ten
24 years with an extension.
25 Other studies regarding the aquifer

1 will be completed by then, and Water Resources
2 will have a much better idea of what water can be
3 allocated in the Eagle/Star area without adverse
4 effects on the aquifer, water levels, and on
5 senior water rights. I thank you.

6 THE HEARING OFFICER: Okay. Thank you,
7 Mr. Smith.

8 Mr. Edwards.

9
10 CLOSING ARGUMENT

11 BY MR. EDWARDS:

12 Mr. Hearing Officer, I would like to
13 thank you, the IDWR for providing this hearing. I
14 have not participated vocally very much on it.

15 But I would also ask IDWR to make a
16 decision on this hearing utilizing all facts
17 presented from both sides and appropriate laws
18 that pertain to this type of water permit.

19 I'm looking forward to the results of
20 this hearing. Thank you.

21 THE HEARING OFFICER: Okay. Thank you,
22 Mr. Edwards.

23 Okay. Let's talk about a briefing
24 schedule. I also want to go through an exhibit
25 list with everybody to make sure we have

1 alternative gives the parties an opportunity to
2 respond to whatever is written by the applicants.

3 MR. ALAN SMITH: All right.

4 THE HEARING OFFICER: So I guess my
5 preference is to have simultaneous briefs.

6 So how long do we need for
7 preparation?

8 Mr. Fereday?

9 MR. FEREDAY: Well, given the
10 circumstances, there's a large record, there's a
11 lot of other things that have piled up in the
12 meantime, perhaps 45 days from now for the
13 opening.

14 THE HEARING OFFICER: Protestants?

15 MR. THORNTON: I mean --

16 MR. ALAN SMITH: I don't know about 45
17 days. I would remind the Hearing Officer that we
18 don't have full-time legal secretaries like
19 Mr. Fereday does.

20 And I'd like to know what particular
21 issues you want briefed. Is it just the legal
22 points that have already been raised, or are we
23 going back into all this hydrology?

24 THE HEARING OFFICER: Well, I don't want a
25 significant re-argument of the facts. I mean

1 everything. I don't know whether we do that on
2 the record or off.

3 Maybe we ought to go off the record
4 for a little bit to do that and then just come
5 back on.

6 Let's talk about a briefing schedule
7 and how we want to go about submitting those.

8 Do we want simultaneous briefs with an
9 opportunity to respond? Or do we want to have
10 applicant submit, protestants, and then
11 applicant's reply? What's the pleasure of the
12 parties?

13 Mr. Fereday?

14 MR. FEREDAY: I think it's more efficient
15 to do simultaneous briefs with an opportunity to
16 reply, if either side wishes to, simultaneously.

17 THE HEARING OFFICER: Okay.

18 Is that fine with the protestants?

19 MR. ALAN SMITH: I would prefer the latter.
20 They have the burden of proof. They should file
21 the opening brief, and then we should have an
22 opportunity to respond, and they'll have an
23 opportunity to respond to our brief.

24 THE HEARING OFFICER: Well, either method
25 we could go through. I -- Mr. Smith, the other

1 those are in the record.

2 If there are particular facts that
3 would go to an identified legal issue -- and we
4 could talk about that, and if you want to visit
5 about specific concerns that I have, I'm happy to
6 do that before we establish the briefing schedule,
7 if you want to.

8 You're sort of hinting at that,
9 Mr. Smith.

10 MR. ALAN SMITH: Well, Mr. Fereday?

11 THE HEARING OFFICER: Well, let's go
12 through the criteria just quickly.

13 I will look hard at the record and
14 scour it for evidence regarding injury and
15 regarding sufficiency of the water supply. I
16 think both of those are important. I think
17 particularly the issue of sufficiency of water
18 supply is one that's of utmost importance.

19 And some of that has to do with
20 existing -- either existing or earlier in time
21 water rights that may be filed I think the
22 Department needs to take into account that would
23 be within this area or close proximity to.

24 You know, some of it has to do with
25 the location of the M3 property, its position with

1 respect to the aquifer, and that aquifer as it
 2 extends to other communities, and the public
 3 interest -- and there's a crossover there that the
 4 Department needs to consider in reviewing the
 5 water supply as it exists.
 6 So I think the review just needs to go
 7 beyond -- or will need to go beyond just looking
 8 at sufficiency of supply directly below M3
 9 properties, but needs to go to the position of the
 10 aquifer. And when I say that, in the tilting
 11 nature of the aquifer, how granting a water right
 12 of this magnitude may affect even future
 13 appropriations in the down tilt. So I guess
 14 that's one thing that I may look at.
 15 With respect to financial resources
 16 and speculation, I guess my initial inclination --
 17 and the protestants can argue as they may, but the
 18 ability of any applicant before the Department of
 19 Water Resources to show full financing of a
 20 project is -- is probably never there. Maybe on
 21 smaller projects that's the case.
 22 So I think the standard, when it says
 23 "Does the applicant have sufficient financial
 24 resources to construct the proposed project?" I
 25 guess I would agree that the standard needs to be

1 is it reasonably likely that that financing can be
 2 had and established.
 3 So again, I'll have to look at that
 4 standard as the -- against the facts of the proof
 5 that's there.
 6 I don't want to talk about the --
 7 necessarily about the factor of speculation,
 8 delay, or in bad faith. But to the extent you
 9 want it argue it, that can be done.
 10 And I think there is a public-interest
 11 issue related to the -- and perhaps it dovetails
 12 into the issue of qualifying as a -- as a
 13 municipal provider.
 14 And I think therein, Mr. Fereday, I
 15 think there's a significant legal issue, because
 16 to seek a water right for reasonably anticipated
 17 future needs, I read the statute to say that the
 18 applicant needs to qualify, and needs to qualify
 19 at the time the application's filed, or at least
 20 needs to qualify at the time the Department
 21 considers the application.
 22 And I have pondered various, I guess,
 23 metaphorical circumstances where the word
 24 "qualify" would be applied, all the way from track
 25 meets to admission to college, to obtaining a

1 driver's license, to all kinds of circumstances
 2 where a person or an entity must qualify.
 3 And I guess right now it seems to me
 4 that qualification means that you run in the
 5 qualifying heat and you make it into the final.
 6 And that a person can't come to the judges and
 7 say, "Well, I finished fourth. I was supposed to
 8 finish second, but I can finish in the top three,
 9 so I qualify."
 10 And so I guess I struggle with the
 11 fact that it imposes a standard of qualification
 12 that is in the present tense, and that it does
 13 not, in my opinion, refer to something that may
 14 happen in the future.
 15 And anyway, it's something that I will
 16 struggle in the writing of a decision. It seems
 17 to me it is a major legal issue, and one that the
 18 decision may turn on.
 19 Conservation of waters of the state of
 20 Idaho, I'm not sure it's a significant issue under
 21 the circumstances, but the parties can argue that.
 22 Okay. I've thrown out some things.
 23 Mr. Thornton?
 24 MR. THORNTON: I need to ask for -- I
 25 believe you were asking for a time frame for the

1 briefs to be submitted, and I have a better idea
 2 of what you want to see, what would be appropriate
 3 for a brief.
 4 I think we've all talked and agreed
 5 that this has been a long process. What strikes
 6 me as pretty amazing is to hear Mr. Fereday ask
 7 for 45 days when we talked about wanting to get
 8 this right -- quite frankly, I don't understand
 9 why it's completed in -- and even though we don't
 10 have any kind of staff, but just to complete that
 11 in two weeks, three weeks. I mean 45 days
 12 seems -- I could probably rewrite, if I had the
 13 wherewithal, everything that's been said in that
 14 45-day time period. It seems ridiculously long to
 15 me.
 16 THE HEARING OFFICER: All right. Well, I
 17 have one protestant arguing it's too short, one
 18 protestant arguing it's too long.
 19 MR. ALAN SMITH: You can't win.
 20 THE HEARING OFFICER: You know, I would not
 21 normally grant that long a period of time. But
 22 the expiration of that time period, Mr. Thornton,
 23 works to the disadvantage of the applicant, not
 24 the protestants, at least as far as I can tell.
 25 I'd like to set this, Mr. Fereday, on

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1 a seven-day schedule, so if we could call it 42 or
2 48 -- or 49, I guess.
3 MR. FEREDAY: 42.
4 THE HEARING OFFICER: 42 days. And I
5 neglected to bring a calendar in.
6 What day would that place us? Anybody
7 have a calendar?
8 MR. ALAN SMITH: What kind of a time
9 schedule do you want on the reply briefs?
10 THE HEARING OFFICER: Okay. So today is
11 the 30th. So one --
12 THE AUDIENCE: Be sure you're in 2009, not
13 2010. It's a two-year calendar.
14 THE HEARING OFFICER: 7, 14, 21, 28 -- I
15 show September 10th.
16 MR. JASON SMITH: September 10th?
17 MR. FEREDAY: Yes.
18 THE HEARING OFFICER: Okay.
19 MR. THORNTON: And, Mr. Hearing Officer,
20 are these --
21 THE HEARING OFFICER: Let's make it --
22 MR. THORNTON: I'm sorry.
23 THE HEARING OFFICER: Let's make it
24 September 11. It's a Friday.
25 MR. JASON SMITH: Friday. Okay.

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1 September 11th.
2 THE HEARING OFFICER: September 11.
3 MR. JASON SMITH: We will remember that
4 day.
5 MR. FEREDAY: And then the replies and
6 responsive briefs?
7 THE HEARING OFFICER: How about
8 October 2nd?
9 MR. FEREDAY: Okay.
10 MR. ALAN SMITH: October 2nd?
11 THE HEARING OFFICER: Yeah.
12 MR. ALAN SMITH: You realize that 9/11 is
13 what the date you're setting for those openings?
14 MR. JASON SMITH: Bad history.
15 MR. ALAN SMITH: That's all right. I'm
16 just joking.
17 THE HEARING OFFICER: I'd set it on the
18 13th, but that doesn't fall on a Friday.
19 MR. ALAN SMITH: No, that's even worse.
20 MR. FEREDAY: So the dates are
21 September 11, October 2?
22 THE HEARING OFFICER: Yeah.
23 MR. FEREDAY: And would the Hearing Officer
24 entertain proposed findings of fact?
25 THE HEARING OFFICER: You know, I'd prefer

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1 not.
2 MR. FEREDAY: Okay.
3 THE HEARING OFFICER: If you want to submit
4 them.
5 MR. FEREDAY: Okay.
6 MR. THORNTON: And I'm not sure what
7 finding of fact is. Could you help me? I'm sure
8 we won't inadvertently do that, but I'm not sure
9 what that means.
10 THE HEARING OFFICER: Well, sometimes the
11 parties will propose findings of fact that the
12 Department -- or the Hearing Officer can then
13 incorporate into the decision.
14 MR. THORNTON: Kind of a legal/factual type
15 manner, is that --
16 MR. ALAN SMITH: It's been my experience
17 they're never adequately done anyway, and you've
18 got to go back and do it all yourself, so...
19 THE HEARING OFFICER: Generally, they have
20 a marked slant toward the position of the party
21 that's drafting the findings of fact. So, you
22 know, if the parties want to spend time at it,
23 they can. But I generally don't refer much to
24 them when they come in.
25 MR. THORNTON: And, Mr. Hearing Officer, is

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1 there a set format that we need to have these
2 briefs? I don't know if there's like examples
3 that we should follow, or we can just get together
4 with ourselves and -- I don't know if there's a
5 formal kind of process -- or an outline, not a
6 process, that we should follow that would be
7 helpful to all parties.
8 THE HEARING OFFICER: Well, the only thing
9 that I would tell you is that I would prefer to
10 have a memorandum or a brief that is largely based
11 on a recitation of the law.
12 MR. THORNTON: Okay.
13 THE HEARING OFFICER: Not a recitation of
14 facts that were presented.
15 MR. THORNTON: Okay.
16 THE HEARING OFFICER: I mean, for instance,
17 Mr. Thornton, your closing argument you wanted to
18 submit that, so I said, "Okay. Well, that's
19 fine."
20 But the closing argument that you gave
21 was extensive with respect to facts. And I don't
22 need, in my opinion, an enlargement of that.
23 If there are specific facts that
24 pertain to a legal argument, looking at the
25 criteria that the Department and the Hearing

1 Officer needs to consider, and you find points and
 2 authorities, those would be legal cases primarily
 3 or, you know, quotes from treatises, or the other
 4 thing that I might look for here is legislative
 5 history, particularly related to the requirement
 6 that an entity or an applicant qualify as a
 7 municipal provider, that kind of information is
 8 helpful to me.
 9 MR. THORNTON: Okay.
 10 THE HEARING OFFICER: But I want it to be
 11 primarily -- or heavily weighted on the legal
 12 points and authorities side.
 13 MR. THORNTON: All right.
 14 THE HEARING OFFICER: Otherwise, it will
 15 just be so long for me to go through it.
 16 MR. THORNTON: Okay. So when these are
 17 offered up, is that where we certify that all
 18 copies were sent to all parties, or do we send
 19 them just to you?
 20 THE HEARING OFFICER: No. All documents
 21 are sent to all parties.
 22 MR. THORNTON: Similar to what we've been
 23 doing, then?
 24 THE HEARING OFFICER: Yes.
 25 MR. THORNTON: Okay.

1 MR. ALAN SMITH: You'll need to stress
 2 those points, John, that he was just talking
 3 about.
 4 MR. THORNTON: Yeah.
 5 THE HEARING OFFICER: Okay. Other things
 6 we need to talk about?
 7 I'd like to go off the record and just
 8 go through the exhibit list, because we have so
 9 many of them. I want to make sure we have all of
 10 those exhibits.
 11 So anything else we need to talk about
 12 at this point on the record?
 13 MR. FEREDAY: I don't think so.
 14 THE HEARING OFFICER: Okay. Thanks. Let's
 15 go off just for a minute.
 16 (Discussion.)
 17 THE HEARING OFFICER: Okay. We have
 18 attempted -- we're back on the record.
 19 We've attempted to inventory the
 20 exhibits, and that inventory has been incomplete.
 21 There are some documents that we need to locate.
 22 And so consequently, I've committed to send out a
 23 summary to the parties so that they have a full
 24 list of at least what we show as exhibits admitted
 25 into the record.

1 And following the distribution of that
 2 summary, the parties can respond if there are any
 3 disagreements or anomalies. And if there are,
 4 then we'll consult the record to make that
 5 determination.
 6 Okay?
 7 MR. FEREDAY: Okay.
 8 THE HEARING OFFICER: All right. With
 9 that, the record will close. I appreciate the
 10 assistance of all parties.
 11 MR. FEREDAY: Thank you.
 12 MR. ALAN SMITH: Thank you.
 13 (Proceedings concluded at 4:22 p.m.)
 14 -oOo-

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REPORTER'S CERTIFICATE

I, JEFF LaMAR, CSR No. 640, Certified
Shorthand Reporter, certify:

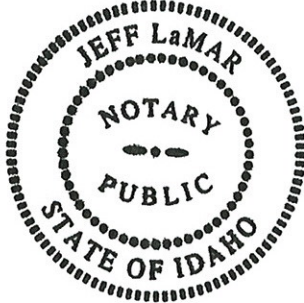
That the foregoing proceedings were taken
before me at the time and place therein set forth,
at which time the witness was put under oath by me.

That the testimony and all objections made
were recorded stenographically by me and transcribed
by me or under my direction.

That the foregoing is a true and correct
record of all testimony given, to the best of my
ability.

I further certify that I am not a relative or
employee of any attorney or party, nor am I
financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal
this 10th day of August, 2009.



A handwritten signature in black ink, appearing to read "Jeff Lamar", written over a horizontal line.

JEFF LaMAR, CSR NO. 640
Notary Public
Eagle, Idaho 83616

My commission expires December 30, 2011

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