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DEPARTMENT OF  
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 63-34348 ) **RESPONSE TO PROTESTANTS'**  
) **EXCEPTIONS**  
In the name of Elmore County, Board of )  
County Commissioners )  
)  
)  
)  
\_\_\_\_\_)

Elmore County, by and through undersigned counsel, submit the following response to  
Exceptions filed by the Ditch Companies, the City of Boise, and the Idaho Conservation League.  
This response is submitted in accordance with IDAPA 37.01.01.730.02.c.

## I. INCORPORATION OF PRIOR RESPONSE

Elmore County incorporates by reference herein Elmore County's Consolidated Response to Exceptions, filed on April 30, 2019, both in response to exceptions previously presented by the protestants, and in response to additional exceptions and argument presented by the Ditch Companies in their submission dated May 21, 2019.

## II. RESPONSE TO DITCH COMPANIES' ADDITIONAL EXCEPTIONS

In addition to the prior Consolidated Response, Elmore County offers the following response to the Ditch Companies' Exceptions to Amended Preliminary Order.

First, the County does not concede that, as the Ditch Companies appear to suggest, the hearing officer somehow altered his decision about the scope of the burden upon an applicant to prove no adverse economic impacts. The County was not required to present evidence in aid of an evaluation of whether and how every drop of water might or might not possibly be used in-basin forever in a speculative economic future involving the speculative growth of speculative industries devoid of any technological advancement or any other social, political, legal, cultural or financial change in a given locality. Such a burden of proof is beyond unreasonable in any type of administrative or adjudicative process.

The County notes that the hearing officer took account of "growth opportunities" in the Treasure Valley economy (of which Mountain Home is a part<sup>1</sup>) as part of the adverse economic

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<sup>1</sup> Even the Ditch Companies' examination of witnesses revealed that the Treasure Valley economy includes the Mountain Home economy. *See e.g.* Hearing Tr. at 195-197 (describing working with Boise and other Treasure Valley cities relating to economic development and noting citizens that participate in Boise economy); Hearing Tr. at 267 ("Q. So when you say 'you all,' you are referring to, I guess, the Treasure Valley area? A. The rest of the Treasure Valley. I mean, you guys [Mr. Farris] kind of seem like you divorce Mountain Home and Elmore County from the Treasure Valley, except for the weather people, they seem to think we're in the upper part of the Treasure Valley."). In short, Elmore County is not so economically, socially, culturally or otherwise divorced from the Treasure Valley, the "fastest growing area in the state, if not the nation," as the Ditch Companies suggest. Indeed, Mountain Home is a very close neighbor with a high level of economic inter-dependence, as the Ditch Companies took great pains to point out, not a far-flung city nefariously trying to steal Boise's water.

impacts analysis. He did not, however, purport to speculate about the exact nature and scope of such “growth opportunities,” or the water needs associated therewith, nor should he have. If a water user in the Treasure Valley, whether for mint, wine, or any other industry, wishes to make use of unappropriated waters at some time in the future, there is a process in place to allow them to apply to do so. The hearing officer appropriately considered the adverse economic impacts, and made a decision based upon substantial evidence in the record, as articulated in his Amended Preliminary Order. The Ditch Companies’ effort to essentially reserve all of the water in the South Fork Boise River for unknown users exclusively for speculative future in-basin uses is beyond the plain language of the statute, as well as the reasonable scope and legislative intent of subpart (g).

Second, and equally important, the Ditch Companies have still failed to articulate their own proposed answer to the question repeatedly propounded to the Director: “what percentages are concerning or problematic?” See Ditch Companies Exceptions to Amended Preliminary Order at 5 (citing Ditch Companies Exceptions to Preliminary Order at 10-11).

The legislative history and case law relied upon by the Ditch Companies in their initial exceptions very clearly demonstrates that it was not the legislature’s intention to preclude the inter-basin water development at issue in this case. It was to preclude “dewatering” a locality, a concept that is completely ridiculous in the context of this case in view of not only the conditions in place to maintain operational flows and protect existing water rights and uses, but the nature of the available water itself—flood flows that presently, intermittently, and for the foreseeable future, leave Basin 63 entirely in enormous quantities.

Reading between the lines, the Ditch Companies propose that every drop of unappropriated flood flows in the South Fork Boise (100%) belongs to future users in the Boise-

Nampa-Caldwell corridor (and until full development, should simply be sent out of state), regardless of the absence of a claim or proposal related thereto, because, lest the Director forgets, the Treasure Valley as defined by the Ditch Companies is the most populous, fastest growing, most economically diverse place in the State, if not the nation. According to the Ditch Companies, a theoretical .02 CFS stockwater diversion out of Basin 63 adversely impacts the Treasure Valley economy (of which Mountain Home is very much a part) because the Treasure Valley is growing so fast that that .02 CFS is better utilized serving a mint farmer in Canyon County in 2035. According to the Ditch Companies, because the wine and mint industries may eventually grow, the flood flows at issue here should not be captured by Elmore County and put to a beneficial use today. According to the Ditch Companies, and without the aid of even a simple schematic or explanation about how flood flows generate more hydropower (critically, the parties marketing power for the at issue hydropower facilities did not protest the application on such grounds), the Treasure Valley is somehow going to miss out on the positive economic impacts of purported additional generated power. The speculation is rampant, but unavailing. The permit will not result in an adverse economic impact, and it certainly does not threaten to dewater the Treasure Valley.

In sum, the answer to the Ditch Companies' question about "concerning percentages" is obviously something much closer to 100% than the 2%, if the legislative intent and precedent relied upon by the Ditch Companies are indeed persuasive. But the Director does not even have to draw such a hard line in this case. The substantial evidence before the Director, and relied upon by the hearing officer, is sufficient to show that the permit will not have an adverse impact on the Treasure Valley economy.

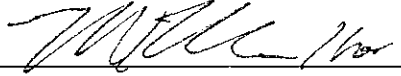
What is really going on here is that a statutory provision—borne out of legislative concern that a large water user or group of water users in a large, financially capable area such as the Boise-Nampa-Caldwell corridor might bully and ultimately dewater a small geographically far-flung locality (or as in this case, a smaller immediate neighbor such as Mountain Home) due to the users' largess, sophistication, organization and growth—is actually being weaponized to impede reasonable water resource development for the benefit of such a smaller community in the ordinary course. It is unfortunate, and should not be reinforced by the Director here. In other words, the Ditch Companies' disingenuous argument relating to subpart (g) in this case serves the very interests of those against which the provision was meant to protect—the persons and entities that would seek to convince the Director to dry up a small community on the outskirts of the Treasure Valley in favor of their own speculative and unsupported future needs or Boise and Nampa's 50 or 100 year planning horizon.

In conclusion, the Ditch Companies' new exceptions are a desperate attempt to reframe the picture they painted in their initial filing of exceptions. Consistent with the legislative history and case law cited by the Ditch Companies at the outset, the hearing officer appropriately concluded, in essence, that the proposed permit would not “dewater” the Treasure Valley, of which Mountain Home is a part. Indeed, to the contrary, the evidence supports the permit's effort to “re-water” a smaller portion of the Treasure Valley that has presented a water resource conundrum for at least 40 years. There is substantial evidence to support those conclusions. There is substantial evidence to support the conclusion that the Treasure Valley economy will not experience adverse effects as a result. Regardless of the temporal clarification the Ditch Companies allege has occurred in the Amended Preliminary Order, and which is disputed, the

result should remain the same. The Director should find that subpart (g) of Idaho Code Section 42-203A(5) does not demand either denial, or subordination, of the permit.

DATED this 4 day of June 2019.

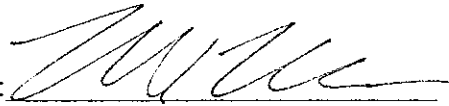
CAMPBELL LAW, CHARTERED

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Scott L. Campbell  
Attorneys for Elmore County, Board of County  
Commissioners

DATED this 4 day of June 2019.

SPINK BUTLER, LLP

By: 

Matthew J. McGee  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of June 2019, I caused a true and correct copy of the above to be served upon the following individuals in the manner indicated below:

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