

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 XI  
(Pages 2372 through 2607)

BEFORE  
HEARING OFFICER: GARY SPACKMAN

Date: June 5, 2009 - 9:00 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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1 APPEARANCES:

2

3 For M3 Eagle LLC:

4 GIVENS PURSLEY LLP

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6 MR. MICHAEL P. LAWRENCE

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9 Boise, Idaho 83701-2720

10 For North Ada County Groundwater Users

11 Association:

12 BY MR. JOHN THORNTON

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15 For Eagle Pines Water Users Association and

16 Individually:

17 BY MR. ALAN SMITH

18 3135 Osprey Road

19 Eagle, Idaho 83616

20 Also Present:

21 David Head

22 Jason Smith

23 Denise Buffington

24

25

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7 EXHIBITS

8 NO. MARKED ADMITTED

9 861 2419 2420

10 862 2516 2516

11 863 2548 \*\*\*\*

12 864 \*\*\*\*

13 865 2551 \*\*\*\*

14 866 2562 \*\*\*\*

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1 THE HEARING OFFICER: We are recording this

2 morning. Anything we need to talk about before we

3 start in from the parties?

4 Mr. Thornton?

5 MR. THORNTON: Yeah, I've got a couple

6 items I'd like to go ahead and submit as exhibits,

7 if I could, that have to do with the dismissal

8 based on municipal lack of evidence for municipal,

9 showing that they're a municipal provider. So

10 I've got a couple things I'd like to put forward

11 here now.

12 THE HEARING OFFICER: Okay. What I'd like

13 to do with respect to that is have those submitted

14 as part of the briefing that comes in.

15 MR. THORNTON: Okay.

16 THE HEARING OFFICER: And we'll do that

17 post hearing.

18 MR. THORNTON: And how does that occur,

19 just so I better understand the --

20 THE HEARING OFFICER: We can talk about the

21 order of how to do that. But I'd like to forge

22 ahead and not get bogged down with that matter

23 right now.

24 MR. THORNTON: So that would occur at some

25 later date, then; is that correct?

1 THE HEARING OFFICER: Yeah. It would be  
2 post hearing. So the parties -- we'll set out a  
3 schedule for submittal of briefs and supporting  
4 information.  
5 MR. THORNTON: Okay. I just wanted to make  
6 sure it was part of the record.  
7 So would that be part of the record of  
8 those hearings, or not?  
9 THE HEARING OFFICER: Well, I'll tell you  
10 what, if nothing else, I'd like you to wait to do  
11 that until it's your testimony for presenting  
12 evidence.  
13 MR. THORNTON: That will be good.  
14 THE HEARING OFFICER: And you can do it in  
15 that setting as well.  
16 MR. THORNTON: Okay.  
17 THE HEARING OFFICER: It's actually  
18 documented.  
19 MR. THORNTON: Thanks.  
20 MR. FEREDAY: Mr. Hearing Officer, if I  
21 could, I did have one comment just about  
22 scheduling.  
23 We anticipate that we will be through  
24 with our inquiry of staff by -- certainly by noon  
25 and -- that's our hope anyway. And therefore, we

1 would hope that the protestants could begin with  
2 their case this afternoon. I just wanted to give  
3 them a heads-up --  
4 MR. THORNTON: Great.  
5 THE HEARING OFFICER: Yeah.  
6 MR. FEREDAY: -- as to their scheduling.  
7 And they may want to be calling their own people  
8 here and getting them ready for this afternoon.  
9 THE HEARING OFFICER: Okay. Now, the one  
10 thing that we have not done is we have not given  
11 notice to anyone who may wish to come and testify  
12 as a public witness, and the timing for that. And  
13 I think that was part of the original order.  
14 So I would anticipate that would not  
15 be today, but probably would be the next day that  
16 we meet, which is -- what? -- the 23rd of June, as  
17 I recall. So I think what we'll do is send notice  
18 out to people and just tell them that's the day  
19 that we would have them show and do that.  
20 And then you can put on your rebuttal  
21 following that presentation.  
22 MR. FEREDAY: Thank you.  
23 THE HEARING OFFICER: Okay.  
24 MR. ALAN SMITH: We may have to -- we may  
25 have to have Mr. Lawton testify today as a public

1 witness. He will not be available the 23rd. So  
2 we may do that a little out of order, with your  
3 permission.  
4 THE HEARING OFFICER: I think that probably  
5 is fine, if they're finished. And Mr. Lawton  
6 could come on and --  
7 MR. THORNTON: That's fine with us.  
8 THE HEARING OFFICER: That's agreeable with  
9 me. It sounds to me like we may have time for  
10 that today anyway.  
11 Okay. Other things we need to talk  
12 about?  
13 Okay. Thanks again for coming today.  
14 Mr. Owsley, if you'll come forward,  
15 please. Raise your right hand.  
16  
17 DENNIS OWSLEY,  
18 having previously been called as a witness by the  
19 Department, was duly sworn and testified as  
20 follows:  
21  
22 THE HEARING OFFICER: Thank you. Please be  
23 seated. I was in your fair city yesterday, by the  
24 way.  
25 If you'll state your name. Again,

1 I'll remind you you're under oath.  
2 THE WITNESS: My name is Dennis Owsley,  
3 O-w-s-l-e-y.  
4 THE HEARING OFFICER: Mr. Fereday, we'll  
5 follow the same order of examination. So I assume  
6 that you'll go forward.  
7 MR. FEREDAY: Okay.  
8  
9 CROSS-EXAMINATION  
10 BY MR. FEREDAY:  
11 Q. Mr. Owsley, I'd like to ask you a few  
12 questions about your background and expertise.  
13 A. Sure.  
14 Q. Do you consider yourself an expert in  
15 seismic exploration or seismic interpretation?  
16 A. No.  
17 Q. What about --  
18 THE HEARING OFFICER: Your response was?  
19 THE WITNESS: No.  
20 Q. (BY MR. FEREDAY): And what about in  
21 running geophysical logs or geophysical  
22 interpretation of well bores?  
23 A. No.  
24 Q. Have you ever run any geophysical logs  
25 in a groundwater well?

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1 A. No.  
2 THE HEARING OFFICER: Okay. You'll need to  
3 speak up, Mr. Owsley. Thanks.  
4 Q. (BY MR. FEREDAY): What about any  
5 formal training in either seismic or geophysics,  
6 have you had any?  
7 A. I've taken a couple college-level  
8 courses, one graduate-level seismic course.  
9 Q. What about geochemistry, do you have  
10 expertise in analyzing or interpreting geochemical  
11 information or data?  
12 A. I have some experience. I don't know  
13 if you'd call it expertise. But I have  
14 experience. I have formal training as well as  
15 experience when I worked for the Department of  
16 Environmental Quality.  
17 Q. Do you consider yourself an expert in  
18 geochemistry?  
19 A. No.  
20 Q. What about groundwater modeling, have  
21 you experience in groundwater modeling or formal  
22 training?  
23 A. I have formal training and experience  
24 in groundwater modeling. Again, I would not  
25 consider myself an expert in that field.

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1 Q. What was your experience with  
2 modeling?  
3 A. I did some Modflow modeling at the  
4 University of Idaho in the Moscow-Pullman Aquifer,  
5 as well as when I worked for the Department of  
6 Environmental Quality, I did what is called source  
7 water assessment modeling, where we determined the  
8 capture zone for a public drinking water well.  
9 Q. Do you consider yourself an expert in  
10 groundwater modeling?  
11 A. No.  
12 Q. What about Boise area geology, have  
13 you made any study of the Boise area geology,  
14 particularly the north Ada County area?  
15 A. I am currently involved in an  
16 investigation in which we are looking at the north  
17 Ada County hydrogeology. I have experience with a  
18 few smaller scale projects that were -- that  
19 occurred in the -- that area, but the most  
20 extensive research is ongoing right now.  
21 Q. And how long have you been involved  
22 with that research?  
23 A. Since I've been with the Department,  
24 about two-and-a-half years.  
25 Q. What about aquifer testing, can you

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1 describe your experience with aquifer testing, if  
2 you can?  
3 A. Yes. I conducted an aquifer test for  
4 my master's project at the University of Idaho.  
5 I've also reviewed multiple aquifer tests at the  
6 Department of Environmental Quality for smaller  
7 scale remediation sites.  
8 Q. With regard to your master's thesis, I  
9 think I have a copy of that here I'd like to show  
10 you. I don't have extra copies of this.  
11 Do you recognize this, Mr. Owsley?  
12 A. I do.  
13 Q. Is that your 2003 master's thesis at  
14 the University of Idaho?  
15 A. It appears so, yes.  
16 Q. When you did your aquifer tests that  
17 were involved in this thesis, they were mostly on  
18 the order of a period -- run for a period of time  
19 of something like 1200 minutes or perhaps less;  
20 isn't that correct?  
21 A. That is correct. The wells we used  
22 were usually city wells, and there was fire flow  
23 restrictions so we could not run the tests longer  
24 than that.  
25 Q. You evaluated the pretest trends in

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1 each of these wells as a part of your aquifer  
2 testing, did you not?  
3 A. I do not recall. I have not read my  
4 thesis in many years. If you read it and that's  
5 what I did, then I'll agree with that.  
6 Q. Well, on page 26 -- perhaps you can  
7 refer to page 26 -- I believe you refer to one  
8 hour of pretest measurements to establish an  
9 antecedent trend, I believe it indicates.  
10 A. That appears so.  
11 Q. This antecedent trend was taken for  
12 that individual well itself, was it not, in that  
13 well?  
14 A. That's correct. The geology up there  
15 is very complex, and every well is pretty much  
16 unique to itself.  
17 Q. Dr. Osiensky was your major professor  
18 in this effort; correct?  
19 A. Yes.  
20 Q. I take it that he agreed that it was  
21 appropriate to look at each well and its trend  
22 rather than to look at some type of regional trend  
23 in evaluating the results of your aquifer test?  
24 A. Yeah, again, I don't think we could  
25 determine a regional trend for that area.

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1 Q. Your aquifer test relied on drillers'  
2 logs rather than geophysical borehole data in  
3 terms of describing the stratigraphy; correct?  
4 A. Correct.  
5 Q. Did you in your effort in conducting  
6 these aquifer tests, did you correct for trend in  
7 the well itself for -- for each of these sets of  
8 data?  
9 A. I don't understand your question.  
10 Q. Did you correct for that antecedent  
11 trend that you were projecting as you conducted  
12 your aquifer test?  
13 A. I believe so.  
14 MR. FEREDAY: Mr. Hearing Officer, we offer  
15 the master's thesis as the next exhibit.  
16 THE HEARING OFFICER: Protestants?  
17 MR. THORNTON: No objections.  
18 MR. ALAN SMITH: Is this really relevant?  
19 I would object on the grounds of relevancy, unless  
20 Mr. Fereday can show us where he's going with  
21 this.  
22 THE HEARING OFFICER: What is the purpose  
23 of the document? Part of my concern, Mr. Fereday,  
24 is the responsibility I have for all of the  
25 increasing number of documents that I'm receiving.

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1 I know that there's been testimony about  
2 methodology, but is it something that I as a  
3 Hearing Officer need to refer to?  
4 MR. FEREDAY: We'll withdraw the offer.  
5 THE HEARING OFFICER: Okay. Thank you.  
6 Q. (BY MR. FEREDAY): Mr. Owsley, in  
7 preparing its memorandum and its narrative  
8 presentations in this case, isn't it a fact that  
9 the staff has conducted no independent scientific  
10 inquiry, other than to evaluate your views of --  
11 and express your views of Hydro Logic's work and  
12 other than to provide your Theis analysis and to  
13 measure water levels? Is that a fair statement?  
14 A. That's a fair statement. But I don't  
15 think we measured the water levels in response to  
16 the review of this case. The water levels have  
17 been measured for the north Ada County  
18 hydrogeologic investigation.  
19 Q. With regard to your narrative, which  
20 I'm going to try to page through here, I hope  
21 fairly rapidly, I notice on pages 3 and 4 you  
22 express --  
23 THE HEARING OFFICER: What number is this,  
24 Mr. Fereday?  
25 MR. FEREDAY: I'm sorry. It's Exhibit 904.

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1 THE HEARING OFFICER: -4.  
2 Q. (BY MR. FEREDAY): You express some  
3 concern about the large number of documents that  
4 were submitted.  
5 Do you recall that?  
6 A. Yes, I believe I -- my concern was  
7 more with the organization, rather than the  
8 volume.  
9 Q. You recognize, do you not, that a  
10 large number of those documents were Treasure  
11 Valley Hydrologic Project documents that were just  
12 identified as exhibits by the applicant; correct?  
13 A. Correct.  
14 Q. On page 9 of your narrative, you  
15 discuss Exhibit 44, figure 4, which is a  
16 cross-section with correlation lines.  
17 Is it -- I guess I'm a little confused  
18 by exactly what your point was in this narrative  
19 statement.  
20 Is it your testimony that the screen  
21 in test well No. 4 is completed into Terteling  
22 Springs Mudstone? Was that your concern?  
23 A. No. My concern is the depiction of  
24 the Terteling Springs Mudstone in this  
25 cross-section. If you look at the well we're

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1 talking about, test well 4, the screen is clearly  
2 completed into the unit that is identified as the  
3 Terteling Springs Mudstone.  
4 Q. Okay. So that would be your concern,  
5 is that we're showing completion into the  
6 Terteling Springs Mudstone, which, in your view,  
7 raises an uncertainty?  
8 A. Based on this diagram, yes.  
9 Q. Mr. Owsley, do you recognize that this  
10 diagram is set forth using two different scales: a  
11 vertical scale in feet and a horizontal scale in  
12 miles?  
13 A. Yes.  
14 Q. In your experience, is it appropriate  
15 for a researcher to show the screens in a vertical  
16 well bore in accurate proportion to the depth of  
17 that well bore?  
18 A. Yes.  
19 Q. And you have no reason to conclude, do  
20 you, that there's anything inaccurate in the  
21 placement of the screen in well 4 in this diagram,  
22 do you?  
23 A. No.  
24 Q. The next page, page 10, Exhibit 904,  
25 raises a similar issue.

1 And I take it that the issue is the  
2 same here, is that you have concerns because of  
3 the locations of screens in areas that are shown  
4 as not being in the PGSA?

5 A. No. What I had concerns with is that  
6 the thickness of the aquifer underneath United  
7 Water State/Linder test wells 1 and 2 was  
8 identified as 525 feet thick, yet on this diagram  
9 it's only approximately 300 feet thick. So  
10 there's an inconsistency there. And that's what I  
11 was trying to point out.

12 Q. But you would agree that the aquifer  
13 is at least 250 feet thick here, would you not?

14 A. It looks about that, yes, based on  
15 this diagram.

16 Q. Do you have any reason to dispute  
17 that?

18 A. Dispute what?

19 Q. To dispute that thickness.

20 A. The 250-foot thickness?

21 Q. Yeah. Do you have any reason to  
22 believe it's less than that? Let's put it that  
23 way.

24 A. No.

25 Q. I'd like you to refer to Exhibit 12,

1 table small i-1. And I'd like to refer you there  
2 to an asterisked statement that states -- and I'll  
3 let you find that.

4 A. Do you know what page number that is?

5 Q. It is right near the front of  
6 Exhibit 12, right after page small Roman viii?

7 A. Table i-1.

8 Q. Yeah.

9 A. All right. I found it.

10 Q. At the bottom of table i-1, it will be  
11 on, I guess, the final page of that, it states, as  
12 I read it, "The top of aquifer estimated from well  
13 driller's report may be inaccurate. Aquifer  
14 bottom depths estimated from geophysical contours  
15 are considered more accurate."

16 Does that help to explain why there  
17 might be a discrepancy in the depth of the aquifer  
18 from one document to another in HLI's materials?  
19 Or do you recall reviewing that?

20 A. I recall reviewing that. But I see a  
21 geophysical log for this well. So it appears that  
22 the placement of the aquifer was based on the  
23 geophysics, not the well driller's report.

24 Q. But don't you agree, Mr. Owsley, that  
25 at least there was an acknowledgment that some

1 figures based on well driller's reports might not  
2 be accurate?

3 A. Sure.

4 Q. With regard to page 11 in Exhibit 904,  
5 you make what you call a last point on this same  
6 slide. I'd like to understand what your point is  
7 with regard to your statement here.

8 Are you saying that the PGSA is  
9 connected to overlying saturated zones? And if  
10 so, what's the basis for that?

11 A. I'm not saying that.

12 Q. So what is your point with regard to  
13 page 11?

14 A. That the elevation of the Pierce Gulch  
15 Sand is approximately -- underneath M3 Eagle's  
16 test well No. 3 is approximately equivalent to the  
17 same water-bearing -- the elevation of the  
18 water-bearing zone beneath the Boise River,  
19 6565 feet.

20 Q. Mr. Owsley, is it your testimony that  
21 you -- your opinion is that the Pierce Gulch Sand  
22 Aquifer is a flatline layer?

23 A. No.

24 Q. You agree that it's a dipping layer,  
25 do you not?

1 A. I agree the mudstone appears to be  
2 dipping, yes.

3 Q. Do you agree that the Pierce Gulch  
4 Sand Aquifer is a dipping layer?

5 A. Yes.

6 Q. With regard to page 13 of Exhibit 904,  
7 you criticize this cross-section, as I take it, at  
8 least, because you note that there is no attempt  
9 in correlating geologic units between wells.

10 Do you -- first of all, do you  
11 recognize that this cross-section was created  
12 before there were geophysics from the new wells  
13 that were drilled on the site? Or do you know?

14 A. I don't know.

15 Q. I'd like you to refer to Exhibit 2,  
16 figure 5, please. Mr. Owsley, I submit to you  
17 that figure 5 of Exhibit 2, which is also a figure  
18 in Exhibit 42, as we all know, is a correlated  
19 cross-section that was submitted with the M3 Eagle  
20 application.

21 Did you recall that?

22 A. Yes.

23 Q. So when you said that there was no  
24 attempt to correlate between these wells, to what  
25 were you referring?

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1 A. The packet of these diagrams that was  
2 submitted.  
3 Q. Just this diagram itself?  
4 A. Well, there's, I think, 13 total, and  
5 that was the only one in which correlation was  
6 made.  
7 THE HEARING OFFICER: Okay. Mr. Owsley,  
8 would you speak up in your response again.  
9 THE WITNESS: I apologize.  
10 THE HEARING OFFICER: Very soft.  
11 Q. (BY MR. FEREDAY): I'd like you to  
12 refer to page 19 of Exhibit 904, please. Here you  
13 refer to Exhibit 19, which was information  
14 submitted, I believe, in November 2006 in this  
15 case by Dr. Wood. You state that there was not a  
16 map to accompany these plots.  
17 Would you please refer to Exhibit 33Q  
18 in the materials, Mr. Owsley.  
19 MR. HEAD: Which exhibit?  
20 MR. THORNTON: Okay.  
21 MR. FEREDAY: 33Q.  
22 Q. Now, Mr. Owsley, do you recall seeing  
23 33Q? And I hope -- you recall seeing it in a much  
24 bigger version than this?  
25 A. I do.

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1 Q. That much bigger version was a couple  
2 of feet long and --  
3 A. A wall-size map.  
4 Q. A wall-size map?  
5 A. Yes.  
6 Q. Do you recognize that these wells that  
7 are listed on Exhibit 19 were referenced in the  
8 TVHP documents, the 33Q that were submitted in  
9 November of 2006?  
10 A. In the TVHP documents?  
11 Q. Yes.  
12 A. No, I'm not aware of that.  
13 Q. The document you're looking at, 33, is  
14 the Treasure Valley Hydrologic Project, one of the  
15 TVHP documents; correct?  
16 A. Yes.  
17 Q. So you didn't realize that at the time  
18 that you wrote your statement on page 19 that  
19 there was a map accompanying these?  
20 A. The geophysical well logs are not  
21 identified, according to this map.  
22 Q. Do you contend that they are not on  
23 that map?  
24 A. I have later learned that they are on  
25 the map.

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1 Q. Also, with regard to Exhibit 19D, at  
2 least some of these same wells, which is the Wood  
3 and Clemens report, isn't it a fact that some of  
4 these same wells are also referenced there on  
5 page 94 of 19D? I just wanted to know whether you  
6 would agree with that, and if so whether you  
7 reviewed those?  
8 A. What page number?  
9 Q. Exhibit 19D, and it's page 94.  
10 A. Could you repeat the question, please?  
11 Q. My question was whether you agree that  
12 at least some of these same wells that you  
13 reference on page 19 of Exhibit 904 are depicted  
14 in a cross-section in Wood and Clemens, which is  
15 19D?  
16 A. I cannot tell.  
17 Q. Did you review Wood and Clemens in  
18 evaluating those well-log data that are discussed  
19 on page 19 of Exhibit 904?  
20 A. I read that report, yes.  
21 THE HEARING OFFICER: Are we on the right  
22 page, Mr. Fereday? We're looking at 19D, page 94?  
23 MR. FEREDAY: Yeah, page 94.  
24 THE HEARING OFFICER: All right.  
25 MR. FEREDAY: And I'll note just for the

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1 record that those aren't sequential pages. This  
2 is a part of a larger document publication that it  
3 was taken from, so it starts at page 80-something,  
4 I believe.  
5 THE HEARING OFFICER: And the cross-section  
6 area you're looking at is the bottom figure on  
7 page 94?  
8 MR. FEREDAY: That's correct. Figure 16.  
9 THE HEARING OFFICER: Okay.  
10 Q. (BY MR. FEREDAY): So, Mr. Owsley,  
11 just so I'm clear on this, you don't recall  
12 reviewing that as a part of your review in this  
13 case?  
14 A. I read that report, yes. But I do not  
15 see these wells on that map, or I cannot determine  
16 which ones are which.  
17 Q. Thank you.  
18 With regard to -- with regard to  
19 page 30 of Exhibit 904 --  
20 A. Okay.  
21 Q. -- you produced a table that you  
22 included in your staff memo.  
23 And it's reproduced here; correct?  
24 A. Correct.  
25 Q. And that table says, "Estimates of the

1 Boise River gains and losses for the Lucky Peak to  
2 Glenwood Bridge reach"; correct?

3 A. Yes, that's correct.

4 Q. Isn't it a fact that two of the  
5 entries on that table are Boise River gains and  
6 losses for the Lucky Peak to Capitol Bridge reach?

7 A. That is correct. The title of that  
8 table should say "Boise River gains and losses  
9 from Lucky Peak to Capitol," you're correct.

10 Q. Okay. Thank you.

11 On page 35 of Exhibit 904, I have a  
12 few comments or questions of you, please.

13 Is it fair to say that you do not have  
14 a clear picture of the mechanism by which recharge  
15 from the Boise River reaches the Pierce Gulch Sand  
16 Aquifer? Would that be a fair statement?

17 A. Yes.

18 Q. Would you agree, Mr. Owsley, that the  
19 lack of drawdown or significant drawdown over time  
20 in the Redwood Creek and Floating Feather wells,  
21 for example, stable measurements in the State and  
22 Linder well, cannot happen without recharge coming  
23 into those wells?

24 A. Yes. Yes.

25 THE HEARING OFFICER: You need to speak

1 loudly.

2 THE WITNESS: Okay.

3 THE HEARING OFFICER: Thank you,  
4 Mr. Owsley.

5 THE WITNESS: Okay.

6 Q. (BY MR. FEREDAY): With regard to  
7 page 37 of 904, you offer some criticism here, it  
8 seems to me, in that HLI did not produce a  
9 water-level change map.

10 Would that be an accurate statement of  
11 your testimony here?

12 A. I do not believe I was criticizing. I  
13 was just pointing out the fact that one was  
14 promised and not presented.

15 Q. Would you refer to Exhibit 45, please.  
16 And I refer you, please, to figure 14 of  
17 Exhibit 45.

18 And I recognize that this is not a  
19 water-level change map, but isn't it a fact,  
20 Mr. Owsley, that the water level when the well was  
21 drilled is provided on that figure and on other  
22 figures in Exhibit 45?

23 A. It appears to be, yes.

24 Q. Did you review that at the time that  
25 you wrote this?

1 A. No, this was submitted after our staff  
2 memorandum.

3 Q. Did you make any effort to evaluate  
4 water level when drilled in any of the wells that  
5 you evaluated for Mr. McVay's review?

6 A. I did not evaluate any wells for  
7 Mr. McVay's review.

8 Q. With regard to Mr. McVay's review, you  
9 were the one who selected the wells to be  
10 measured; is that correct?

11 A. That's correct. The wells that were  
12 selected were all of the historical wells in the  
13 area of the M3 project.

14 Q. You stated earlier, I believe, that  
15 you're in charge of the north Ada County  
16 hydrogeological investigations for the Department  
17 of Water Resources; correct?

18 A. Correct.

19 Q. How many wells are you currently  
20 measuring in that effort?

21 A. I believe the number is 81.

22 Q. How did you select those wells to  
23 measure?

24 A. Reviewed well logs, looked at  
25 locations, depths, that nature.

1 Q. And what criteria did you apply when  
2 you did look at a well log?

3 A. Whether the well was properly  
4 constructed, whether we had a driller's report for  
5 the well, whether we knew the current owner for  
6 the well. There were several factors that went  
7 into it.

8 Q. What frequency of measurements have  
9 you been carrying out in these wells?

10 A. Hand measurements are quarterly. We  
11 have approximately 20 data loggers currently  
12 running as well.

13 Q. Are those continuous data loggers?

14 A. Yes, they are.

15 Q. When were those put in place?

16 A. It was the last fall. I don't know  
17 the exact dates.

18 Q. That would be the fall of 2008?

19 A. Correct, yes.

20 Q. Mr. Owsley, have you received any  
21 reports of wells going dry in the north Ada area?

22 A. Yes, I have.

23 Q. Have you investigated those reports?

24 A. Yes, I have.

25 Q. Can you describe what you have found?

1 A. There appears to be a few wells that  
2 are included in our network that have shown  
3 declining water levels, in a few instances wells  
4 have had to be deepened and/or replaced.  
5 Q. Can you describe which wells those  
6 are?  
7 A. Would you like names of the owners?  
8 Q. Yes.  
9 A. Banducci, Dator, Cummins, Taylor,  
10 Edwards. There may be more. That's a few that I  
11 know off the top of my head.  
12 Q. And is it your opinion that these  
13 wells all needed to be deepened because of lowered  
14 groundwater levels in the area?  
15 A. Yes.  
16 Q. Did you measure water levels in the  
17 previous well before the complaint came in?  
18 A. Yes.  
19 Q. In each of these cases?  
20 A. Not in each of the cases, but in a few  
21 instances, yes, the old well is actually still in  
22 existence, and it is partially saturated only a  
23 few months of the year.  
24 Q. Did you evaluate the construction of  
25 any of these wells?

1 A. Just based on the well driller's  
2 reports.  
3 Q. How much decline have you documented  
4 in the Pierce Gulch Sand Aquifer, if any?  
5 A. I don't know.  
6 Q. Do you know which of these wells is  
7 completed into the Pierce Gulch Sand Aquifer?  
8 A. No, I do not.  
9 MR. FEREDAY: Could we go off the record  
10 for just a minute?  
11 THE HEARING OFFICER: Okay.  
12 (Recess.)  
13 THE HEARING OFFICER: We're recording  
14 again.  
15 Q. (BY MR. FEREDAY): Mr. Owsley, with  
16 regard to your well monitoring network, did you  
17 include the well known as TVHP No. 1?  
18 A. No.  
19 Q. Did you include the State and Linder  
20 test well?  
21 A. No.  
22 Q. I'd like you to refer, please, to  
23 Exhibit 45, figure 17.  
24 Have you evaluated the TVHP well in  
25 any way?

1 A. No.  
2 Q. It is a well that is monitored by the  
3 Department, though, is it not?  
4 A. It has just recently been taken over  
5 by the Department. Historically it was monitored  
6 by a consulting firm.  
7 Q. And that monitoring by the consultant  
8 is for the Department; correct?  
9 A. Correct.  
10 Q. With regard to figure 17, do you have  
11 any dispute that this well is completed in the  
12 Pierce Gulch Sand Aquifer?  
13 A. I would want to review the log for  
14 that well before I answered that.  
15 Q. Have you reviewed the log for this  
16 well?  
17 A. I have, but it's just not clear to me  
18 right now off the top of my head.  
19 Q. Do you agree that this well does not  
20 currently show a decline based on the data in  
21 figure 17?  
22 A. Based on that figure, I would agree.  
23 MR. FEREDAY: Okay. No further questions.  
24 THE WITNESS: Okay.  
25 THE HEARING OFFICER: Thank you.

1 Mr. Thornton?  
2 MR. THORNTON: Yeah, could I have just  
3 about a minute or so here?  
4 THE HEARING OFFICER: Sure.  
5 MR. THORNTON: Let me grab my notebook  
6 here.  
7 THE HEARING OFFICER: Do you want to go off  
8 the record?  
9 MR. THORNTON: No. I'll just grab this  
10 here.  
11  
12 CROSS-EXAMINATION  
13 BY MR. THORNTON:  
14 Q. Hello, Mr. Owsley.  
15 A. Morning.  
16 Q. If you could turn to Exhibit 209.  
17 That's the Treasure Valley Hydrologic Project.  
18 A. 209?  
19 Q. Yeah. And actually, I think it's  
20 in -- excuse me, it should be Exhibit No. 33.  
21 It's one that we had doubled up on. Exhibit 33.  
22 A. And which document in 33?  
23 Q. And our tabs are not the same. It  
24 would be on -- let me get the right page here. It  
25 would be in the exec- -- it would be probably in

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1 33, I'm guessing, if it's B. It's titled  
2 "Simulation of groundwater flow in the Lower Boise  
3 River Basin," so it's fairly -- it's only in about  
4 the first 15 pages of that document.  
5 A. Yes, I've found it.  
6 Q. You've found it?  
7 THE HEARING OFFICER: Okay. Now I need  
8 help.  
9 THE WITNESS: 33B.  
10 MR. THORNTON: 33B.  
11 THE HEARING OFFICER: Okay.  
12 Q. (BY MR. THORNTON): And if you could  
13 go to page 6. And on page 6, second paragraph  
14 down, full paragraph, the sentence states -- and I  
15 ask your opinion in terms of the flow direction.  
16 It says, "Potentiometric surface contours indicate  
17 groundwater movement in a northwesterly to  
18 southwesterly direction, depending on depth and  
19 location."  
20 Have you -- are you familiar with the  
21 Treasure Valley Hydrologic Project?  
22 A. Yes, I've reviewed it.  
23 Q. Okay. Have you seen new evidence  
24 presented as part of M3's testimony that assures  
25 us that the flow is different than this

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1 northwesterly to southwesterly direction? Do you  
2 see compelling evidence?  
3 A. I don't understand the question.  
4 Q. Okay. Let me see if I can rephrase  
5 the question.  
6 A. Sure.  
7 Q. That paragraph that identifies -- the  
8 Treasure Valley Hydrologic Report identifies  
9 groundwater movement in a northwesterly to  
10 southwesterly direction.  
11 The question is: Have you seen  
12 evidence presented in M3's data to refute that  
13 flow direction?  
14 MR. FEREDAY: I'm going to object just for  
15 purpose of clarifying that the statement actually  
16 says "in a northwesterly to southwesterly  
17 direction depending on depth and location." I  
18 just want to make sure that the full statement is  
19 understood.  
20 THE HEARING OFFICER: Okay. I think that's  
21 what was read to begin with.  
22 MR. THORNTON: Okay. And maybe --  
23 appreciate that for clarification. I'll clarify  
24 that better, if I could. So I'll do another  
25 question, if I may.

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1 THE HEARING OFFICER: Okay.  
2 Q. (BY MR. THORNTON): About halfway down  
3 through that second full paragraph, it identifies  
4 the sentence, "And potentiometric surface contours  
5 in deeper zones indicate a more uniformly western  
6 flow direction."  
7 Do you see that?  
8 A. Yes.  
9 Q. Have you seen any compelling evidence  
10 to -- presented by M3 to show that groundwater  
11 flow is to the north and west versus west?  
12 A. No.  
13 Q. On the last paragraph there's a  
14 statement by Petrich and Urban that it's "The  
15 individual hydrograph indicates relatively stable  
16 water levels in many areas, although water-level  
17 declines have occurred in a number of wells."  
18 Would you agree with their finding?  
19 A. Yes.  
20 Q. And then later in that, couple of  
21 lines down, it states that "Additional groundwater  
22 level declines were observed in the areas between  
23 northwest Boise and Eagle and southwest Boise,  
24 Meridian, and Kuna."  
25 Do you agree with that, their findings

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1 there?  
2 A. I did not review the wells that had  
3 the declines, but that's what it states in the  
4 report.  
5 Q. Do you have any basis for, say,  
6 refuting that or...  
7 A. No.  
8 Q. Okay. Okay. If you could go to  
9 page 34 on probably 3- -- the same document, 33.  
10 It's possibly 33C, "Simulation of increased  
11 groundwater withdrawals in the Lower Boise River  
12 Basin."  
13 Are you at that --  
14 A. What was the page number?  
15 Q. Page 34. And the conclusion  
16 recommendations, would you agree with conclusion  
17 No. 1, which says, "Aquifer level declines may  
18 occur if all of these currently unprocessed,  
19 nonsupplemental groundwater rights were granted"?  
20 A. Yes.  
21 Q. Are you aware -- do you have knowledge  
22 that in the Treasure Valley Hydrologic Project  
23 that they included data, I believe just until  
24 1996, in terms of unprocessed applications?  
25 A. Yes.

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1 Q. Okay. And on 3, in their conclusion  
2 3, they found -- would you agree with their  
3 findings that "Local areas of simulated declines  
4 were noted again south of Lake Lowell in an area,  
5 and then in an area in the northwestern portion of  
6 the model and in portions of the area between  
7 Boise, Meridian, and Kuna"? And would you agree  
8 with their findings there?  
9 A. That's what it states. Again, I have  
10 not reviewed the wells --  
11 Q. Okay.  
12 A. -- that showed declines.  
13 Q. And they go on to state that it's  
14 possibly that they may have had unrealistically  
15 high simulated stresses in their models that may  
16 have caused that.  
17 But do you also see where the  
18 simulated declines may also indicate potential  
19 problems in supplying the increasing groundwater  
20 demands in these areas?  
21 A. Yes, I see that.  
22 Q. And would you agree with that  
23 potential?  
24 A. Yes.  
25 Q. And then in their recommendations on

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1 No. 4 on the same page, they have a recommendation  
2 that says, "Review specific water right requests  
3 that are predicted to result in greater than  
4 average local drawdowns."  
5 Would you agree that that's what  
6 you're doing?  
7 A. Yes.  
8 Q. Okay. If you could go to Exhibit 12,  
9 which is the reanalysis of 16 aquifer tests. Let  
10 me get to my page. And if you could go to  
11 page 240.  
12 The first question, have you read and  
13 are familiar with the reanalysis of 16 aquifer  
14 tests?  
15 A. Yes.  
16 Q. Okay. And on page 240 on No. 19 --  
17 and actually, some of the conclusions if -- I  
18 guess if we go back to page 237, it's "Summary of  
19 regional aquifer characteristics," and then we  
20 have conclusions. And then on 19, we have a  
21 conclusion. I want to find out if you would agree  
22 with that where it says, "Construction of  
23 additional high-capacity wells in the PGSA appear  
24 feasible in the project area. These high-capacity  
25 wells will cause drawdown that will affect other

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1 wells."  
2 Would you agree with that finding?  
3 A. Yes.  
4 Q. Okay. Do you believe that there is  
5 connection between the deeper regional -- the  
6 so-called PGSA with -- and communication with the  
7 shallower groundwater levels?  
8 A. I don't know.  
9 Q. Okay. And then No. 19, it goes on to  
10 say, "There are more than 1600 wells in the  
11 greater Eagle/Star area, many of them poorly  
12 constructed."  
13 Do you know why there's so much talk  
14 about poorly-constructed wells?  
15 A. I guess it would come down to the  
16 function of the well. They're probably considered  
17 poorly constructed if you were to use them as a  
18 dedicated monitoring well. But I would assume  
19 that most all of them have been drilled to the  
20 standards of the Idaho well drilling standards.  
21 Q. Okay. So you would agree that  
22 probably the majority of the wells are meeting  
23 state standards in terms of their construction?  
24 A. Yes.  
25 Q. And would a poorly-constructed well

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1 have any more of a problem in terms of water-level  
2 decline if a deeper aquifer was getting drawn down  
3 and pulling water from the shallower aquifer?  
4 A. I don't know.  
5 Q. Okay. Would you agree that then the  
6 last statement, last sentence in 19, it says,  
7 "Development of additional municipal groundwater  
8 supplies and associated water table drawdowns may  
9 require some existing wells to be deepened and/or  
10 replaced," would you agree with that finding?  
11 A. Yes.  
12 Q. Okay. And on 20, the next conclusion,  
13 would you agree that -- with their statement, "The  
14 additional -- with development of additional wells  
15 and full development of existing municipal water  
16 rights will cause artesian pressure to decline  
17 over time throughout the Star/Eagle area"?  
18 A. Yes.  
19 Q. Do you have an approximate distance  
20 from the M3 proposed high-volume municipal wells,  
21 how far they are away from the Boise River between  
22 Eagle and Star?  
23 A. I don't know off the top of my head.  
24 Q. More than a couple miles?  
25 A. Let me refer to a map.

1 Q. Yeah, that's -- potentially, if you  
 2 could in the same document, if you could refer  
 3 to -- and it's maybe ten pages back -- the  
 4 figure 98.  
 5 THE HEARING OFFICER: This is in which  
 6 exhibit?  
 7 MR. THORNTON: Yeah. Exhibit 33, I think,  
 8 B, and we're just past -- the figure I'm referring  
 9 to is just past page about 245 or so. And there's  
 10 a figure 98.  
 11 Q. So it would be in the same document  
 12 that you were in, Mr. Owsley.  
 13 A. I was in document 12.  
 14 Q. Yeah. And you know what? I said 33.  
 15 And excuse me. It's still Exhibit 12. I  
 16 apologize.  
 17 MR. FEREDAY: I'm sorry. Mr. Thornton,  
 18 which figure in Exhibit 12 were you referring to?  
 19 MR. THORNTON: Yeah. It's figure 98. It's  
 20 a few pages past page 241 where we were talking  
 21 about the conclusions.  
 22 THE WITNESS: To answer your first  
 23 question, it appears 4 to 5 miles, approximately,  
 24 to the Boise River.  
 25 Q. (BY MR. THORNTON): Okay. Okay.

1 Thank you.  
 2 And would you agree with the statement  
 3 that "the artesian pressure may be lost in the  
 4 Eagle/Star area"?  
 5 A. Yes.  
 6 Q. Okay. And in your opinion of  
 7 reviewing M3's pumping that they did for their  
 8 nine-day aquifer test, was that completed as they  
 9 had proposed it to be completed?  
 10 A. The SVR-7 test?  
 11 Q. Correct.  
 12 A. Yes.  
 13 Q. Okay. And then did they have the same  
 14 size of diameter of wells that they were  
 15 originally, the large-bore wells, were they put  
 16 in?  
 17 A. Can you repeat the question?  
 18 Q. For the -- M3 had a proposal to do --  
 19 of a high-capacity pumping test, a proposal  
 20 prospectus. And I was wondering if that was  
 21 carried out.  
 22 A. No, that was not.  
 23 Q. Okay. Do you believe that the aquifer  
 24 was stressed adequately to adequately determine  
 25 boundaries and the full aquifer characteristics

1 for sustainability?  
 2 A. No, I do not.  
 3 Q. Okay. Do you -- after the review of  
 4 the documents and after being cross-examined and  
 5 that, do you still feel that there's a fair amount  
 6 of inconsistencies in the data and analysis that  
 7 was completed with M3?  
 8 A. In the data, no.  
 9 Q. Okay.  
 10 A. In the interpretations and  
 11 conclusions, yes.  
 12 Q. Okay. All right. And then I'd like  
 13 you to take a look at one article here.  
 14 I'll give that one to you and  
 15 Mr. Hearing Officer.  
 16 This is a document that comes from  
 17 Idaho State University, their geosciences  
 18 department, I think. And I'd ask you to take a  
 19 look at that document, and on the second page and  
 20 the third page, it's just a short little  
 21 description of the geology of the Gem County area.  
 22 And on the third page it gives the symbols, a  
 23 legend, if you will, for fault lines.  
 24 Do you see that in the symbol section  
 25 on the third page of that?

1 A. Yes, I do.  
 2 Q. And then if you look at the first  
 3 page, the cover page, if you will, the red dot for  
 4 the town of Emmett, and do you see what appears to  
 5 be a fault line crossing Highway 16 going towards  
 6 Emmett?  
 7 A. Yes, I do. Yes.  
 8 Q. Has that fault line been discussed as  
 9 part of -- has that been included in the model or  
 10 any discussions that we've had so far? I'm not  
 11 sure if it has.  
 12 A. I think it has. To me it looks like  
 13 it's the fault that you could see on the road cut  
 14 as you're driving down into Emmett.  
 15 Q. Okay. And is that depicted on the  
 16 green line that we were talking about?  
 17 A. No, I don't believe so. I believe  
 18 it's an extension of the West Boise/Eagle fault.  
 19 Q. And through that area there?  
 20 A. Yes.  
 21 Q. Okay. I'm looking for a description  
 22 of that.  
 23 If we could go off the record while  
 24 we're looking for --  
 25 THE HEARING OFFICER: Okay. Let's go off

1 for a minute.  
 2 (Recess.)  
 3 Q. (BY MR. THORNTON): Mr. Owsley, I had  
 4 given you a document titled "Gem County, Idaho,"  
 5 which is a description of the geology of Gem  
 6 County. We were talking about a particular black  
 7 line on the front cover that's identified as a  
 8 fault, and I was wondering if you were familiar  
 9 with that.

10 And I believe you stated that you  
 11 thought that was an extension of the West  
 12 Boise/Eagle fault system; is that correct?

13 A. I believe so, yes.

14 Q. And then we had referred to -- we  
 15 found that -- if you would go to Exhibit 45 on  
 16 figure 1. And you can see the representation in  
 17 the red dashed line of the West Boise/Eagle fault  
 18 and --

19 THE HEARING OFFICER: Give us a minute to  
 20 get there.

21 MR. THORNTON: Sorry.

22 THE HEARING OFFICER: You may be there,  
 23 but -- okay. Exhibit 45 what?

24 MR. THORNTON: Figure 1.

25 MR. ALAN SMITH: Figure 1.

1 THE HEARING OFFICER: Okay.

2 Q. (BY MR. THORNTON): And on that  
 3 figure 1, I believe we are looking at a red dashed  
 4 line that is identified as the West Boise/Eagle  
 5 geologic fault; is that correct?

6 A. Yes, that is correct.

7 Q. All right. And what I would submit  
 8 after looking at both of these myself, that on the  
 9 document that I just handed you that has that  
 10 black line on the Gem County geology map, that it  
 11 does, in fact, appear to me that this is probably  
 12 a better representation of that same fault; would  
 13 you agree?

14 A. I would agree, yes.

15 MR. THORNTON: That's the first time I've  
 16 actually looked at it together. And that's good  
 17 for me to know personally.

18 So if I could, I'd like to just enter  
 19 this as an exhibit as a further basis for the  
 20 existence of that fault line there. Although it  
 21 does appear to be represented on figure 1 as a  
 22 dashed line, this is represented as a solid line.  
 23 So if I could enter this as an exhibit for the  
 24 record.

25 THE HEARING OFFICER: Well, shall we mark

1 this exhibit numerically? Where are we at?

2 MR. THORNTON: We were somewhere around 908  
 3 or something. I'm not sure.

4 THE HEARING OFFICER: I don't think this  
 5 would be in your numbers, would it?

6 MR. THORNTON: Well, no. If you want to  
 7 put it in our numbers, we were around -- around  
 8 850 or something.

9 THE HEARING OFFICER: Yeah.

10 MR. LAWRENCE: The last NACGUA exhibit was  
 11 860.

12 MR. THORNTON: 860. So would this be 861?

13 THE HEARING OFFICER: Okay.

14 (Exhibit 861 marked.)

15 MR. THORNTON: Thank you on that.

16 THE HEARING OFFICER: Do you wish to offer  
 17 this document?

18 MR. THORNTON: I do wish to offer that as  
 19 an exhibit, if I could.

20 THE HEARING OFFICER: Okay. Mr. Fereday?

21 MR. FEREDAY: No objection.

22 THE HEARING OFFICER: Okay. Any of the  
 23 other parties?

24 MR. ALAN SMITH: No objection.

25 THE HEARING OFFICER: All right. Document

1 marked as Exhibit 861 is received into evidence.

2 (Exhibit 861 admitted.)

3 Q. (BY MR. THORNTON): Okay. A few more  
 4 questions. If we could have you go to Exhibit 16,  
 5 which is the M3 model.

6 And then on page 14, would you agree  
 7 that there's a paragraph -- it's the paragraph  
 8 just above where it says "The M3 model is an  
 9 ongoing process." And in the center of that  
 10 paragraph, it has a couple of sentences that say,  
 11 "The prediction made by the model are unlikely to  
 12 be 100 percent accurate. Rather, we believe they  
 13 give a reasonable range of likely impacts at  
 14 various points within a few miles of the M3  
 15 property. Further away, there was less emphasis  
 16 on data collection and analysis. Predictions are  
 17 likely to be less accurate."

18 Would you agree with that statement?

19 A. Yes.

20 Q. Okay. Do you agree that there's -- do  
 21 you see any -- have you seen any information  
 22 provided by M3 in terms of how accurate their  
 23 model is, any error bands, any standard deviations  
 24 provided for how accurate their data is?

25 A. The model was calibrated to head

1 values and transmissivity values. And other than  
 2 that, I don't know.  
 3 Q. And does this simply changing two  
 4 variables in a model without looking at monitoring  
 5 results, does that assist in better determining  
 6 the accuracy of that model, the model results?  
 7 A. If I understand the question  
 8 correctly, if changing two parameters would assist  
 9 in better --  
 10 Q. Determining the accuracy of the model.  
 11 A. I don't know.  
 12 Q. Do you not need to look at monitoring  
 13 results to determine the accuracy of your model?  
 14 A. You need some data to base the  
 15 calibration process on, yes.  
 16 Q. And have you seen any -- I'll ask you  
 17 again, have you seen any estimates of accuracy in  
 18 any form, any statistical form or any method to  
 19 show how accurate -- how reliable that model is?  
 20 A. I do not recall.  
 21 Q. Okay.  
 22 A. It may be specified in the modeling  
 23 documents, but I do not recall offhand.  
 24 Q. Okay. All right. And the same  
 25 Exhibit 16, page 33. And in the next to the last

1 paragraph -- and this is in a section identified  
 2 as "M3 model overview of results" -- there's a  
 3 paragraph that starts by stating, "Based on the  
 4 model not being calibrated to replicate responses  
 5 in the unnamed alluvial aquifer overlying the  
 6 Pierce Gulch Aquifer. The model estimates that  
 7 wells completed in this aquifer may have drought  
 8 impacts that are on the order of two-thirds of  
 9 those predicted."  
 10 Do you understand that to be true,  
 11 that this M3 model did not model the effect on  
 12 overlying aquifers?  
 13 A. Yes.  
 14 Q. And would you agree with their  
 15 statement about midway through that paragraph  
 16 where it says "However, because the M3 model was  
 17 not calibrated to aquifers other than the Pierce  
 18 Gulch Sand Aquifer, it cannot be used to  
 19 accurately predict aquifer responses from pumping  
 20 in any aquifer besides the Pierce Gulch"? Would  
 21 you agree with that statement?  
 22 A. Yes, I would.  
 23 Q. Okay. Do we -- have you seen an  
 24 appropriate analysis that can lead folks that are  
 25 concerned about their wells, can you -- have you

1 seen anything that says "Hey, here's our model and  
 2 how we predicted effects on shallower aquifers"?  
 3 Have you seen that?  
 4 A. No.  
 5 MR. THORNTON: That's all my questions.  
 6 THE HEARING OFFICER: Okay. Mr. Smith?  
 7 MR. ALAN SMITH: Thank you.  
 8  
 9 CROSS-EXAMINATION  
 10 BY MR. ALAN SMITH:  
 11 Q. Mr. Owsley, I'll start with those  
 12 questions first that Mr. Vincent deferred to you,  
 13 and I guess if you want, you can defer them back  
 14 to him.  
 15 A. I'll attempt to answer them.  
 16 Q. And before I start, remember, I think  
 17 there's a quote from Abe Lincoln that any fool can  
 18 ask more questions than a wise man can answer. So  
 19 if you'll keep that in mind, that will help you  
 20 through this.  
 21 A. Okay.  
 22 Q. I think Abe Lincoln also said  
 23 something about a guy representing himself had a  
 24 fool for a client and a more severe name for a  
 25 lawyer. So just keep those in mind.

1 I want to go first to this Kling  
 2 irrigation well test that -- I think you talked  
 3 about that on Exhibit 50, page 8, the Kling  
 4 domestic well.  
 5 Do you have that?  
 6 A. Okay. I'm there.  
 7 Q. Was the Kling domestic well unable to  
 8 recover from the Kling irrigation -- irrigation  
 9 well test?  
 10 A. We were not presented the data to  
 11 fully investigate that.  
 12 Q. If there was an inability of the Kling  
 13 domestic well to recover from the Kling irrigation  
 14 test which was done in January, would that  
 15 possibly be even more severe inability to recover  
 16 during the irrigation season?  
 17 A. Possibly.  
 18 Q. Possibly?  
 19 A. Possibly, yes.  
 20 Q. Did the fault identified by Wood in  
 21 2007 have an effect on the different water levels  
 22 noted in the other wells during and after the  
 23 Kling test?  
 24 A. I don't know if it's the fault that  
 25 has the impact on the water-level fluctuations or

1 not.  
 2 Q. All right. On Exhibit 50, page 8, was  
 3 it the water-level fluctuation that caused the  
 4 staff report to segregate the wells into two  
 5 groups?  
 6 A. It was the water-level fluctuation and  
 7 the overall trend of the water levels.  
 8 Q. But you wouldn't know whether that  
 9 fault caused the wide disparity in the fluctuation  
 10 between the two groups?  
 11 A. I do not know, no.  
 12 Q. Do you have any idea why the group two  
 13 wells have such a distinct downward trend compared  
 14 to the group one wells?  
 15 A. I do not know that, no.  
 16 Q. Could that be from a fault?  
 17 A. If it was due to a fault, it would be  
 18 due to the fault restricting recharge to that  
 19 area. The downward trends, I don't think, are  
 20 indicative of a fault.  
 21 Q. If the water-level data for the Kling  
 22 domestic well was left out after the test, would  
 23 that skew the test analysis results?  
 24 A. If the data was left out?  
 25 Q. Uh-huh. I believe this is on page 9

1 of Exhibit 50. I think you mentioned -- or you or  
 2 Mr. Vincent mentioned --  
 3 A. I see where you're referring to. We  
 4 were just --  
 5 Q. The next to the last paragraph.  
 6 A. Yeah. We were requesting the data  
 7 from the Kling domestic well. I don't know if it  
 8 would invalidate the results that were presented.  
 9 Q. Are the water-level fluctuations in  
 10 the PGSA in the M3 vicinity not understood because  
 11 the effects of the fault are not understood? I  
 12 think that's from page 9 of Exhibit 50.  
 13 A. I don't think they're understood, but  
 14 again, I don't know if it's directly related to a  
 15 fault.  
 16 Q. Let's go to the SVR-7 aquifer test.  
 17 This was about 900 gallons per minute  
 18 for nine days?  
 19 A. Correct.  
 20 Q. The evidence so far is that the Big  
 21 Gulch well is about 180 feet deep. I think there  
 22 have been several witnesses testify to that.  
 23 Could there be reasonable uncertainty  
 24 whether it is actually in the PGSA or in a  
 25 shallower aquifer?

1 A. Yeah, I don't think anybody knows at  
 2 this point whether it is or not.  
 3 Q. All right. If the Big Gulch well had  
 4 significant drawdown and had difficulty recovering  
 5 for 12 days and it is in a shallower aquifer,  
 6 would that not indicate that pumping from the  
 7 deeper PGSA was causing drawdown in the shallow  
 8 aquifers in that area?  
 9 A. If in fact that well is completed in  
 10 the shallow aquifer, then yes.  
 11 Q. Okay. The SVR-7 test again was pumped  
 12 for about nine days at 900 gallons per minute,  
 13 that's about 1.3 million gallons per day, and the  
 14 applicant is requesting up to 15 million gallons a  
 15 day in a peak period, would not a longer and  
 16 larger test clear up some of the uncertainty about  
 17 the aquifer's sustainability in this area?  
 18 A. I believe so, yes.  
 19 Q. Why was the well with the greatest  
 20 drawdown among observation wells -- and that was  
 21 the Big Gulch well -- left out of the SVR-7  
 22 hydrograph?  
 23 A. I do not know.  
 24 Q. What does this figure indicate to you?  
 25 A. Which figure was that?

1 Q. I think that's Exhibit 44, Exhibit 44,  
 2 figure 46, if you'd refer to that.  
 3 A. Okay. Could you repeat the question,  
 4 please?  
 5 Q. Yeah. I was just wondering what these  
 6 figures indicate to you. Would that indicate  
 7 incomplete recovery of the Big Gulch well and that  
 8 the aquifer may be limited to some extent?  
 9 THE HEARING OFFICER: Okay. This is  
 10 Exhibit 44, what figure?  
 11 MR. ALAN SMITH: Figure 46.  
 12 THE HEARING OFFICER: I'm having trouble  
 13 with the numbering.  
 14 Q. (BY MR. ALAN SMITH): And also I think  
 15 you mentioned this on Exhibit 50 at page 4.  
 16 A. Okay. I believe there's two questions  
 17 asked.  
 18 Q. Yes.  
 19 A. The first one was my interpretation of  
 20 figure 46; is that correct?  
 21 Q. Correct.  
 22 A. To me, figure 46 is a good summary of  
 23 the water levels collected on the M3 property. It  
 24 also includes both of the aquifer tests that were  
 25 conducted on the M3 property.

1 And again, we wanted to point out the  
2 different fluctuations between the State and  
3 Linder well TW-1 and the remaining wells on the  
4 figure based on the large fluctuations. We wanted  
5 to indicate the declining trends on a majority of  
6 the wells completed on the M3 property and how  
7 that was inconsistent with previous knowledge.  
8 And then there was a question about the Big Gulch  
9 stock well.

10 Q. The Big Gulch stock well. Would that  
11 indicate to you that the recovery was incomplete?

12 A. The Big Gulch stock well is not on  
13 this figure. And I guess I don't understand the  
14 question.

15 Q. Let's go to Exhibit 50, page 18, that  
16 same table that I think Mr. Fereday asked you  
17 about. I think it's Exhibit 50, page 18.

18 A. Okay. I'm there.

19 Q. It's that table of the water -- water  
20 level breaks.

21 And my question is this. If the  
22 Capitol Bridge to Barber Dam river stretch seems  
23 to be losing water and the Glenwood Bridge to  
24 Barber Dam stretch is actually gaining water from  
25 groundwater sources, does that not raise more

1 PGSA.

2 A. Yes.

3 Q. Exhibit 904 at page 41.

4 A. Okay.

5 Q. And what factors or lines of evidence  
6 are you talking about there? Was one of those the  
7 lack of recovery of the Big Gulch stock well?

8 A. Yeah, it -- one line of evidence was  
9 the lack of recovery in the Big Gulch stock well.  
10 Another line of evidence was the declining water  
11 levels that we saw on the M3 property. The  
12 difference in the fluctuations was also another  
13 line of evidence.

14 Q. All right. Did the fact that the PGSA  
15 is similar to the East Boise Aquifer, which is  
16 having problems also, have some bearing on one of  
17 your lines of evidence?

18 A. I don't know if the East Boise Aquifer  
19 is the same as the aquifer beneath the M3 site.  
20 What I presented that for is a comparison, that  
21 you can have a productive aquifer and not have it  
22 be sustainable.

23 Q. All right. Going to Exhibit 50 at  
24 page 22, I think this is a figure showing the  
25 estimated drawdowns of 10 cfs.

1 questions about the recharge of the PGSA?

2 A. That raises questions, yes.

3 Q. How old is the water in the Goddard  
4 well?

5 A. Based on the documentation I've  
6 reviewed, I believe the number is 2,960 years old.

7 Q. So that was about a thousand years BC  
8 when they were building pyramids in Egypt?

9 A. I don't know about the pyramids, but  
10 it sounds about right for a thousand BC.

11 Q. That's pretty old water, then?

12 A. Yes.

13 Q. Doesn't this, as well as the  
14 geologically ancestral water conclusion by Squires  
15 and Glanzman, contradict HLI's conclusion about a  
16 robust recharge from the Boise River?

17 A. It doesn't necessarily contradict  
18 that. It could have been robustly recharged  
19 during the time it was available for recharge. It  
20 just doesn't indicate that it's being recharged  
21 today.

22 Q. And I think you were questioned  
23 about -- and this is your Exhibit 904, page 41,  
24 you were questioned about lines of evidence that  
25 caused you to question the sustainability of the

1 A. Yes.

2 Q. My question is this: In your opinion,  
3 what would the estimated drawdown be after a  
4 couple of months of hot weather, say July and  
5 August, with M3 pumping at 20 to 23 cfs? Would  
6 you have an opinion about the drawdowns?

7 A. I did not do that calculation. I  
8 don't know.

9 Q. And isn't the maximum drawdown what is  
10 going to determine if a particular well owner has  
11 to lower his pump or deepen his well, rather than  
12 the average pumping?

13 A. It could play a factor, yes.

14 Q. All right. Have you done some  
15 measurements on the Edwards well?

16 A. Mr. Norm Edwards?

17 Q. Norman Edwards, yes, sir.

18 A. Yes, I have.

19 Q. Have you been monitoring that well?  
20 That's a domestic well?

21 A. Yes, I believe I measured it three  
22 times.

23 Q. And over what period of time have you  
24 measured it?

25 A. The first measurement was, I believe,

1 in October of 2008, and then again in December or  
2 January of that year, and then once more just  
3 recently in March of 2009.

4 Q. Have you recorded your measurements of  
5 the static levels in that well?

6 A. Yes.

7 Q. Do you recall what they are?

8 A. The first two were 60-some feet depth  
9 to water below land surface, and the most recent  
10 one was I believe 72 feet. I'm not exactly sure.  
11 It's in the 70 feet --

12 Q. Do you have that information with you  
13 there?

14 A. I may.

15 It was 70.8 feet on March 24th of  
16 2009.

17 Q. And do you know when that well was  
18 drilled?

19 A. I believe in 1960. I don't know the  
20 exact date.

21 Q. Could it have been 1972?

22 A. Could have been, yes.

23 Q. Do you know what the static water  
24 level was from the well driller's report at that  
25 time?

1 A. I believe it was on the order of  
2 60 feet.

3 Q. So it's dropped 12 feet in some 30 or  
4 so years?

5 A. Correct.

6 Q. Let's go to the Eagle Pines irrigation  
7 well. Exhibit 45, figure 27.

8 And does that not show the static  
9 level at 105 feet in 1955 when Charlie Fisher  
10 drilled the well?

11 A. Yes, it does.

12 Q. And at a later date it was 112 in  
13 200- -- 2001, I believe?

14 A. That's what it shows, yes.

15 Q. And that well is about 208 feet deep?

16 A. Yes, that's what it says.

17 Q. Let's go to 2001. That well was  
18 measured again, according to this chart, and it  
19 was at 122 feet in 2001?

20 A. That appears to be the pumping water  
21 level, yeah.

22 Q. Pumping level?

23 A. Yes.

24 Q. And in 2006 what was the pumping level  
25 measurement at that time?

1 A. I do not recall.

2 Q. If our information is correct, it was  
3 126 feet.

4 A. The pumping level?

5 Q. Pumping level.

6 A. Okay.

7 Q. And that's in 2006.

8 A. Okay.

9 Q. Would that indicate there's been some  
10 drawdown in that well?

11 A. There's been drawdown for sure due to  
12 the pumping. To determine whether the regional  
13 aquifer levels are dropping, I'd feel more  
14 comfortable evaluating nonpumping water levels  
15 with similar seasonal dates.

16 Q. All right. If the pumping level's at  
17 126 feet down and the pump will shut off for a  
18 short period of time and then measure it again by  
19 laying pump and it would come back to 123 feet,  
20 would that sound reasonable to you?

21 A. Yeah, sure.

22 Q. How deep is that pump in that well, if  
23 you know?

24 A. I do not know.

25 MR. ALAN SMITH: I believe that's all I

1 have.

2 THE HEARING OFFICER: Okay. Let's see. I  
3 can't remember the convention we were following.

4 Do we want to have one more chance at  
5 this and go through some questions? Mr. Fereday?

6 MR. FEREDAY: Yes.

7  
8 FURTHER CROSS-EXAMINATION  
9 BY MR. FEREDAY:

10 Q. Mr. Owsley, with regard to the  
11 questions Mr. Smith was just asking you about the  
12 Edwards domestic well, you stated, I believe, that  
13 you measured it at 60 feet below ground level in  
14 2008; isn't that right?

15 A. No.

16 Q. What was your testimony in 2008, what  
17 was the measurement?

18 A. 60-something.

19 Q. 60-something?

20 A. Correct. I actually have the records  
21 here. I could verify for you.

22 On September 11th it was 68.25. On  
23 December 30th, it was 68.02.

24 Q. You're aware, aren't you, that in  
25 September water levels are still at a low level in

1 that part of the aquifer?  
 2 A. Yes. And that's why I made the  
 3 statement that I'd feel more comfortable reviewing  
 4 nonpumping water levels from the same seasonal  
 5 time, and the well was drilled in April and the  
 6 last measurement was in the end of March. So that  
 7 would be the comparative water levels.  
 8 Q. The end of March also is within the  
 9 irrigation season, is it not?  
 10 A. It probably depends on the season. I  
 11 don't know if the wells are --  
 12 Q. Do you know what the irrigation season  
 13 is in this area, Mr. Owsley?  
 14 A. Define "irrigation season."  
 15 Q. Sorry?  
 16 A. Will you define "irrigation season"?  
 17 Q. I asked you.  
 18 A. I believe it varies, depending on who  
 19 the farmer is and where you're at.  
 20 Q. Would you please refer to Exhibit 45,  
 21 figure 5.  
 22 With regard to M3 Eagle test well  
 23 No. 1, Mr. Owsley, would you agree with me that  
 24 the regional drawdowns -- seasonal drawdowns in a  
 25 well can be -- starting from mid-March can be

1 several feet, easily, based on Eagle test well  
 2 No. 1?  
 3 A. Will you repeat that question, please?  
 4 Q. Do you agree that beginning in  
 5 mid-March on both of the years 2007 and 2008  
 6 drawdowns were occurring?  
 7 A. In 2007, I would agree with that. In  
 8 2008, it doesn't appear as clear. Again, I think  
 9 this may -- this figure may indicate the variable  
 10 timing of the irrigation season. It appears the  
 11 downward trend shown in March 2007 occurs in  
 12 mid-April of 2008.  
 13 Q. Wouldn't you agree, though, that in  
 14 order to determine whether water levels are  
 15 dropping you need to correct for regional trends?  
 16 A. No, because that's what we'd be  
 17 looking at is the regional trend. So if you  
 18 corrected for it, it wouldn't tell you anything.  
 19 Q. You agree, though, don't you, that the  
 20 wells in the north Ada County area rise -- the  
 21 water levels rise and fall regardless of pumping  
 22 in that well annually; correct?  
 23 A. Correct.  
 24 Q. Would you agree that measuring at the  
 25 top of the recovery period would give you a better

1 idea of what the overall trend in the aquifer  
 2 would be?  
 3 A. I believe the top or the bottom of  
 4 both would provide that information.  
 5 Q. With regard to the questions about the  
 6 Kling domestic well, you're aware, aren't you,  
 7 Mr. Owsley, that HLI did provide monitoring data  
 8 in the Kling domestic well in their November 26th  
 9 filing, or did you not see that?  
 10 A. I believe it was submitted as a locked  
 11 .pdf format, just a locked .pdf format.  
 12 Q. You could read that, though, could you  
 13 not?  
 14 A. You could read the data, but it wasn't  
 15 identified as to what the data represented.  
 16 Q. You recognize, do you not, that HLI  
 17 has a dedicated monitoring well less than 100 feet  
 18 from the Kling domestic well, don't you?  
 19 A. Yes.  
 20 Q. And you recognize that that data was  
 21 evaluated and provided?  
 22 A. Yes.  
 23 Q. With regard to the lack of recovery  
 24 that you assert appears in the Big Gulch stock  
 25 well after the SVR-7 nine-day aquifer test, that

1 lack of recovery was something in the order of  
 2 four-tenths of a foot or less, was it not?  
 3 A. I believe so, out of a total  
 4 one-and-a-half feet of drawdown, approximately  
 5 two-thirds.  
 6 Q. In the aquifer test that you conducted  
 7 for your thesis, you did not see a full recovery,  
 8 did you, in the same amount of time as the test  
 9 took place?  
 10 A. I didn't have the opportunity to do  
 11 the recovery. As I mentioned, the wells we used  
 12 were public water wells, and they were required to  
 13 be turned back on.  
 14 Q. But you were able, were you not, to  
 15 evaluate those wells and their water levels for  
 16 the same period of time after the pump was turned  
 17 off as the period of time during which the test  
 18 was run; isn't that accurate?  
 19 MR. ALAN SMITH: Objection. Irrelevant.  
 20 THE HEARING OFFICER: Overruled.  
 21 THE WITNESS: I do not recall.  
 22 Q. (BY MR. FEREDAY): Mr. Owsley, you  
 23 testified that in your opinion the SVR-7 aquifer  
 24 test did not stress the aquifer enough to  
 25 determine boundaries.

1 Do you recall that?  
 2 A. I believe the question was to  
 3 determine all of the boundaries, yes.  
 4 Q. How much drawdown would you have to  
 5 see before you would be satisfied in, let's say,  
 6 SVR test well No. 9 that test well -- that well  
 7 I'll represent to you had something like .2 feet  
 8 of drawdown after nine days.  
 9 Is it your testimony that what you're  
 10 interested in is doubling the volume of that test  
 11 so that you would see .4 feet of drawdown in that  
 12 well?  
 13 A. No, that's not my testimony.  
 14 Q. What would be the kind of stress that  
 15 you think would be appropriate?  
 16 A. A higher pumping rate at a longer  
 17 period of time.  
 18 Q. What if the pumping rate were doubled  
 19 to 1800 gallons per minute, wouldn't that result  
 20 in a -- and run for the same amount of time,  
 21 wouldn't that just simply double the .2 to  
 22 .4 feet?  
 23 A. Yes.  
 24 Q. Is that a "yes"?  
 25 A. Yes.

1 Q. And that would be a significant  
 2 difference, in your view?  
 3 A. I don't think the drawdown in a  
 4 particular well is what I'm referring to. It's  
 5 the change in slope at the end of the test is what  
 6 is a concern. And if we could understand what  
 7 caused that change in slope, I would feel more  
 8 comfortable.  
 9 Q. Do you agree that the recovery plot of  
 10 the Big Gulch stock well did not show a boundary?  
 11 A. I'd agree. Again, that's why I would  
 12 like to see a longer test to understand whether  
 13 that was actually a boundary we saw at the end of  
 14 the first test.  
 15 Q. Mr. Owsley, do you agree that a  
 16 poorly-constructed well can fail to produce water  
 17 for reasons other than water levels available to  
 18 it?  
 19 A. Yes, I've heard multiple instances  
 20 throughout our north Ada County project.  
 21 Q. Where that's the case?  
 22 A. Yes.  
 23 Q. In your testimony about the direction  
 24 of groundwater flow in response to Mr. Thornton,  
 25 did you -- did I hear you testify that in your

1 opinion groundwater in the PGSA flows from the  
 2 northeast to the southwest?  
 3 A. I don't recall testifying to that. I  
 4 thought he asked me if I've seen additional data  
 5 that would dispute the figures that were presented  
 6 in the Treasure Valley reports.  
 7 Q. And your answer to that was what?  
 8 Maybe we need to --  
 9 A. "No."  
 10 Q. So in other words, you don't see any  
 11 data or any evidence that would dispute the  
 12 conclusion in the Treasure Valley Hydrologic  
 13 Project report that groundwater in the PGSA  
 14 flows -- groundwater flows from the northeast to  
 15 the southwest; is that correct?  
 16 A. Not exactly. There's four figures in  
 17 that Treasure Valley report that show groundwater  
 18 flow directions, depending on the depth. And they  
 19 do not identify the PGSA in any of those. So it's  
 20 tough to determine which figure to compare to. I  
 21 think the general idea of that was the western  
 22 flow direction.  
 23 Q. Do you disagree with Dr. Ralston's  
 24 conclusion with regard to groundwater flow in the  
 25 vicinity of the M3 Eagle property in the PGSA?

1 A. What was his conclusion?  
 2 Q. Exhibit 47, figure 9 is where he set  
 3 that forth.  
 4 A. He includes two western data points,  
 5 one of them in which is the Caldwell City well,  
 6 which we expressed our concerns in our staff  
 7 memorandum about. So the inclusion of that well,  
 8 again, creates questions to me. But generally,  
 9 the flow direction's to the west-northwest.  
 10 Q. Do you have any reason to disagree  
 11 with that?  
 12 A. No.  
 13 Q. I think you testified that the wells  
 14 that Mr. McVay measured in the staff's review are  
 15 near the M3 property.  
 16 Do you recall that?  
 17 A. In the vicinity, yes.  
 18 Q. Would you refer to Exhibit 50,  
 19 figure 1, please.  
 20 Are those the wells that Mr. McVay  
 21 evaluated?  
 22 A. No. None of the wells that he  
 23 evaluated are on that map.  
 24 Q. I'm sorry. It's figure 1 of the McVay  
 25 memo that's attached to Exhibit 50 --

1 A. All right.  
 2 Q. -- along figure 1.  
 3 A. Yes, those appear to be the ones.  
 4 Q. Those are the wells?  
 5 A. I believe so.  
 6 Q. And your view is that these wells are  
 7 in the vicinity of M3.  
 8 That's your definition of "vicinity"?  
 9 A. That is our historic network for that  
 10 area, yes.  
 11 Q. When you selected the geothermal well  
 12 in Dry Creek, did you recognize that it was a  
 13 geothermal artesian well?  
 14 A. I believe Mike pointed that out to me.  
 15 Q. Do you contend that that's in the  
 16 Pierce Gulch Sand Aquifer?  
 17 A. No. And I believe Mike also indicated  
 18 that in his memo, that the three wells in the Dry  
 19 Creek are not similar to the wells in non-Dry  
 20 Creek.  
 21 Q. With regard to Mr. Glanzman's  
 22 geochemical review, do you have any dispute with  
 23 the conclusion that the water in the PGSA has a  
 24 source in the Boise River?  
 25 A. Do I dispute that?

1 Q. Correct.  
 2 A. No.  
 3 MR. FEREDAY: Could we take just a minute  
 4 off the record?  
 5 THE HEARING OFFICER: Yeah, let's go off  
 6 just for a minute.  
 7 (Recess.)  
 8 THE HEARING OFFICER: Okay. We are  
 9 recording.  
 10 Mr. Fereday?  
 11 MR. FEREDAY: We have no further questions.  
 12 THE HEARING OFFICER: Okay. Mr. Thornton?  
 13 MR. THORNTON: Yeah, I think just one  
 14 question.  
 15  
 16 FURTHER CROSS-EXAMINATION  
 17 BY MR. THORNTON:  
 18 Q. And if you could go to Exhibit 47 and  
 19 figure 9 that you were just referred to by  
 20 Mr. Fereday.  
 21 A. Okay.  
 22 Q. There's a reference to the flow  
 23 direction and what Dr. Ralston presumably had  
 24 identified.  
 25 The question to you, do you remember

1 Dr. Ralston's saying that the easiest thing to do  
 2 is to connect dots in terms of wells, in terms of  
 3 identifying flow lines?  
 4 A. I do not recall him saying that.  
 5 Q. Okay. Do you recall him saying that  
 6 the most difficult thing, instead of connecting  
 7 dots, is to be able to actually appropriately  
 8 characterize the direction of flow underground and  
 9 not -- in between those dots?  
 10 A. Yes.  
 11 Q. Okay. And do you also remember  
 12 Dr. Ralston identifying that for the well  
 13 identified in figure 9 as 2412 that that was of  
 14 unknown construction?  
 15 A. I believe he referred to that, yes.  
 16 Q. And you also remember that Dr. Ralston  
 17 identified in his opinion it was of unknown, what  
 18 aquifer it was in?  
 19 A. Yes.  
 20 Q. Okay. And so really do these -- in  
 21 your opinion, do these flow lines depicted here  
 22 show a high degree of certainty for the direction  
 23 of flow?  
 24 A. I do not believe so, no.  
 25 MR. THORNTON: That's all the questions I

1 have. Thank you.  
 2 THE HEARING OFFICER: Okay. Mr. Smith?  
 3 MR. ALAN SMITH: I'm going to follow my  
 4 earlier advice. No further questions.  
 5 THE HEARING OFFICER: Okay. Mr. Owsley, do  
 6 you have anything that you wish to add based on  
 7 the questions that you received?  
 8 THE WITNESS: No.  
 9 THE HEARING OFFICER: Okay. I have one  
 10 question.  
 11 By the way, I want to note for the  
 12 record -- I didn't state this earlier -- that  
 13 Mr. Norm Edwards is not here. I have expected to  
 14 see him perhaps through some of the examination  
 15 here. But I was told that he wasn't here at the  
 16 beginning, and he has not yet appeared. So we'll  
 17 just continue to forge ahead.  
 18  
 19 EXAMINATION  
 20 BY THE HEARING OFFICER:  
 21 Q. I have a question about the table in  
 22 Exhibit 50 that's been referred to.  
 23 A. Yes. The Boise River table?  
 24 Q. Right. And it's on page 18. And as  
 25 Mr. Fereday asked you questions about this table,

1 I think his question to you was about two of those  
2 values representing gains or losses from Lucky  
3 Peak to Barber -- I'm sorry, lucky Peak to Capitol  
4 Bridge.

5 A. Correct.

6 Q. And as I recall, your response was  
7 that the label or the title on the table should be  
8 for Lucky Peak to Capitol Bridge. And I implied  
9 from your response that that would then -- that  
10 title would make all four of those measurements.

11 A. I was incorrect in stating that.  
12 Probably the best title for this table should be  
13 "Estimates of Boise River gains and losses,"  
14 period. Because the IDWR 2009 estimate is an  
15 estimate between the diversion dam and Glenwood  
16 Bridge.

17 The USGS 1997 estimate is, again, an  
18 estimate between the diversion dam and Glenwood  
19 Bridge.

20 The Urban and Petrich estimate in 1998  
21 appears to be an estimate between the diversion  
22 dam and Capitol Bridge, and similar to the Urban  
23 2005 estimate. However, I have talked to  
24 Mr. Urban about these estimates, and there's some  
25 uncertainty related to those values.

1 Q. But the table would support previous  
2 testimony that we heard, that the Boise River is  
3 generally a losing reach upstream from Capitol  
4 Bridge; correct? In other words, the Boise River  
5 loses water during -- as it flows through that  
6 reach?

7 A. I don't think that is known at this  
8 time. I believe it's been historically considered  
9 a losing reach, but the USGS report and a recent  
10 review of the IDWR data does not support that.

11 Q. Wouldn't the data that's presented  
12 here in your testimony, the Urban and Petrich  
13 measurement or estimate and the Urban estimate  
14 being a negative value and represented as being  
15 upstream from Capitol Bridge, wouldn't that  
16 indicate that the Boise River is a losing reach  
17 above Capitol Bridge?

18 A. Those numbers indicate that. But  
19 those numbers are based on an empirical formula I  
20 believe a previous section manager at IDWR had  
21 developed and cannot be reconstructed.

22 THE HEARING OFFICER: Okay. Well, I  
23 understand at least what the data is and  
24 represents a little better.

25 THE WITNESS: Okay.

1 THE HEARING OFFICER: Okay. Further  
2 questions based on what I've asked, Mr. Fereday?

3  
4 FURTHER CROSS-EXAMINATION  
5 BY MR. FEREDAY:

6 Q. Mr. Owsley, you agree that the Boise  
7 River does have losing reaches, do you not?

8 A. I don't know.

9 Q. Okay. You agree, do you not, that  
10 groundwater wells in the above Capitol reach have  
11 an increasing -- excuse me, a decreasing head with  
12 depth or decreasing potential with depth? Do you  
13 agree with that?

14 A. I don't know that either.

15 Q. You haven't evaluated that?

16 A. No.

17 THE HEARING OFFICER: Okay. You'll need to  
18 speak up.

19 THE WITNESS: No, I have not evaluated  
20 that.

21 Q. (BY MR. FEREDAY): Groundwater showing  
22 a decreasing potentiometric head with depth  
23 indicates that that is a groundwater recharge  
24 area; correct?

25 A. Potentially, yes.

1 Q. And groundwater -- a groundwater  
2 aquifer with an increasing potential with depth  
3 indicates that that aquifer is discharging;  
4 correct?

5 A. Correct.

6 Q. Do you agree that the Pierce Gulch  
7 Sand Aquifer, for example, in the vicinity of the  
8 Swift well does have increasing potential with  
9 depth?

10 A. I don't feel entitled to -- I don't  
11 feel I have the knowledge to answer that question  
12 about the Pierce Gulch Sand Aquifer at that well  
13 location.

14 Q. Do you have any reason today to  
15 dispute the TVHP model with regard to its  
16 assumptions about river gains or aquifer -- or  
17 river losses or aquifer recharge?

18 A. Yes, just as I pointed out.

19 Q. Just your comments here to --

20 A. Yes.

21 Q. -- the Hearing Officer?

22 A. And further review with the authors  
23 further justifies those concerns.

24 I should note that only 1 percent of  
25 the Boise River is represented in the Treasure

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1 Valley water budget, that loss, the minus 21 cfs.  
2 So I don't know how much emphasis was placed on  
3 calculating Boise River losses when it was just a  
4 minor, minor part of the overall water budget for  
5 the Treasure Valley project.  
6 Q. The Boise River runs some 2 million  
7 acre-feet a year, does it not?  
8 A. Yes.  
9 Q. And your testimony still is you don't  
10 know whether any of that 2 million acre-feet is  
11 lost to aquifers; is that correct? Is that your  
12 opinion?  
13 A. No, that's not my opinion. We know  
14 that a lot of it is lost to the aquifers through  
15 the irrigation practices that is Boise River  
16 water, and it also returns right back to the  
17 river.  
18 Q. But is it your testimony that you  
19 don't know whether there's any leakage out of the  
20 river itself or out of main canals themselves to  
21 aquifers?  
22 A. Out of the canals, there's been fairly  
23 significant studies that show a loss to the  
24 shallow aquifer. Out of the Boise River, I don't  
25 know. I've never measured the Boise River, and I

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1 believe the USGS study is the most detailed  
2 investigation we have of the river.  
3 MR. FEREDAY: No further questions.  
4 THE HEARING OFFICER: Mr. Thornton, on that  
5 particular subject?  
6 MR. THORNTON: Yes.  
7  
8 FURTHER CROSS-EXAMINATION  
9 BY MR. THORNTON:  
10 Q. For the USGS 1997, was that conducted  
11 by USGS personnel?  
12 A. Yes.  
13 Q. And are they experts in measuring  
14 surface water flow?  
15 A. I don't know if the author is an  
16 expert in surface water flows or not. I believe  
17 that report was submitted as an exhibit in this  
18 hearing.  
19 Q. Yes. And the estimates that they --  
20 the USGS had were actually from calculated field  
21 measurements; is that correct?  
22 A. Correct.  
23 Q. And not based on empirical formulas?  
24 A. Correct.  
25 MR. THORNTON: No further questions.

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1 THE HEARING OFFICER: Mr. Smith?  
2 MR. ALAN SMITH: No questions.  
3 THE HEARING OFFICER: Thank you,  
4 Mr. Owsley.  
5 MR. FEREDAY: Can we take just a minute?  
6 THE HEARING OFFICER: Yeah, let's take ten  
7 minutes again.  
8 MR. FEREDAY: Thank you.  
9 (Recess.)  
10 THE HEARING OFFICER: Okay. We are  
11 recording again after another morning recess.  
12 We've finished the examination of Mr. Dennis  
13 Owsley. And now Mr. Michael McVay has come to the  
14 witness chair.  
15 So, Mr. McVay, if you'd raise your  
16 right hand. Oh, you've already been sworn in.  
17 I'm sorry. I'll remind you of that, and please be  
18 seated.  
19 Mr. Fereday, you may examine  
20 Mr. McVay.  
21  
22 MICHAEL McVAY,  
23 having been previously called as a witness by the  
24 Department and previously duly sworn, was examined  
25 and testified as follows:

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1 CROSS-EXAMINATION  
2 BY MR. FEREDAY:  
3 Q. Mr. McVay, I intend to ask you a few  
4 questions with respect to your exhibit, which is  
5 Exhibit 905 in this record. I believe it's your  
6 narrative testimony along with your slides.  
7 Do you recall that?  
8 A. I do.  
9 Q. To begin with, I'm looking at page 22,  
10 and I'll just read from the last line there. With  
11 regard to your analyses, Mr. McVay, you state here  
12 on page 22 that your "...analyses were not  
13 intended to assign a water-level trend to any  
14 aquifer, only to compare water levels in an effort  
15 to identify aquifers."  
16 And then again on page 1 you say  
17 something that I take it is similar, "This  
18 undertaking was not intended to determine the  
19 periods of rising and declining water levels in  
20 individual wells."  
21 Based on those statements, Mr. McVay,  
22 is it fair to conclude that your analysis does not  
23 attempt to determine whether water-level trends  
24 are rising or falling in the Pierce Gulch Sand  
25 Aquifer?

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1 A. That's correct.  
2 Q. What was the purpose of simply  
3 differentiating between aquifers?  
4 A. Well, Dennis said -- when he asked me  
5 to do this work, he had expressed a concern he was  
6 unable to -- or he wasn't unable. He was having  
7 difficulty differentiating between the upper  
8 undifferentiated alluvial aquifers and the Pierce  
9 Gulch Aquifer and what kind of connection existed  
10 between those aquifers. And so he asked that I  
11 look at this -- these data in an attempt to try to  
12 differentiate between those.  
13 Q. Have you had any training in college  
14 or elsewhere with regard to differentiating  
15 between aquifers by means of measuring water  
16 levels?  
17 A. I had training in college coursework  
18 and in other professional work settings in  
19 water-level analysis, but nothing particular for  
20 differentiating different aquifers, based on  
21 water-level behavior.  
22 Q. So what scientific approach did you  
23 adopt, then, in undertaking this project?  
24 A. What scientific approach?  
25 Q. Yes. What scientific basis for

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1 aquifer differentiation were you relying on?  
2 A. Visual analysis, visual graphical  
3 analysis.  
4 Q. If differentiating between aquifers  
5 was your purpose, why did you not include water  
6 level from -- water-level data from several known  
7 PGSA wells that are in the area?  
8 A. I just looked at the wells that were  
9 given to me.  
10 Q. I believe that Mr. Vincent, if I  
11 recall correctly, indicated that the water-level  
12 trend discussion in the staff memo was not correct  
13 in that it ascribed water-level trends to the PGSA  
14 that it should not have.  
15 Do you recall testimony along those  
16 lines?  
17 A. I don't recall --  
18 Q. Perhaps I'm not recalling that right,  
19 but I --  
20 A. And I did miss some of -- I missed  
21 most of Mr. Vincent's testimony, especially his --  
22 THE HEARING OFFICER: Okay. Mr. McVay, I  
23 need you to wait until Mr. Fereday finishes his  
24 question --  
25 THE WITNESS: Still need to slow down.

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1 THE HEARING OFFICER: -- and vice versa.  
2 Yeah.  
3 Q. (BY MR. FEREDAY): With regard to  
4 page 2 of your exhibit -- I'll withdraw that  
5 question.  
6 With regard to page 2 of your  
7 Exhibit 905, you note that the data was collected  
8 on variable sampling frequencies.  
9 A. Yes.  
10 Q. The reason for that was what?  
11 A. I'm not sure all of the reasons.  
12 Typically, they're economical or logistical, just  
13 getting out there, getting feet on the ground.  
14 Currently we're in the process of reducing some of  
15 our sampling schedules based on our economic woes.  
16 Q. So it was a "get the data when and  
17 where you could"?  
18 A. I believe so.  
19 Q. With regard to any of the wells that  
20 you sampled, do you have geophysical logs on any  
21 of them?  
22 A. I don't know -- no, I never saw any  
23 geophysical logs on any of them.  
24 Q. You don't know, do you, which well is  
25 completed in which aquifer?

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1 A. We did assign some aquifer --  
2 designation. I personally am not knowledgeable  
3 enough to know which ones are and are not. I  
4 relied on Dennis and somewhat on HLI's  
5 interpretations of the protestant wells.  
6 Q. With regard to the dates on which data  
7 is collected, would you agree with me that it can  
8 make a vast difference if data are collected at  
9 times when the aquifer is changing due to regional  
10 trends as compared to taking all the data and  
11 evaluating what all the data say as to aquifer  
12 levels?  
13 A. Are you talking about seasonal trends  
14 or regional aquifer trends?  
15 Q. Seasonal trends.  
16 A. Seasonal trends. I do agree that that  
17 can be a problem.  
18 Q. With regard to Exhibit 45, figure 5,  
19 which we've talked about several times, I'd like  
20 you to refer to that, please.  
21 A. I found that figure.  
22 Q. You've indicated in your narrative  
23 testimony, I believe, Mr. McVay, that you took  
24 water-level samples during the period between  
25 March and May; correct?

1 A. Yeah, I didn't take any samples, but I  
 2 picked data from those -- from that period.  
 3 Q. Doesn't figure 5 fairly graphically  
 4 demonstrate the fact that the seasonal water-level  
 5 trends in at least the Pierce Gulch Sand Aquifer  
 6 are quite sharply downward from March through May?  
 7 Would you agree?  
 8 A. I agree that they show that in this  
 9 well.  
 10 Q. Don't you agree that this is shown in  
 11 other hydrographs for other wells in the PGSA?  
 12 A. Some of them, yes.  
 13 Q. Would you agree that missing a  
 14 year-to-year matchup by even a few days in  
 15 comparing water levels could be significantly  
 16 affected by seasonal trends such as this?  
 17 A. It's possible.  
 18 Q. You noted on page 10 that one should  
 19 try to pick a date before or after the irrigation  
 20 season.  
 21 Do you recall that?  
 22 A. I do.  
 23 Q. But you didn't -- you weren't able to  
 24 do that, were you?  
 25 A. I was not able to do that.

1 Q. With regard to page 11 in your  
 2 narrative testimony, Exhibit 905, I'm interested  
 3 in one of the red-shaded figures here, well  
 4 12CCA1.  
 5 Do you see that, near a third of the  
 6 way up from the bottom?  
 7 A. Yes, I do.  
 8 Q. Do you contend that this well is  
 9 completed in the Pierce Gulch Sand Aquifer?  
 10 A. I don't remember what we designated  
 11 that as.  
 12 Q. If you could refer to Exhibit 45,  
 13 figure 25, maybe that will shed some light.  
 14 A. Excuse me. 25?  
 15 Q. Yes.  
 16 A. Okay. I found that figure.  
 17 Q. Do you know when the seasonal high is  
 18 in this well?  
 19 A. Based on this graph, I do not.  
 20 Q. With regard to these red-colored  
 21 figures such as well 12CCA1, you indicate that  
 22 this is the average date, which is a function of  
 23 alternating fall and spring high water levels, how  
 24 was that -- how was that number derived and how  
 25 does it have meaning in your analysis?

1 A. So this table in particular was to  
 2 show the variability in timing of the high water  
 3 level in this dataset, either due to the data  
 4 collection or to the physical high water mark.  
 5 And so what I did is I looked at the full dataset  
 6 that I had, and I picked the high water level for  
 7 each year that was represented in this data.  
 8 And some years that water level was  
 9 late in the year, in the fall, and in other years  
 10 it was early in the year in the spring. And  
 11 again, I'm not sure if that's physical, or if it's  
 12 just data collection.  
 13 And so when I took the average of  
 14 these dates, then I got a number -- or a date in  
 15 midsummer. And I believe those dates don't hold  
 16 much value because I'm not sure if the high water  
 17 levels are true or not.  
 18 Q. Do you recognize that some wells in  
 19 the north Ada County area actually do have their  
 20 highest water levels in the summer?  
 21 A. I could believe that.  
 22 Q. And would that indicate to you that  
 23 those wells are responding to irrigation  
 24 application, or do you know?  
 25 A. I don't know, but that would be my

1 first assumption.  
 2 Q. And those wells would not be typical  
 3 of Pierce Gulch Sand Aquifer wells; correct?  
 4 A. I don't know.  
 5 Q. So in other words, on page 11 on  
 6 table 2 there, you're just saying that you  
 7 averaged water levels and came up with a new month  
 8 that would be an average month of high water  
 9 level?  
 10 A. This table was in response to the  
 11 Hydro Logic response to our staff memo, where they  
 12 expressed concern over my choice of dates. And I  
 13 wanted to illustrate the dates aren't like in the  
 14 previous figure 5 where they absolutely occur in  
 15 March or they absolutely occur in April, and that  
 16 in this dataset the high water levels are quite  
 17 variable and that I was forced to make choices  
 18 based on those -- that variability.  
 19 Q. Okay. On page 13 you note that you  
 20 were able, at least for most of the wells -- and  
 21 I'll quote here -- "...to pick very similar dates,  
 22 which reduced the variability associated with  
 23 seasonal water-level changes."  
 24 But is it your view, Mr. McVay, that,  
 25 for instance, to look at your table here,

1 figure 8, a March 9th date in 2000 is very similar  
 2 to a May 23rd date in 2003?  
 3 A. I don't think I understood the  
 4 question.  
 5 Based on this table?  
 6 Q. Yeah. The table, as you say,  
 7 illustrates the dates chosen for each well;  
 8 correct?  
 9 A. Correct.  
 10 Q. And you say up above that you were  
 11 able to pick very similar dates, which reduced the  
 12 variability associated with seasonal water-level  
 13 changes.  
 14 Is it your testimony that the seasonal  
 15 water change that occurs between -- let's say, to  
 16 pick two examples from your table -- March 9th and  
 17 May 23rd is of no consequence?  
 18 A. That is not my testimony. March 9th  
 19 and May 23rd -- oh, I see. On 05 north 01 east  
 20 35ACA1?  
 21 My testimony is I'm not quite sure how  
 22 much effect that has. I did do some analyses to  
 23 try to determine the variability, but it was not  
 24 statistically valid. And so I can't report how  
 25 much variability is associated with that.

1 Q. With regard to your comments about  
 2 HLI's plots, I have a few questions. Let's go to  
 3 page 27.  
 4 For this well, which is CAD1, do you  
 5 have any reason to disagree that the highest water  
 6 level measured since 1980 occurred in  
 7 approximately 2002 in this well?  
 8 A. I do not.  
 9 Q. And do you disagree with my  
 10 characterization here, Mr. McVay, that both  
 11 periods, if you take them separately from 1980 to  
 12 1990 and from 1990 to the end of that chart, show  
 13 rising trends?  
 14 A. Do I disagree with that statement?  
 15 Q. Right.  
 16 A. I don't disagree that visually they  
 17 appear to have an upper trend. As I stated  
 18 earlier in my testimony, that sporadic sampling  
 19 schedule can produce artifact trends. I don't  
 20 know if that's the case here, but it's a concern  
 21 that I have.  
 22 MR. FEREDAY: No further questions.  
 23 THE HEARING OFFICER: Okay. Mr. Thornton?  
 24 MR. THORNTON: Yeah.  
 25 ///

1 CROSS-EXAMINATION  
 2 BY MR. THORNTON:  
 3 Q. If you could go to Exhibit 906, which  
 4 is your evaluation that you provided to  
 5 Mr. Owsley. I believe it's 906, evaluation of  
 6 north Ada County historical water-level trends.  
 7 A. Is that memo 1?  
 8 Q. I --  
 9 A. Is there a date on that memo?  
 10 Q. January 28th, 2009.  
 11 A. Okay.  
 12 THE HEARING OFFICER: Do you have it?  
 13 THE WITNESS: I do not.  
 14 THE HEARING OFFICER: Here's a copy.  
 15 THE WITNESS: I have that memo.  
 16 Q. (BY MR. THORNTON): Okay. And your  
 17 task was -- presented to you was to look at a  
 18 number of wells and their water-level trends;  
 19 correct?  
 20 A. Correct. Well, their water-level  
 21 behavior.  
 22 Q. Behavior. Okay. Thank you.  
 23 And then on page 4 in your report on  
 24 your conclusions, down in No. 3, obviously you've  
 25 had a chance to -- following your report and have

1 it reviewed, scrutinized, and a chance to probably  
 2 rethink what you've done, is that correct, since  
 3 this report?  
 4 A. To some degree, yes.  
 5 Q. So on No. 3 you state, "All wells  
 6 classified as undifferentiated."  
 7 What do you mean by  
 8 "undifferentiated"? Just maybe let me know.  
 9 A. I believe we took that phrase from the  
 10 HLI where they characterized the Pierce Gulch  
 11 Aquifer and the above aquifers as undifferentiated  
 12 alluvial.  
 13 Q. Okay. Was your task to identify the  
 14 water level characteristics of just the Pierce  
 15 Gulch or of a variety of aquifers?  
 16 A. He just -- he gave the wells to me,  
 17 the list of wells, and then asked if I could  
 18 determine the difference between Pierce Gulch and  
 19 other wells in the area.  
 20 Q. And looking back on it now, were you  
 21 able to do that?  
 22 A. Not very well. I was able to conclude  
 23 that several wells in the Dry Creek area really  
 24 appeared to plot together, and they were easy to  
 25 separate out based on the hydrographs that I had

1 created.  
2 Q. Okay. And then would you agree in  
3 No. 3, your final statement where "All wells  
4 classified as undifferentiated for Pierce Gulch  
5 display negative water-level trends that range  
6 from loss of .21 feet per year to .49 feet per  
7 year with an average trend of a loss of .27 feet  
8 per year"? Do you still feel that that is  
9 appropriate?

10 A. I had found some mistakes, and I want  
11 to make sure that I have the correct numbers.

12 Yes, I still agree with that.

13 MR. THORNTON: No further questions.

14 THE HEARING OFFICER: Mr. Smith?

15  
16 CROSS-EXAMINATION

17 BY MR. ALAN SMITH:

18 Q. Mr. McVay, do all of these wells in  
19 your evaluation on Exhibit 50, page 3, I believe,  
20 it is -- page 2, do all of those wells show  
21 negative water trends except for that one which is  
22 a shallow alluvial well?

23 A. Exhibit 50, page 2?

24 THE HEARING OFFICER: This would be the --

25 MR. ALAN SMITH: Yes.

1 THE HEARING OFFICER: This would be his  
2 memo to Dennis Owsley?

3 Q. (BY MR. ALAN SMITH): This is your  
4 memo. I'm sorry. Your graph there.

5 A. Okay.

6 Q. Table 1.

7 THE HEARING OFFICER: This is on page 2 of  
8 the McVay memo to Dennis Owsley that was attached  
9 as part of Exhibit 50.

10 THE WITNESS: Could you repeat the  
11 question? Sorry. I lost it.

12 Q. (BY MR. ALAN SMITH): Yes. I was just  
13 asking, if all of those wells show a negative  
14 downward water-level trend except for that one  
15 well which is an alluvial -- shallower alluvial  
16 well? I believe that's 11BBB1.

17 A. Uh-huh, yes. What was the question  
18 again? Do I still believe --

19 Q. Do all of these wells, in your  
20 evaluation, show negative water-level trends,  
21 other than that one?

22 A. I believe that I revised that, and now  
23 there are two wells that display positive  
24 water-level trends that are not in the Dry Creek  
25 area.

1 Q. Looking at figure 1 -- we're still on  
2 Exhibit 50, page 3, figure 1.

3 Is it possible that the faults shown  
4 here might tend to channel the drawdown from M3  
5 Eagle property toward the southeast?

6 A. I have not analyzed that at all.

7 Q. Okay. Do you know where the 32D, as  
8 in dog, B, as in boy, D, as in dog, 1 well, do you  
9 know where that's located?

10 A. 5 north, 1 east 32DBD1?

11 Q. Correct.

12 A. I see it located just south and a  
13 little east of the M3 property.

14 Q. Are you aware that the area around  
15 this well has already been having problems with  
16 many wells needing to be deepened or replaced with  
17 deeper wells in the last few years?

18 A. I'm personally not aware of that. I  
19 heard Dennis testify to that.

20 Q. Isn't the 32DBD1 well the worst  
21 downtrend well of your evaluation? I think it's  
22 back on page 2.

23 A. I believe that did show the steepest  
24 decline. But I didn't compare it to other wells  
25 during this analysis. It only had fall data, and

1 so I didn't feel it was applicable.

2 MR. ALAN SMITH: I think that's all I have.

3 THE HEARING OFFICER: Okay. Further  
4 questions, Mr. Fereday?

5 MR. FEREDAY: No further questions.

6 THE HEARING OFFICER: Okay. Anything else,  
7 Mr. Thornton?

8 MR. THORNTON: No further questions.

9 THE HEARING OFFICER: Okay. Thank you,  
10 Mr. McVay.

11 That concludes the testimony of the  
12 Department witnesses. And it's about quarter to  
13 12:00. What do we want to do? Do we want to  
14 break for lunch at this point? It's probably a  
15 reasonable time, even though it's a little early.

16 MR. THORNTON: Lunch break sounds good.

17 THE HEARING OFFICER: And then how do we  
18 want to start in? Mr. Thornton, do you want to  
19 start presenting your testimony?

20 MR. THORNTON: Yeah.

21 THE HEARING OFFICER: How do we want to  
22 work in the testimony of Mr. -- well, let's go off  
23 the record. I don't think we need to have this  
24 discussion recorded.

25 (Discussion.)

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1 THE HEARING OFFICER: Okay. We are  
2 recording.  
3 And Mr. Lawton is here and has agreed  
4 to testify, and the parties have agreed to have  
5 him come on.  
6 Mr. Lawton, raise your right hand,  
7 please.  
8  
9 BILL LAWTON,  
10 appearing as a public witness,  
11 was duly sworn and testified as follows:  
12  
13 THE HEARING OFFICER: Please be seated, and  
14 you may narrate your testimony. I understand you  
15 have a statement. If you would state for the  
16 record your name and spell it, please.  
17  
18 DIRECT NARRATIVE TESTIMONY  
19 BY BILL LAWTON:  
20 THE WITNESS: My name is Bill Lawton.  
21 That's L-a-w-t-o-n. I live in Eagle. I'm  
22 basically here for public testimony today.  
23 For people that don't know, I was one  
24 of the protesters. And I have been not allowed to  
25 be a protester anymore because I wasn't able to

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1 attend all the hearing meetings, mainly because  
2 I'm self-employed and I cannot afford to take the  
3 time off work.  
4 A few statements just about the  
5 proceedings. From the very start of this, it was  
6 very obvious to me that Givens, Pursley was doing  
7 everything possible to get rid of protesters.  
8 That doesn't seem to be -- I mean I  
9 understand if there's no protesters you get your  
10 water rights, but that doesn't seem to be  
11 something that is in the way things should be  
12 done.  
13 I've also noticed that everybody  
14 that's here, whether you're working for Water  
15 Resources, you're one of the attorneys, you work  
16 for Hydro Logic, you're the specialist that  
17 testified, every one of these people is being  
18 paid, and more than likely the people from M3 are  
19 being paid.  
20 Everybody's making money except the  
21 protesters. The protesters have got nothing out  
22 of this. We're merely trying to protect our  
23 rights and our property and to keep from having to  
24 spend money. And I see a problem with that too.  
25 Luckily, Mr. Smith and Mr. Edwards are

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1 both retired so they could spend the time. I know  
2 Mr. Thornton has had problems having to be here  
3 with his boss. And somehow I just see this to be  
4 a massive problem in the system, and I really  
5 don't have an answer how it can be fixed.  
6 But the length of this whole thing, I  
7 know that when I got into this, I figured there  
8 would be testimony for one or two days, and it  
9 would be over. This thing has run out basically,  
10 if you figure time for depositions and everything  
11 we're probably talking at least 15 business days  
12 of what's gone on.  
13 I'd also like to state that the M3  
14 attorneys have tried to say that the protesters  
15 are antigrowth. I am against growth. I've lived  
16 in Eagle for 15 years, but the growth that I'm  
17 against is the growth that has gone against a plan  
18 that has been in operation for years.  
19 In that 15 years there have been many,  
20 many meetings. All property north of Beacon Light  
21 Road was supposed to be 5 acres and work into  
22 10 acres and 40 acres up in the foothills. If  
23 that had stayed in force, we wouldn't be here  
24 today.  
25 And once again, money seems to be at

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1 the root of what's going on here, because people  
2 that live -- had property in the foothills for  
3 years have accepted this, and now they're selling  
4 their property for I'm sure more money because  
5 they've set this up to be developed.  
6 There have been subdivisions put in  
7 south of Beacon Light where I live, and we've  
8 never said a word about them because it was all  
9 done, lots of houses, by the way the plan had been  
10 set up.  
11 Basically, I restore cars for my life.  
12 I just use common sense on everything I do. I've  
13 listened to what little bits of testimony I hear  
14 stories from both sides, but I can say that  
15 absolutely nobody in this room, be it Hydro Logic,  
16 any -- Dr. Ralston, anybody can positively say  
17 what water is in the ground in Eagle.  
18 These experts can -- you know, they  
19 can come from both sides. They really don't know.  
20 The only way to tell what water is in the ground  
21 is to monitor it, use it, and when it starts going  
22 down, you have to come up with an accepted lower  
23 level and go by that, and then stop the usage of  
24 water.  
25 This M3 thing with the amount of water

1 they're asking for, it can cause nothing but  
2 trouble, if the problem's there. And I don't  
3 think any of the protesters or anybody would have  
4 a problem if nothing happens. But nobody can tell  
5 us what's in that ground. The only way we know is  
6 by using the water and stopping using it when it  
7 starts going down.

8 We need an acceptable water level.  
9 What is it? I mean so far nobody's been able to  
10 say. I mean should our water level drop 5 feet,  
11 10 feet, 50 feet? It could go down to 400 feet  
12 from one thing I heard.

13 And I do know that I went to one of  
14 the early meetings at the City Hall in Eagle. And  
15 at that meeting they had people stand up and talk  
16 about electrical, roads, the whole thing. I said  
17 this all sounds a little crazy. But then the guy  
18 got up and talked about water and said they were  
19 going use 4 to 5 million gallons a day.

20 That's not what this water right is  
21 asking for. 4 to 5 million gallons a day -- I  
22 know what our irrigation pump uses, and that  
23 didn't seem to be a problem to me.

24 I also know -- I've got a friend that  
25 lives on Beacon Light, down right across from the

1 feedlot. My wife asked him, "Why aren't you  
2 people worried about this water problem?"

3 His statement was they had been told  
4 there would be no problems from this. So somebody  
5 is putting the word out somewhere that this isn't  
6 a problem.

7 And now that I -- the only people that  
8 can be saying this is isn't going to be a problem  
9 has got to be M3, the attorneys, or Hydro Logic.  
10 And I'm wondering how many of these people from  
11 any one of these operations would personally or  
12 corporately guarantee us from water loss, because  
13 I don't think any of them will because they don't  
14 know what's there. This stuff all just bothers  
15 me.

16 My well at my house was drilled in  
17 1975. It was a shallow well. In May of '08, it  
18 just went dry. Pumped very little water. Just  
19 happened just like that (indicating). I find out  
20 that my neighbor two weeks earlier had a shallow  
21 well that totally went dry. She got no water from  
22 it.

23 So something was going on just last  
24 May, a year ago, that caused two wells right --  
25 actually, I'm on one side of Mr. Smith, the other

1 well was right on the other side of him. There  
2 was another well near us that went dry, and  
3 another lady that I talked to that was having  
4 problems. So something is going on with water  
5 levels. My well had been there for years.

6 The only thing I can figure is there  
7 was a big well put in at Eagle Road and Floating  
8 Feather that went online possibly in March of '08,  
9 and that well might have done what happened. I  
10 spent 12,000 -- \$11,000 putting in a new well.

11 And in closing, with what's happened  
12 in eastern Idaho, I'm sure over there water rights  
13 were issued and there wasn't a lot of study. And  
14 finally they had problems.

15 We've had very little study in the  
16 Eagle area, really. And these large water rights  
17 are being asked for. But this time people have  
18 written letters in concern. There have been  
19 protesters, and people are definitely worried  
20 about the availability of water and what could  
21 happen.

22 I have a feeling that if problems do  
23 occur down the road, the agricultural water is  
24 going to be shut off before any of this domestic,  
25 multiuse water.

1 We have an irrigation pump that  
2 actually they've talked about from the M3 side,  
3 the Eagle Pines Water Users, that's been in the  
4 ground for 50 -- or the water right's been issued  
5 for 54 years. If water levels start being a  
6 problem, I have a -- I have a worry that they're  
7 going to shut off the irrigation pump, and that's  
8 going to affect my property values.

9 If this water right is approved and  
10 there are problems in the future, I might be  
11 expected to spend another \$25,000 to drill a new  
12 domestic well. I could be expected to spend 5- or  
13 \$10,000 to upgrade our agricultural well.

14 And if that doesn't work, then I'm  
15 going to be required to go to Eagle City Water,  
16 which is going to cost who knows how much to get  
17 run to our property, and pay for it.

18 Somehow this stuff doesn't seem right.  
19 The water has been in the ground for years, and it  
20 has to be monitored and set up so when it goes  
21 down we don't -- we can take care of it.

22 And if these water rights are approved  
23 and water levels drop drastically, with all the  
24 documentation that's come out in this hearing, I  
25 fear that the state of Idaho will be set up for

1 massive class action lawsuits by allowing this to  
 2 happen.  
 3 And that's all I have to say.  
 4 THE HEARING OFFICER: Okay. Thank you,  
 5 Mr. Lawton.  
 6 Mr. Fereday, questions for Mr. Lawton?  
 7  
 8 CROSS-EXAMINATION  
 9 BY MR. FEREDAY:  
 10 Q. Mr. Lawton, your domestic well is near  
 11 the Eagle Pines well, is it not?  
 12 A. Well, what do you mean by "near"? I  
 13 mean --  
 14 Q. How close is it to the Eagle Pines  
 15 well, sir?  
 16 A. I'm going to guess it's -- I don't  
 17 know -- a quarter of a mile, half mile. I don't  
 18 really know. Could be closer to a half mile, I  
 19 suppose.  
 20 Q. You agree that monitoring should  
 21 occur, based on your comments?  
 22 A. Yes.  
 23 Q. You recognize, do you not, that M3  
 24 Eagle is monitoring groundwater in the area and  
 25 has been since 2006?

1 A. I recognize that they're monitoring  
 2 water level, but you still aren't sucking huge  
 3 amounts of water out of the ground that you will  
 4 have the right to do and bypass all of that  
 5 monitoring and run us dry. That's what I worry  
 6 about. Or drastically reduce the water level.  
 7 Once you have the water right, then this game is  
 8 over for us.  
 9 Q. Have you heard any testimony in this  
 10 case from Mr. Brownlee or Mr. Squires, for  
 11 example, that describes the long-term monitoring  
 12 program that they envision?  
 13 A. No. The only testimony I've heard was  
 14 the day that the gentleman from Water Resources  
 15 were here and seemed to shoot a lot of holes in a  
 16 lot of the study that Hydro Logic did. That's the  
 17 only thing I've heard.  
 18 And I still -- I come down to the fact  
 19 that nobody knows what is there. And once we get  
 20 down to an acceptable lower level, it has to stop.  
 21 And studies -- the good Lord -- if there's a good  
 22 Lord, the good Lord knows what's in the ground.  
 23 That's it. So --  
 24 Q. You testified that your well, in your  
 25 words, went dry suddenly in May of '08; correct?

1 A. Yes.  
 2 Q. It just stopped producing water?  
 3 A. One day I did some work in the house,  
 4 I changed a washer in my bathtub. And I walked  
 5 over and I turned the well on, and it kept  
 6 running. And I said that's very strange.  
 7 And that's the day -- two days later  
 8 my wife went out and watered, and there was no  
 9 water. And we got just enough water to barely  
 10 fill up our tank, and we used as little as  
 11 possible and got in touch with a well driller.  
 12 And by that time the neighbor's well  
 13 had gone completely dry. She never got another  
 14 drop out of hers.  
 15 Q. Do you know how that 1975 vintage well  
 16 was constructed with regards to its screens?  
 17 A. I have no idea. All -- I had the pump  
 18 pulled out one time, and it was sitting on the  
 19 bottom of the well, and that's all I know.  
 20 I do know that I have seen water  
 21 levels that were 10 to 12 feet above the pump when  
 22 that was pulled out. So the water levels have  
 23 been there.  
 24 Q. Was your other well, your irrigation  
 25 well, also in existence in 2008?

1 A. The irrigation well's been in  
 2 existence since basically 1955.  
 3 Q. And the irrigation well is still  
 4 producing; correct?  
 5 A. Right.  
 6 Q. How far away from your domestic well  
 7 is the irrigation well?  
 8 A. Well, that's what we just talked  
 9 about. It's a quarter to a half mile.  
 10 Q. Okay. That irrigation well is the  
 11 Eagle Pines well?  
 12 A. That's it.  
 13 Q. You share that well; is that correct?  
 14 A. Yes.  
 15 Q. Did your domestic well produce sand at  
 16 any time, Mr. Lawton?  
 17 A. Very little.  
 18 Q. But a little?  
 19 A. Uh-huh.  
 20 Q. And it would produce that a little bit  
 21 all the time?  
 22 A. Uh-huh.  
 23 Q. You don't know why your well went dry,  
 24 do you, Mr. Lawton?  
 25 A. No. It just went dry.

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1 Q. It stopped producing?  
2 A. It stopped producing. And the fact  
3 that it happened when it happened in other places  
4 close by tells me that obviously there was a  
5 problem with water levels.  
6 MR. FEREDAY: No further questions.  
7 THE HEARING OFFICER: Okay. Mr. Thornton,  
8 questions?  
9 MR. THORNTON: No questions.  
10 THE HEARING OFFICER: Mr. Smith, questions?  
11 MR. ALAN SMITH: No questions.  
12 THE HEARING OFFICER: Okay. Thank you,  
13 Mr. Lawton.  
14 THE WITNESS: Thank you very much for  
15 letting me talk.  
16 THE HEARING OFFICER: Sure. We'll break  
17 for lunch. Let's come back about five after 1:00.  
18 No, let's come back at ten after.  
19 MR. FEREDAY: Okay.  
20 (Lunch recess.)  
21 THE HEARING OFFICER: Okay. We are  
22 recording after the lunch recess.  
23 And it's now the protestants'  
24 opportunity to present their case-in-chief.  
25 Mr. Thornton, I think by agreement you

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1 are to go first.  
2 MR. THORNTON: Yes.  
3 THE HEARING OFFICER: Okay.  
4 MR. THORNTON: And as obviously you're  
5 aware, and the hearing is aware, our main expert  
6 witness, Dr. Ralston, has previously testified.  
7 THE HEARING OFFICER: Yes.  
8 MR. THORNTON: What I'd like to do is I've  
9 got some documents here that I'd like to submit to  
10 you as potential exhibits that are in support of  
11 the potential dismissal for the case based on M3  
12 not being identified as a municipal provider.  
13 And this is M3 -- what I just handed  
14 out is M3 Eagle's responses to NACGUA's  
15 interrogatories, Requests for Productions, and  
16 Requests for Admissions, and this was dated  
17 November 24th, 2008.  
18 And the response that M3 provided,  
19 which is a document that I submitted, is in  
20 response to NACGUA's document dated October 24th,  
21 2008, for discovery requests and interrogatories.  
22 And I'd like to just turn your  
23 attention -- and I'll quickly go through these.  
24 But on page 16 of --  
25 THE HEARING OFFICER: Well, let me --

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1 before we start into the content of this document,  
2 I want to make sure that counsel for the applicant  
3 or the applicant has had a full opportunity to  
4 review this. And the concern I have is that  
5 interrogatories, or responses to them, can be  
6 admissible for certain purposes.  
7 But the purpose of discovery is to  
8 discover admissible evidence or evidence or  
9 information that might lead to relevant or  
10 admissible evidence. So the scope of this is much  
11 larger than necessarily what comes into the  
12 record.  
13 So at least before we start into the  
14 details, Mr. Fereday, you're familiar with this  
15 document --  
16 MR. FEREDAY: Yes.  
17 THE HEARING OFFICER: -- and perhaps what's  
18 attached?  
19 MR. FEREDAY: Yes, I am. And you have  
20 accurately described what discovery is and the  
21 purpose for it.  
22 Discovery responses typically are not  
23 introduced as evidence unless they are properly  
24 offered, typically for impeachment of a witness.  
25 So we would object on that ground.

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1 On the other hand, we recognize that  
2 the Hearing Officer has already stated that  
3 documents can be attached to pleadings, such as  
4 briefs, and perhaps some of this material could be  
5 attached and, in fact, I think it already has been  
6 attached to the protestants' motion on this  
7 matter. So therefore, we would feel that this is  
8 cumulative, and for that reason as well would  
9 object to it.  
10 THE HEARING OFFICER: Well, my other  
11 concern, I guess, I think there's been an  
12 admission by the applicants, at least at the  
13 present time and based on what was discussed  
14 before, that the applicant is not presently a  
15 municipal provider. That's what I understood,  
16 Mr. Fereday. If that's a misrepresentation,  
17 please correct me.  
18 MR. FEREDAY: That's what we have stated,  
19 at least -- but it is not our position that we do  
20 not qualify as a municipal provider. We believe  
21 we are qualified.  
22 THE HEARING OFFICER: Okay.  
23 MR. FEREDAY: We are not currently  
24 providing water. That is the -- that is the  
25 admission.

1 THE HEARING OFFICER: So is that consistent  
2 with your understanding of the answers that are in  
3 this discovery, Mr. Thornton?

4 MR. THORNTON: I would say I think I  
5 believe that there is -- the admissions that they  
6 have is more than just they're not a -- currently  
7 a provider, but I think it goes through some of  
8 the -- I believe the -- it may not be the right  
9 term, the legal or the procedural rules for what  
10 it takes to become a municipal provider.

11 It hits on a number of those issues or  
12 those points in the regulations that shows that M3  
13 is not currently, underneath about three different  
14 aspects, a municipal provider. But there's  
15 highlighted in there three different kinds of  
16 aspects to that ruling.

17 THE HEARING OFFICER: Okay. Well, again,  
18 I'm reluctant to allow interrogatories in as  
19 evidence. And it's -- I know I have some latitude  
20 to allow, and the rules of evidence are relaxed,  
21 but I have not seen interrogatories come in as  
22 evidence. I think they're used to discover or  
23 find evidence, Mr. Thornton. My inclination -- in  
24 fact, at this point in time I'll refuse to allow  
25 it as an exhibit.

1 MR. THORNTON: Okay.

2 THE HEARING OFFICER: Okay. That doesn't  
3 prevent you from presenting facts that may be  
4 there in some way.

5 MR. THORNTON: Right.

6 THE HEARING OFFICER: Okay.

7 MR. THORNTON: And this next document are  
8 NACGUA's motions for stay and limited discovery  
9 for purposes of settlement. And we've got -- I'd  
10 like to enter these in as an exhibit as well.

11 THE HEARING OFFICER: Now, is this a  
12 document that's been filed with the Department?

13 MR. THORNTON: No. Well, I'm not -- I have  
14 to admit, I'm not quite sure what filing is. It  
15 was sent to the Hearing Officer, as well as -- as  
16 was a previous document sent to the Hearing  
17 Officer. So I'm not sure when we say "filed" what  
18 actually you mean by that.

19 And the intent of this is somewhat  
20 similar as the previous document where M3 has not  
21 met the burden to show that it is a municipal  
22 provider. And this is, again, dated on  
23 November 10th, 2008, where we brought this concern  
24 up or this point up at that time. And that's why  
25 we'd like to submit this, and partially to show

1 their admissions, and partially to show we were  
2 concerned about this several months ago.

3 THE HEARING OFFICER: My guess is this  
4 document is part of the files in the Department.  
5 It was filed with me and it was a motion for a  
6 stay. And it was probably -- although I'd have to  
7 go back and look at it, but it was probably  
8 addressed by subsequent order. So I don't see a  
9 need to duplicate the documentation as an exhibit.

10 MR. THORNTON: Okay. All right.

11 THE HEARING OFFICER: I can dig through the  
12 files and try to find this, but I'm almost certain  
13 it's there.

14 MR. THORNTON: And so, Mr. Hearing Officer,  
15 is that then part of the record? I just want  
16 to --

17 THE HEARING OFFICER: Yes. Yeah.

18 MR. THORNTON: And if I could ask this  
19 question: Would the previous document that I  
20 tried to submit, is that part of the record in  
21 that it was sent to all parties, including the  
22 Hearing Officer? I'm not sure how that --

23 THE HEARING OFFICER: Interrogatories in  
24 discovery are not considered to be part of the  
25 evidence, even if they're sent to the Hearing

1 Officer.

2 MR. THORNTON: Okay.

3 THE HEARING OFFICER: And actually, I don't  
4 expect those to be sent to the Department.  
5 Discovery is normally exchanged between parties,  
6 and a tribunal normally doesn't see those.

7 Again, they are for the purposes  
8 primarily of impeachment, unless there's some  
9 agreement by the parties to use, for instance,  
10 portions of the deposition as the actual testimony  
11 of a particular witness.

12 MR. THORNTON: Okay. All right. Okay. If  
13 we could then call our first witness. I'd like to  
14 call Mr. Brownlee of M3 Corporation.

15 THE HEARING OFFICER: Okay. Mr. Brownlee,  
16 come forward, please. You're under oath as well.

17  
18 WILLIAM I. BROWNLEE,  
19 having been called as a witness by North Ada  
20 County Groundwater Users Association and  
21 previously sworn, testified as follows:  
22

23 THE WITNESS: Yes.

24 THE HEARING OFFICER: Please be seated.

25 ///

1 DIRECT EXAMINATION  
 2 BY MR. THORNTON:  
 3 Q. We just thought you were -- after so  
 4 many days here you needed to get up and have a say  
 5 in this matter.  
 6 A. Perfect.  
 7 Q. Mr. Brownlee, if you could pull up --  
 8 it's Exhibit 55. It should be a letter. It's a  
 9 letter from Mr. Fereday to the director,  
 10 Dr. Tuthill.  
 11 A. Right here. Okay.  
 12 Q. And then if you could turn to the  
 13 second -- the second page, in the second  
 14 paragraph, it is titled "The concept of phasing."  
 15 A. Uh-huh.  
 16 Q. And in that letter -- I'll just try to  
 17 paraphrase, read portions of it. And then again,  
 18 of course, this is a letter from Mr. Fereday to  
 19 Dr. Tuthill. It says, "While you agree that the  
 20 Department needs to process M3 Eagle's water right  
 21 application within a reasonable time frame, you  
 22 raise a question whether the application might be  
 23 considered in phases."  
 24 It goes on to say, "Basically, we were  
 25 opposed to the phasing idea." You commented that

1 person representing M3 at these hearings, agree  
 2 that phasing is an option as long as the overall  
 3 priority date is -- into the future is kept at the  
 4 date of the filing of the application?  
 5 A. Could you put into context what you  
 6 mean by "phasing"?  
 7 Q. Yeah. Perhaps the way I believe you  
 8 described the phasing of your development -- I  
 9 could be wrong, but I believe it was five phases;  
 10 correct? And then at each one of those phases, I  
 11 believe, in the pre-annexation agreement they're  
 12 supposed to be -- you will be turning over like  
 13 say the water systems, I believe, to the City of  
 14 Eagle at phases.  
 15 Is that somewhat correct?  
 16 A. That's correct.  
 17 MR. FEREDAY: I'm going to have to object.  
 18 I think Mr. Thornton has already asked this  
 19 question in his earlier testimony, and he already  
 20 answered it then. So that would be my objection,  
 21 that it has been asked and answered of this  
 22 witness.  
 23 THE HEARING OFFICER: I'll overrule it  
 24 right now, and allow some exploration of the  
 25 subject, Mr. Fereday. Some of it's because of the

1 the instantaneous diversion rate needed for M3  
 2 Eagle development is large, but you noted this is  
 3 a peak diversion on a peak day at full build-out.  
 4 It goes on to say that "Jeff Davis  
 5 explained that the phased water approvals would be  
 6 difficult in light of the need to represent to  
 7 buyers who then apply in community setting what  
 8 they can expect at build-out."  
 9 It goes on to say, "In addition we  
 10 pointed that M3 Eagle has filed a municipal water  
 11 right application with planning horizon and future  
 12 needs components to address the entire project's  
 13 water needs at one time as the 1996 act directs."  
 14 You stated that "We anticipate this  
 15 water right will be conveyed and the project  
 16 annexed to the City of Eagle."  
 17 This is the -- I was reading through  
 18 that just to give context for these -- this last  
 19 sentence. "However, I recognize that this issue  
 20 was left for potential further discussion. Phil  
 21 noted, and we agree, that if some type of phasing  
 22 were used it would have to protect the applicant's  
 23 overall priority in the context of the municipal  
 24 statute."  
 25 Would you, as I believe the main

1 expiration of time since those original questions.  
 2 So go ahead, Mr. Thornton.  
 3 MR. THORNTON: I appreciate it. And I may  
 4 well have asked this exact question, and if so I  
 5 apologize for that. But as I get older and my  
 6 kids get more annoying, then it seems like my  
 7 "Sometime's" disease kicks in.  
 8 Q. But is -- so would -- and this is what  
 9 I didn't think I asked and may have, would M3  
 10 consider phasing of a water rights -- let me give  
 11 you -- excuse me. Let me give you a picture, and  
 12 then you can tell me if you think that would be  
 13 acceptable.  
 14 M3 is looking at a potential build-out  
 15 for a 30-year time period. You're currently  
 16 looking at about 23 cfs.  
 17 And if your water right were phased  
 18 over that 30 years, say, in increments of 5 for  
 19 your phases, so you got the first 5 cfs let say  
 20 for the -- and you built out to that, and then it  
 21 would be in conjunction with monitoring. And  
 22 monitoring showed things looked to be fine, then  
 23 you would get the next 5 cfs and build out, and  
 24 based on monitoring, you would get the next 5, and  
 25 then at the end of that planning horizon you would

1 then have the full water right if the monitoring  
2 was appropriate or was indicative of not  
3 overtaxing the aquifer, but then you would get a  
4 priority date starting back in 2009 or '10,  
5 whenever you started or finally got approval for  
6 that, would that be appropriate -- would that be  
7 feasible for M3 to live with?

8 A. Well, I guess my answer to this would  
9 be that just by the nature of development itself  
10 the water right is phased because you don't build  
11 out the entire 7,153 units in one day.

12 I believe that we have stated that we  
13 are going to have monitoring of the resource as we  
14 go forward. And I also believe that there are  
15 rules in place that monitor the groundwater  
16 withdrawal of our right in relationship to senior  
17 water rights that impose similar conditions to  
18 what you're talking about.

19 Also, just from a practical  
20 perspective, if water is not there from our  
21 monitoring and the pumping of the aquifer to  
22 support future development, the thought that we  
23 would build homes that we couldn't supply domestic  
24 water to is not -- not only not feasible, it's  
25 ludicrous.

1 So I believe that from our  
2 perspective, we're as concerned about the resource  
3 in the future as anyone. I think what you're  
4 asking is is would we -- correct me if I'm wrong,  
5 would we accept a water right that granted us only  
6 one-fourth or one-fifth of the total amount of  
7 water that we're requesting? Is that your  
8 question?

9 Q. Let me -- pretty close. So currently  
10 you're requesting, let's say, 23 cfs, and that for  
11 the first phase you would be granted 5 cfs -- so  
12 you don't get any more than that -- based on  
13 monitoring, when you are to the point where you  
14 built out and you need more, then based -- and the  
15 monitoring results, then the Department could then  
16 grant you another 5 cfs, kind of incrementally  
17 over the planning horizon, and then when the  
18 planning horizon is completed, let's say  
19 everything goes along appropriately for your  
20 development and as well as the groundwater  
21 sustainability, then let's say you're out in 30  
22 years from now in 2039, I guess that would be,  
23 then you would have the full water right and a  
24 priority dating back to 2009 for the full water  
25 right.

1 A. Mr. Thornton, I don't know technically  
2 how that would work. As I had mentioned, I  
3 believe that due to the nature of development, we  
4 are essentially accomplishing what you're talking  
5 about. So I really don't know how to answer that  
6 question, other than what I've said.

7 Q. Okay. Do you -- I appreciate that.  
8 Do you -- in your mind, do you have an  
9 understanding potentially that concerns the  
10 protestants that if granted a full water right and  
11 if monitoring does show to be problematic, the  
12 difficulty we see in terms of shutting -- or  
13 curtailing any future groundwater development that  
14 you still have the capacity for?

15 A. Well, I believe that the imposition of  
16 curtailment is outside the scope of what we as a  
17 person holding a water right has the ability to  
18 do. I believe that's in the purview of the  
19 Department.

20 So I think that irrespective of  
21 whether we have a water right or not, if we do  
22 have a water right, we're all in the same boat as  
23 you are. So if there's injury to the aquifer, it  
24 may not be us that's causing the injury, it may be  
25 other pumping wells that are in the PGSA or in the

1 same area of Eagle that's causing the injury, and  
2 not ourselves.

3 So we're going to be as concerned  
4 about monitoring and enforcement of rules of  
5 priority and seniority of water rights as you  
6 folks are.

7 Q. And then the last question on this  
8 Document 55, that same paragraph, "Concept of  
9 phasing," the last sentence, "Phil noted, and we  
10 agree, that if some type of phasing were used, it  
11 would have to protect the applicant's overall  
12 priority in the context of the municipal statute."

13 Could you explain what you interpret  
14 the intent of that to mean?

15 MR. FEREDAY: Objection. This question  
16 also has been asked and answered before.

17 THE HEARING OFFICER: Overruled.

18 THE WITNESS: I must say I wasn't at the  
19 meeting, as noted on page 1. The attendant was  
20 Jeff Davis of our office.

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

22 A. So the only thing I can do is  
23 interpret the words that are written. And I'm  
24 assuming that it -- as written, it would state  
25 that if we had a water right, then some condition

1 of phasing was imposed by the Department, that the  
2 extent of our water right that is not being  
3 currently used would be in seniority over any  
4 future water rights that are granted.

5 Q. Okay. Thank you.

6 If you could turn to Exhibit No. 2.  
7 And Exhibit No. 2 is M3 Eagle's regional  
8 hydrogeologic characterization one-year report.  
9 And when you're in that exhibit, if we could go to  
10 page 1.

11 And actually, I'm going to take a  
12 quick pause here. Excuse me, Mr. Hearing Officer.  
13 I just want to make sure -- I believe it is -- I'm  
14 stepping back to the document, the Exhibit No. 55  
15 that we just went over, Mr. Fereday's letter to  
16 Dr. Tuthill. I just want to make sure that that's  
17 part of the record. I believe it is, kind of from  
18 the earlier agreement that we had. I just want to  
19 make sure.

20 MR. FEREDAY: Yes, my understanding it is  
21 in the record.

22 MR. THORNTON: Okay.

23 MR. FEREDAY: If you're asking me.

24 MR. THORNTON: Well --

25 MR. LAWRENCE: My notes say that it has

1 been admitted.

2 MR. THORNTON: That would be fine with me.  
3 Then they've answered it enough for me.

4 Q. I apologize for jumping around,  
5 Mr. Brownlee.

6 On page 1 of Exhibit 2, in that large  
7 first paragraph, a little more than halfway down,  
8 I'll read it to you, in regards to the red herring  
9 question -- the red herring statement.

10 Have you heard in the testimony people  
11 talk about the "red herring"?

12 A. Is that a bird?

13 Q. I think it's a fish, but I could be  
14 wrong.

15 Have you heard any discussions on a  
16 red herring?

17 A. No, I don't recall specifically.

18 Q. Have you heard any discussions of red  
19 herring in the context of the Boise -- of the  
20 water underneath M3 property coming from the Boise  
21 on the way to the Payette River?

22 A. Yes, I have.

23 Q. Have you heard that now in the context  
24 of a red herring?

25 A. I --

1 Q. Maybe not.

2 A. I don't understand what you mean by  
3 "red herring."

4 Q. I think the red herring was something  
5 that's really either not real or not appropriate  
6 or not --

7 THE HEARING OFFICER: Well, Mr. Thornton,  
8 rather than get into a discussion about what the  
9 term actually means, why don't we just go to the  
10 subject matter?

11 MR. THORNTON: Okay.

12 THE HEARING OFFICER: Thank you.

13 MR. THORNTON: We'll drop the red herring.

14 THE HEARING OFFICER: Thank you.

15 Q. (BY MR. THORNTON): Okay. Have you  
16 heard lots of discussions on water going from the  
17 Boise to the Payette?

18 A. Yes, I have.

19 Q. And in your knowledge from what you've  
20 heard in testimony and being associated with this  
21 project, is that important in terms of the overall  
22 application for water rights?

23 A. Mr. Thornton, I would say that I'm not  
24 qualified to determine what the importance of that  
25 is. I would say from a layperson that I've seen

1 no evidence presented during this hearing that  
2 would show otherwise.

3 Q. Okay. And have you heard testimony  
4 from M3's experts that it really doesn't matter  
5 where the water comes from, and if it goes to the  
6 Payette or not, it wouldn't make much of a  
7 difference? Have you heard that testimony?

8 MR. FEREDAY: Objection. I think that  
9 mischaracterizes the testimony, at least in part,  
10 of our experts.

11 THE HEARING OFFICER: I guess my question,  
12 Mr. Thornton, is maybe a broader one. The  
13 questions that are being tendered to Mr. Brownlee  
14 right now I think are of a technical nature.

15 And my question is: What do you --  
16 what do you think that you can elicit from  
17 Mr. Brownlee in responses to these technical  
18 questions that will further enlighten the Hearing  
19 Officer or the record? Because I guess my take is  
20 even if Mr. Brownlee were to answer that question  
21 one way or another, just based on his  
22 qualifications to answer that question, I would  
23 discount the answer and would rely on the other  
24 testimony in the record.

25 So it's not that I find his testimony

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1 to be unbelievable, it's just that he's not the  
2 person who brings to the record itself into  
3 evidence that information.  
4 So my question is: What do you think  
5 you can elicit or draw out from Mr. Brownlee on  
6 this subject?  
7 MR. THORNTON: And I appreciate that. I'm  
8 not attempting to ask from a technical aspect his  
9 knowledge. And so I'll work on trying to take  
10 that technical aspect out.  
11 THE HEARING OFFICER: Okay. So you've  
12 asked a question, Mr. Thornton.  
13 MR. THORNTON: I'll withdraw that in the  
14 hopes of trying to ask one that will --  
15 THE HEARING OFFICER: Thank you.  
16 MR. THORNTON: -- elicit the information  
17 that I'm trying to get.  
18 Q. So let's just go to page 1 of Exhibit  
19 No. 2. And in there it identifies "The  
20 groundwater proposed to be withdrawn by M3 Eagle  
21 for its development will be from subsurface flow  
22 that has already departed the Boise Basin on its  
23 way to the Payette Basin so the impacts to  
24 existing area water users in the lowlands near  
25 Eagle are predicted to be small."

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1 And would you agree with that  
2 statement?  
3 A. That's what it reads, yes.  
4 Q. Okay. Do you, in your opinion, as  
5 representing M3 have an idea of what "predicted to  
6 be small" is?  
7 MR. FEREDAY: Objection. Foundation. This  
8 witness has not been qualified to opine on those  
9 subjects.  
10 MR. THORNTON: I'll withdraw that question  
11 and try to ask it again.  
12 THE HEARING OFFICER: Okay.  
13 Q. (BY MR. THORNTON): I'm trying to look  
14 at this and frame the question, Mr. Brownlee, in  
15 the context of concerns that adjacent -- or people  
16 in the north of the Boise River in the Eagle area  
17 have in terms of predictions to be small.  
18 Without a technical nature or trying  
19 to look at it from your neighboring well owners in  
20 the Eagle area, what do you take -- not in the  
21 technical sense, but what does that mean to you,  
22 "predicted to be small"?  
23 A. Well, I think that given the testimony  
24 that has been given by the experts and the graphs  
25 that have been generated predicting drawdown, the

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1 models that have been generated predicting  
2 drawdown don't show a significant drawdown due to  
3 our pumping in the aquifer.  
4 So I guess the definition of "small"  
5 is, in my mind, anything that is not significant  
6 enough to materially impact the senior groundwater  
7 right users in the aquifer.  
8 Q. And going with what you said -- and  
9 this may be getting into the legal case, I think  
10 out of the engineering aspect, but what is  
11 material effect, in your mind, if you were talking  
12 to local citizens? What is that?  
13 MR. FEREDAY: Object.  
14 THE WITNESS: I'm not qualified to answer  
15 that question.  
16 Sorry, Jeff.  
17 THE HEARING OFFICER: Okay. I'll let the  
18 answer stand, Mr. Fereday. He used the term.  
19 Mr. Thornton, next question.  
20 Q. (BY MR. THORNTON): Okay. Then on  
21 page 2, the large paragraph in the top, and about  
22 the fourth sentence down, in the middle it says,  
23 "All analyses conducted to date by HLI indicate a  
24 high likely that adequate groundwater supplies are  
25 present beneath M3 Eagle to support the planned

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1 community without importing water from outside the  
2 area and without causing unreasonable impacts to  
3 existing water rights."  
4 Do you agree with that?  
5 A. Yes.  
6 Q. Okay. And could you give me your  
7 layman's interpretation of what "unreasonable  
8 impacts" are?  
9 A. I don't know what unreasonable or  
10 reasonable impacts are, but I guess the -- the  
11 layman's definition that you're asking for is ones  
12 that don't injure within the confines of the rules  
13 senior water rights within the basin.  
14 Q. And if you go to page 10 of the same  
15 report. And there's a section called "Domestic  
16 wells." And it says, "Records survey of over 1600  
17 domestic single-family household wells in the  
18 greater project area from Eagle to Emmett show  
19 that the preponderance of domestic wells are  
20 located upgradient towards Star and Eagle from the  
21 M3 site; that is to say, groundwater flow in the  
22 aquifer encounters these wells first before  
23 flowing to the M3 site. Water levels would likely  
24 be lowered to some degree in some of these wells  
25 under long-term pumping as discussed above."

1 Then it goes on to say -- and again, I  
2 want your help because I see it all over M3's  
3 documents, and yet there's no definition provided.  
4 The last sentence in that paragraph, "M3 Eagle is  
5 absolutely committed to mitigating unreasonable  
6 and damaging interference effects that would be a  
7 result of its water development, whether it  
8 require lowering a pump in a nearby well or even  
9 deepening of wells in extreme cases."

10 Again I ask you, what is  
11 "unreasonable" and "damaging"? I see this so  
12 often, but I see no definition of that.

13 A. Well, Mr. Thornton, I believe that it  
14 would probably be best in rebuttal when  
15 Mr. Squires testifies, who wrote this report,  
16 who's qualified to answer that question, to more  
17 fully answer that question.

18 Q. And I believe in questions we did ask  
19 of your technical experts, Mr. Fereday objected  
20 and said that's one of legal interpretation. So  
21 I'm trying to get a layman's view for concerned  
22 senior water right holders what is unreasonable.  
23 What is damaging? Nobody says what that is.

24 MR. FEREDAY: I will object again to the  
25 extent that it asks for a legal conclusion as to

1 what "material injury" is under Idaho law. But if  
2 he has a layman's answer other than that, I  
3 suppose he can answer.

4 THE HEARING OFFICER: Okay. Overruled.

5 Mr. Brownlee, if you can answer the  
6 question, please do so.

7 THE WITNESS: Well, I believe that I  
8 previously stated that if there's rules that  
9 govern the damage to a senior water right holder  
10 by a junior water right holder, that we would be  
11 required to comport with those rules. And if we  
12 caused damage and the damage was deemed to be  
13 something that was unreasonable by the Department,  
14 then we would have to mitigate that impact.

15 Q. (BY MR. THORNTON): And do you have an  
16 understanding of legally what that is?

17 MR. FEREDAY: Objection.

18 THE HEARING OFFICER: Sustained.

19 Q. (BY MR. THORNTON): Have you read over  
20 the language in the statutes or the code that  
21 identify "unreasonable impacts"?

22 A. No, I have not.

23 Q. But yet you would agree that M3,  
24 including yourself, has stated numerous times at  
25 public meetings that M3's committed to not have

1 unreasonable impacts and damage to wells?

2 A. I believe that's a fair statement,  
3 yes.

4 Q. But yet you don't even know what the  
5 law says?

6 A. Well, that's correct. That's not for  
7 me to interpret. I'm not a lawyer.

8 Q. Okay. I'd like you to take a look at  
9 a document that -- this is the Valley Times,  
10 May 4th.

11 Do you remember being interviewed for  
12 that newspaper article?

13 A. Yes, I do.

14 Q. And the date of this was May 4th of  
15 2009, or in that general time period?

16 A. It's not indicated on the piece of  
17 paper that you just handed out. So I'm assuming  
18 that's correct, if you say so.

19 Q. May 4th -- you remember it being in  
20 May?

21 A. I remember it being within the last 30  
22 or so days.

23 Q. Okay. After the hearings -- do you  
24 remember it being after the hearings were well  
25 underway?

1 A. Yes.

2 Q. Okay. And to call your attention to a  
3 statement they have in the newspaper on the right  
4 column where it says, "The groundwater proposed to  
5 be withdrawn by M3 Eagle for its development will  
6 be from subsurface flow that has already departed  
7 the Boise Basin on its way to the Payette Basin so  
8 that impacts to existing area water users in  
9 lowlands near Eagle are predicted to be small."

10 Is that your statement?

11 A. I believe that's the interpretation of  
12 the reporter. That's not in quotes.

13 Q. Is that what you stated?

14 A. I don't recall the question that he  
15 asked me, so I don't believe that I stated that  
16 specifically that way, no.

17 Q. So just a few days ago you don't  
18 remember making a statement that "impacts are  
19 predicted to be small"?

20 MR. FEREDAY: Objection. I don't believe  
21 it was a few days ago. I believe it simply  
22 repeats what has already been asked and answered.

23 THE HEARING OFFICER: Okay. Overruled.

24 THE WITNESS: I believe that based upon the  
25 studies that we have done and the reports that

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1 have been generated by our experts that have  
2 looked at this, modeled this, done aquifer  
3 testing, done predicted drawdowns, that the way  
4 that it's been characterized to me is that it's  
5 small.  
6 Q. (BY MR. THORNTON): So in all the  
7 testimony that you've heard over the last how  
8 many -- 11th day or whatever it is today, wouldn't  
9 you agree that this is a disingenuous statement to  
10 the general public?  
11 A. Why?  
12 Q. In terms of does this give the public  
13 an impression that there's nothing to worry about  
14 when I think there's lots of testimony to show  
15 otherwise?  
16 MR. FEREDAY: Objection. This appears to  
17 be Mr. Thornton testifying and arguing with the  
18 witness. If there's a question here, I think the  
19 answer -- well, maybe he could rephrase the  
20 question for an answer. But I object to this line  
21 of questioning.  
22 MR. THORNTON: I was just answering his  
23 question to me.  
24 THE HEARING OFFICER: Yeah, he should not  
25 ask you a question, although -- he shouldn't have

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1 asked the question.  
2 I struggle a little bit, Mr. Thornton,  
3 when your question of Mr. Brownlee is for him to  
4 identify whether his own statement is disingenuous  
5 or not. And I think you can ask him questions  
6 about whether -- whether this statement is  
7 consistent with facts that -- or what facts he  
8 knows to make that statement. I probably would  
9 have sustained an objection after that question.  
10 So why don't you re-ask a question of  
11 Mr. Brownlee, and we'll see where we go.  
12 MR. THORNTON: Okay.  
13 THE HEARING OFFICER: By the way, I don't  
14 think I would ever anticipate that a witness would  
15 call his own statement disingenuous.  
16 MR. THORNTON: Okay.  
17 Q. So, Mr. Brownlee, would M3 agree to  
18 fund a bond to defray cost of water delivery  
19 systems to area well users who must modify their  
20 wells or seek surface water delivery from sources  
21 off the property of their own land, off their own  
22 land if they were impacted by the municipal well  
23 withdrawals from M3 property?  
24 A. We've never discussed that type of a  
25 structure. I'm not aware of that being a

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1 requirement of the municipal water right.  
2 Q. Okay. That's all the questions on  
3 this exhibit.  
4 I would like to introduce this exhibit  
5 as part of the record.  
6 THE HEARING OFFICER: Okay. Mr. Fereday?  
7 MR. FEREDAY: We would object to the  
8 admission, at least to this extent: That we  
9 believe it is being offered as evidence of a  
10 statement by Mr. Brownlee, when the piece itself  
11 makes clear that the quoted -- that the language  
12 regarding "predicted to be small" is clearly not  
13 his quote. It's clearly a quote from Mr. Squires,  
14 which is directly out of his report. Therefore, I  
15 think it's been mischaracterized.  
16 I also think it's hearsay, and I think  
17 it has limited value. And we would object to its  
18 entry for those reasons, at least unless that  
19 misconception is cleared up. It's been  
20 misrepresented.  
21 THE HEARING OFFICER: Okay. Well, I  
22 recognize the statement just from the presentation  
23 of evidence as being one that rings familiar to me  
24 as having been almost verbatim, and maybe  
25 verbatim, in the text of the exhibits that I now

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1 have.  
2 And I don't know whether Mr. Brownlee  
3 has that ability of total recall to spout that  
4 kind of verbiage out to a newspaper reporter. If  
5 he does, I admire him. But my guess is this was  
6 lifted or extracted from somewhere.  
7 But nonetheless, Mr. Fereday,  
8 Mr. Brownlee has identified this particular  
9 newspaper article as one he participated in. I  
10 recognize that this is language from one of the  
11 exhibits, probably not his own. And consequently,  
12 he's relying, if he did read it or find it, on  
13 somebody else's.  
14 So I'll receive it into evidence.  
15 Let's mark this as Exhibit 862.  
16 MR. THORNTON: -2.  
17 (Exhibit 862 marked.)  
18 THE HEARING OFFICER: Okay. It's received  
19 into evidence.  
20 (Exhibit 862 admitted.)  
21 MR. THORNTON: Okay. The next document  
22 that I want to go over actually is a collection of  
23 letters that private citizens have submitted to  
24 the Director Tuthill regarding their -- and  
25 they're a mixture of both folks concerned about

1 the water right and those in favor. And  
2 unfortunately, when we were in DEQ office last  
3 week, I had all the packets, and somehow I either  
4 misplaced it or tossed it out or it grew legs. So  
5 this isn't all of the letters. This probably  
6 represents maybe a third of the letters.

7 I talked with Deb Gibson yesterday,  
8 and she was pretty sure that all of them were on  
9 the website. And I checked there to make copies,  
10 and they're not.

11 Q. So one thing -- and one -- I guess I  
12 wanted to ask Mr. Brownlee, have you taken time to  
13 read these letters?

14 A. I've read a few letters, but I haven't  
15 read them all, no.

16 Q. Okay. And in the letters that you've  
17 read, have you seen any that said that they're  
18 antidevelopment, don't build?

19 A. Yes, there's a couple of them that  
20 I've seen that have stated that.

21 Q. Could you point to any of those that  
22 have, then. I'm not aware of that.

23 A. I don't know what letters you have  
24 contained in this packet.

25 Q. So I guess I would like to submit, if

1 I could, this as an exhibit, but a total package,  
2 Mr. Hearing Officer, to make sure that they're  
3 part of the record. And further review, there are  
4 some in favor of it, and I would say there's many  
5 more -- I mean nine-to-one ratio of ones against.  
6 But I would hope that the Hearing Officer  
7 considers those letters.

8 I'm somewhat surprised that,  
9 Mr. Brownlee, you haven't read those over if  
10 you're concerned about the general public. But --  
11 and I would also like to see if you could find --  
12 and maybe Mr. Alan Smith has all those letters.  
13 I'd like to find where they say "no development."

14 MR. FEREDAY: Mr. Hearing Officer, I'm  
15 going to have to object here. In the first place,  
16 I'm not sure whether he's asking a question or  
17 making an offer. Maybe he could clarify.

18 MR. THORNTON: Well, two -- I want to thank  
19 you.

20 Q. One is, have you read all of the  
21 letters? And I think I -- and the answer to that  
22 question is?

23 THE HEARING OFFICER: He answered no, he  
24 hasn't.

25 MR. THORNTON: Okay. And then the other

1 is, I asked a question of did he read any of them  
2 that said "We don't want your development," flat  
3 out?

4 And I believe I heard him say there's  
5 a couple.

6 And I would like to offer to the  
7 Hearing Officer upon reading those is to find out  
8 if any of them say they flat out don't want the  
9 development.

10 THE HEARING OFFICER: Okay. Well, with  
11 respect to that question, Mr. Thornton, number  
12 one, I don't want Mr. Brownlee to spend time  
13 during the hearing itself trying to read all of  
14 those letters and find a particular one or two in  
15 the text that would state that they're not in  
16 favor of the development.

17 And I'm not sure how much difference  
18 it makes with respect to Mr. Brownlee anyway. I  
19 guess my question for you again is what is it that  
20 you are trying to elicit from Mr. Brownlee in your  
21 questioning of him on this subject? What is it  
22 that you want to get from him into the record?

23 MR. THORNTON: Okay.

24 THE HEARING OFFICER: And I don't know what  
25 it is. I don't know where we're headed with this

1 line of questioning.

2 Q. (BY MR. THORNTON): What I'm trying to  
3 find out, if you have an understanding of, is by  
4 reviewing the written letters -- and they're  
5 also -- which aren't in this packet, too,  
6 petitions signed by maybe 70, 80 people of  
7 homeowners, individual homeowners, of the general  
8 concern for a lot of the well owners in the area  
9 from a public interest standpoint.

10 THE HEARING OFFICER: Okay. Now, are you  
11 asking another question of Mr. Brownlee?

12 MR. THORNTON: Yes, I am. Well, I did  
13 both. I apologize for that.

14 THE HEARING OFFICER: We have some other  
15 things that are undone, because I think you also  
16 moved for admission of these documents.

17 And we have been receiving these  
18 comments. They've been coming in. In fact, there  
19 was a flurry of them at one time, I think just  
20 before the hearing started, and then they've been  
21 coming in occasionally. I haven't read these  
22 documents.

23 I've asked Deborah Gibson to try to  
24 track them and to distribute copies of these  
25 documents out to the parties, because I'm assuming

1 that the parties are not receiving them. I mean  
2 they're not being carbon-copied by the people that  
3 are sending them to us. So I don't know whether  
4 that distribution is presently complete or not.  
5 And my guess is that they would not all be scanned  
6 because that scanning takes place on a periodic  
7 basis. So we have them.

8 And I guess the question -- I would  
9 not want them, I guess, to come in as exhibits,  
10 necessarily. So I guess the question is, what  
11 does the Department do with these? I'm happy to  
12 talk about that at this point in time if the  
13 parties want to talk about that subject. So...

14 MR. FEREDAY: Mr. Hearing Officer, if I  
15 could respond.

16 THE HEARING OFFICER: Okay.

17 MR. FEREDAY: We have noted the receipt of  
18 these from time to time under cover of Deborah --  
19 usually Deborah Gibson's letter noting that these  
20 are being incorporated into the record for this  
21 matter, and we have not objected to that.

22 We do believe it's appropriate not to  
23 have them marked as exhibits in this hearing,  
24 however. They are part of the record. So maybe  
25 it doesn't make much difference. But we also

1 believe that they speak for themselves for  
2 whatever they're worth, and the Hearing Officer  
3 can review them, and presumably will review them  
4 as part of his review of the materials in this  
5 case. So we would object to it being admitted  
6 now.

7 THE HEARING OFFICER: All right. So,  
8 Mr. Thornton, my take on this is the Department  
9 has typically allowed these kinds of public  
10 comments to come into the record. There's some  
11 question, I guess, about their efficacy or their  
12 reliability, that folks aren't here to be  
13 examined. But for the most part, the information  
14 that's contained in these comment letters are more  
15 representations of sentiment than they are of  
16 evidentiary value. And I -- and they may have  
17 some value from that perspective.

18 But because they're not here -- I  
19 intend to review them, and they are, at least  
20 right now, part of the record. I knew that we  
21 needed to talk about this at some point. But  
22 based on Mr. Fereday's statement, the Hearing  
23 Officer will review them, and then ascribe to them  
24 their -- the weight that's appropriate. So I  
25 guess I would not want to add this documentation

1 as an exhibit.

2 MR. THORNTON: And, Mr. Hearing Officer, if  
3 they are part of the record, then I find that to  
4 be --

5 THE HEARING OFFICER: Okay.

6 MR. THORNTON: -- appropriate. Concern was  
7 in some of the letters that Ms. Gibson sent she  
8 identified they're in a Department file, sometimes  
9 they're a record. So I wasn't sure if they were  
10 in, quote, "the official record."

11 THE HEARING OFFICER: Okay.

12 MR. THORNTON: I don't understand the  
13 overall process.

14 THE HEARING OFFICER: Well, the subject  
15 needed to be addressed. So I appreciate your  
16 raising it.

17 MR. THORNTON: Okay. Thank you.

18 THE HEARING OFFICER: But I don't see that  
19 Mr. Brownlee, through these letters, would have  
20 additional evidence or testimony that would help  
21 me.

22 MR. THORNTON: And my -- yeah. My, I  
23 guess, hope was to make sure that M3, represented  
24 by Mr. Brownlee, is taking time to check the pulse  
25 of the people that are concerned about potential

1 impacts. To me, that's in terms of being one of  
2 the major developers for many, many years, is he  
3 really checking the pulse and the concerns of the  
4 citizens potentially affected.

5 THE HEARING OFFICER: Well, I'll allow you  
6 to pursue that line of questioning a little.

7 MR. THORNTON: Yeah.

8 THE HEARING OFFICER: But in my opinion,  
9 that particular line of questioning is not  
10 relevant to the criteria that I need to consider.

11 MR. THORNTON: Okay.

12 THE HEARING OFFICER: There's no -- there's  
13 no -- there's no factor of empathy in the factors  
14 that I have to consider, if I can use that modern  
15 term.

16 MR. THORNTON: And in fact, it may be --  
17 I'm sure some of that is based on empathy. But I  
18 would like to see -- I guess I view some of these  
19 letters as not empathy, but as based on folks that  
20 are going to have potentially some small impact,  
21 unreasonable impact, damaging effects. I don't  
22 see that as empathy. I see that as an economic  
23 cost to those individuals.

24 THE HEARING OFFICER: Sure. And if you  
25 want to ask specific questions about those impacts

1 and not necessarily interpretation of what's  
2 significant or not significant, but specific  
3 impacts, I guess what I would suggest to you is  
4 that you maybe even give Mr. Brownlee numbers and  
5 let him respond.

6 But I think to deal in the theory of  
7 this is not one that -- not a line of questions  
8 that helps me much or helps any of us.

9 MR. THORNTON: Okay.

10 THE HEARING OFFICER: Okay?

11 MR. THORNTON: Okay. Appreciate that.  
12 Thanks.

13 Q. Mr. Brownlee, have you heard testimony  
14 that M3 has somewhere in the neighborhood expended  
15 \$2 million on the water studies for this project?

16 A. Yes.

17 Q. And would you agree that is a large  
18 sum of money?

19 A. Yes.

20 Q. Okay. And then how many homes or lots  
21 is M3 planning on selling over the planning  
22 horizon, approximately?

23 A. We are zoned for 7,153, if we achieve  
24 all of our bonus densities through various means  
25 in the pre-annexation development agreement.

1 Q. And that probably doesn't include any  
2 commercial developments, that was all homes; is  
3 that right?

4 A. We were -- have entitlement for up to  
5 245 acres of nonresidential use.

6 Q. Okay. So do you realize that the  
7 average cost increase for each one of those homes  
8 on that \$2 million is less than \$300 a home?

9 A. Okay. Yes.

10 Q. So when you break down \$2 million to  
11 7,000 homes, is \$300 extra selling a home or a  
12 lot, is that a make-or-break deal for somebody,  
13 \$300?

14 A. No. I don't believe that that is a  
15 make-or-break deal, but it's just one piece of the  
16 overall cost equation for the development.

17 Q. So how do you compare the expense of  
18 this additional expense of less than \$300 a home  
19 or a lot with the senior water right well owners  
20 potentially paying tens and thousands of dollars  
21 in deepening or re-drilling their wells?

22 A. Well, the way I would look at it is  
23 that I believe that we could have filed an  
24 application and spent considerably less money and  
25 done considerably less number of tests. I believe

1 there has been testimony by experts that the  
2 amount of data that's been provided in this case  
3 is greater than any other cases they've been  
4 involved in.

5 So I think that the putting a marker  
6 out there to go count for by \$2 million really  
7 is -- what was the \$2 million spent on? And I  
8 think we've made a very good effort as a developer  
9 in the community, much greater than any effort  
10 I've seen anyone else put forth, to try to  
11 determine the quantity, quality, and  
12 sustainability of this aquifer.

13 Q. Are you aware of any other developer  
14 utilizing groundwater that has been looking at  
15 putting in 7,000 homes?

16 A. I believe that the overall Avimor  
17 build-out is projected to be close to 9- to 12,000  
18 homes. I'm not familiar with other water rights  
19 that are being sought for other master-plan  
20 communities that are in the south Boise area or  
21 other areas. But I know there are other large  
22 scale master-plan communities that are being  
23 contemplated. But I'm not --

24 Q. Are you aware that Avimor has agreed  
25 to 5 cfs in their water rights?

1 A. I believe they -- that they have a 5  
2 cfs water right, but they also have water that's  
3 being provided to them by United Water.

4 Q. So wouldn't you agree that M3  
5 investing \$2 million is really a bargain compared  
6 to the 38 water right holders defending their  
7 water rights in this case for much more than  
8 \$2,000 apiece?

9 MR. FEREDAY: Objection. It calls for  
10 complete speculation. There's no foundation that  
11 this witness has any knowledge of what these  
12 people are spending.

13 THE HEARING OFFICER: Sustained.

14 Q. (BY MR. THORNTON): Are you aware that  
15 \$300, on average, a lot is a whole lot less than  
16 Mr. Lawton who's spent like \$12,000 taking care of  
17 his water-depletion problem?

18 MR. FEREDAY: Objection. This seems to  
19 argue that Mr. Brownlee is somehow responsible for  
20 Mr. Lawton's need to improve his well.

21 THE HEARING OFFICER: Well, I view the  
22 question only as being one of comparative monetary  
23 numerical values. And so if Mr. Brownlee can make  
24 that comparison, I'll allow him to do it.

25 THE WITNESS: Can you restate the question

1 for me?  
2 THE HEARING OFFICER: I will recognize that  
3 the 11- or \$12,000 that Mr. Lawton has expended is  
4 more than \$300.

5 Next question, Mr. Thornton.

6 Q. (BY MR. THORNTON): Okay. Are you  
7 aware that -- and have heard testimony that  
8 there's potentially a couple thousand domestic and  
9 water users potentially impacted by M3?

10 MR. FEREDAY: Objection. I don't think  
11 there was that testimony. But if he heard it, I  
12 suppose he can go ahead and answer it.

13 THE HEARING OFFICER: Overruled. Let's  
14 try.

15 THE WITNESS: I believe the testimony to  
16 date has been one with little presentation of any  
17 evidence to counteract the fact that I believe  
18 that we're saying that we're not going to impact  
19 those well owners.

20 MR. THORNTON: Okay. Mr. Hearing Officer,  
21 I've got another series of -- a different set of  
22 questions. I'm just looking at it being 2:15.  
23 Maybe a short break, would that be okay, get some  
24 water and then carry on?

25 THE HEARING OFFICER: Sure. Let's break

1 for ten minutes.

2 MR. THORNTON: Okay.

3 (Recess.)

4 THE HEARING OFFICER: We are recording.  
5 Mr. Thornton, further questions?

6 Q. (BY MR. THORNTON): Mr. Brownlee,  
7 we're going to turn our focus now to the financial  
8 ability for M3 to carry out this project over the  
9 planning horizon and to put the groundwater to  
10 beneficial uses. And there's a document number --  
11 I believe it's 54. If you could find that. And  
12 it's a letter from a CPA, Mr. Thomas Cervino, to  
13 Department of Water Resources, dated March 30th,  
14 2009.

15 A. Uh-huh.

16 Q. Let me know when you have that.

17 A. I have it before me.

18 Q. And as I understand, that was in  
19 partial response to Judge Alan Smith's  
20 interrogatories No. 7 through 10 where Mr. Smith  
21 asked for some financial information.

22 Are you familiar with this Exhibit 54  
23 being submitted by M3 in partial response to  
24 Mr. Smith's questions?

25 A. I don't recall us submitting this in

1 response to Mr. Smith's questions. I believe we  
2 submitted this at the request of Mr. Fereday to  
3 update the financial that had been submitted with  
4 the initial filing of the application.

5 Q. Okay. And to your knowledge, is there  
6 other financial information that M3 has provided  
7 to Department of Water Resources?

8 A. I believe there was a financial  
9 statement that was filed with the initial  
10 application. I don't know what exhibit number it  
11 would be.

12 Q. And are you aware that this updates  
13 that original financial statement, this  
14 Exhibit 54?

15 A. Yes, this is dated the -- March 30th,  
16 2009.

17 MR. THORNTON: Okay. All right. And I  
18 just wanted to make sure. I believe that this  
19 exhibit, Mr. Hearing Officer and Mr. Fereday, is  
20 already a part of the record; is that correct?

21 MR. FEREDAY: I believe it is.

22 THE HEARING OFFICER: We have previously  
23 referred to it in testimony.

24 MR. THORNTON: Okay. I just wanted to make  
25 sure. Thanks.

1 Q. So, Mr. Brownlee, do you agree that  
2 the burden of proof is on M3 as the applicant for  
3 the water right to show the State and Hearing  
4 Officer they have financial resource capabilities  
5 to successfully finance development and put the  
6 State's water to beneficial use?

7 MR. FEREDAY: Objection. Calls for a legal  
8 conclusion.

9 THE HEARING OFFICER: Sustained.

10 Q. (BY MR. THORNTON): Mr. Brownlee, are  
11 you familiar with the Idaho Code regarding the  
12 requirements for the applicant to submit, and I'll  
13 quote, "current financial statements certified to  
14 show the accuracy of the information contained  
15 therein or a financial commitment letter along  
16 with a financial statement of the lender or other  
17 evidence to show that it is reasonably probable  
18 that financing will be available to appropriate  
19 the water and supply it to beneficial use  
20 proposed"?

21 A. If you're reading directly from them,  
22 that's what it says. I understand that.

23 Q. Are you the main person with M3  
24 responsible for the financing of this project?

25 A. I am one of the managing partners for

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1 this project.  
2 Q. So are you in charge of the financing?  
3 Do you have intimate financial knowledge of M3 and  
4 its abilities to carry out this project?  
5 A. Yes.  
6 Q. So do you agree that it's the -- the  
7 burden of proof is on M3 to show that it's got  
8 financial capabilities to carry this project out?  
9 MR. FEREDAY: Objection.  
10 THE HEARING OFFICER: Sustained.  
11 Q. (BY MR. THORNTON): And the  
12 information that M3 has provided so far is, again,  
13 this Exhibit No. 54; is that -- that's what I  
14 understand has been submitted so far; correct?  
15 MR. FEREDAY: Objection. That is not what  
16 his testimony was.  
17 THE HEARING OFFICER: Sustained.  
18 MR. THORNTON: Okay.  
19 Q. Mr. Brownlee, I'll try to ask this  
20 again. What documents or document has M3  
21 provided, the most current documents, to identify  
22 their financial capabilities for carrying out this  
23 project?  
24 MR. FEREDAY: Objection. Asked and  
25 answered.

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1 THE HEARING OFFICER: I'll allow that as a  
2 preliminary question. I believe he's already  
3 identified this document, which is Exhibit 54, as  
4 that most recent submittal, Mr. Thornton. I'll  
5 allow him to re-answer the question if he can  
6 elaborate.  
7 THE WITNESS: The Exhibit 54, March 30th,  
8 2009, is the most recent submittal, which  
9 incorporates a summary of asset, liabilities, and  
10 equity, income tax base as prepared by Thomas D.  
11 Cervino, CPA, and also the chief financial officer  
12 for the M3 companies.  
13 Q. (BY MR. THORNTON): Okay. Would you  
14 agree that the economy and capital markets in  
15 general and real estate markets in particular have  
16 dramatically, negatively changed since M3 filed  
17 its application, and those same markets may stay  
18 impaired for some time?  
19 A. Well, I don't know how long they'll  
20 stay impaired. But I would agree that the markets  
21 have changed since March 30th, 2009, yes.  
22 Q. And how has this affected M3?  
23 A. From what perspective?  
24 Q. Their financial capabilities. How has  
25 this affected M3's financial capability for

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1 carrying out this project over the 30-year  
2 planning horizon?  
3 A. The structure of M3 Eagle -- and you  
4 refer to M3 -- I'm assuming that's M3 Eagle you're  
5 referring to?  
6 Q. Yes.  
7 A. M3 Eagle is a limited liability  
8 company that is -- consists of two partners, the  
9 Dallas Police and Firemen's Pension Fund, which is  
10 a three-plus-billion-dollar pension fund, who is  
11 the funding partner for this partnership, and  
12 ourselves, as the managers and other members of M3  
13 Eagle LLC.  
14 The partnership structure for M3 Eagle  
15 is one that it does include, as shown under "Notes  
16 payable," a \$15 million obligation that is due to  
17 Dallas Police and Firemen's Pension Fund. So  
18 essentially the amount of capital that we have  
19 invested in this, which is close to \$80 million,  
20 is an all cash investment.  
21 So our impairment that might be caused  
22 by lending institution of an institutional nature,  
23 like a J.P. Morgan Chase or someone like that,  
24 foreclosure, we have none of those risks because  
25 of the structure of the partnership. We have a

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1 very conservative structure, which puts us in a  
2 position to be able to develop the property when  
3 the market dictates.  
4 Q. Okay. And is it, in your opinion,  
5 important to understand who Department of Water  
6 Resources is doing business with financially,  
7 their financial capability?  
8 MR. FEREDAY: I object. I think he's  
9 asking what the Department of Water Resources'  
10 views are.  
11 MR. THORNTON: I'm asking Mr. Brownlee's  
12 understanding, if he agrees that it's important  
13 for M3, if they're doing business with IDWR, to  
14 provide appropriate level of financial statements.  
15 THE HEARING OFFICER: Okay. Before you  
16 answer that question, Mr. Brownlee, I will sustain  
17 the objection.  
18 And I'm not sure -- it's on the basis  
19 of what Mr. Fereday objected to, Mr. Thornton.  
20 But the question, to me, is almost rhetorical in  
21 nature. It begs a question of whether, to me,  
22 that -- whether Mr. Brownlee thinks it's important  
23 to submit information to the partner.  
24 And I guess my reaction is,  
25 Mr. Thornton, of course it is. They wouldn't be

1 here otherwise. So let's move on.  
 2 MR. THORNTON: Okay.  
 3 THE HEARING OFFICER: Thanks.  
 4 MR. THORNTON: We'll do that.  
 5 Q. So M3's financial viability or  
 6 financing sources, capabilities, and contingency  
 7 plans, and how each may be impacted by continued  
 8 stressed economic conditions should thoroughly be  
 9 understood; would you agree with that?  
 10 A. I think it's important that there's a  
 11 very clear understanding that not all developments  
 12 are in the same basket. And not all developers  
 13 have the same capabilities. And not all  
 14 development deals have the same structures.  
 15 I believe that what I've testified to  
 16 is that the structure that we have in place for  
 17 this particular property, which is subject to this  
 18 application, or the applicant in this hearing, has  
 19 a structure in place that if you were asking me  
 20 how does this structure compare to other deals  
 21 that are in stress because they have too much  
 22 leverage or that the institutional lender is  
 23 calling the loan or failure to renew the loan  
 24 because of failure to meet loan covenants, in a  
 25 comparative analysis under those two scenarios, if

1 that's what you're asking, is that this structure  
 2 is very conservative. We have no outside lenders.  
 3 So we are in control of our own  
 4 destiny. And we have the position to be able to  
 5 move forward with our financial partner when the  
 6 market so dictates to do so. And they have a very  
 7 strong balance sheet and are capable of  
 8 performing.  
 9 Q. So the financial statements that  
 10 you've provided here on Exhibit No. 54 are of or  
 11 about M3 Eagle LLC, not the parent company.  
 12 Why is that?  
 13 A. Because each individual asset is held  
 14 in a single-asset LLC that is specifically for  
 15 that deal.  
 16 Q. And so do you have any reasons why you  
 17 haven't provided detailed audited financial  
 18 information for the parent company?  
 19 A. No. It's not a parent company  
 20 structure. It is a -- Dallas Police and Fire  
 21 Department Pension Plan is a member in M3 Eagle  
 22 LLC.  
 23 Q. In terms of -- in section 42-203(a) of  
 24 the Idaho Code, chapter 5, I guess subpart (d),  
 25 again, I stated it once. It says, "The applicant

1 shall submit a current financial statement  
 2 certified to show the accuracy of the  
 3 information."  
 4 I don't see anywhere this is -- or do  
 5 you see anywhere where this (indicating) says  
 6 "certified"?  
 7 A. I don't know what's required by  
 8 certification. But the signature of Thomas D.  
 9 Cervino is a registered CPA, licensed CPA.  
 10 Q. And then do you also see on the first  
 11 page of that document 54 where he states the work  
 12 that he has done is -- is based on M3 Eagle and  
 13 not in the -- as an employee, not in the capacity  
 14 of a certified public accountant in the practice  
 15 of public accounting? Do you read that as being  
 16 certified?  
 17 A. I believe it says "not in the capacity  
 18 of a CPA in the practice of public accounting,"  
 19 because he's not a public accountant.  
 20 Q. So this is -- excuse me. Is this  
 21 statement audited by anybody else other than  
 22 internal?  
 23 A. No, we do not do audited statements.  
 24 The fund does not require that.  
 25 Q. And then the Idaho Code goes on to say

1 that you have a current financial statement  
 2 certified or a financial commitment letter along  
 3 with financial statement of the lender.  
 4 Do you have a financial commitment  
 5 letter identified in this packet here?  
 6 A. I -- no.  
 7 Q. Okay. And it goes on to say in the  
 8 Idaho Code about the financial commitment. It  
 9 says, "The applicant shall submit plans and  
 10 specifications along with estimated construction  
 11 costs for the project works. The plan shall be  
 12 definite enough to allow for determination of  
 13 project impacts and implications."  
 14 Could you direct me to where M3 has  
 15 provided plans and specifications with estimated  
 16 construction costs for the project works?  
 17 A. I believe that Stanley Engineering  
 18 prepared an estimate of the overall cost of the  
 19 system on an itemized basis on a phase-by-phase  
 20 basis, and that was submitted as part of the  
 21 overall package. I don't know what exhibit number  
 22 that is.  
 23 Q. And I'll myself take your word on  
 24 that.  
 25 Do you have any financial commitment

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1 letter from your parent company showing that they  
2 will be there for the full future plan of this  
3 project over the next 30 years?  
4 MR. FEREDAY: Objection. Asked and  
5 answered.  
6 MR. THORNTON: I'll withdraw that question  
7 and try to ask it.  
8 Q. Do you have any financial commitment  
9 letter that you can point to for the full  
10 build-out of this project?  
11 A. Well, first of all, the answer to  
12 that's no. But the -- I don't know of any  
13 master-plan community development that we've  
14 certainly ever been involved in or any one of my  
15 peers in the industry that I'm aware of that has a  
16 30-year project that has the financial commitment  
17 for the complete, using your terminology,  
18 "build-out of the community." I mean that --  
19 those types of commitments don't exist in our  
20 world that we deal in.  
21 Q. Do you have a financial commitment  
22 letter that we can see for six months or a year?  
23 A. Once again, the typical process for a  
24 financing commitment for a master-plan community  
25 would be based upon the financing commitment for

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1 the particular phase, given the known start of  
2 construction date, giving a set of plans and  
3 specifications that are approved and permitted and  
4 bid by third-party contractors. So typical in a  
5 process is that your financing commitment would be  
6 tied to that phase of construction.  
7 And I believe, as we've testified, we  
8 don't anticipate starting construction of this  
9 project, depending upon market conditions, until,  
10 I believe, 2011 was the testimony. So that would  
11 not exist as of today.  
12 Q. In the Idaho Code 045, I'll read it to  
13 you underneath, "The evaluation criteria,"  
14 rule 45, and its criteria for determining whether  
15 the applicant has sufficient financial resources  
16 to complete the project. Not six months into the  
17 project or one year, but the project.  
18 It goes on to say that "An applicant  
19 will be found to have sufficient financial  
20 resources upon a showing that it reasonably --  
21 that it is reasonably probable that funding is or  
22 will be available for project construction or upon  
23 a financial commitment letter acceptable to the  
24 director. This showing is required and is  
25 described in rule subsection 040.050.C or at the

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1 time the hearing provided by subsection  
2 rule 0405.C is conducted."  
3 So what do you have to show us at this  
4 hearing for your financial commitment for this  
5 project, other than an uncertified balance sheet?  
6 A. At this time that is all that we have  
7 submitted on the financial capabilities of this  
8 partnership.  
9 Q. Okay. If you'd turn to -- on the  
10 document 54, on page 3, and there's a note near  
11 the bottom called -- it's note 5, and it's  
12 titled -- the overall title of that page, and  
13 actually this balance sheet, is "M3 Eagle LLC  
14 selected information, substantially all  
15 disclosures are not included." Let me go to there  
16 first.  
17 What does "selected information,  
18 substantially all disclosures are not included"  
19 mean in this balance sheet?  
20 A. I'm sorry, Mr. Thornton. Can you  
21 point me to where you're reading that from?  
22 Q. Yeah, I can. If you would go to, I  
23 believe, the second -- excuse me, page No. 2 where  
24 it gets into a disclosure of your summary of  
25 significant accounting policies. And at the

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1 heading of that page and for the next three -- or  
2 two pages, it says, "Selected information,  
3 substantially all disclosures are not included."  
4 What does that mean to you as  
5 representing the financial ability of M3?  
6 A. I'm not a CPA, so that particular  
7 wording may be a nuance of that profession. But  
8 the disclosures relative to the partnership and  
9 its assets are set forth on the assets, liability,  
10 and equity on page 1. I believe what you're  
11 referring to here are the notes, which are trying  
12 to explain what's set forth on page 1.  
13 I would assume "substantially all  
14 disclosures are not included," which would mean  
15 that there may be other things inside of the  
16 operating agreement for the partnership that  
17 aren't specifically set out in this document. I  
18 don't know.  
19 Q. Okay. And if you'd go on to page 3,  
20 the footnote where it says "note 5."  
21 A. Uh-huh.  
22 Q. And in there it says, "Concentrations.  
23 The company is limited to a single major equity  
24 contributor for the funding of land purchases,  
25 entitlement, development, and operation."

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1 And in your opinion, is this prudent  
2 to have M3 tied with just one single company?  
3 A. When you have a company that is a  
4 public company, by the way, their financial  
5 statements are available on the Internet, and they  
6 are audited. You can go on the Internet under  
7 "Dallas Police and Firemen's Pension Plan" and  
8 view all the financial statements that you'd like.  
9 So I'm assuming that is a public record.  
10 Having a financial partner that is the  
11 size of this pension fund is probably not  
12 unprudent for a development of this size.  
13 Q. Okay. And if you go to footnote 3 on  
14 page 3, it has "Identification of notes payable as  
15 of December 31st, 2008."  
16 And it appears that there's a  
17 \$15 million credit facility from the company's  
18 major equity contributor to finance entitlement  
19 budget through March of 2009; correct?  
20 A. Correct.  
21 Q. Do you know what the status of that  
22 is, since we're past March 2009?  
23 A. The status of the credit facility?  
24 Q. Yeah.  
25 A. It's still in place.

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1 Q. And what about the notes payable?  
2 A. The \$15 million is still carried on  
3 the books as a note payable.  
4 Q. And it says, "Notes payable of  
5 3.5 million for predevelopment financing secured  
6 by deed of trust with interest rate of 12 percent,  
7 maturing on September 1st, 2008."  
8 A. That's been paid off.  
9 Q. And just to make sure, is the Dallas  
10 Fire and Police Pension Fund investment in M3, so  
11 their investment in M3, is it direct to M3 or  
12 through one of pension plan investment managers?  
13 A. It is -- the pension plan investment  
14 managers have the responsibility to manage  
15 specific assets. The investment comes directly  
16 from the pension fund.  
17 Q. And who is the investment manager  
18 selected by the pension plan who made the decision  
19 to invest in M3?  
20 A. CDK Realty.  
21 Q. And if I could -- I'm going to hand to  
22 you document No. 2. I'll get those.  
23 MR. FEREDAY: Is this an exhibit? Is this  
24 an existing exhibit?  
25 MR. THORNTON: It is not. It's one that

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1 was referred to by Mr. Brownlee as the information  
2 that's on the Internet.  
3 THE HEARING OFFICER: Do you want us to  
4 mark this?  
5 MR. THORNTON: Yeah, you can mark it.  
6 THE HEARING OFFICER: So this will be  
7 Exhibit 863.  
8 (Exhibit 863 marked.)  
9 Q. (BY MR. THORNTON): And what's before  
10 you is just a minute summary on this document  
11 No. 2. And if you go to page 3 of that document,  
12 then you'll see a spreadsheet for the City of  
13 Dallas Police and Fire Pension system.  
14 What percent of the total pension plan  
15 is allocated to real estate investments on this  
16 spreadsheet?  
17 A. It says "29.3 percent."  
18 Q. Correct. I should have said that.  
19 Okay. And then if you go to document No. 3, which  
20 I'll hand out, which is "Investment implementation  
21 policy for the Dallas Fire -- Police and Fire  
22 Pension Plan." This is available, again, on their  
23 website.  
24 THE HEARING OFFICER: So shall we mark  
25 this, Mr. Thornton?

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1 MR. THORNTON: Yes, please.  
2 THE HEARING OFFICER: This document will be  
3 864.  
4 (Exhibit 864 marked.)  
5 Q. (BY MR. THORNTON): So on page 4 of  
6 the document that we just identified as 864 --  
7 make sure I get to page 4 -- what is the pension  
8 plan's investment policy guideline for real estate  
9 investments?  
10 A. Are you referring to page 4?  
11 Q. Yes.  
12 A. It says "18 percent."  
13 Q. Correct. And you just stated  
14 currently at 29 percent; correct?  
15 A. I believe it was 29.3 percent.  
16 Q. Yeah. Would you agree that that is  
17 outside of -- substantially outside of what their  
18 investment policy strategy is?  
19 MR. FEREDAY: Objection. I don't think  
20 this witness has any basis to know what their  
21 investment policy is.  
22 MR. THORNTON: My argument would be if  
23 Mr. Brownlee's representing M3, the financial end  
24 of things, it would surprise me if he is not very  
25 familiar with CDK, who is just one of the managers

1 of the Dallas pension plan.  
 2 THE HEARING OFFICER: Okay. Overruled.  
 3 I'll allow him to attempt to answer the question  
 4 if he knows the answer.  
 5 THE WITNESS: Can you repeat the question?  
 6 Q. (BY MR. THORNTON): Yeah. Does this  
 7 appear to be -- the difference of the pension plan  
 8 policy guideline for real estate investments being  
 9 18 percent, it's currently at 29 percent, in your  
 10 opinion, is that out of -- substantially out of  
 11 their desires for a stable pension plan?  
 12 A. To my knowledge, that's a -- the asset  
 13 allocation on their balance sheet relative to  
 14 percentages is based upon, in a large part, to the  
 15 stock market, predominantly in the S&P 500.  
 16 And as the stock market rises and  
 17 falls, the asset value of real estate remains  
 18 constant, so you're going to have a fluctuating  
 19 percentage as it relates to the overall portfolio.  
 20 For example, since January of this year, I believe  
 21 the stock market has risen some 30 percent. So  
 22 you would have to recalculate their balance sheet  
 23 to determine what that percentage is today.  
 24 Q. Would you agree that real estate  
 25 investments also has gone down, generally?

1 A. I believe that there's very few real  
 2 estate properties that haven't lost value in  
 3 today's market.  
 4 Q. So what percent of the total pension  
 5 plan assets does M3 have based on the spreadsheet  
 6 on -- let me back up -- on page 3 of document 864?  
 7 A. Well, it looks like you calculated  
 8 9 percent, which I'm not sure what that  
 9 represents.  
 10 Q. And I'm actually not sure either.  
 11 9 percent, I would say that that -- we have  
 12 calculated it as the net value of the pension plan  
 13 currently is 2.6 billion, dropped more than  
 14 800 million, and it represents about 3 percent of  
 15 the Dallas pension plan.  
 16 Do you agree with that?  
 17 A. 3 percent of 2.6 billion is roughly  
 18 78 million. So I would assume that's a close  
 19 calculation.  
 20 Q. Correct. How many managers does this  
 21 pension -- Dallas Police and Fire Pension Plan  
 22 have?  
 23 A. I'm not familiar with anyone other  
 24 than CDK Realty and Advisors.  
 25 MR. THORNTON: Okay. If we can go to

1 Exhibit 5. That's No. 5. If you're wondering  
 2 where No. 4 went, it's my dyslexia. I forgot.  
 3 THE HEARING OFFICER: So do you want this  
 4 document marked?  
 5 MR. THORNTON: Yeah, please.  
 6 THE HEARING OFFICER: So this will be 865.  
 7 MR. THORNTON: Correct.  
 8 (Exhibit 865 marked.)  
 9 Q. (BY MR. THORNTON): I'm trying to get  
 10 my -- okay. If you go to Document 864, page 3.  
 11 A. Document 864.  
 12 Q. That spreadsheet identifies the asset  
 13 distribution by advisors, the next two pages. And  
 14 if we wanted to count up all those managers, there  
 15 would be 55. And one would be real estate  
 16 investment group, of which CDK is part of?  
 17 THE HEARING OFFICER: Okay. I'm confused.  
 18 THE WITNESS: Yeah, I don't have what  
 19 you're talking about.  
 20 THE HEARING OFFICER: Mr. Thornton, I'm not  
 21 sure whether we even have these documents numbered  
 22 the way you're referring to them.  
 23 MR. THORNTON: Okay.  
 24 THE HEARING OFFICER: I'm lost.  
 25 MR. THORNTON: Okay.

1 THE HEARING OFFICER: Let me tell you what  
 2 I have. I have labeled as 863 a document that's,  
 3 at least just below the organization letterhead  
 4 block, as "Minute summary." That's what --  
 5 MR. THORNTON: Yeah, board meeting  
 6 Thursday, and I have that identified -- and that  
 7 could be part of the problem -- as 864.  
 8 THE HEARING OFFICER: Well, that's not the  
 9 way they were numbered when we originally numbered  
 10 them.  
 11 MR. THORNTON: Oh, okay.  
 12 THE HEARING OFFICER: The minutes -- the  
 13 minute summary is 863 and has a label on it that  
 14 way. And that's the label that was first placed  
 15 on that document.  
 16 And I have another label that was  
 17 placed on an investment implementation policy for  
 18 the Dallas Police and Fire Pension System that has  
 19 an exhibit label of 864 on it.  
 20 MR. THORNTON: Okay.  
 21 THE HEARING OFFICER: So I think we've been  
 22 referring to the wrong exhibits.  
 23 MR. THORNTON: I believe so. I apologize.  
 24 THE HEARING OFFICER: And I wondered when  
 25 you were talking about a 9 percent a little bit

1 ago.  
 2 MR. THORNTON: Okay.  
 3 THE HEARING OFFICER: Okay.  
 4 MR. THORNTON: Thank you. And I apologize,  
 5 Mr. Hearing Officer, running you around here.  
 6 Q. So if we could go to document 863,  
 7 pages 3 and 4 identifies for the City of --  
 8 THE HEARING OFFICER: Wait a minute. I  
 9 don't have a page 4 for 863. 863 is the  
 10 document -- it's titled "Minute summary."  
 11 MR. THORNTON: Correct.  
 12 THE HEARING OFFICER: I don't have a  
 13 page 4. I have a page 3. There are three pages  
 14 in this document. One, two, three.  
 15 MR. FEREDAY: I only have three in mine.  
 16 MR. THORNTON: So let's go to -- and I  
 17 apologize. And it appears that I have not made a  
 18 copy of the fourth page, and I would like to do so  
 19 perhaps at a break, try to get copies of that last  
 20 page, if that's possible. And I apologize for  
 21 that.  
 22 And actually, that's an important  
 23 page, because that identifies the real estate  
 24 advisor groups that I'm going to talk about. What  
 25 I'm -- going through my mind is, as much as I

1 don't want to delay things, is if it's possible to  
 2 try to go get a copy of that page so we can add it  
 3 to the document. And again --  
 4 THE HEARING OFFICER: Okay. Let's break  
 5 for another ten minutes.  
 6 (Recess.)  
 7 THE HEARING OFFICER: We are recording.  
 8 I guess I had just asked Mr. Thornton  
 9 off the record, and I'll be more brief about it.  
 10 But I would like to know where we're headed in  
 11 questioning Mr. Brownlee about the internal  
 12 workings of the Dallas Police and Fire Pension  
 13 System. And first of all, whether he has the  
 14 ability to answer those questions; and second of  
 15 all, what the relevance of that line of  
 16 questioning is, even if he can. And so I guess  
 17 I've asked Mr. Thornton for a statement.  
 18 Mr. Fereday, you wanted to say  
 19 something as well, and then I'll allow  
 20 Mr. Thornton to respond.  
 21 MR. FEREDAY: Yes. We would anticipate  
 22 objecting to the admission of these three exhibits  
 23 should they be offered for a couple of reasons:  
 24 relevancy, as you just mentioned; but maybe more  
 25 fundamentally, Mr. Brownlee is the protestants'

1 witness. They have called him. However, they  
 2 were obligated to provide to us exhibits that they  
 3 would call -- that they would use in their direct  
 4 case, and provide those to us many weeks ago. And  
 5 these were not provided, I will represent. And  
 6 this is the first we've seen them.  
 7 So we don't believe that these  
 8 exhibits comport with the Hearing Officer's  
 9 pre-hearing order with regard to exchange of  
 10 exhibits.  
 11 We recognize that the financial  
 12 capability of the M3 project is an issue. We  
 13 think it's been aired quite substantially already.  
 14 But those would be our comments. We believe that  
 15 this goes beyond -- and it also goes beyond what  
 16 the Hearing Officer has allowed in terms of  
 17 exchange of exhibits. It's prejudicial to us to  
 18 see these for the first time now.  
 19 THE HEARING OFFICER: Okay. Mr. Thornton?  
 20 MR. THORNTON: I guess the basis for the  
 21 questioning is that the public and IDWR, I  
 22 believe, have the right to know the financial  
 23 capabilities and sustainability for M3 to carry  
 24 out this project, especially when they're asking  
 25 for a future-needs water right that goes 30 years.

1 In terms of the initial information  
 2 provided by M3 for financing, in our review of  
 3 that we could not find out until we started this  
 4 hearing who their financial backer was. We just  
 5 heard "private investor." Heard no more until, I  
 6 believe, Mr. Brownlee, to my knowledge, identified  
 7 that when we had a hearing -- him providing  
 8 testimony in the first probably couple of days.  
 9 So we did not even know, nor I don't  
 10 think in our researching the files of the  
 11 Department of Water Resources with some of your  
 12 water resource personnel to find out their  
 13 financial backing, we couldn't find that out.  
 14 We had -- and I could pull up here --  
 15 and it's actually in one of the admissions that  
 16 when we had counsel, Ms. Beeman, she was trying to  
 17 find out. The information we found out is there's  
 18 one financial person -- or company. We had no  
 19 information on that.  
 20 When we did find that out during this  
 21 hearing, it allowed us to look at what is the  
 22 financial capability of M3. They talk about being  
 23 backed by the Dallas Pension Plan. Through the  
 24 questions that I will be asking Mr. Brownlee, I  
 25 think we will find that they are nothing -- M3 is

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1 nothing but a blip on the screen that could vanish  
2 like that (indicating) in terms of financing.  
3 I have seen nothing provided, other  
4 than this little document by an internal CPA  
5 person that Mr. Brownlee probably couldn't take  
6 this down to the corner Jackson Food Store and buy  
7 a quart of milk with it.  
8 How in the world am I or the  
9 protestants or the people in Idaho supposed to  
10 look at a spreadsheet that doesn't have all the  
11 information to know about the viability of M3?  
12 The last thing we want is for them to start up and  
13 then to have a problem with "Oh, my gosh who's  
14 now" -- if M3 folds because CDK folds because  
15 their company folds and the pension plan keeps,  
16 you know, losing \$800 million next year and  
17 they're gone, who's going to be left for that mess  
18 out there?  
19 We don't feel that they have met even  
20 close to my interpretation of the evaluation  
21 criteria to provide sufficient financial  
22 resources. I see nothing other than a simple  
23 statement.  
24 So the lateness of this information is  
25 not that we didn't -- weren't submitting it. We

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1 didn't even know who the investment company was  
2 until just a couple weeks ago.  
3 THE HEARING OFFICER: Okay. Well, I guess  
4 I'll allow a few more questions, Mr. Thornton.  
5 MR. THORNTON: Okay.  
6 THE HEARING OFFICER: But these have not  
7 yet been offered. And I'm not sure I'll allow  
8 them into the record.  
9 The other -- the other thing that I  
10 guess I'm a little uncertain about, although I see  
11 the narrative, there is a reference in the  
12 one-page statement of assets, liabilities, and  
13 equities is that there is a 15 -- \$15 million note  
14 payable.  
15 And then it says in the notes there is  
16 a -- they've obtained a \$15 million credit  
17 facility. And I'm not sure that I understand the  
18 difference between that and a note payable at this  
19 point.  
20 So I don't -- I guess as you delve  
21 into how many investors there are or how many  
22 managers there are in the Dallas Police and Fire  
23 Pension System, I think we're way beyond an  
24 understanding of even what's here. I'm just --  
25 I'm just not following why or what. And I think

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1 you've got to lay some foundation to take me into  
2 why this is even important, because I don't see  
3 it.  
4 MR. THORNTON: Okay.  
5 THE HEARING OFFICER: So go ahead.  
6 MR. THORNTON: Okay.  
7 THE HEARING OFFICER: But I want to warn  
8 you that I'll be pretty strict about how far I  
9 allow you to try to delve into this with  
10 Mr. Brownlee.  
11 MR. THORNTON: Okay.  
12 MR. ALAN SMITH: Could I make a statement  
13 here?  
14 THE HEARING OFFICER: Sure.  
15 MR. ALAN SMITH: In response to my  
16 interrogatories, we got three pages: a letter from  
17 the accountant discounting the fact that he's a  
18 CPA; we got those other two documents that  
19 Mr. Thornton has just gone through. That's all  
20 that they provided.  
21 They want to lock up a water right for  
22 20 or 30 years. Aren't they going to show us how  
23 they're going to finance all of this over that  
24 extended period of time? They don't even show us  
25 five or ten years down the road, or even one year

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1 what their financing is.  
2 And I think that's what Mr. Thornton's  
3 getting to. These documents aren't certified.  
4 Apparently, that's required. We have some  
5 problems with their financial showing. Very  
6 inadequate. That's all.  
7 THE HEARING OFFICER: Well, let's see where  
8 the questions go. But I want them -- I guess I  
9 want them linked to this particular financial  
10 statement, to start with, Mr. Thornton.  
11 MR. THORNTON: And, Mr. Hearing Officer,  
12 the financial statement, just so I can hopefully  
13 do a better job is --  
14 THE HEARING OFFICER: Well, the statement  
15 of assets, liabilities, and equity. And start  
16 with that and tell me -- and then explore what  
17 those are and where they come from with  
18 Mr. Brownlee if you want additional information.  
19 MR. THORNTON: Okay.  
20 THE HEARING OFFICER: And then if we need  
21 to launch into this, okay. But I don't even have  
22 the foundation for knowing what the \$15 million  
23 note payable is.  
24 MR. THORNTON: Okay. I've got questions.  
25 And I will take your thoughts and direction, and

1 hopefully be more focused on that approach.  
 2 THE HEARING OFFICER: Okay. Thank you.  
 3 Q. (BY MR. THORNTON): So, Mr. Brownlee,  
 4 part of me maybe asking some of these initial  
 5 questions is to get me in the right context again  
 6 after, you know, this last 20 minutes or half an  
 7 hour. And again, I apologize for not having the  
 8 pages copied correctly.  
 9 M3 Company Eagle LLC, you get your  
 10 monies directly from where?  
 11 A. Well, the proper name is M3 Eagle LLC,  
 12 not M3 Companies LLC.  
 13 Q. Thank you.  
 14 A. The limited liability company is  
 15 funded by the Dallas Police and Fire Pension  
 16 System as a member of a limited liability company.  
 17 Q. Do you get your money and is your  
 18 contract or whatever through agreements directly  
 19 with the Dallas Police Pension Fund or with CDK?  
 20 A. Directly with Dallas Police Fire  
 21 Pension System. CDK is an advisor. They oversee  
 22 the management of the asset on behalf of the  
 23 pension plan.  
 24 Q. And is M3 one of approximately 17  
 25 investment -- real estate investment companies

1 that CDK has?  
 2 A. I don't know what you're basing 17 CDK  
 3 Realty advisor investments on. So I can't comment  
 4 on that.  
 5 MR. THORNTON: I can't remember if we  
 6 handed this -- handed this one out. Okay. This  
 7 may be helpful.  
 8 Look on this, this exhibit here,  
 9 perhaps.  
 10 THE HEARING OFFICER: Okay. Let's number  
 11 this as 866.  
 12 (Exhibit 866 marked.)  
 13 Q. (BY MR. THORNTON): On Document 866 --  
 14 and if you look on CDK's website where they list  
 15 their companies, underneath "Land" down towards  
 16 the bottom, do you see "American Ranch Eagle"?  
 17 A. Yes, I do.  
 18 Q. And is that -- how is that associated  
 19 with -- I may not be calling it correctly -- M3  
 20 Eagle LLC?  
 21 A. I believe that the listing was when we  
 22 originally started the project, we were looking at  
 23 a potential for an American Ranch as a portion of  
 24 it. I don't know. I can't speak on behalf of CDK  
 25 why they listed it that way.

1 Q. So would you agree that CDK's -- this  
 2 Document 866 dated April 16th, 2009, less than  
 3 approximately a month ago, had American Ranch  
 4 Eagle in there, which M3 was identified, or you're  
 5 telling me you're not aware of that?  
 6 A. What I'm telling you is this is the  
 7 first time I've ever seen this, and we're not  
 8 responsible for any portion of CDK Realty  
 9 Advisors, nor their website, so I don't know what  
 10 you're trying to establish here.  
 11 Q. Would you go to -- did we turn out  
 12 No. 5? I think we did. I'd like to -- I think  
 13 I've handed this one out. CDK's -- do you have  
 14 the No. 5?  
 15 A. Yes, I have that.  
 16 Q. It's the last one. Yes.  
 17 Do you see on CDK's website down at  
 18 the bottom on the first page where M3 Company is  
 19 part of CDK?  
 20 A. The M3 Companies is not part of CDK.  
 21 We're listed as one of the companies that they do  
 22 business with.  
 23 Q. Are they the managers overall on your  
 24 company?  
 25 A. They have no management authority,

1 responsibility, or anything to do with the M3  
 2 Companies.  
 3 Q. So if you go to Exhibit No. 863, the  
 4 minute summary board meeting dated Thursday,  
 5 March 12th -- and this is one I screwed up. And  
 6 hopefully the fourth page. This is a spreadsheet  
 7 by the City of Dallas Fire and Pension System.  
 8 Do you see the fourth page where  
 9 they're talking about real estate advisors?  
 10 A. Yes.  
 11 Q. And you see CDK Advisors there?  
 12 A. Correct.  
 13 Q. Is M3 embedded underneath that  
 14 386 million?  
 15 A. M3 Eagle LLC's investment would be  
 16 part of the 386448, I assume. But I don't have  
 17 any knowledge of the preparation of this asset  
 18 distribution by Advisor.  
 19 Q. So as being the person responsible for  
 20 financing for M3, you don't know really where your  
 21 money is coming from, do you?  
 22 A. I don't know how you're drawing that  
 23 inference, because I'm not involved in the  
 24 preparation of the City of Dallas Police and  
 25 Firemen's Pension System asset distribution list.

1 I have nothing to do with the development of these  
 2 documents.  
 3 Q. Who is your direct involvement with  
 4 securing funding for the M3 project?  
 5 A. I work directly with the attorneys. I  
 6 work with the CDK Advisors. We work directly with  
 7 the board members for the pension fund, but we  
 8 have no day-to-day involvement in the preparation  
 9 of their financial statements or the operation of  
 10 either CDK Realty or the pension fund.  
 11 Q. You do work with CDK Advisors?  
 12 A. I believe I've stated that several  
 13 times, yes.  
 14 Q. You had stated, I believe earlier in  
 15 your testimony, that the City of Dallas Pension  
 16 Fund was -- I think you originally said it was  
 17 approximately 3.4 or -5 billion dollars; is that  
 18 correct?  
 19 MR. FEREDAY: Objection. This has been  
 20 asked and answered. We seem to be going over the  
 21 same ground. And I'm just wondering whether it's  
 22 appropriate -- and I don't believe it is -- for  
 23 Mr. Thornton to be asking repetitive questions.  
 24 MR. THORNTON: I'll withdraw that question.  
 25 THE HEARING OFFICER: Okay. Again, I

1 guess, Mr. Thornton, we're into the details now of  
 2 the Dallas Police and Fire Pension System. And I  
 3 guess I would like to go back to the structure --  
 4 if you want to pursue it with Mr. Brownlee -- the  
 5 structure of M3 Eagle LLC, who's contributed what  
 6 money for -- I mean I understand from his  
 7 testimony there are three members. There is at  
 8 least a note that's been -- of some type that's  
 9 been issued by this entity.  
 10 I don't know anything about the  
 11 relative percentage of participation or who's  
 12 contributing what, whether there's additional  
 13 contributions from the Dallas Police and Fire  
 14 Pension System.  
 15 But we're into details of this system  
 16 and CDK, and I guess I don't even necessarily  
 17 understand the structure of the LLC that we're  
 18 dealing with right now. So there's a total  
 19 disconnect for me between the two on that.  
 20 And if you want to explore it, I think  
 21 you've got to lay the foundation first with  
 22 Mr. Brownlee. Now, I don't know whether that  
 23 makes sense.  
 24 MR. THORNTON: It does. And I apologize.  
 25 Sometimes I struggle trying to meet the intent of

1 what you're saying, of which I am trying to do.  
 2 And I think I understand the basis for your  
 3 concern. So I'll try again here a little better.  
 4 THE HEARING OFFICER: Okay.  
 5 Q. (BY MR. THORNTON): How are you  
 6 assured of -- how is M3 assured of money coming in  
 7 each year?  
 8 A. For what?  
 9 Q. For paying your bills, for doing  
 10 hydrologic studies, for doing the planning  
 11 processes, entitlements, or whatever.  
 12 A. We prepare an annual budget and  
 13 business plan that we then submit to CDK, who  
 14 takes that in for board approval.  
 15 Q. Do you have any type of irrevocable  
 16 letter of credit that says M3 is going to be  
 17 funded six months, one year, five years, ten  
 18 years, from CDK?  
 19 A. No.  
 20 Q. I thought I heard you earlier say you  
 21 go directly with Dallas Pension Plan, now I hear  
 22 you saying you go back through CDK so I'm  
 23 confused.  
 24 Can you help me better understand  
 25 that?

1 A. No, I didn't see that at all. What I  
 2 said was CDK Realty Advisors is the manager of  
 3 this asset. And they have nothing to do with the  
 4 internal workings of the M3 Companies.  
 5 Q. And so CDK is identified as -- let me  
 6 make sure I'm stating this correctly.  
 7 If you go to Document No. 863,  
 8 page 4 --  
 9 THE WITNESS: Mr. Hearing Officer, my  
 10 documents aren't numbered by 863 or 864. Could  
 11 you ask Mr. Thornton to refer to the title of the  
 12 document, please?  
 13 Q. (BY MR. THORNTON): Yes. The document  
 14 is Dallas Police and Fire Pension System minute  
 15 summary board meeting, March 12th, 2009.  
 16 Do you have that in front of you,  
 17 Mr. Brownlee?  
 18 A. Got it right here.  
 19 Q. CDK is listed as one of 55 different  
 20 investment advisors for the pension plan.  
 21 What happens when -- if CDK, who is  
 22 largely invested in real estate with the -- with  
 23 poor investments from their other 16 projects they  
 24 have goes bad, how do we know, how does IDWR, how  
 25 does the public know that CDK isn't just going to

1 say "Sorry, M3. We've lost money, and you're no  
2 longer being funded"? What do we have to show  
3 your financial sustainability?

4 A. Well, I think you're confused on how  
5 the -- what CDK is and what the pension fund's  
6 operations are. CDK is an advisor for the pension  
7 fund. So they are not providing the funding. The  
8 pension fund itself is providing the funding.  
9 They are only an advisor. The only thing that  
10 they do is advise. They do not provide any  
11 funding to us at all.

12 Q. What happens if the advisors advise  
13 policemen -- the pension plan to no longer fund  
14 some of their real estate groups or -- how do  
15 you -- how does M3 identify that you're going to  
16 be around here for six months, one year, whatever?

17 MR. FEREDAY: Objection. This asks this  
18 witness to speculate about what other parties may  
19 intend or conclude.

20 THE HEARING OFFICER: Okay. Sustained.

21 Mr. Thornton, I want to just take a  
22 few minutes myself with Mr. Brownlee, and I want  
23 to establish some things that I don't understand.  
24 Okay? And then -- and I'm not an accountant, so I  
25 may ask a number of questions that are -- I guess

1 I need to basically have some understanding. I  
2 want to ask these questions of Mr. Brownlee so I  
3 have some underlying understanding of what M3  
4 Eagle LLC actually is. Okay?

5 MR. THORNTON: All right.

6 THE HEARING OFFICER: All right.

7  
8 EXAMINATION  
9 BY THE HEARING OFFICER:

10 Q. Mr. Brownlee, I have -- this is  
11 Exhibit 54. And I'm looking at a summary of  
12 assets, liabilities, and equity. And if you'll  
13 refer to that, please.

14 A. Yes, sir.

15 Q. And in this particular financial  
16 statement -- well, before I ask you that question.

17 You have testified that the financing  
18 of M3 Eagle LLC is a combination of cash, equity,  
19 and indebtedness; is that correct?

20 A. That's correct.

21 Q. And the indebtedness is what, looking  
22 at this particular spreadsheet?

23 A. If you refer to page 1, the  
24 indebtedness is \$15 million listed under "Notes  
25 payable." And it's also referenced on page 3

1 under "Note 3" as a credit facility. That is  
2 provided by Dallas Police/Firemen's Pension System  
3 as a loan unsecured, just an unsecured loan to M3  
4 Eagle LLC Partnership.

5 Q. Okay. And so has -- has M3 Eagle LLC  
6 received that \$15,000 as money?

7 A. I believe you mean 15 million.

8 Q. 15 million. I'm sorry.

9 A. Yes, it has.

10 Q. Okay. So it's not in the nature of a  
11 line of credit, then? I mean you -- M3 Eagle LLC  
12 has received that cash?

13 A. That is correct.

14 Q. And M3 Eagle LLC owes that \$15 million  
15 to the creditor?

16 A. To Dallas Police and Firemen's Pension  
17 System.

18 Q. Okay. And so at least with respect to  
19 that \$15 million, the financial status of the  
20 Dallas Police and Fire Pension System or any  
21 entities that are operating is not at issue;  
22 correct? I mean that -- you received the  
23 \$15 million, and M3 Eagle owes that money?

24 A. That is correct. And if I might  
25 clarify, the structure of putting the \$15 million

1 in there as a note payable has to do with the  
2 preferential rates of return within the limited  
3 liability company. So instead of structuring it  
4 as equity, which carries a higher preferential  
5 rate of return than the debt.

6 Q. Okay. And then does the Dallas Police  
7 and Fire Pension System have any other monetary or  
8 membership interest in M3 Eagle LLC?

9 A. The membership of M3 Eagle LLC is  
10 broken out that the Dallas Police and Firemen's  
11 Pension System is a member and WWJ Eagle, which is  
12 myself, Jeff Davis, and Scott Schirmer, have a  
13 separate limited liability company which is a  
14 member. Those are the only two members. And then  
15 the manager is M3 Companies.

16 Q. And where has the cash contribution  
17 come from that you referred to?

18 A. It comes directly from the pension  
19 system.

20 Q. Okay. So the pension system has  
21 provided the cash component?

22 A. That's correct.

23 Q. And the note payable?

24 A. That is correct.

25 Q. And so the pension system has -- has

1 then essentially funded the entire M3 Eagle LLC?  
 2 A. That is correct.  
 3 Q. Okay. And so in this -- in this  
 4 entire sum of money that's shown both in the  
 5 assets and in the liabilities and member's equity,  
 6 the -- and I didn't write it down, but the  
 7 separate LLC that is comprised of you and two  
 8 other members, you have not placed any cash  
 9 contribution of your own into the -- into the LLC,  
 10 M3 Eagle?

11 A. That is correct. And that's typical  
 12 of the structures that we have with them.

13 Q. Okay. And so the cash contribution of  
 14 the Dallas Police and Fire Pension System, has  
 15 that cash contribution been made already to the M3  
 16 Eagle LLC?

17 A. Yes, it has.

18 Q. So there's been both a cash  
 19 contribution and a note payable, and all of that  
 20 money has been contributed now to M3 Eagle LLC?

21 A. That is correct.

22 THE HEARING OFFICER: Okay. And so I guess  
 23 with that -- those questions, Mr. Thornton, what  
 24 is the -- what is the relevance of the financial  
 25 situation of the Dallas Police and Fire Pension

1 System or of any of its managers? M3 Eagle LLC  
 2 has received cash from them.

3 MR. THORNTON: I think the relevance comes  
 4 from the Idaho Code that says an applicant needs  
 5 to show that they have financial ability to put  
 6 the water to beneficial use. I have not seen  
 7 that.

8 They identified it as being certified  
 9 per a letter of -- a financial commitment letter  
 10 along with a financial statement of the lender.  
 11 I've seen nothing.

12 My concern is that the Dallas Pension  
 13 Plan, as was stated by Mr. Brownlee, was at the  
 14 end of 2007 worth approximately 3.5 billion, is  
 15 now worth 2.7 billion, lost \$800 million. The  
 16 company is there. They're dropping projects. I  
 17 don't know how viable M3 is, when M3 only  
 18 represents about 3 percent of that pension plan.

19 I don't see any information that  
 20 Mr. Brownlee has provided or alluded to here that  
 21 shows any commitment, a week commitment, a year  
 22 commitment to carry this project out.

23 THE HEARING OFFICER: Okay. But the  
 24 financial viability of this entity and the  
 25 subentities that are managing it, in my opinion,

1 is not at issue. It's not at issue.

2 MR. THORNTON: It's my understanding -- and  
 3 I'll -- be it not a financial expert, but common  
 4 sense is, what happens if Dallas Pension Plan says  
 5 "We're not funding M3 Eagle because we've got to  
 6 readjust -- we're out of whack from running  
 7 18 percent in real estate. We're running  
 8 29 percent."

9 THE HEARING OFFICER: They've fully funded  
 10 it, Mr. Thornton. Now, if you can show or ask  
 11 questions that it is undercapitalized, that M3  
 12 Eagle LLC doesn't have enough money to do the  
 13 project based on what's presented, then I think  
 14 that's a legitimate line of questions to pursue,  
 15 and that somehow the Dallas Police and Fire  
 16 Pension System would have to come up with  
 17 additional money, which they don't have.

18 But at least right now, based on my  
 19 questions about the assets and liabilities sheet,  
 20 all of the assets and liabilities have -- well,  
 21 the assets, and then the corresponding  
 22 liabilities, which have to balance -- again, I'm  
 23 not an accountant. But as Mr. Brownlee has  
 24 testified, those monies are in their pocket.

25 So the financial status of these other

1 entities is not in question at this hearing. And  
 2 I won't allow any additional questions on the  
 3 subject until -- until you can establish that  
 4 somehow they -- they -- when I say "they," M3  
 5 Eagle LLC, will need to obtain more assets or  
 6 resources from these entities.

7 MR. THORNTON: With --

8 THE HEARING OFFICER: I need to push this  
 9 along, or we'll be in a quagmire forever.

10 MR. THORNTON: I guess I'd like to ask --  
 11 with all due respect, I guess, who at IDWR is  
 12 asking these questions to meet the intent of the  
 13 Idaho Code?

14 THE HEARING OFFICER: Well, it's ultimately  
 15 my responsibility.

16 MR. THORNTON: And I guess my view is I see  
 17 three pages of statements uncertified. I see --  
 18 I've got to go through a lot more in terms of  
 19 buying a car at Saturn in terms of showing my  
 20 financial statements than M3 showing they have  
 21 \$15 million that I don't know what that -- maybe  
 22 they have it, maybe they don't. I don't know. I  
 23 don't know what the commitment, in terms of this  
 24 Dallas Pension Plan or CDK says "We're taking that  
 25 money back." I don't understand what ability M3

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1 has to carry this project through.  
2 THE HEARING OFFICER: Okay. If you want to  
3 pursue a line of questioning regarding whether  
4 they're sufficiently capitalized or not, I think  
5 that's appropriate. I think you can explore the  
6 contractual arrangements between Dallas Police and  
7 Fire Pension System to determine whether they  
8 might call some of that money or that indebtedness  
9 back in some way.  
10 MR. THORNTON: Right.  
11 THE HEARING OFFICER: But to try to delve  
12 into the subject with Mr. Brownlee of the  
13 financial health of the Dallas Police and Fire  
14 Pension System when they've contributed all of the  
15 money that's in the balance sheet right now, and  
16 it's either been in cash or a loan, but M3 Eagle  
17 LLC has received the money, I won't allow you to  
18 go there until you lay a foundation.  
19 Okay?  
20 MR. THORNTON: Okay. Yes.  
21 THE HEARING OFFICER: All right. Let's go.  
22 MR. ALAN SMITH: Could I make a statement  
23 here, please?  
24 THE HEARING OFFICER: Sure.  
25 MR. ALAN SMITH: What I have here is a copy

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1 of the 37.03.08 of the Idaho Administrative Code,  
2 Department of Water Resources Appropriation Rules,  
3 section I says, "The applicant shall submit."  
4 That's a mandatory language.  
5 Every court has ruled when the statute  
6 says "shall," it's mandatory. "The applicant  
7 shall submit a current financial statement  
8 certified." We have no certified statements.  
9 Don't know of any attached to Exhibit 42, their  
10 second amended application.  
11 It says that "The financial statements  
12 certified to show the accuracy of the information  
13 contained therein or a financial commitment  
14 letter" -- we don't have that -- "along with the  
15 financial statement of the lender or other  
16 evidence to show that it is reasonably probable  
17 that financing will be available to appropriate  
18 the water and apply it to the beneficial use  
19 proposed."  
20 We're talking 20, 30 years down the  
21 road. They haven't given us anything. That says  
22 "shall," and they haven't submitted to anything,  
23 and it's certified.  
24 THE HEARING OFFICER: And that's --  
25 MR. ALAN SMITH: This isn't certified.

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1 THE HEARING OFFICER: And that's fine,  
2 Mr. Smith. And that argument, I think, goes to  
3 the nature of whether they've satisfied their  
4 burden of proof or not. But it's not, at least  
5 right now -- that establishment about whether it's  
6 certified or not is -- those questions have  
7 already been asked and we've referred to the  
8 document.  
9 So it's then a question of whether  
10 that burden of proof has been satisfied based on  
11 the facts that are in evidence. And I'll consider  
12 that.  
13 Okay?  
14 MR. ALAN SMITH: Very well.  
15 THE HEARING OFFICER: Let's go forward,  
16 Mr. Thornton.  
17 MR. THORNTON: Okay.  
18  
19 FURTHER DIRECT EXAMINATION  
20 BY MR. THORNTON:  
21 Q. What is M3's contingency if the Dallas  
22 Pension Plan reallocates and discontinues its  
23 support of this project?  
24 MR. FEREDAY: Objection. That calls for  
25 speculation.

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1 THE HEARING OFFICER: Overruled.  
2 THE WITNESS: Well, I would go back to what  
3 I had mentioned earlier, which is the structure in  
4 a real estate development deal is very critical to  
5 its success. What we have is in this instance we  
6 have 6,005 acres that, with the exception of the  
7 \$15 million unsecured line from the pension system  
8 to M3 Eagle, is free and clear.  
9 So typically, when you go forward with  
10 the development of a piece of property in a  
11 master-plan community, you use a combination of  
12 funding sources. We went through and obtained at  
13 the legislative level approval of the community  
14 infrastructure district, which is a funding  
15 mechanism to utilize tax-exempt bond financing to  
16 finance public infrastructure.  
17 We did that predominantly to position  
18 ourselves to finance the sewer and water systems  
19 within the community.  
20 You have other means, which is  
21 utilizing institutional debt. Institutional debt  
22 is typically limited to 50 percent of the  
23 appraised value in a finished condition of the  
24 phase of development that you're going to move  
25 forward with, or you have the ability to

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1 contribute additional cash to the partnership from  
2 your financial partner, which in this instance is  
3 the pension system.  
4 The thing that we're faced with as a  
5 developer when you move forward is determining  
6 what's the best course. And the same structure  
7 does not apply to all phases of the project.  
8 So typically, what we are looking at  
9 is trying to not have a highly leveraged piece of  
10 property going through the entitlements phase,  
11 which is essentially what we're in, and then as  
12 the project proves itself out and becomes more  
13 reliable to be a revenue-producing entity, you  
14 increase the leverage, either through utilizing  
15 some form of bond financing, such as the community  
16 infrastructure district, or a combination of that  
17 with institutional funding.  
18 What institutional lenders typically  
19 look at is they look at who are the partners in  
20 the transaction. I understand that you continue  
21 to reference the decline in the pension fund  
22 system.  
23 They have an obligation to mark their  
24 assets to value and to market to market. So as  
25 the stock market, which was the largest component,

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1 and equities market, which is the largest  
2 component of their portfolio changes, obviously  
3 their net worth changes. So that's something that  
4 changes on a continuous basis.  
5 One thing that is certain is that  
6 2 1/2 billion is a lot of money. And so when you  
7 have a financial partner in a transaction such as  
8 this that has those types of resources and balance  
9 sheet, it assists you as a developer of the  
10 property to obtain institutional or bond  
11 structured financing to develop the property.  
12 Q. (BY MR. THORNTON): Okay. So is the  
13 explanation that you just provided, is that in  
14 writing anywhere that is available for IDWR?  
15 A. I believe it's in testimony. It just  
16 got put in writing. So it's part of the  
17 transcript.  
18 Q. Do you have any prior -- I'm sorry.  
19 A. I believe it's now part of the  
20 transcript, yes.  
21 Q. Have you provided that prior to, or  
22 just right now?  
23 A. I don't recall what our application  
24 spoke to relative to this.  
25 Q. And the \$15 million debt you have,

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1 what are the terms of that on a -- on a yearly or  
2 biannual basis or whatever, for the \$15 million?  
3 A. The note is renewable, I believe, on  
4 an annual basis.  
5 Q. And how is that paid off? What is due  
6 the interest on that?  
7 A. The debt would either be paid off  
8 through conversion to equity or through  
9 institutional financing.  
10 Q. I'm trying to think of how to ask this  
11 question without being redundant or it going  
12 nowhere, Mr. Hearing Officer.  
13 Do you have anything you can show us  
14 that identifies a commitment for continued funding  
15 to carry this project through to beneficial use?  
16 MR. FEREDAY: Objection. Asked and  
17 answered.  
18 THE HEARING OFFICER: No. No, I don't  
19 think so, Mr. Fereday, because -- I think there  
20 may be a difference between what I see on a  
21 balance sheet and the ultimate costs of what it  
22 takes to finance and build this project  
23 ultimately.  
24 And I'm not sure that I have heard  
25 testimony or have that kind of linkage. And I

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1 guess that if Mr. Thornton doesn't ask the  
2 questions, I will ask them. So I want to know --  
3 I mean I have a statement of assets, liabilities,  
4 and equity. Maybe it's been long enough since I  
5 heard the testimony of Mr. Brownlee about what it  
6 costs, or what the total costs of development will  
7 be, but I don't know that I have an idea of what  
8 the ultimate financing will be for that cost and  
9 whether M3 Eagle LLC has the assets to do that.  
10 Okay?  
11 So overruled, Mr. Thornton.  
12 Mr. Brownlee.  
13 THE WITNESS: I do not -- I know that we  
14 have not submitted any financial commitment letter  
15 of any form that contemplates the funding of  
16 100 percent of the build-out of this community  
17 over 30 years.  
18 As I previously testified, that would  
19 be done on a phase-by-phase basis. The financing  
20 commitment would either come from additional  
21 equity contribution from the pension plan, based  
22 upon an approved business plan for that point in  
23 time, a combination of additional equity and debt  
24 from an institutional lender, or a combination of  
25 equity, debt from an institutional lender, and the

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1 utilization of the community infrastructure  
2 district legislation.  
3 Q. (BY MR. THORNTON): Has any  
4 commitment -- I believe you said that you didn't  
5 have any for the full project.  
6 Do you have anything for the first  
7 phase?  
8 A. We're not in a position, because of  
9 several reasons, to request such a commitment. It  
10 would be premature at this time. We're not  
11 annexed to the City of Eagle, although we have  
12 contiguity to do so or are in the process of doing  
13 so.  
14 The market obviously does not dictate  
15 that we start development of this project at this  
16 point in time. And the first phase of the  
17 development has not been through the platting and  
18 planning process and met the requirements of our  
19 pre-annexation and development agreement to  
20 position ourselves to construct the project. It  
21 is not our business practice to obtain financing  
22 commitments years in advance of the necessity to  
23 have them.  
24 Q. So are you aware of what was -- that I  
25 read to you in terms of the Idaho Code that

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1 requires that at the time of hearing? Were you  
2 instructed by anyone that that was a requirement?  
3 A. We were instructed that we needed to  
4 provide a financial statement on the entity, and  
5 that the financial statement would be viewed in  
6 that context.  
7 Q. What is the total cost to build-out  
8 for M3, the planning horizon? Do you have an  
9 estimate on that?  
10 A. As I mentioned, I believe there's an  
11 exhibit that Stanley Engineering prepared. I  
12 don't know what exhibit number that is.  
13 Do you have a reference?  
14 MR. JASON SMITH: 42, I believe.  
15 Q. (BY MR. THORNTON): Exhibit 42. And  
16 on page 42 there's a balance sheet.  
17 MR. JASON SMITH: Cost estimate.  
18 MR. THORNTON: Cost estimate.  
19 Q. I was wondering if you could walk us  
20 through these costs. And these are for sewer,  
21 water, pressure irrigation.  
22 THE HEARING OFFICER: Which particular  
23 subpart?  
24 MR. THORNTON: Page 2 of 5.  
25 THE HEARING OFFICER: Wait a minute. I'm

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1 in Exhibit 42.  
2 MR. HEAD: Oh, yeah.  
3 THE HEARING OFFICER: And then there are  
4 various subparts, A --  
5 MR. FEREDAY: A9.  
6 MR. THORNTON: A9, I guess.  
7 MR. HEAD: It's right towards the end of 9.  
8 Yeah, A9.  
9 Q. (BY MR. THORNTON): And so on this --  
10 are you to the table that says "M3 Eagle summary  
11 of utility costs"?  
12 A. Page 2 of 5?  
13 Q. Yes.  
14 A. Yes.  
15 Q. I see the five different phases,  
16 columns, and then maybe just looking at phase one,  
17 if you could help me understand where there is  
18 subtotal costs of 20 million and a total hard cost  
19 of approximately 22.7 -- 22.8 million.  
20 Can you explain to me what those costs  
21 are either based on, and what they would do in  
22 terms of completion of phase one?  
23 A. Well, those costs represent the sewer,  
24 water, and pressure irrigation system. They don't  
25 represent the costs to construct the streets and

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1 other improvements within that phase.  
2 I believe the next page, 3 of 5, gives  
3 a detailed listing of the quantities -- page 3 and  
4 4 give the detailed listing of the quantities that  
5 are -- comprise the summary.  
6 Q. Uh-huh.  
7 A. The \$20,439,714 represents a summary  
8 of the sewer, water, and pressure irrigation  
9 system for 498 sites on 896 developable acres.  
10 Q. Okay. And how far will that  
11 \$15 million go for getting phase one completed?  
12 And as you've identified, who will take care of  
13 the roads, electrical, you know, those types of  
14 things? How far is \$15 million that you allege to  
15 have in hand going to help pay for this phase one?  
16 A. I believe as I testified, referring  
17 back to Exhibit 54, the \$15 million is a  
18 liability, which I testified to the Hearing  
19 Officer had been fully funded. The partnership  
20 had \$4,944,738 in cash on hand. That is not  
21 contemplated to be used to fund these costs.  
22 Q. What is the source of that funding for  
23 these costs?  
24 A. As I mentioned, it would either be  
25 through a combination of debt or equity, and the

1 debt consisting either of institutional debt or  
2 infrastructure financing through bonds.

3 Q. And do you have for us today  
4 information that shows that you do have financing  
5 approved and assured for phase one as of today?

6 A. I believe I testified that we do not.

7 Q. Just the last one -- question I'll ask  
8 in regards to Document 863.

9 A. Can you reference the title, please?

10 Q. Yes. It is the Dallas Police and Fire  
11 Pension System minutes summary.

12 A. Okay.

13 Q. And if you look through how their net  
14 assets are spread in their broad categories, for  
15 the real estate advisor's portion of the pension  
16 fund is 760 million; correct?

17 A. That's correct, yes.

18 Q. I believe you earlier stated that most  
19 of their funding was -- or a large portion -- the  
20 largest portion was based on -- I could be wrong  
21 in stating this, but based on stocks and bonds  
22 and --

23 A. No, I didn't say their funding is --

24 MR. FEREDAY: Objection. Again, I think  
25 especially in light of the Hearing Officer's

1 comments earlier, I think this is not relevant to  
2 investigate the nature of investments within one  
3 of the investment advisor groups in the pension  
4 system.

5 THE HEARING OFFICER: Sustained.

6 And, Mr. Thornton, I'm not allowing  
7 any additional questions related to the financial  
8 health of Dallas Police and Fire Pension System or  
9 CDK.

10 MR. THORNTON: Okay.

11 THE HEARING OFFICER: And I'll tell you the  
12 reason for that. The reason for that is because  
13 their participation right now is either -- well,  
14 it really is in monetary contribution to the LLC.

15 And Mr. Brownlee has testified that  
16 there will have to be additional financing for the  
17 development of the infrastructure and for the  
18 construction of the subdivision or the proposed  
19 development. None of that is included in the  
20 financial sheet and the summary of assets and  
21 liabilities that I have.

22 So we don't even know where that may  
23 come from. It may come from here, and it may not.

24 If we're to explore that I think is entirely  
25 speculative at this point. Okay? So I'm not

1 allowing any more questions regarding this.

2 MR. THORNTON: Okay.

3 THE HEARING OFFICER: Thanks. And I won't  
4 receive them into evidence either.

5 MR. THORNTON: And if I could just make  
6 a -- well, I'll just move on.

7 Any other?

8 Q. Mr. Brownlee, why should -- in your  
9 opinion as the manager of M3, why should IDWR  
10 grant you a water right for any longer than you've  
11 been able to secure financing for?

12 MR. FEREDAY: Objection. Asks this witness  
13 to speculate as to what the IDWR might think, and  
14 also asks for a legal conclusion.

15 THE HEARING OFFICER: Sustained.

16 MR. THORNTON: No more questions.

17 THE HEARING OFFICER: Okay. Mr. Smith?

18 Now, wait a minute. Wait a minute.  
19 Wait a minute.

20 This is your witness, Mr. Thornton.

21 MR. THORNTON: Yes.

22 THE HEARING OFFICER: I don't know  
23 whether -- how we want to approach the examination  
24 of Mr. Brownlee under the circumstances.  
25 Mr. Smith could recall him as part of his case.

1 MR. ALAN SMITH: Yes, we would call him.

2 THE HEARING OFFICER: But I'm saying, it's  
3 now Mr. Thornton's presentation. Now, we can do  
4 this a couple of different ways, I suppose. And  
5 if we want to keep the testimony separate so that  
6 Mr. Thornton calls Mr. Brownlee and then  
7 Mr. Fereday examines, and then Mr. Thornton calls  
8 his next witness, then at some point in time then,  
9 Mr. Smith, you'll have an opportunity to call your  
10 witnesses.

11 Now -- or we could have the questions  
12 all come in to Mr. Brownlee at the present time.

13 What do the parties prefer?

14 MR. FEREDAY: Mr. Hearing Officer, I would  
15 suggest the latter, that if Mr. Smith intends to  
16 call this witness. And I believe Mr. Smith did  
17 name him as a witness.

18 MR. ALAN SMITH: I don't recall. I'd have  
19 to look.

20 MR. FEREDAY: If he was named as a witness,  
21 then I would suggest that he continue questioning  
22 him now as his witness, and then we would -- then  
23 we would cross-examine.

24 If he did not name him as a witness,  
25 then I don't believe Mr. Smith can call him. And

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1 I believe -- I've just been informed that he did  
2 not name him as a witness.  
3 MR. JASON SMITH: We'll have to look.  
4 MR. FEREDAY: So in that case, I would  
5 suggest that we be entitled to cross-examine at  
6 this time.  
7 THE HEARING OFFICER: Okay. Let's take a  
8 recess. Why don't you search through our  
9 documents. Let's take a ten-minute recess.  
10 (Recess.)  
11 THE HEARING OFFICER: We're recording  
12 again.  
13 Okay. There's a question about  
14 whether Mr. Smith should be entitled to examine  
15 Mr. Brownlee. And I guess we could have a great  
16 big argument about -- I guess there's an agreement  
17 that Mr. Brownlee was not identified by Mr. Smith  
18 as a witness, and I didn't look at our records  
19 because of that agreement. There's also a  
20 reference to rule 43. I assume that would be  
21 rule 43 of Idaho Civil Rules of Procedure, which I  
22 know they are out there, but the Department is not  
23 bound by the Rules of Procedure by expressly in  
24 the Department's rules of -- I'm sorry. I didn't  
25 say that right.

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1 The Department is not bound to follow  
2 the Idaho Rules of Civil Procedure in its  
3 proceedings, and that's expressly stated in the  
4 Department's Rules of Procedure.  
5 So based on all of that, however, I  
6 think, Mr. Fereday, I will allow some additional  
7 questions to be asked by Mr. Smith at this point,  
8 given the subject matter, and then we'll come to  
9 you for cross-examination.  
10 But I want to be careful about how far  
11 we go, Mr. Smith. But I want to give you an  
12 opportunity. So if you'll pose your questions,  
13 please.  
14 MR. ALAN SMITH: I'm limited, then, to only  
15 what Mr. Thornton has gone into? But I believe --  
16 I believe Mr. Thornton asked him about municipal  
17 provider and that type of thing.  
18 THE HEARING OFFICER: Okay. I'll allow you  
19 to ask some questions of Mr. Brownlee. Let's see  
20 where we go.  
21 MR. ALAN SMITH: All right.  
22  
23 CROSS-EXAMINATION  
24 BY MR. ALAN SMITH:  
25 Q. Mr. Brownlee, I've only got about four

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1 or five questions here.  
2 Did M3 Eagle LLC hold a franchise to  
3 supply water for municipal purposes at the time  
4 the application was filed or does it now hold such  
5 a franchise at the present time?  
6 MR. FEREDAY: Objection. Asked and  
7 answered.  
8 THE HEARING OFFICER: Overruled.  
9 THE WITNESS: It does not.  
10 Q. (BY MR. ALAN SMITH): Was M3 a  
11 political subdivision of the State of Idaho at the  
12 time the application was filed or is it now at the  
13 present time?  
14 A. It is not.  
15 Q. Did M3 own, control, or operate a  
16 public water supply regulated by the State of  
17 Idaho at the time it filed the application, or  
18 does it now operate such a public water supply?  
19 A. It does not.  
20 Q. And I believe you testified earlier  
21 that M3 is not a municipality at the present time  
22 or at the time you filed the application?  
23 A. That is correct.  
24 Q. And that is your testimony.  
25 The last question or two I have is,

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1 what will happen to M3's financing if they only  
2 get a phased type of water right rather than the  
3 complete water right that you seek, if you know?  
4 A. It would be dependent upon the way  
5 within which the right was phased and how that  
6 affected the ability to develop the property.  
7 MR. ALAN SMITH: That's all.  
8 THE HEARING OFFICER: Okay. Mr. Fereday,  
9 cross-examination.  
10  
11 CROSS-EXAMINATION  
12 BY MR. FEREDAY:  
13 Q. Mr. Brownlee, have you completed  
14 financings for real estate projects of this  
15 magnitude before?  
16 A. Yes.  
17 Q. Can you describe some of these?  
18 A. Well, most recently we started  
19 development of Wickenburg Ranch in 2007. I  
20 believe it was 2007. The project entails the  
21 construction of approximately 70 to \$80 million of  
22 infrastructure to date.  
23 We are still under development on that  
24 project, even though given the severity of the  
25 market conditions in the Phoenix market. The

1 project has a single investor that has contributed  
2 over \$110 million in cash to date for the  
3 construction of that project.

4 That is typical of the way that we  
5 strive to structure our projects so that we have  
6 the ability to be fluent when the market  
7 conditions dictate, and we also have the ability  
8 to use leverage in the future when the market  
9 dictates.

10 Prior to that we completed the  
11 construction of American Ranch in Prescott, which  
12 was utilized and done through bank financing. In  
13 that structure our presales allowed us to always  
14 have a negative balance. By that, I mean we had  
15 more cash in the bank from sale of lots that we  
16 were utilizing our own cash to build the  
17 infrastructure.

18 And prior to that we financed the  
19 construction of Prescott Lakes in phases through  
20 two financial institutions.

21 The -- those are the most recent  
22 projects that we've done that would be comparable  
23 to this.

24 Q. You testified in response to  
25 Mr. Thornton's inquiries that you own the land at

1 M3 Eagle free and clear.

2 Is this unusual for a developer to own  
3 the land free and clear starting out on the  
4 project?

5 A. In our industry you don't typically  
6 see this large scale of property being owned free  
7 and clear. What it does is it allows us the  
8 flexibility to choose how to finance the project  
9 going forward, because typically in a financing  
10 structure you use the land as collateral.

11 Our investment to date is not -- when  
12 the market turns obviously is relevant to the  
13 fair-market value of the land versus the  
14 investment. So it gives us a lot of equity to  
15 work with.

16 Typical debt structures provide for  
17 funding of 50 percent, approximately, of the  
18 fair-market value of that phase of construction.  
19 Having all of the land free and clear provides you  
20 additional collateral to utilize to finance the  
21 infrastructure.

22 Q. Does the fact that you own the land  
23 free and clear make the financing structure and  
24 challenges more or -- more conservative or less  
25 conservative than what you've done in other

1 projects?

2 A. It's more conservative. We really  
3 started taking this approach in 2004, and since  
4 that time have structured the majority of our  
5 deals to have no debt.

6 Q. Could you explain how you would  
7 finance the M3 Eagle project. And I know that  
8 you've gone into this in some degree, and I'm not  
9 asking you to repeat yourself. But I'm not sure  
10 that I got a clear picture based on Mr. Thornton's  
11 inquiry.

12 So could you tell us how you would  
13 finance the M3 Eagle project going forward from  
14 here.

15 A. Yes. The project would be financed in  
16 phases. Typically, you would have a requirement,  
17 either from your partner in the transaction or a  
18 self-imposed requirement on ourself that we would  
19 build the project on a phase-by-phase basis, that  
20 we would achieve a certain level of absorption,  
21 and by that I mean sales of the number of lots in  
22 that particular phase.

23 We would take infrastructure that is  
24 either -- infrastructure that has an impact fee or  
25 a hookup fee associated with it, for example,

1 water and sewer systems, that are going to be  
2 conveyed to the public municipality, and utilize  
3 the community infrastructure district to finance  
4 those, which allows for a tax assessment against  
5 each individual property as it's sold, and then is  
6 paid by the homeowner over a period of time  
7 through its property tax.

8 We would take those things that are  
9 not long term in nature, such as the cost of  
10 constructing an amenity in the community, those  
11 things that impose a significant burden or have  
12 the potential to impose a burden on the project  
13 and -- golf courses, for example, and try to  
14 structure those so that they are constructed out  
15 of equity.

16 And we would try to structure a  
17 transaction that's very low leveraged. By that I  
18 mean something that is south of 50 percent loan to  
19 value, typically down to 0 percent.

20 As I just mentioned, our most recent  
21 project in Wickenburg Ranch, that is structured  
22 with no debt, even though the partnership carries  
23 an allocation of debt and equity because of the  
24 structure of the partnership.

25 The debt in that situation is not

1 dissimilar than the \$15 million here. It comes  
2 from the same partner that provides the equity.  
3 And that's done to allow for the profits -- the  
4 calculation of the profits distribution within the  
5 partnership.

6 Q. Mr. Brownlee, in your opinion, is it  
7 reasonably probable that financing will be  
8 available to complete project construction?

9 A. Yes.

10 MR. FEREDAY: No further questions.

11 THE HEARING OFFICER: Mr. Thornton?

12  
13 REDIRECT EXAMINATION

14 BY MR. THORNTON:

15 Q. Mr. Brownlee, I believe you just  
16 stated that it's reasonably probable that M3 could  
17 get financing for this project; correct?

18 A. Yes.

19 Q. Can you show us any evidence of that,  
20 other than speculation?

21 A. Well, I guess that the evidence would  
22 be based upon my 28 years in this business and  
23 understanding what's necessary to finance a  
24 project of this magnitude.

25 But based upon the track record of our

1 company and based upon the knowledge that we have  
2 of the ability to finance projects of this nature,  
3 I don't believe it's speculative.

4 Q. Do you have any, again, hard evidence  
5 or irrevocable letters of credit, financial  
6 lending statements for that today?

7 A. I believe I've testified -- you've  
8 asked me the same question three times, and I've  
9 said no.

10 Q. So at American Ranch project, how many  
11 houses are planned there?

12 A. The American Ranch project? What are  
13 you referring to?

14 Q. Yeah, I believe you had stated that  
15 you had the project maybe somewhat in a similar  
16 scope as M3 titled American Ranch; is that  
17 correct? Am I --

18 A. That's a project that we've already  
19 developed and sold all the lots in the community.

20 Q. So as I understand, maybe I'm wrong,  
21 that it's 10 percent sold?

22 A. You are wrong. It's 100 percent sold.

23 Q. And are they currently selling  
24 foreclosed lots in that?

25 A. I have no idea.

1 Q. And what stage did M3 sell that off,  
2 the development?

3 A. We sold that -- well, we sold all the  
4 finished lots to consumers. And that project was  
5 sold out between, I believe, 2003 and 2005.

6 Q. In your Wickenberg Ranch project, if  
7 I'm pronouncing that correctly, how many houses  
8 are planned there?

9 A. 2300.

10 Q. And then how many are now completed  
11 there?

12 A. None.

13 Q. The financing for American Ranch and  
14 Wickenberg, is that also through Dallas Pension  
15 Plan?

16 A. It's not an American Ranch and  
17 Wickenberg. It's called Wickenberg Ranch.

18 Q. Okay. For those two projects, is the  
19 funding coming from Dallas Police/Firemen's  
20 Pension Plan?

21 A. No, it is not.

22 Q. In your opinion, M3, should they be  
23 the ones taking the risk in this development or  
24 should the, I guess, citizens of the Eagle area  
25 take the risk?

1 MR. FEREDAY: Objection. Beyond the scope  
2 of the cross and --

3 MR. THORNTON: I withdraw that question.  
4 You're correct.

5 THE HEARING OFFICER: Okay.

6 MR. THORNTON: No further questions.

7 THE HEARING OFFICER: Okay. Mr. Smith, any  
8 further questions?

9 MR. ALAN SMITH: No questions.

10 THE HEARING OFFICER: Mr. Fereday?

11 MR. FEREDAY: No questions.

12 THE HEARING OFFICER: Okay. Thank you,  
13 Mr. Brownlee.

14 More witnesses, Mr. Thornton?

15 MR. THORNTON: No more witnesses.

16 THE HEARING OFFICER: Okay. Mr. Smith, do  
17 we want to start in on witnesses for you?

18 MR. ALAN SMITH: I think we'd prefer to  
19 wait. We've only got about 20 minutes.

20 THE HEARING OFFICER: Mr. Fereday?

21 MR. FEREDAY: We would prefer not to wait,  
22 Mr. Hearing Officer. We saw already that we could  
23 make quite a bit of progress through some of these  
24 witnesses. So I -- I hope that we can get going.

25 I'd also like to even suggest that we try to --

1 after we close today, that we have an  
2 off-the-record discussion about another date  
3 between now and the 23rd, if that might have --  
4 might open up.

5 I would prefer to go until 6:00 today  
6 if necessary. This is really dragging on, and I  
7 would appreciate them putting on their witnesses  
8 and continuing.

9 THE HEARING OFFICER: Okay. Tell me,  
10 Mr. Smith, who do you intend to call?

11 MR. ALAN SMITH: I intend to call my son,  
12 Jason Smith.

13 THE HEARING OFFICER: Okay. And what's the  
14 length of testimony?

15 MR. ALAN SMITH: Probably an hour, hour and  
16 a half.

17 THE HEARING OFFICER: Okay.

18 MR. ALAN SMITH: But I have -- I have other  
19 commitments here right after 5:00, and I'd prefer  
20 not to go late.

21 THE HEARING OFFICER: Okay. Mr. Fereday, I  
22 think I'll cut off testimony today. But I am  
23 willing to explore the possibility of additional  
24 days, and the reason is I had a three-day hearing  
25 scheduled next week that has cancelled, settled.

1 And so I'm willing to explore at least  
2 those three days, which was Tuesday, Wednesday,  
3 Thursday, and just see if the parties have some  
4 time. I don't know.

5 MR. FEREDAY: That's 10, 11, 12?

6 THE HEARING OFFICER: I thought it was 9,  
7 10, and 11. The 12th was Friday, and I can't do  
8 it on the 12th.

9 MR. ALAN SMITH: We've got the 8th, but not  
10 9, 10, and 11.

11 MR. THORNTON: The 8th is what day of the  
12 week?

13 MR. ALAN SMITH: Monday.

14 THE HEARING OFFICER: Let's go off the  
15 record. We'll close the record for today.

16 (Proceedings adjourned at 4:38 p.m.)

17 -oOo-

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1 REPORTER'S CERTIFICATE

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

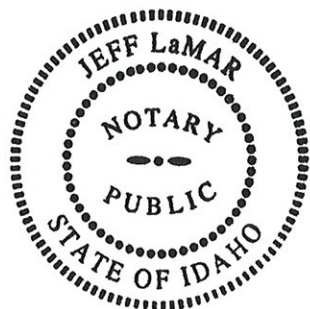
4 That the foregoing proceedings were taken  
5 before me at the time and place therein set forth,  
6 at which time the witness was put under oath by  
7 me.

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

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

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

17 IN WITNESS WHEREOF, I set my hand and seal  
18 this 16<sup>th</sup> day of June, 2009.



25

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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