BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT 63-34348 IN THE NAME OF ELMORE COUNTY, BOARD OF COUNTY COMMISSIONERS	**ORDER ON RECONSIDERATION; AMENDED PRELIMINARY ORDER APPROVING PERMIT UPON CONDITIONS**

On April 2, 2019, the hearing officer issued a *Preliminary Order Approving Permit Upon Conditions* ("*Preliminary Order*") in this matter pursuant to Idaho Code § 42-203A(5). On April 16, 2019, the Board of County Commissioners of Elmore County ("Elmore County") timely filed a *Petition for Reconsideration/Petition for Clarification* ("*Petition*") along with the *Declaration of Terry M. Scanlan in Support of Petition for Reconsideration/Petition for Clarification*.[1] After reconsideration, the hearing officer now grants in part and denies in part the *Petition*. Elmore County's arguments are addressed below and the *Preliminary Order* is thereafter amended.[2]

I. ISSUES FOR RECONSIDERATION AND CLARIFICATION

1. *Reconsideration of 10,000 AF Maximum Diversion Volume*

a. *Elmore County Petition*

First, Elmore County "seeks elimination of the 10,000 ["AF"] volume listed for 'Maximum Diversion Volume,' as well as the 5,000 AF volume listed for each of the direct flow irrigation and direct flow ground water recharge" components of Permit No. 63-34348 ("Permit"). *Petition* at 2. Elmore County argues the volumetric limitation should not limit

[1] On April 23, 2019, the City of Boise filed *City of Boise's Response to Elmore County's Petition for Reconsideration/Petition for Clarification*. On April 30, 2019, the Boise Project Board of Control filed *Boise Project Board of Control's Response to Elmore County's Petition for Reconsideration/Petition for Clarification*. Because the Idaho Department of Water Resources' ("Department") Rules of Procedure (IDAPA 37.01.01) do not authorize responses to petitions for reconsideration, the responses will not be considered.

[2] On April 16, 2019, pursuant to Department Rule of Procedure 730 (IDAPA 37.01.01.730) and Idaho Code § 67-5245, the following exceptions to the *Preliminary Order* were filed with the Director of the Department: (1) *City of Boise's Brief Taking Exception to the Preliminary Order Approving Permit Upon Conditions*; (2) *Idaho Conservation League's Exceptions to April 2, 2019 Preliminary Order*; and (3) *Ditch Companies' Exceptions to Preliminary Order Approving Permit Upon Conditions*. While the exceptions were filed with the Director and not the hearing officer, the hearing officer will address the argument that the hearing officer did not consider the potential future impact of Elmore County's application on Basin 63. *See infra* Sec. II.

development of direct flow components of the Permit because diversion rates and other conditions appropriately limit development of direct flow uses. *Id.*

Elmore County further argues the hearing officer erred in determining it "was not entitled to a permit to divert more than 10,000 AF" because the application for permit ("Application") "did not list a quantity greater than 10,000 AF." *Id.* Elmore County maintains that because IDWR's instructions allow for both direct flow and storage components to be combined and included on one application, it should be able to propose a volumetric limitation for the various storage components under the right, while also "be[ing] able to develop direct flow components beyond the scope of such volumetric limitations . . . ." *Id.* at 5.

b. *Hearing Officer's Analysis and Decision*

Elmore County argues the hearing officer's determination of a 10,000 AF volume limit is an error, because such a determination is contrary to Department instructions that Elmore County characterizes as "leav[ing] something to be desired respecting clarity." *Petition* at 4. Elmore County's argument is deficient in two ways.

First, Elmore County's argument relies on review and interpretation of a document outside of the record. A hearing officer's decision must be based exclusively on the record made before the agency. *See* Idaho Code 67-5249(3); IDAPA 37.01.01.650.01; and IDAPA 37.01.01.712.01. The Department's *Instructions for Filing an Application for Permit* (*Instructions*) were not submitted to, or admitted into, the record, nor did the hearing officer take official notice of them. To rely on the Instructions now, without testimony from all parties as to their meaning and applicability to the permit, would be contrary to law.

Second, Elmore County's Application was ambiguous and created genuine and reasonable uncertainty among witnesses and experts in this case as to the actual annual diversion volume limits proposed by Elmore County. As discussed in the preliminary order, the face of the application suggests Elmore County intended to limit the annual diversion volume to 10,000 AF. The plain language of the Application narrative supports the contention that the application was not intended to be for more than 10,000 AF. Attachment A to the Application states, "[w]ater will be pumped from the South Fork Boise River to Little Camas Reservoir for storage, <u>then</u> diverted through the existing Mountain Home Irrigation District canal to the divide between the South Fork Boise drainage and Long Tom Creek drainage (T1S, R8E, S22)." *Application* at Attachments p. 5—Narrative (emphasis added). The narrative explicitly states that water will first be stored in Little Camas Reservoir, then later diverted for recharge and irrigation uses. If the Application had intended for more than 10,000 AF of total diversion for beneficial use, the application narrative should have detailed diversions to storage and additional simultaneous or subsequent diversion of water for direct delivery. It did not.

These contradictions resulted in real confusion amongst the experts about the proposed diversion volume. The City of Boise's ("Boise") *Expert Report, prepared by Gregory Sullivan, P.E. dated August 7, 2019* ("*Boise Expert Report*") states, "The application claims a maximum diversion rate of 200 cfs and a maximum annual volume of 10,000 acre-feet." Boise Ex. 6 at 3. Boise's Expert Report also quotes the narrative description from the Application, "Water will be pumped from the South Fork Boise River to Little Camas Reservoir for storage, then diverted through the existing Mountain Home Irrigation District Canal . . . ." *Id.* Boise's *Rebuttal Expert Report, prepared by Gregory K. Sullivan, P.E. dated September 18, 2018,* points out that Elmore County's water availability analysis assumed an annual volume of 20,000 acre-feet and noted "[20,000 acre-feet] is contrary to the amended application for permit no. 63-34348 which indicates a proposed annual appropriation of 10,000 acre-feet. Boise Ex. 10 at 4.

Confusion as to the actual diversion volume proposed by the Application was also evident in the testimony of witnesses and experts at hearing. When Boise's expert witness was asked what quantity of water was being applied for by the application, Mr. Sullivan responded, "200 cfs is the rate of flow, and then 10,000 acre-feet annually." Tr. Vol. IV, pp. 1055-56. The Watermaster of Water District 63 was similarly confused as to the annual volume limited identified on the Application. At hearing, when asked if he was aware Elmore County was not limiting its diversions to 10,000 acre-feet, the Watermaster stated, "No, I was not aware of that." Tr. Vol. V, p. 1401. The Watermaster's response came after reviewing the Application at the request of the Department to submit his Watermaster Recommendations to the water right file. Boise Ex. 2 at 1. The testimony of Mark Zirschky, the District Superintendent for the Pioneer Irrigation District, offered another perspective on the volume limit of the Application. When asked what the Application sought to accomplish, Mr. Zirschky stated, "My understanding is a diversion out of Anderson . . . with a 10,000 acre-feet element of storage for aquifer recharge. And also in my opinion and undefined amount for supplemental irrigation." Tr. Vol. V, p. 1430. Finally, testimony by Dave Shaw, an expert witness for the Ditch Companies[3], identifies differences between the identified volume limit on the face of the application and the annual volume of water used in Elmore County's water supply analysis. When asked what his understanding of the quantities involved in the application was, Mr. Shaw responded, "Looking at Mr. Scanlan's initial analysis of water supply, he cut his analysis off at 20,000 acre-feet per year. But the face of the application lists the total maximum annual diversion at 10,000 acre-feet per year." Tr. Vol. VI, p. 1571.

Adequate notice of what the applicant is seeking is necessary in order to satisfy the requirements of due process in an administrative proceeding. *See Grindstone Butte Mut. Canal Co. v. Idaho Power Co.*, 98 Idaho 860, 865, 574 P.2d 902, 907 (1978). Administrative hearings "must faithfully observe the 'rudiments of fair play'." *Id.* While there is some evidence in the

[3] The "Ditch Companies" are: Ballantyne Ditch Company; Boise Valley Irrigation Ditch Company; Canyon County Water Company; Eureka Water Company; Farmers' Cooperative Ditch Company; Middleton Mill Ditch Company; Middleton Irrigation Association, Inc.; Nampa & Meridian Irrigation District; New Dry Creek Ditch Company; Pioneer Ditch Company; Pioneer Irrigation District; Settlers Irrigation District; South Boise Water Company; and Thurman Mill Ditch Company.

record that the applicant did not intend to limit the diversion rate to 10,000 AF, contradictory information in the application and the exhibits presented at hearing created confusion as to the full extent of Elmore County's proposal. In this case, because of the uncertainty associated with whether Elmore County's Application identified an annual diversion volume limit in excess of 10,000 AF of water, the hearing officer will keep the 10,000 AF combined use limit.

Elmore County also argues the hearing officer's determination of 5,000 AF volume limits "for each of the direct flow irrigation and direct flow ground water recharge" components of the permit are in error. *Petition* at 2. Elmore County is incorrect in its characterization. The Permit only limited the direct diversion of irrigation to 5,000 AF. The direct diversion of recharge is limited to 10,000 AF in recognition of the combined volume limit identified on the application. In his Preliminary Order, the hearing officer concluded it "would conflict with the local public interest to approve permit 63-34348 without proper conditioning to ensure the ground water recharge will occur pursuant to the Permit consistent with the intent of the Application." *Preliminary Order* at 24. Condition 6 of the Permit, along with a 5,000 AF volume limit on the "direct flow irrigation" component of the Permit, are necessary to ensure the local public interest is maintained in this matter and that ground water recharge under the Permit is not supplanted by supplemental irrigation.[4] Accordingly, the hearing officer will retain the 5,000 AF volume limit on the direct flow irrigation component of the permit.

2. *Reconsideration of Condition 16 – Point of Compliance*

a. *Elmore County Petition*

Elmore County argues the point of compliance in Condition 16 of the Permit is distinct from the point of compliance in a previous version of Standard Condition 907. *Petition* at 6. "In the previous versions, the point of compliance was 'at the point of diversion' and further 'shall be based on gauged Lucky Peak Dam discharge minus the gauged diversion to the New York Canal[,]' [while] Condition 16, as set forth in the Permit, specifies [a] point of compliance and measurement at the Middleton Gauge." *Id.* Elmore County argues this distinction "significantly changes the effect of Standard Condition 907" because it carries the potential of limiting flood flows for appropriation for significant periods." *Id.* at 6. Specifically, "Standard Condition 907 would prevent diversion of significant portions of flood release, without providing any benefit to downstream water rights." *Id.* at 7.

Elmore County proposes that Permit Condition 16 should be modified as follows:

> If measured or calculated Boise River flows ~~at the Middleton Gage~~ immediately downstream of the New York Canal Diversion Dam are less than 240 cfs during the period beginning June 16 and ending February 29, water shall not be diverted

[4] Condition 6 states: "In any given year, water diverted for irrigation from storage and irrigation shall not exceed 50 percent of the total volume of water diverted for all uses described by the right."

pursuant to this right. If measured or calculated Boise River flows ~~at the Middleton Gage~~ immediately downstream of the New York Canal Diversion Dam are less than 1,100 cfs during the period beginning March 1 and ending May 31, water shall not be diverted pursuant to this water right. If the benchmark stream maintenance flows of 240 cfs (from June 16 to February 29) and 1,100 cfs (From March 1 to May 31) subsequently change, then the diversion of South Fork Boise River flows under this right will be limited to provide for the new benchmark flows. Measured or calculated Boise River flows immediately downstream of Diversion Dam shall be based on gauged Lucky Peak Dam discharge minus the gauged diversion of the New York Canal and water rights 63-12399, 63-12420, and 63-31409.

Id. at 7-8.

b. *Hearing Officer's Analysis and Decision*

The intent of the Department's Standard Condition 907, and additionally Standard Conditions 906 and 908, is to define when diversion of "flood releases" can occur without mitigation. DC Ex. 24 at 2. These conditions are important, because the Department's policy is to deny "[a]pplications which propose use of surface water upstream from Star Bridge" "unless the applicant files an acceptable plan to mitigate or avoid any material injury to existing water rights." DC Ex. 22 at 1. Without the standard conditions limiting diversion to defined periods of flood control releases when mitigation is not necessary, applicants would otherwise have to mitigate for their diversions.

The original Standard Condition 907 language limits diversions to certain flow conditions in the Boise River as measured at the "point of diversion." *See Petition* at 6. In the case of Elmore County's Permit, its point of diversion is not physically located downstream of the Lucky Peak Dam. Therefore, a proxy location must be established that meets the intent of the Department's policy to limit diversions under the Permit to avoid any material injury to existing water rights. Throughout the hearing concerns were raised by protestants and public witnesses regarding the impacts Permit No. 34348 might have on water supplies in the Boise River on all reaches downstream from Lucky Peak Dam, not just at the New York Canal's point of diversion. For this reason, the New York Canal is not an appropriate "point of compliance."

The Department's Application Processing Memo No. 59 states, "[s]urface water in the Boise River or tributary to the Boise River downstream from Star Bridge is generally available for appropriation." DC Ex. 22 at 1. The United States Geological Survey's Middleton Gage is the

closest gage to the Star Bridge that continuously measures and reports Boise River flow rates.[5] Therefore, establishing the Middleton Gage as the "point of compliance" in condition 16 on Elmore County's Permit is appropriate to ensure that only flood control releases are diverted by the Permit upstream of the Star Bridge. Accordingly, the hearing officer will not modify condition 16 as requested by Elmore County.

3. *Reconsideration of Place of Use*

a. *Elmore County Petition*

Elmore County argues the "Department's GIS shapefile of the [Mountain Home Irrigation District ("District")] and the listed place of use for the District in the Department's database appear not to be the same." *Petition* at 8. Therefore, it requests "the Department determine the current boundary of the District, and adjust either the GIS shape files (and the Permit) or the list of quarter-quarter sections in the Department's database for the [District]." *Id.*

b. *Hearing Officer's Analysis and Answer*

The hearing officer agrees with Elmore County. There was a discrepancy between the District's current service area GIS shapefile and the Public Land Survey ("PLS") description of the place of use on the Permit[6]. The Department has analyzed the District's current GIS service area boundary shapefile on file with the Department and manually re-determined and updated the PLS description of the place of use on the Permit.

4. *Petition for Clarification Related to the Constitutionality of Permit Condition No. 14*

a. *Elmore County Petition*

Elmore County seeks "clarification regarding the meaning and effect" of Permit Condition No. 14 ("Condition 14"), the inclusion of which, it assumes, is a result of recently enacted Idaho Code § 42-115. *Petition* at 8. Condition 14 states: "This right is subordinated to the capture and retention of water in existing on-stream reservoirs operated for storage and flood control purposes during and following flood control operations until the date of allocation."

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[5] United States Geological Service, Gage No. 13210050 Boise River NR Middleton ID.

[6] To clarify, the PLS description of the District's service area boundary in the Department's Enterprise water rights database matched the District's current service area GIS shapefile on file with the Department. However, a workflow application used to automatically populate the PLS description on the permit document trimmed small slivers of acres off of certain quarter-quarter lands leading to the discrepancies noted by Elmore County on the original permit.

Elmore County believes that if flood control releases from the relevant on-stream reservoirs are not captured or retained then it should be allowed to divert and use water that otherwise would be released from those reservoirs. *Id.* at 9. It is unclear to Elmore County whether the Department reads Condition 14 in the same manner or whether the Department reads the condition "to mean that Elmore County cannot divert any water 'during and following flood control operations until the date of allocation.'" *Id.* Such a reading, Elmore County argues, would render the new permit worthless from an economic and political perspective and be in violation of Elmore County's constitutional rights. *Id.* at 9-10.

Elmore County argues Article XV, Section 3 of the Idaho Constitution controls and Idaho Code § 42-115 and Condition 14 "must be consonant with the[] constitutional principles" of the prior appropriation doctrine. *Id.* at 11. Specifically, it argues the unappropriated flood flow water is available for appropriation, that that water cannot be subordinated by restriction on new permits or licenses, that priority of appropriation should govern, and that the Department "is obliged to render an interpretation [of Idaho Code § 42-115 and Condition 14] that does not interfere with the constitutionally protected rights of Elmore County, the Permit owner." *Id.* at 11-13.

Next, Elmore County argues that Idaho Code § 42-115 violates its constitutional right to equal protection under federal and Idaho law. *Id.* at 13. "The Statute and the condition imposed pursuant to the statute illegally categorize the type of water permit acquired by the County and subject the County to disparate treatment under the law without a legitimate legal basis," especially in light of the distinction made between permits and licenses that involve storage reservoirs of 1000 AF or less. *Id.* at 13-14.

b. *Hearing Officer's Analysis and Answer*

Elmore County asks the Hearing Officer to opine on how Condition 14 will be administered by the Department. This proceeding is not the appropriate forum for deciding issues of administration. The condition is effectively mandated by statute and how the Director will administer the condition is a question to be decided by the Director. *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 157, 408 P.3d 899, 912 (2018) ("It is well settled that the administration of water is a matter committed to the Director's discretion.").

House Bill 1, passed during the 2019 legislative session, created new Idaho Code § 42-115. *See* H.B. 1, 65th Legis., 1st Reg. Sess. (Idaho 2019). House Bill 1 included an emergency clause so the statute became effective upon signature by the Governor on February 13, 2019. The statute states:

> 42-115. STORAGE. To ensure that new or proposed projects to store more than one thousand (1,000) acre feet of surface water do not interfere with the storage

> of water in existing on-stream storage reservoirs operated for storage and flood control purposes, the director of the department of water resources shall subordinate permits and licenses for projects to store more than one thousand (1,000) acre feet of surface water issued after the effective date of this section to the capture and retention of water in existing on-stream storage reservoirs during and following flood control operations until the date of allocation.

Idaho Code § 42-115.

Elmore County proposes to store more than 1,000 AF of surface water in the Little Camas reservoir. Because the Permit was issued after February 13, 2019, the hearing officer was required to "subordinate" the permit "to the capture and retention of water in existing on-stream storage reservoirs during and following flood control operations until the date of allocation." *Id.* Condition 14 is language taken directly from House Bill 1 and placed on new permits by the Department to effectuate the subordination requirements of the statute.

To the extent Elmore County is asking the hearing officer to declare Idaho Code § 42-115 unconstitutional, the hearing officer cannot do so. Under the Department's Rules of Procedure "A hearing officer in a contested case has no authority to declare a statute unconstitutional." *See* IDAPA 37.01.01.415. Unless a court of competent jurisdiction whose decisions are binding precedent in the State of Idaho has declared a statute or rule unconstitutional, or the same or substantively identical state statute or rule has been declared so, the hearing officer has no authority or ability to address issues of constitutionality. *Id.* No such situation presents itself here.[7] If Elmore County believes a statute or rule has not been validly enacted, or is otherwise unconstitutional, it should seek reprieve in the proper venue: The courts.

II. ISSUES ON EXCEPTIONS ADDRESSED BY THE HEARING OFFICER

1. Exceptions and Argument – The hearing officer erred in his interpretation and application of Idaho Code § 42-203A(5)(g) by not considering future economic impacts the Permit will have on Basin 63

The City of Boise ("Boise"), the Ditch Companies, and the Idaho Conservation League ("ICL") filed exceptions in this matter.[8] Each argue, generally, that the hearing officer's findings in relation to a temporal restriction on the analysis required by Idaho Code § 42-203A(5)(g) is in error. That statute requires the Department, when the place of use is outside the watershed or local area where the source of water originates, to consider whether an application "will

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[7] Aside from the issue of constitutionality, the hearing officer reiterates the Department's authority to condition permission to use public waters. *See e.g.* Idaho Code § 42-203A; and *Hardy v. Higginson*, 123 Idaho 485, 489, 849 P.2d 946, 950 (1993) (application to appropriate water in Idaho subject to the local public interest standard (Idaho Code § 42-202B(3)).

[8] *See supra* fn. 2.

adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates." Idaho Code § 42-203A(5)(g).

In the original *Preliminary Order* in this matter, the hearing officer's discussion could be interpreted to limit his analysis to the state of the local economy of the Boise River basin "as it exists." *See* Preliminary Order at 27. The Parties assert that future impacts may be taken into account under the statutory analysis. The hearing officer agrees. Future economic impacts under this analysis may be valuable in the Department's considerations of transfers under Idaho Code § 42-203A(5)(g). The Hearing Officer did not foreclose or discount potential future economic impacts to Basin 63 as a result of the *Preliminary Order*. The Hearing Officer specifically addressed future growth opportunities, but to ensure there is no confusion as to this issue, the Hearing Officer will remove references to economic considerations "as it exists."

Based on the foregoing Order on Reconsideration, the hearing officer incorporates the above analysis into the previously filed Preliminary Order and now files this Amended Preliminary Order, as follows:

BACKGROUND

On March 3, 2017, the Board of County Commissioners of Elmore County ("Elmore County") applied for permit no. 63-34348 ("Application") with the Idaho Department of Water Resources ("Department").[9] On September 25, 2017, Elmore County amended the Application, modifying the legal description of the point of diversion and place of use. Elmore County seeks a "[t]otal quantity to be appropriated" of 200 cubic feet per second ("cfs") not to exceed 10,000 acre-feet ("AF") per year, from the South Fork of the Boise River ("SFBR") for diversion to storage, ground water recharge storage, ground water recharge from storage, ground water recharge, irrigation storage, irrigation from storage, and irrigation. *Application* at 1, Attachments p.2—Proposed Uses.

The Application states that Elmore County proposes to construct a pump station and pipeline to pump water "from the [SFBR] to Little Camas Reservoir for storage," then divert water "through the existing Mountain Home Irrigation District ["MHID"] canal to the divide between the South Fork Boise drainage and Long Tom Creek drainage (T1S, R8E, S22)." *Application* at Attachments p.5—Narrative. The Application states:

> The pump station and pipeline are located on federal land. Place of use for recharge is Mountain Home Reservoir, a gravel pit area and the natural streambeds of East Fork Long Tom Creek, Long Tom Creek and Canyon Creek. Mountain Home Irrigation District operates Mountain Home Reservoir that is

[9] At the hearing in this matter, the hearing officer took official notice of the documents in the Department's electronic file for the Application pursuant to the Department's Rule of Procedure 602 (IDAPA 37.01.01.602). The electronic file includes the Application, publication notice, protests, and other filings in this case.

> located on federal land. Three separate parties own portions of the gravel pit area: Calvin Ireland, Bureau of Land Management and Mountain Home Highway District. The creek beds cross both private and federal lands. Applicant is in the process of securing agreements for the pumping station, gravel pit areas and use of MHID facilities.

Id. The Application further states that, after water is pumped from the SFBR to Little Camas Reservoir:

> [W]ater will flow through an existing tunnel, which may be enlarged for additional flow, to the streambed of East Fork Long Tom Creek. Water will flow down the East Fork Long Tom Creek, through Long Tom Reservoir, Long Tom Creek, to Canyon Creek. Water will then flow down Canyon Creek to the [MHID] diversion. At the diversion, water can be diverted to Mountain Home Reservoir for ground water recharge (through reservoir leakage) and/or irrigation purposes, to the gravel pit area for ground water recharge, or can be allowed to flow downstream in Canyon Creek for ground water recharge via the Creek bed. A beginning point and ending point were used to describe the ground water recharge place of use via the creek beds.

Id.

The Department published notice of the Application in the Mountain Home News, the Post Register, the Times-News, the Idaho Statesman, and the Lewiston Tribune for two consecutive weeks between October 19 and October 26, 2017.

The Boise Project Board of Control ("BPBC"); the group of protestants collectively referred to herein as the Ditch Companies; Idaho Power Company; Cat Creek Energy, LLC[10]; the City of Boise ("Boise"); Riverside Irrigation District; the Idaho Conservation League ("ICL"); and the United States Bureau of Land Management ("BLM") timely protested the Application.[11]

On June 4, 2018, the hearing officer held a prehearing conference. The hearing officer subsequently issued an *Order Authorizing Discovery; Scheduling Order; Notices of Status*

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[10] Cat Creek Energy, LLC, withdrew its protest on August 28, 2018, prior to the hearing in this matter.

[11] At the hearing, BLM and Elmore County submitted a *Settlement Agreement* to resolve BLM's protest. Idaho Power Company and Elmore County submitted a *Stipulation for Settlement of Protest* to resolve Idaho Power Company's protest. The hearing officer will include conditions that Elmore County and BLM agreed to on a permit issued pursuant to the Application. However, the hearing officer will include the Department's Standard Condition 106 in lieu of the condition agreed to by Idaho Power Company and Elmore County. Standard Condition 106 states: "Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality monitoring and/or permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture." The Department's Standard Condition 106 is substantively the same as the condition requested by Idaho Power Company and Elmore County.

Conference and Hearing. The hearing officer held a status conference on July 10, 2018. Following the July 10 status conference, the hearing officer issued an *Amended Scheduling Order*, which set a September 25, 2018, deadline for dispositive motions.

On September 25, 2018, ICL, the Ditch Companies, and Boise filed motions for summary judgment and memoranda in support. ICL also filed an *Affidavit of Marie Callaway Kellner* ("Kellner Affidavit"); the Ditch Companies filed an *Affidavit of Andrew J. Waldera in Support of Ditch Companies' Motion for Summary Judgment* ("Waldera Affidavit"); and Boise filed a *Declaration of Counsel Abigail R. Germaine* ("Germaine Declaration"). On October 9, 2018, Elmore County filed its *Consolidated Response to Protestants' Motions for Summary Judgment* ("Response"). In its Response, Elmore County moved to strike various documents attached to the Kellner Affidavit, Waldera Affidavit, and Germaine Declaration. On November 9, 2018, the hearing officer issued an *Order Denying Motions for Summary Judgment; Order Denying Motion to Strike*.

The hearing officer held the hearing in this matter on November 13th through 16th and December 7th and 10th. *See Amended Notice of Hearing and Public Testimony* (Nov. 9, 2018). The hearing officer allowed public witness testimony pursuant to the Department's Rule of Procedure 355. *See id.* The hearing officer authorized the parties to file post-hearing briefs by January 14, 2019. Elmore County[12], BPBC, Boise, the Ditch Companies, and ICL timely filed response briefs.[13]

ANALYSIS

A. Criteria for Evaluating an Application for Permit

Idaho Code § 42-203A(5) sets forth the criteria for evaluating an application for permit:

> In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought

[12] Elmore County asserts for the first time in its post-hearing brief that Boise's participation in this matter is "null and void" and "all evidence presented, or testimony elicited from witnesses by [Boise's] attorney, must be disregarded by the Department and cannot be utilized by any valid party to this matter." *Elmore County's Post-Hearing Brief* at 21-24. Elmore County bases its assertion on a conclusion that, by filing a protest to the Application, Boise "has 'sued'" Elmore County and such action can only legally occur following direction from a "majority vote of the Boise City Council," which was not obtained in this instance. *Id.* at 23-24. Boise's protest does not constitute "a lawsuit against" Elmore County. *See* Black's Law Dictionary, definition of "sue" (10th ed. 2014).

[13] Boise filed a response brief on January 15, 2019. Elmore County filed an objection to Boise's response brief on January 16, 2019. The hearing officer will not consider Boise's response brief or Elmore County's objection because the hearing officer did not authorize those filings. *See* Tr. Vol. VI, p. 1677.

to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The Department's Water Appropriation Rules (IDAPA 37.03.08) further describe how the Department must evaluate an application to appropriate water pursuant to the criteria in Idaho Code § 42-203A(5). Rule 40.04.c states: "The applicant has the ultimate burden of persuasion for the criteria of [Idaho Code § 42-203A(5)]." IDAPA 37.03.08.040.04.c.

B. Elmore County's Proposed Use

As an initial matter, the hearing officer must describe Elmore County's "proposed use." As stated above, Elmore County seeks a "[t]otal quantity to be appropriated" of 200 cfs not to exceed 10,000 AF per year, from the SFBR for diversion to storage, ground water recharge storage, ground water recharge from storage, ground water recharge, irrigation storage, irrigation from storage, and irrigation. *Application* at 1, Attachments p. 2—Proposed Uses. Elmore County seeks a year-round period of use for diversion to storage, ground water recharge storage, ground water recharge from storage, and ground water recharge. *Id.* Elmore County seeks a March 1 to November 15 period of use for irrigation from storage and irrigation. *Id.* Conditions and limitations will be imposed on Elmore County's proposed use for the reasons described as follows.

1. <u>Diversion volume and rate</u>

While the face of the Application specifies a "[t]otal quantity to be appropriated" of 10,000 AF, Elmore County's expert applied a 20,000 AF diversion volume limit in his Flood Water Availability Analysis for Application 63-34348 ("Water Availability Analysis"). Pet. Ex. 14 at 1; *see* Tr. Vol. III, pp. 674-77. BPBC, Riverside Irrigation District, and Boise request that a permit issued pursuant to the Application ("Permit 63-34348") include a 10,000 AF limit consistent with the face of the Application. *Post Hearing Brief of the Boise Project Board of Control and Riverside Irrigation District* ("BPBC Brief") at 3; *City of Boise's Post-Hearing Brief* at 20; Boise Ex. 10 at 4. In addition, Attachment A to the Application states, "Water will be pumped from the South Fork Boise River to Little Camas Reservoir for storage, <u>then</u> diverted

through the existing Mountain Home Irrigation District canal to the divide between the South Fork Boise drainage and Long Tom Creek drainage (T1S, R8E, See)." *Application* at Attachments p.5—Narrative (emphasis added). If the Application had intended for more than 10,000 AF of total diversion for beneficial use, the application narrative should have detailed the diversions to storage and additional simultaneous or subsequent diversion of water for direct delivery, but it did not. The hearing officer agrees with BPBC, Riverside Irrigation District, and Boise, that the Application proposes a total volume of 10,000 AF. Idaho Code § 42-203A(5) allows the Department to "approve and grant a permit for a smaller quantity of water than applied for," but does not allow the Department to approve a permit for a greater amount of water than applied for.[14] Accordingly, consistent with the face of the Application, Permit 63-34348 should be limited to a total quantity of 10,000 AF.

In addition, while the Application seeks 200 cfs for purposes of diversion to storage, ground water recharge, and irrigation, Elmore County's expert testified that the MHID "facilities, particularly the canal [and] the tunnel system between Little Camas and Long Tom divide" are "not adequate to convey 200 cfs." Tr. Vol. III, p. 711. Elmore County's expert testified that "52 cfs was a measurement this summer on one day upstream and downstream of one tunnel that [MHID] has since repaired." Tr. Vol. III, p. 770. Mr. Ascuena, MHID Board Member, testified that the capacity of those MHID facilities is between 3,000 and 4,000 "inches," or "somewhere between 60 and 80 cfs." Tr. Vol. II, pp. 435, 493; Tr. Vol. III, pp. 752, 770. Elmore County's expert testified that the facilities could convey "[s]omewhere between 50 and 100" cfs. Tr. Vol. III, pp. 711, 770; *see* Tr. Vol. III, pp. 672-63. Elmore County's expert stated: "it looks like we wouldn't ever go over 100 cfs" down the canal. Tr. Vol. II, pp. 553-54. Accordingly, Permit 63-34348 should include a diversion rate limit of 200 cfs for diversion to storage, but a combined diversion rate of 100 cfs for direct delivery of ground water recharge and irrigation.

2. Place of use for recharge

The Application states: "Place of use for recharge is Mountain Home Reservoir, a gravel pit area and the natural streambeds of East Fork Long Tom Creek, Long Tom Creek and Canyon Creek." *Application* at Attachments p.5—Narrative. However, Elmore County states in its post-hearing brief that "no locations other than the gravel pits are identified for [aquifer recharge] purposes of the proposed permit." *Elmore County's Post Hearing Brief* at 11, n.2; *see* Tr. Vol. II, p. 544. Accordingly, Permit 63-34348 should only authorize the gravel pit areas specified in the Application as the place of use for ground water recharge.

3. Period of use

[14] If an applicant wants "a greater rate of diversion or depletion" the applicant must amend the application and the priority date must be advanced. IDAPA 37.03.08.035.04.a & c.

Elmore County's expert reports, witness testimony, and post-hearing brief establish that the Application only seeks to divert water from the SFBR "at times when water is being passed through Anderson Ranch, Arrowrock, and Lucky Peak [R]eservoirs for flood control purposes." Pet. Ex. 14 at 1; *see* Tr. Vol. II, p. 525 ("And then we've got this application to pull . . . flood waters out of Anderson that we're here about today."); Tr. Vol. II, p. 554 ("we were seeking unappropriated flood water flows"); Tr. Vol. II, p. 412 (Application is to procure water "being flood water rights in excess of the normal flows."); *Elmore County's Post Hearing Brief* at 11 ("The water supply is unappropriated flood flows."); *Id.* at 17-19 (referring to "flood flows" and "flood water"). BPBC and Riverside Irrigation District request that Permit 63-34348 include a condition limiting diversion to times when "flood releases are being made from both Anderson Ranch Dam and from Lucky Peak." *BPBC Brief* at 6-7. The hearing officer agrees that a condition should be imposed limiting diversion from the SFBR to times when releases for flood control purposes are occurring from Anderson Ranch Dam and Lucky Peak Dam.

Boise asserts that "flood flows are historically only available from April 18 through July and pursuant to the Department's January 22, 1980, *Idaho Department of Water Resources Memorandum on Boise River Appropriations*, permits for consumptive use shall not be approved from June 15 through November 1." *City of Boise's Post-Hearing Brief* at 19. Boise, therefore, argues that Permit 63-34348 "should be limited to a season of use that correlates with the available flood flows and allowable diversion under Department policy." *Id.*

An April 18 date to begin the period of use for Permit 63-34348 would not be appropriate. Elmore County's expert report states that water would have been available for appropriation beginning April 17 in 2012. Pet. Ex. 14 at "13190500: South Fork Boise River Anderson Ranch Dam," page 5 of 11. Further, the Ditch Companies' expert report states that water would have been available for appropriation in January, February, and March some years between 1956 and 2018. DC Ex. 34 at Table 1. In addition, while the Department's 1980 Memorandum excluded June 15 to November 1 as a possible period of use for new applications for permit for consumptive use "on the Boise River and tributaries in the reach upstream from Lucky Peak Reservoir," such exclusion was based on a conclusion that "no water is available for any additional consumptive uses." DC Ex. 21. No party disputes that water is available to divert from the SFBR when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Elmore County's Water Availability Analysis demonstrates "there is a volume available for appropriation" in nine of the last twenty years (1999-2018). Tr. Vol. II, p. 567; *Water Availability Analysis* at 1; *Id.* at 5, Table 1. Boise's expert and the Ditch Companies' expert agree that water is available for appropriation during times when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Tr. Vol. IV, pp. 1060-67; Tr. Vol. VI, pp. 1575-76; DC Ex. 34 at Table 1. The June 15 limitation should not be imposed on Permit 63-34348.

In sum, a condition of approval limiting diversion from the SFBR to times when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam will appropriately limit the period of use for irrigation, ground water recharge, and diversion to

storage. Ground water recharge storage, ground water recharge from storage, and irrigation storage should be authorized year-round as requested in the Application. While the Application requests a March 1 to November 15 period of use for irrigation from storage and irrigation, a March 15 to November 15 period of use should be imposed because that is the period of use for MHID's decreed water rights for those purposes. *See* DC. Ex. 57.

4. Place of use for irrigation and supplemental irrigation condition

Boise requests that the hearing officer "impose a condition on the permit if granted, which makes clear that the Application shall be used only for supplemental irrigation." *City of Boise's Post-Hearing Brief* at 17. The Application states that MHID's "rights for irrigation" are "used for the same" irrigation purposes proposed by the Application. *Application* at 2. The map included with Attachment A to the Application specifies that the irrigation place of use is the "MHID Service Area." Testimony at the hearing established that the Application's proposals related to irrigation are intended "to supplement existing rights." Tr. Vol. I, p. 250; Tr. Vol. I, p. 166; Tr. Vol. II, p. 295 ("it would provide supplemental water from [MHID] to landowners . . . within [MHID]."); Tr. Vol. II, p. 417 (MHID board member stating: "We will allow Elmore County to use our system to convey water to the Mountain Home area for recharge" and "in return," MHID "patrons are going to receive supplemental irrigation.").

Accordingly, a condition should be included on Permit 63-34348 which requires that water shall only be used for irrigation from storage and irrigation to supplement existing irrigation rights within MHID's service area.[15]

C. Evaluation Criteria Analysis

1. Reduction to the quantity of water under existing water rights

Idaho Code § 42-203A(5)(a) requires that the hearing officer evaluate whether Elmore County's proposed use "will reduce the quantity of water under existing water rights." The Department's Water Appropriation Rule 45.01.a states that the proposed use will reduce the quantity of water under existing water rights if "[t]he amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less." IDAPA 37.03.08.045.01.a.i.[16] Rule 45.01.a further states that "[a]n application that would otherwise be denied because of injury to another water right

[15] Because water shall only be used for irrigation from storage and irrigation to supplement existing irrigation rights within MHID's service area, Permit 63-34348 will also include a condition limiting those uses to the acres actually irrigated within MHID's service area in any given irrigation season and a condition limiting those uses to the smaller of the combined limits imposed on MHID's surface water rights.

[16] Rule 45.01.a.ii and iii are not at issue in this matter.

may be approved upon conditions which will mitigate losses of water to the holder of an existing water right . . . ." IDAPA 37.03.08.045.01.a.iv.

As discussed above, Elmore County only seeks to divert water from the SFBR during times of flood control releases from Anderson Ranch Dam and Lucky Peak Dam. Elmore County's Water Availability Analysis demonstrates "there is a volume available for appropriation" in nine of the last twenty years (1999-2018). Tr. Vol. II, p. 567; *Water Availability Analysis* at 1; *Id.* at 5, Table 1. Boise's expert and the Ditch Companies' expert agree that water is available for appropriation when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Tr. Vol. IV, pp. 1060-67; Tr. Vol. VI, pp. 1575-76; DC Ex. 34 at Table 1.

The BPBC and Riverside Irrigation District "are concerned" that Permit 63-34348 "will affect the storage rights in the Boise River reservoirs." *BPBC Brief* at 4. The storage rights in the Boise River reservoirs (water right nos. 63-303 & 3613 for Arrowrock Reservoir; 63-3614 for Anderson Ranch Reservoir; and 63-3618 for Lucky Peak Reservoir) are senior in priority to a permit that would be issued pursuant to the Application. The Water District 63 watermaster's distribution of water rights in accordance with the prior appropriation doctrine as required by Idaho Code § 42-602 will ensure Permit 63-34348 will not reduce the quantity of water under existing Boise River reservoir storage water rights.

The BPBC, Riverside Irrigation District, and the Ditch Companies assert that Permit 63-34348 must not interfere with "physically filling [] the Boise River reservoirs." *BPBC Brief* at 8; *see Ditch Companies' Post Hearing Brief* at 5. The Ditch Companies assert that "[t]he Application, if granted, must be conditioned in a manner fully protecting the refill settlement and the Refill 1 and Refill 2 water rights." *Ditch Companies' Post Hearing Brief* at 4.

At the hearing, the hearing officer took official notice of the proposed "Refill 1 and Refill 2" water rights (nos. 63-33734A and 63-33734B) referred to by the Ditch Companies and marked as DC Ex. 58. The proposed "Refill 1 and Refill 2" water rights are intended to protect the physical filling of the "Boise River reservoirs." On February 19, 2019, the State of Idaho filed with the Snake River Basin Adjudication District Court a *Motion to Decree Water Right No. 63*-33734A and a *Motion to Decree Water Right No. 63-33734B and Disallow Water Right Claim Nos. 63-33732, 63-33733, 63-33734, 63-33737, and* 63-33738.

If decreed, the "Refill 1" water right, water right no. 63-33734A, will bear a priority date of September 30, 1965. DC Ex. 58 at Ex. 2 to Attachment B. If decreed, the "Refill 2" water right, water right no. 63-33734B, will bear a priority date of March 16, 1973. DC Ex. 58 at Ex. 2 to Attachment D. Permit 63-34348 will have a 2017 priority date. Accordingly, Permit 63-34348 will be junior in priority to the Refill 1 and Refill 2 water rights if decreed.

Further, if decreed, the Refill 1 and Refill 2 water rights will not be subordinate to Permit 63-34348. The Refill 1 water right states:

> This water right is subordinate to all water rights established pursuant to Idaho law for uses within the IDWR Administrative Basin 63, except water rights to store more than 1,000 acre-feet of surface water permitted or licensed after April 15, 2019. This water right shall not be administered as subordinate to water rights permitted or licensed for managed ground water recharge after April 15, 2019 or any water rights for the storage or use of water for power purposes.

DC Ex. 58 at Ex. 2 to Attachment B. Because Elmore County's proposed "uses" are not "within the IDWR Administrative Basin 63," the Refill 1 water right, if decreed, will not be subordinate to Permit 63-34348. Similarly, the Refill 2 water right, if decreed, will be subordinate to "[a]ll surface water rights within IDWR Administrative Basin 63 with a priority date earlier than May 1, 2014, with a decreed or licensed diversion rate of less than 0.1 CFS" and "[a]ll water rights listed on attachment A." DC Ex. 58 at Ex. 2 to Attachment D, "Other Provisions Necessary for Definition or Administration of This Water Right," par. 5. Because Permit 63-34348 does not have a "diversion rate of less than 0.1 CFS" and is not "listed on attachment A," the Refill 2 water right, if decreed, will not be subordinate to Permit 63-34348. Therefore, the Water District 63 watermaster's distribution of water rights in accordance with the prior appropriation doctrine as required by Idaho Code § 42-602 and the decrees for the Refill 1 and Refill 2 water rights will ensure Permit 63-34348 will not interfere with "physically filling [] the Boise River reservoirs."[17]

The Ditch Companies argue that Permit 63-34348 will reduce the quantity of water under existing water rights because "the Boise River corridor below Lucky Peak Dam acts like/benefits from a 'sponge' mechanism." *Ditch Companies' Post Hearing Brief* at 2. The Ditch Companies assert that "[t]his hydraulic mechanism is supported by flood flows charging the shallow aquifer, which shallow groundwater then discharges back to the Boise River channel as river flows decline." *Id.* The Ditch Companies further assert "[t]his mechanism prolongs river flow for the benefit of existing [natural flow] water rights, and lessens the need for irrigators to call upon their storage accounts for roughly four to five days approaching the Day of Allocation." *Id.*; Tr. Vol. V, p. 1420.

Evidence in the record suggests that Elmore County's proposed use may have some impact on "bank storage." Tr. Vol. V, pp. 1422-23.[18] However, this reduction to "bank storage"

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[17] Even if the proposed Refill 1 and Refill 2 water rights are not decreed, Idaho Code § 42-115, and a condition on Permit 63-34348 in accordance with Idaho Code § 42-115, will ensure that diversion of water pursuant to Permit 63-34348 does not interfere with physically filling the Boise River reservoirs.

[18] The Ditch Companies suggest that diversion pursuant to Permit 63-34348 will reduce "bank storage" by "approximately 1,500 AF in typical flood control years." *Ditch Companies' Post Hearing Brief* at 3. However, the "1,500 AF" estimate was the Water District 63 watermaster's estimate of the total "bank storage" benefit from "flood flows." *See* Tr. Vol. V, pp. 1419-23. Elmore County does not propose to divert all "flood flows" that occur below Anderson Ranch Dam. *See* Pet. Ex. 14 at 3 (estimating that Elmore County's proposed diversion would

does not constitute a reduction to the quantity of water under existing water rights as the Ditch Companies' assert. While the "bank storage" may "prolong river flow for the benefit of existing [natural flow] water rights," those natural flow water rights are not rights for "shallow groundwater" that is the "bank storage." Accordingly, those natural flow water rights are not authorized to divert "bank storage." *See City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (holding that recharge "must be included in the purpose of use element before a water right may be used for recharge"); *see Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 367 P.3d 193, 202-03 (2016) (holding that a water right holder was not entitled to divert from a point of diversion that "lies outside the specified point of diversion" of the partial decree for the water right). As a result, reduction to "bank storage" attributable to Permit 63-34348 is not a reduction to the quantity of water under existing water rights.

The Ditch Companies, BPBC, Riverside Irrigation District, Boise, and ICL raise a concern that Elmore County might divert water out of Anderson Ranch Reservoir when water is not being released for flood control purposes. *Ditch Companies' Post Hearing Brief* at 4; *ICL Closing Brief* at 3; *City of Boise's Post-Hearing Brief* at 21-22; *BPBC Brief* at 7-8. BPBC points to the Water District 63 watermaster's "concern that Elmore County may take water that is not actually flood control water. . . ." *BPBC Brief* at 7. BPBC and Riverside Irrigation District propose a specific condition requiring Elmore County to "mitigate for the depletion of water stored in Anderson Ranch Reservoir that occurs as a result of the diversions taking place that did not occur when water was actually released for flood control from Anderson Ranch [D]am and from Lucky Peak [D]am . . . ." *BPBC Brief* at Attachment A. Boise also proposes a specific condition that would require Elmore County "to obtain reservoir storage contracts or rent storage water in sufficient amounts to cover any out-of-priority diversion that may be determined to occur following completion of the in-arrears Water District 63 accounting." *City of Boise's Post-Hearing Brief* at 21-22.

Elmore County asserts that the concern it might divert water out of Anderson Ranch Reservoir when water is not being released for flood control purposes "is less of a concern in view of the fact that beginning next year, the Department will know every day when the system is in flood control, not days or a week in arrears." *Elmore County's Post Hearing Brief* at 10 (citing Elmore County's expert testimony at Tr. Vol. II, p. 570 "that beginning next year, the watermaster will be informing the Department any time on all days when the system is in flood control. So rather than waiting until . . . the accounting progresses a few days, the Department should know when they are in flood control at all times. The watermaster should know. So he should be able to notify us on a fairly immediate basis . . . when we can divert, and when we cannot divert.").[19] However, Elmore County agrees that "mechanisms exist" to mitigate for

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"account for approximately 5% of the average available flow volume [at Anderson Ranch Reservoir] during the diversion period."). Elmore County's reduction to "bank storage" would be a small percentage of the "1,500 AF" estimate.

[19] The Ditch Companies, BPBC, Riverside Irrigation District, Boise, ICL, and Elmore County all suggest that the potential injury to mitigate would be due to "accounting arrearage." *Elmore County's Post Hearing Brief* at 10; *Ditch Companies' Post Hearing Brief* at 4; *ICL Closing Brief* at 3; *City of Boise's Post-Hearing Brief* at 21-22; *BPBC*

such diversions. *Id.* Elmore County proposes it could release "the calculated overage from Little Camas Reservoir back into Anderson Ranch Reservoir." *Id.*; *see* Tr. Vol. II, p. 571. Elmore County also proposes it could rent water "through a rental pool rental to rent storage water to replace that." Tr. Vol. II, p. 571.

Pursuant to Water Appropriation Rule 45.01.a.iv, the hearing officer will impose a condition requiring that Elmore County mitigate its diversions out of Anderson Ranch Reservoir that occur when water is not being released for flood control purposes as authorized by Permit 63-34348. *See* IDAPA 37.03.08.045.01.a.iv. Elmore County correctly proposes that it can mitigate by releasing water from Little Camas Reservoir back into Anderson Ranch Reservoir or by renting water from the Water District 63 Rental Pool. Elmore County could also mitigate, as BPBC and Riverside Irrigation District propose, by "permanent transfer of a water right or portion of a water right." *BPBC Brief* at Attachment A.[20] Elmore County has met its burden to establish its proposed use will not "reduce the quantity of water under existing water rights." I.C. § 42-203A(5)(a).

2. Sufficiency of the water supply

Idaho Code § 42-203A(5)(b) requires that the hearing officer evaluate whether the "water supply itself is insufficient for the purpose for which it is sought to be appropriated." The Department's Water Appropriation Rule 45.01.b states:

> The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction

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Brief at 7-8. But Elmore County will only divert pursuant to Permit 63-34348 when informed by the Water District 63 watermaster that water is being released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Accordingly, the potential injury to mitigate would be due the watermaster's failure to inform Elmore County to stop diverting pursuant to Permit 63-34348 when water is no longer being released for flood control purposes. Because Elmore County will be restricted to diverting water when water is being released for flood control purposes, no mitigation will be required from Elmore County for a failure to fill due to flood control operation.

[20] The Ditch Companies assert for the first time in their post-hearing brief that "evaporative losses associated with" the Application are "injury-producing" because such "[e]vaporative losses, absent mitigation, will reduce the quantity of water otherwise available in the [SFBR] as the County diverts additional water to mask or cover those losses. . . ." *Ditch Companies' Post-Hearing Brief* at 3. Elmore County cannot divert "additional water" from the SFBR beyond what Permit 63-34348 will authorize. Evaporative losses to the "storage component of up to 10,000 AF annually stored" in Little Camas Reservoir will be borne by Elmore County, not by existing water rights downstream from Anderson Ranch Reservoir. Evaporative losses associated with Permit 63-34348 will not "reduce the quantity of water under existing water rights."

or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment.

IDAPA 37.03.08.045.01.b.

The Ditch Companies and Boise criticize Elmore County for not conducting a cost-benefit analysis "demonstrating that the direct benefits of the project exceed the County's direct costs." *Ditch Companies' Post Hearing Brief* at 5; *City of Boise's Post-Hearing Brief* at 6-7. However, Water Appropriation Rule 45.01.b does not require that an applicant conduct a cost-benefit analysis to establish the water supply is sufficient for the proposed use. Rather, the Rule specifies one avenue an applicant, or person in opposition to an application, may pursue to establish that the water supply is either sufficient or insufficient for the proposed use. If the evidence in the record establishes that "water is not available for an adequate time interval in quantities sufficient to make the project economically feasible," the applicant can present evidence of noneconomic factors that could justify application approval. At that point, the Department must also "consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment."

The Ditch Companies and Boise assert that Elmore County's proposed project is not "economically feasible." This assertion is based on estimated costs of Elmore County's proposed project and resulting estimated water delivery costs to individual farmers in "the Elmore County area" per acre-foot of water. *City of Boise's Post-Hearing Brief* at 7-8; *Ditch Companies' Post Hearing Brief* at 6-7. In short, the Ditch Companies and Boise argue that farmers would have to pay approximately $300 to $400 per acre-foot to receive water for irrigation pursuant to the Application; farmers cannot afford that cost; and therefore, the project is not economically feasible. *Id.*

The Ditch Companies' and Boise's argument assumes that individual farmers will bear the entire cost of the project and ignores that Elmore County "has the taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue the project construction in accordance with the construction schedule." IDAPA 37.03.08.045.01.d; *see Elmore County's Post-Hearing Brief* at 16. Elmore County Commissioners who testified at the hearing acknowledged the County's taxing and bonding authority and the role it will play in funding the proposed project. Tr. Vol. I, p. 64 (Commissioner Corbus testifying concerning the expense of the proposed project that "the citizens of Elmore County know and understand that's a hurdle to come, and we'll have to deal with it."); Tr. Vol. I, p. 214 (Commissioner Wooten explaining that to fund the project the County would pursue grants in addition to utilizing taxing and bonding authority); Tr. Vol. II, pp. 352-53 (Commissioner Hofer stating the county has bonding authority to fund the project). The Ditch Companies and Boise have not established that individual farmers will bear the entire cost of Elmore County's proposed project such that "water is not available for an adequate time interval in quantities sufficient to

make the project economically feasible." Accordingly, it is not necessary for the hearing officer to address whether noneconomic factors could justify application approval.

As stated above, the Application only seeks to divert water from the SFBR when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Elmore County's Water Availability Analysis demonstrates "there is a volume available for appropriation" in nine of the last twenty years (1999-2018). Tr. Vol. II, p. 567; *Water Availability Analysis* at 1; *Id.* at 5, Table 1. Elmore County's expert testified that the water supply is sufficient for the proposed "recharge" and "supplemental irrigation" uses. Tr. Vol. II, pp. 565-66. Boise's expert and the Ditch Companies' expert agree that water is available for Elmore County's proposed use. Tr. Vol. IV, pp. 1060-67; Tr. Vol. VI, pp. 1575-76; DC Ex. 34 at Table 1. Elmore County has met its burden to establish that the water supply is sufficient for the purposes for which Elmore County seeks to appropriate it.

3. Application filed in good faith or for delay or speculative purposes

Idaho Code § 42-203A(5)(c) requires that the hearing officer evaluate whether "it appears" that the Application "is not made in good faith, is made for delay or speculative purposes." The Department's Water Appropriation Rule 45.01.c states:

> The criteria requiring that the [Department] evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of applications requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project.

Rule 45.01.c also states:

> An application will be found to have been made in good faith if:
>
> i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
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> ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c.

Rule 45.01.c further states: "Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence."

The Ditch Companies assert the Application "lacks good faith" because Elmore County does not have "necessary land use entitlements." *Ditch Companies' Post Hearing Brief* at 11. The Ditch Companies acknowledge that Elmore County has "filed diversion point and pipeline right-of-way applications with the United States." *Id.* The Ditch Companies acknowledge that Elmore County has "binding legal entitlement . . . located in and around the existing recharge gravel pits" that were "obtained in connection with the licensing of formerly lapsed Permit No. 61-7731." *Id.* at 12.

The Ditch Companies criticize Elmore County for not yet pursuing agreements with all of the "private landowners . . . who own lands across which the County will need access." *Id.* The Ditch Companies acknowledge that Elmore County will rely upon MHID's system to cross various private lands. *Id.* Indeed, MHID has agreed to allow Elmore County to use its "system to convey water to the Mountain Home area for recharge" and to deliver supplemental irrigation water to MHID "patrons." Tr. Vol. II, p. 417; Tr. Vol. II, p. 427 (MHID board member testifying MHID "is committed and willing to allow utilization of its facilities for Elmore County's project."); *see* Pet. Ex. 23. However, the Ditch Companies assert that Elmore County's intent to rely on MHID's system to cross the various private lands "is legally infirm." *Ditch Companies' Post Hearing Brief* at 12.

Because Elmore County "has the authority to exercise eminent domain authority," Elmore County also has "legal access to the [private] property necessary to construct and operate the proposed project." IDAPA 37.03.08.045.01.c.i. The Ditch Companies acknowledge that Elmore County "possesses eminent domain authority," but argue Elmore County has not undertaken eminent domain "proceedings in furtherance of that authority as required under Rule 40.05.e." *Ditch Companies' Post Hearing Brief* at 13. The Department's Water Appropriation Rule 40.05.e does not require that Elmore County exercise its eminent domain authority prior to obtaining a permit. Rather, Rule 40.05.e requires that, if the applicant can obtain a possessory interest in lands necessary for project facilities and the place of use via eminent domain proceedings, the applicant "must show that appropriate actions are being taken to obtain the interest." IDAPA 37.03.08.040.05.e.i. Elmore County passed a motion to "take any actions deemed legally required under Idaho law to use the easements and rights of way of the [MHID] crossing privately owned real property, including eminent domain procedures, in order to divert, convey, store, deliver and use water under a permit of license

approved under [the Application]." Pet. Ex. 25 at EC 14323. Elmore County has taken appropriate actions to obtain a possessory interest in private property necessary for the proposed project.[21]

The Ditch Companies also criticize Elmore County for not contacting "the State of Idaho for land use authorization purposes," as portions of MHID's delivery system and reservoirs appear to reside on state land. *Ditch Companies' Post Hearing Brief* at 12. But Elmore County is statutorily authorized to use Long Tom Creek and Canyon Creek to convey water across State land as proposed. *See* I.C. § 42-105. Accordingly, Elmore County does not need authorization from the State of Idaho to convey water in Long Tom Creek and Canyon Creek.

Regarding the possible location of portions of Little Camas Reservoir and Long Tom Reservoir on state lands, the BLM exhibit maps depict the reservoirs residing at least partially on state lands (BLM Ex. 1 at 3, 5). While the Mountain Home Co-Operative Company acquired much of the historic state land underlying the reservoirs in fee simple in 1913[22], it is not clear if it acquired all underlying state land in fee simple. Further complicating the matter, the Department's digital tax parcel spatial data layer received from Elmore County does not agree with BLM Exhibit 1, and depicts different portions of Little Camas Reservoir overlying state land.[23] The record is not sufficiently clear to determine whether Little Camas Reservoir and Long Tom Reservoir partially reside on state land and to what extent. Accordingly, the permit should be conditioned to require Elmore County to obtain authorization from the State of Idaho to use state lands underlying Little Camas Reservoir and Long Tom Reservoir. Proof of such authorization, or proof of the Idaho Department of Land's concurrence that such authorization is not necessary because the reservoirs do not reside on state land, shall be submitted to the Department prior to the diversion of water under this permit.

The Ditch Companies assert that the capacity of the "MHID canal system upstream of the divide between the Boise River Basin and the Mountain Home plateau is a 'constraint' impacting the County's project." *Ditch Companies' Post Hearing Brief* at 13-14. The Ditch

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[21] The Ditch Companies refer to the hearing officer's *Preliminary Order Rejecting Permit No. 37-22682* (Oct. 6, 2015), presumably to support a contention that the hearing officer should reject the Application because Elmore County has not yet secured agreements with all of the "private landowners . . . who own lands across which the County will need access." *Ditch Companies' Post Hearing Brief* at 12. That matter is distinguishable. The applicant for Permit 37-22862 presented no evidence demonstrating access to the points of diversion necessary to operate the proposed project, no evidence of authority from landowners adjacent to or near the Hiawatha Canal approving off-canal recharge activities, no evidence demonstrating legal access to lands over which ditches would have to be pioneered to convey water, and did not have authority to exercise eminent domain.

[22] Idaho Department of Lands website at https://gis1.idl.idaho.gov/dlr/, search for Little Camas Reservoir (T01S, R09E, S16) and Long Tom Reservoir (T01S, R07E, S36).

[23] Elmore County Parcel information: Shapefile, Assessor Parcel Data[digital]. Mountain Home: Elmore County Assessor's Office, June 18, 2018.

Companies also assert that Elmore County has not established an "operational plan demonstrating how" its water will be delivered through MHID's facilities "during the irrigation season and the irrigation facility maintenance season." *Id.* at 15. Boise similarly asserts there is uncertainty as to "the availability of conveyance and storage capacity in the system . . . to convey any water diverted under this Application to its intended place of use." *City of Boise's Post-Hearing Brief* at 10.[24]

As discussed above, Elmore County's expert testified that the MHID "facilities, particularly the canal [and] the tunnel system between Little Camas and Long Tom divide" are "not adequate to convey 200 cfs." Tr. Vol. III, p. 711. Elmore County's expert further testified that the facilities can convey "[s]omewhere between 50 and 100" cfs. *Id.*; *see* Tr. Vol. III, pp. 672-63. Accordingly, the hearing officer will limit Permit 63-34348 to a combined diversion rate of 100 cfs for ground water recharge and irrigation. While this may constrain Elmore County's proposed use, such constraint does not equate to an obvious impediment that will "prevent the successful completion of the project." IDAPA 37.03.08.045.01.c.iii.

Similarly, while Elmore County has not precisely established what quantities of water for its proposed uses will flow through MHID's facilities, MHID has agreed to allow Elmore County to use its "system to convey water to the Mountain Home area for recharge" and to deliver supplemental irrigation water to MHID "patrons." Tr. Vol. II, p. 417; Tr. Vol. II, p. 427 (MHID board member testifying MHID "is committed and willing to allow utilization of its facilities for Elmore County's project."); *see* Pet. Ex. 23. Mr. Ascuena testified at the hearing that MHID will operate Little Camas Reservoir, Long Tom Reservoir, and Mountain Home Reservoir as well as MHID's "ditch system" to accommodate Elmore County's proposed use. Tr. Vol. II, pp. 442-51, 459, 464-65. Mr. Ascuena also testified there is capacity "in our reservoirs" and "available capacity" in "the tunnel and the canals" for Elmore County's proposed use. Tr. Vol. II, pp. 450-51, 459, 494-97. The conveyance and storage capacity in MHID system is not an obvious impediment that will "prevent the successful completion of the project." IDAPA 37.03.08.045.01.c.iii.

Elmore County asserts the Application "was made in good faith, and not for delay or speculative purposes." *Elmore County's Post Hearing Brief* at 14. Elmore County asserts that its pursuit of "the Application involved years of public outreach, the evaluation of local water conditions and options, and pursuit and development of agreements with critical stakeholders and partners." *Id.*

The record establishes that Elmore County has obtained support for the Application from the Mountain Home Mayor, the Mountain Home Chamber of Commerce, the Rotary Club

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[24] Boise also asserts "no analysis or groundwater modeling has been completed to show whether it will be effective in recharging the aquifer." *Id.* at 11. However, in 2017, both SPF Water Engineering, LLC, and the Department evaluated the ability of the recharge pits proposed as the place of use for the Application to "handle the recharge." Tr. Vol. II, pp. 528-34. Elmore County's expert testified these evaluations support "a conclusion that there is a beneficial effect to ground water levels from the aquifer recharge activities." Tr. Vol. II, p. 533.

of Elmore County, and the Mountain Home Irrigation District. *See* Pet. Ex. 16; Tr. Vol. II, pp. 414-27. Further, at least as early as 2015, Elmore County hired SPF Water Engineering, LLC ("SPF") to investigate potential options for importing water "to the Mountain Home area for recharge of the local aquifer" to "support existing and future water supply needs in the vicinity of Mountain Home." Pet. Ex. 5 at EC 1954. In 2017, SPF prepared another report for Elmore County to "explore possible sources of additional supply" to address concerns that "water supplies are insufficient to support existing uses and future development" in the Mountain Home Plateau and "curtailment of groundwater rights will result in substantial impacts to the local economy." Pet. Ex. 9 at p.i. One of the alternatives considered in this report is the project proposed by the Application. *Id.* at 75-76. Elmore County filed the Application in 2017 and hired SPF in 2018 to prepare a "Flood Water Availability Analysis for Application 63-34348" (Pet. Ex. 14). Elmore County also hired an "agricultural and resource economist" in 2018 to prepare a report addressing whether the Application will "adversely affect the economy of the Boise River basin." Pet. Ex. 12. Elmore County has pursued agreements with private landowners and MHID and has filed applications with federal entities to secure access necessary for Elmore County's proposed use. Tr. Vol. I, pp. 44-74; Pet. Exs. 19, 20, 21, 22, 23. Elmore County also passed a motion to "take any actions deemed legally required under Idaho law to use the easements and rights of way of the [MHID] crossing privately owned real property, including eminent domain procedures, in order to divert, convey, store, deliver and use water under a permit of license approved under [the Application]." Pet. Ex. 25 at EC 14323. Elmore County asserts these actions "demonstrate good faith." *Elmore County's Post Hearing Brief* at 14. Based on Elmore County's substantive actions in pursuit of the Application, the hearing officer is satisfied that the Application is "made in good faith" and not "for delay or speculative purposes." Idaho Code § 42-203A(5)(c).

4. Sufficiency of the applicant's financial resources

Idaho Code § 42-203A(5)(d) requires that the hearing officer evaluate whether the applicant "has sufficient financial resources with which to complete the work involved." The Department's Water Appropriation Rule 45.01.d sets forth "[c]riteria for determining whether that applicant has sufficient financial resources to complete the project." IDAPA 37.03.08.045.01.d. The Rule states: "A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule." IDAPA 37.03.08.045.01.d.ii. Elmore County has such authority. *See* I.C. §§ 31-604, 811, 877, 1901 *et seq.*; *see* I.C. §§ 57-201 *et seq.* Elmore County "has sufficient resources to complete the project." IDAPA 37.03.08.045.01.d.

5. Conflict with the local public interest

Idaho Code § 42-203A(5)(e) requires that the hearing officer evaluate whether Elmore County's proposed use "will conflict with the local public interest as defined in section 42-202B, Idaho Code." Idaho Code § 42-202B(3) defines "local public interest" as "the interests that the

people in the area directly affected by a proposed water use have in the effects of such water use on the public water resource."

Elmore County asserts the Department should only focus on the interests of Elmore County in its analysis of Idaho Code § 42-203A(5)(e) because Idaho Code § 42-203A(5)(g) "states what the Director must consider related to the concerns of non-local areas such as the Treasure Valley. Otherwise, that provision of Idaho Code Section 42-203A(5) has no independent meaning and is rendered 'mere surplusage.'" *Elmore County's Post Hearing Brief* at 17.

Elmore County's reading of Idaho Code § 42-203A(5)(e) is too narrow. The definition of local public interest requires the hearing officer to evaluate "the interests that the people in the area directly affected by a proposed water use have in the effects of such water use on the public water resource." I.C. § 42-202B(3). The protestants have participated in this matter to raise concerns about the effects Elmore County's proposed water use could have on the public water resource in Basin 63. Those concerns are appropriate to consider pursuant to Idaho Code § 42-203A(5)(e). In contrast, Idaho Code § 42-203A(5)(g) requires the hearing officer to evaluate whether Elmore County's proposed use will "adversely affect the local economy" of Basin 63, which is distinct from the protestants' interest "in the effects of such water use on the public water resource."

BPBC and Riverside Irrigation District assert that, "[t]o the extent that taking Boise River water out-of-basin would adversely affect the water supplies for the reservoirs, doing so would also violate the local public interest." *BPBC Brief* at 4. As previously discussed, the following factors will ensure Permit 63-34348 does not reduce the quantity of water under existing Boise River reservoir storage water rights or interfere with the physical filling of the Boise River reservoirs: 1) the Water District 63 watermaster's distribution of water rights in accordance with the prior appropriation doctrine as required by Idaho Code § 42-602; 2) the decree of the "Refill 1 and Refill 2" water rights; and 3) the conditioning of the permit in accordance with Idaho Code § 42-115.

BPBC and Riverside Irrigation District assert "the Department should condition any permit so as to protect the reservoir fill of the contemplated Anderson Ranch raise" to "protect the local public interest of the water users in the Boise River basin . . . ." *BPBC Brief* at 9. Elmore County's expert testified that, "if they raise Anderson as proposed to create 29,000 acre-feet of storage, it would have filled in every one of those years [that historically Elmore County would have been able to divert]." Tr. Vol. II, p. 576. Elmore County's expert report estimates that, in years water would have been available for Elmore County to divert, over 100,000 AF was available "at Anderson." Pet. Ex. 14 at 5, Table 1. Elmore County's proposed use will not interfere with the contemplated "Anderson Ranch raise."[25]

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[25] Elmore County's expert also testified that, while Elmore County considered subordinating its water use pursuant to Permit 63-34348 to "storage developed by the [BOR]," such subordination would not be "useful for Elmore

BPBC, Riverside Irrigation District, and ICL assert that Permit 63-34348 should be conditioned to maintain "operational flows" that occur via "agreement between the [Bureau of Reclamation ("BOR")] and the [Idaho Fish and Game ("IDFG")]" in the SFBR below Anderson Ranch Reservoir and "[w]intertime flows of 240 cfs in the Boise River downstream of Lucky Peak." *ICL Closing Brief* at 6; *see BPBC Brief* at 10, Attachment A.

IDFG submitted a letter "in response to a request from [SPF], acting on behalf of [Elmore County], for comment . . . regarding the effects of construction and operation of" Elmore County's proposed water use. ICL Ex. 7. In the letter, IDFG described that "[c]urrent discharge rates [from Anderson Ranch Reservoir] target minimally 300 cfs" from September 16 to March 31, and 600 cfs from April 1 to September 15, "to support fish habitat and to benefit rainbow trout spawning." *Id.* at 14.

Public witness testimony at the hearing reflects the local public interest in maintaining flows in the Boise River and in the SFBR below Anderson Ranch Dam. Allison Olson testified:

> [The Application] is concerning to me, because there are a lot of recreaters, like myself, and a whole bunch of others, who come to Boise specifically to recreate on our pristine wild rivers. And there are also species of fish, and of ecosystems and habitats that rely on a certain amount of water flying—or flowing—through the Boise River—sometimes flying. So something that would really help me with this water right if it were to be approved is some conditions that would protect the instream flows in the Boise River. So that the current recreaters, the future generations, the future users of this water, the current species of fish, and the hopeful future species of fish will be able to use this water as we have used it, and enjoyed it for many, many years prior.

Tr. Vol. VI, pp. 1699-1700. Richard Prange testified:

> The river is considered a blue ribbon and is nationally recognized as such. It has excellent water quality, a reliable and protected flow regime, and habitat ingredients to provide for a healthy trout fishery. The South Fork downstream of Anderson Ranch Dam is undoubtedly the most popular fly fishing destination in southwest Idaho.

Tr. Vol. VI, p. 1711.

County" because it would shorten "our length of time to pump." Tr. Vol. II, pp. 576-78. Further, "that future storage, would still have adequate time to fill, because they are not diverting out of the river. They are just taking everything that's coming by." Tr. Vol. II, p. 578. For these additional reasons, it would not be reasonable to subordinate Permit 63-34348 to storage created by the contemplated Anderson Ranch Dam raise.

In his water availability analysis, Elmore County's expert accounted for the [BOR] policy to try to "maintain a 600 cfs minimum flow in the [SFBR] downstream of Anderson Ranch Dam during the irrigation season" and "300 cfs in the winter." Pet. Ex. 14 at 2; Tr. Vol. II, p. 556. Elmore County's expert testified that Elmore County has no "desire to deplete those [minimum] flows." Tr. Vol. III, p. 620. Elmore County's expert even testified that "the intent" of the Applicant "is not to divert flood flows under 200 cfs." Tr. Vol. III, p. 645. Therefore, the Applicant would agree to "never divert water if there was less than 200 cfs available above minimum flows [of 600 cfs] occurring." Tr. Vol. III, p. 644. In other words, the Applicant "would not turn on, unless [flow past Anderson Ranch Dam] was over 800 actual flow." *Id.* In his water availability analysis, Elmore County's expert also accounted for the 240 cfs "minimum operational river flow" in the Boise River near Middleton. Pet. Ex. 14 at 4. Further Elmore County's expert testified that Elmore County did not "have any discomfort with" the Department's Standard Condition 907, which defines when the diversion of flood releases may occur. Tr. Vol. III, p. 809. Consistent with Elmore County's expert testimony, the hearing office will impose conditions on Permit 63-34348 limiting diversion to times when 800 cfs of water or more is being released from the Anderson Ranch Reservoir for flood control purposes.

ICL asserts the IDFG letter "indicates that" the "600/300 cfs operational flows are not enough to maintain long-term river health, and thus, fishery health" and "period flows greater than 2400 cfs for more than 8 days in a row are the ***minimum*** needed to maintain the river and fishery." *ICL Closing Brief* at 7 (emphasis in original).[26] ICL asks the hearing officer to impose such a condition on Permit 63-34348.[27] *Id.* at 7-8.

The IDFG letter states that "the high flow events required to maintain instream habitat and riparian dynamics are likely in excess of 2400 cfs. Based on the analyses presented here, we regard 2400 cfs for > 8 days to be a minimal flow required to maintain stream channel substrates required by trout." ICL Ex. 7 at 16. But Elmore County cannot control how the "dam operators" operate the Boise Reservoir system to "shape" flood releases. Tr. Vol. III, pp. 622-23. As such, it would not be reasonable to condition Permit 63-34348 to require that Elmore County ensure that "period flows greater than 2400 cfs" happen for "more than 8 days in a row." As Elmore County's expert testified: "If [the dam operators" have to take [flows] up to

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[26] Public witness testimony also addressed "periodic flows." Brian Brooks testified: "I learned to fly fish on the South Fork to read moving water. . . . I've commuted, and rafted, and drift boated on that river. . . . And I think that there [are] thousands of Idahoans who have those same experiences, which indicates how valuable of an economic asset that the South Fork is, and how important it is that we maintain [the] conditions [of] that river for periodic flows, high flows so the fish—and remains a world class fishery." Tr. Vol. VI, p. 1691.

[27] ICL also asserts the hearing officer should deny the Application because of the "dangerous direction it takes Idaho water management by authorizing new inter-basin transfers." *ICL Closing Brief* at 4. However, as Elmore County's expert testified, and ICL acknowledges, other inter-basin transfers have occurred in Basin 65, Basin 63, and Basin 02, specifically Black Canyon Irrigation District, MHID, Big Bend Irrigation District, and Farmers Co-op. Tr. Vol. III, p. 786. ICL's arguments that such inter-basin transfers are distinguishable from the Application, and therefore approval of the Application will set dangerous precedent, are not compelling. Further, Idaho Code § 42-203A(5)(g) specifically contemplates that such inter-basin transfers can be approved.

3,000 or 3,500 to get [] whatever deemed necessary for flushing, there ought to be a way to do that." Tr. Vol. III, p. 630; *see* Tr. Vol. III, p. 623 (Elmore County's expert stating "if they need to get up to a certain flow for scour, or annual channel maintenance, what have you, they have some flexibility to do that.").

Boise asserts "[t]he Hearing Officer should condition the water permit, if granted, to only allow the Applicant to divert when a minimum of four thousand (4,000) cfs is being released for flood control purposes" to "help ensure that the effects on the flows in the SFBR are minimal." *City of Boise's Post-Hearing Brief* at 12-15. Boise's 4,000 cfs limit is based on Elmore County's estimation that its "proposed diversion of 200 cfs . . . would only account for approximately 5% of the average available flow volume during the diversion period." *Id.* at 12; *see* Pet. Ex. 14 at 3. In other words, Boise asserts that, to ensure Elmore County's diversions are equal to or less than 5% of the available flows, the hearing officer should condition Permit 63-34348 to limit diversion from the SFBR to times when flows below Anderson Ranch Dam equal or exceed 4,000 cfs.

Nothing in the record establishes that Boise's requested limit is necessary to "ensure that the effects on the flows in the SFBR are minimal." Rather, as discussed above, the record establishes the importance of maintaining operational flow targets of 300 cfs and 600 cfs on the SFBR agreed to by BOR and IDFG. Elmore County has agreed not to interfere with these operational flows, and then some—Elmore County will not even divert "unless [flow past Anderson Ranch Dam] was over 800 [cfs] actual flow." Tr. Vol. III, p. 644. These limitations help ensure that Elmore County's proposed use does not conflict with the local public interest.

Boise asserts the Application conflicts with the local public interest because Elmore County "has other more reliable, cost effective, remedies available." *City of Boise's Post-Hearing Brief* at 8. Specifically, Boise asserts that: 1) Elmore County's pending "Snake River Application has the potential to deliver 14,000 [AF] annually to the Mountain Home Area," the "place of use for the recharge" proposed by the Application, so the Application is not necessary to address "the [7,000 AF] deficit in the proposed place of use," and 2) Mountain Home is pursuing "conservation measures . . . to reduce water consumption and mitigate the pumping deficit it is experiencing." *Id.* at 8-9.

The fact that Elmore County has a pending application for water from the Snake River does not mean that such application will be approved, nor does it mean that Elmore County can rely at this time upon water pursuant to that application to resolve the pumping deficit in the "Mountain Home Area." Further, the fact that Mountain Home is pursuing conservation measures to help mitigate the pumping deficit does not render the Application in conflict with the local public interest. While Mountain Home's conservation measures may help reduce the pumping deficit, no evidence in the record quantifies the benefit of those conservations measures such that the hearing officer can conclude the Application is, therefore, unnecessary.

Boise asserts Permit 63-34348 should be subordinate to "future in Basin 63 uses" because "less flow in the Boise River means more stringent water quality standards for [Boise] and others who hold National Pollutant Discharge Elimination System (NPDES) permits and discharge into the Boise River." *City of Boise's Post-Hearing Brief* at 15. ICL asserts the hearing officer should impose a condition "to protect necessary flow targets for all the Clean Water Act discharge permits on the Boise River system." *ICL Closing Brief* at 8.

Those who hold NPDES permits and discharge into the Boise River are responsible for taking actions to ensure the conditions of their NPDES permits are satisfied. As discussed herein, Elmore County proposes to divert a small percentage of unappropriated floodwater from Anderson Ranch Reservoir that otherwise flows out of the Boise River basin. Elmore County has also agreed to a condition that will maintain operational river flows in the Boise River below the Lucky Peak Dam. If NPDES permit holders require additional flows to satisfy permit conditions, those permit holders have other remedies to secure the water necessary to meet the conditions of their NPES permits.[28] It is not necessary to condition Permit 63-34348 as Boise and ICL request to ensure the Application does not conflict with the local public interest.

The Ditch Companies assert the Application conflicts with the local public interest because Elmore County did not "perform" environmental studies. *Ditch Companies' Post Hearing Brief* at 17, n.29, 18. As discussed above, Elmore County has agreed to, and the hearing officer will impose, conditions on Permit 63-34348 to protect operational flows in the SFBR below Anderson Ranch Reservoir and the Boise River below Lucky Peak Reservoir. The operational flows on the SFBR are agreed to by IDFG and BOR "to support fish habitat and to benefit rainbow trout spawning." ICL Ex. 7 at 14. In addition, Elmore County's expert acknowledged that Elmore County will "have to comply with" requirements "identified during the NEPA process." Tr. Vol. III, p. 628. Consistent with BLM and Elmore County's *Settlement Agreement*, Permit 63-34348 will include a condition that Elmore County cannot divert water until it obtains necessary "authorizations from United States agencies." These conditions will help ensure that diversion pursuant to Permit 63-34348 will not conflict with the local public interest.

Elmore County asserts its proposed use is not in conflict with the local public interest because: 1) "there is resounding public support for the project," 2) "the ability to begin to meaningfully resolve long-standing annual deficits in the local aquifer and provide more irrigation will in turn positively impact the local economy, which is heavily reliant upon agriculture," 3) "[t]he project will begin to stabilize the water supplies of the City of Mountain Home," and 4) "[r]ecreational opportunities at Little Camas Reservoir and Mountain Home Reservoir, as well as the economic benefits related thereto, will also be improved by the proposed influx of flood flows that are otherwise leaving the state of Idaho." *Elmore County's*

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[28] Possible remedies include, but are not limited to, filing a new water right application, renting storage water from the WD63 rental pool, or petitioning the Idaho Water Resource Board to establish a minimum stream flow.

Post Hearing Brief at 17-18. Elmore County also points "to the State Water Plan relative to the Snake River for guidance on matters of local public interest" and notes "that the Application involves the development of new aquifer storage, ensuring the availability of water for future DCMI uses in the Snake River Basin, and developing supplemental water supplies to sustain existing agricultural development." *Id.* at 18. Elmore County asserts "such factor supports a finding that the Application is in the local public interest." *Id.*

Indeed, as discussed above, the record establishes that Elmore County has obtained support for the Application from the Mountain Home Mayor, the Mountain Home Chamber of Commerce, the Rotary Club of Elmore County, and the Mountain Home Irrigation District. *See* Pet. Ex. 16; Tr. Vol. II, pp. 414-27. Further, at least as early as 2015, Elmore County hired SPF to investigate potential options for importing water "to the Mountain Home area for recharge of the local aquifer." Pet. Ex. 5 at EC 1954. In 2017, SPF prepared another report for Elmore County to "explore possible sources of additional supply" because "[g]roundwater pumping in portions of the Mountain Home Plateau in Elmore County has resulted in chronic water-level declines." Pet. Ex. 9 at p.i. One of the alternatives considered in this report is the project proposed by the Application. *Id.* at 75-76. Public witnesses who testified at the hearing emphasized the importance of the Application's ground water recharge purpose. Senator Bert Bracket stated: "Water is badly needed in Elmore County as the Mountain Home aquifer is declining approximately two feet per year. Future viability of the City of Mountain Home and the surrounding area is at risk without additional water." Tr. Vol. VI, p. 1721. Representative Christy Zito testified: [The Application] is not taking water from any prior use, from any prior water rights. It's simply overflow flood waters that would be used to help recharge the aquifer in Elmore County. And I'm just here to support that." Tr. Vol. VI, p. 1739.

A majority of the evidence presented at the hearing supports that Elmore County is pursuing Permit 63-34348 primarily to address these "chronic water-level declines" via ground water recharge. As Elmore County's post-hearing brief emphasizes, Permit 63-34348 is intended to "begin to meaningfully resolve long-standing annual deficits in the local aquifer" and "begin to stabilize the water supplies of the City of Mountain Home." *Elmore County's Post Hearing Brief* at 17. However, the Ditch Companies assert "the dominant purpose of the Application is to supply additional irrigation water to MHID patrons in hopes that they can grow more and higher income-yield commodities . . . as evidenced by the clearly superior position of MHID and its interests in this matter under the existing [*Letter of Intent to Negotiate Water Agreement with Elmore County* ("Letter of Intent")] and Ascuena's candid testimony." *Ditch Companies' Post Hearing Brief* at 10-11.

The Letter of Intent includes some "basic terms that would form the 'back-bone' of such an Agreement." Pet. Ex. 23 at 1. One term is that "MHID agrees to allow Elmore County to use MHID's water conveyance facilities to deliver water to authorized places of use under any new water right obtained from the [SFBR] by Elmore County, pursuant to such limitations and operational restrictions determined by the MHID, at its sole discretion." *Id.* at 2. Ascuena described the Agreement as follows: "We will allow Elmore County to use our system to

convey water to the Mountain Home area for recharge. With the stipulation is, that in the action thereof, we won't accept any liabilities for their part of the system. We will be the only ones to manipulate our system, open headgates, close headgates, that whole thing. We operate our equipment. That's it." Tr. Vol. II, p. 417. Ascuena also testified that, in return, it is his "understanding that the district membership, or the district patrons, are going to receive supplemental irrigation." *Id.* Ascuena testified "there is maybe seven out of ten years we do not get our full irrigation allotment, we're short of. Supplement up to that full allotment. Once we get our full allotment, if there is more than that, then the County could use their gravel pits for recharge." *Id.* The Ditch Companies point to this testimony to support their contention that "MHID is going to get its full allotment before the County sees a drop of water." *Ditch Companies' Post Hearing Brief* at 10-11, 11 n.14. However, Ascuena testified his understanding is that "[t]he main purpose of the [A]pplication is for ground water recharge." Tr. Vol. II, p. 415.

While a majority of the evidence presented at the hearing supports that Elmore County is pursuing Permit 63-34348 for the main purpose of ground water recharge to begin to address chronic water level declines in the Mountain Home area, the evidence also suggests a possibility that water diverted pursuant to Permit 63-34348 may only be delivered for "supplemental irrigation" to MHID patrons. It would conflict with the local public interest to approve Permit 63-34348 without proper conditioning to ensure that ground water recharge will occur pursuant to the Permit consistent with the intent of the Application. Accordingly, the hearing officer will condition Permit 63-34348 to ensure that, in any given year, at least 50% of the water diverted pursuant to the Permit is delivered for ground water recharge.[29]

6. Contrary to conservation of water resources

Idaho Code § 42-203A(5)(f) requires that the Department determine whether the Application is "contrary to the conservation of water resources within the state of Idaho."

Elmore County asserts its proposed use is not contrary to the conservation of water resources within Idaho because the Application "proposes the diversion of flood flows that currently flow out of the state of Idaho." *Elmore County's Post Hearing Brief* at 19. Elmore County asserts that "diverting unappropriated flood flows (otherwise bound to flow out of the state) for the purpose of supplemental irrigation and aquifer recharge ***within*** the State of Idaho is . . . consistent with the conservation of water resources." *Id.* at 19-20 (emphasis in original).

The Ditch Companies assert that Elmore County's proposed use "is inconsistent with the conservation of water resources" because it will "export water" available as a result of "periodic flood flows" from "a high population, high growth, and high need area to one of much smaller population growth potential" where there is "comparatively little need (north Mountain

[29] To ensure proper administration of Permit 63-34348, the hearing officer will also include a condition requiring Elmore County to install measurement devices and report diversions so that Elmore County can demonstrate at the time of licensing that, in any given year, at least 50% of beneficial use was for ground water recharge.

Home groundwater supplies are largely stable and resilient)." *Ditch Companies' Post Hearing Brief* at 19-20. The hearing officer disagrees. Elmore County proposes to divert a small portion of unappropriated "flood flows that currently flow out of the state of Idaho," the rest of which is available for others, including those in Basin 63, to seek to appropriate through the application for permit process. Further, the evidence in the record contradicts the Ditch Companies' assertion that Elmore County's proposed use will only benefit "north Mountain Home groundwater supplies." Elmore County's expert testified that "ground water contour maps show waters flowing generally north to south, from [the proposed] area of recharge, down south beneath Mountain Home. So I think that any water you can put into the aquifer north of Mountain Home eventually gets into the aquifer beneath Mountain Home. . . . I think our benefit will flow south." Tr. Vol. II, pp. 582-84.

The hearing officer agrees with Elmore County that its proposal to divert water that is otherwise leaving the state of Idaho and apply that water to beneficial uses within Idaho is consistent with the conservation of water resources within Idaho. The Applicant has met its burden to demonstrate its proposed use is not contrary to the conservation of water resources within Idaho.

7. Adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates

Idaho Code § 42-203A(5)(g) requires that where, as in this case, "the place of use is outside the watershed or local area where the source of water originates," [30] the Department must consider whether the application "will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates."[31]

Elmore County asserts the Application will not adversely affect the Treasure Valley's local economy. *Elmore County's Post Hearing Brief* at 20. Elmore County asserts that its expert's water availability analysis demonstrates: 1) there are "substantial unappropriated flood flows in the Boise River system on certain good water years," 2) the "comparatively nominal diversion in priority under the proposed permit" will have "nominal impact on water flowing in the system during such years," and 3) its proposed use will not adversely impact "potential storage in the Boise River reservoir system" or operational flows in the SFBR or Boise River. *Id.* Indeed, Elmore County's expert concluded that Elmore County's proposed diversion "would only account for approximately 5% of the average available flow volume [past the Anderson Ranch Reservoir gage] during the diversion period." Pet. Ex. 14 at 3. Elmore County's proposed use would reduce "the volume of water available for subsequent new appropriations from the Boise River at Glenwood Bridge by approximately 2%." *Id.* at 1. On years water would

[30] Elmore County's expert testified that Elmore County's proposed use is "an interbasin transfer, [both] in terms of administrative basins, and in terms of hydrologic reasons." Tr. Vol. III, p. 798.

[31] Elmore County retained an expert agricultural and resource economist to address Idaho Code § 42-203A(5)(g).

have been available for Elmore County to divert as proposed, the volume available "at Anderson" were between 100,000 AF and 800,000 AF. *Id.* at 5, Table 1. Elmore County has also agreed to, and the hearing officer will impose, conditions on Permit 63-34348 to protect operational flows on the Boise River as well as operational flows on the SFBR below Anderson Ranch Dam.

Elmore County's expert agricultural and resource economist evaluated whether Elmore County's proposed use will "adversely affect the economy of the Boise River basin." Pet. Ex. 12 at 1; Tr. Vol. III, p. 817. Elmore County's expert reviewed the "economic profile" of Ada and Canyon Counties as well as irrigated agriculture in the Treasure Valley. *Id.* at 3-5. Elmore County's expert noted that the Application proposes to "utilize only floodwater that would otherwise be lost from the Boise River basin" and that Elmore County's proposed diversion "would reduce the availability of water for future appropriations by only 2 percent." *Id.* at 4-5. Elmore County's expert also analyzed the municipal water supply for the Treasure Valley with respect to existing use and future demand. *Id.* at 5-6. Elmore County's expert concluded that approval of the Application "will not adversely affect the economy of the Boise River Basin." *Id.* at 7-8.

The Ditch Companies criticize Elmore County's expert for not analyzing: 1) "the economic impacts of the loss of water in Basin 63 for existing hydro-electric facilities;" 2) "the economic impacts of the loss of water for recreational and fishery opportunities provided by instream or operational flows;" 3) "the economic impacts of the loss of flows on water quality requirements for NPDES permits, including those of the City of Boise;" 4) "the current or future municipal needs for any of the municipalities other than Suez's service area;" 5) "the fact that the [BOR] is currently evaluating raising Anderson Ranch Dam to store an additional 29,000 acre feet;" 6) "the fact that Micron Technology had recently filed new water right applications for industrial and groundwater recharge and any water diverted by the County would not be available for this use;" or 7) "the economic cost of the Basin 63 water users from cloud seeding efforts." *Ditch Companies' Post Hearing Brief* at 21-24. The hearing officer will address each of the Ditch Companies' criticisms in turn.

As Elmore County points out, "the at-issue hydropower generation water rights all contain substantially the same remark: 'The rights for the use of water confirmed in this license shall be junior and subordinate to all rights for the use of water other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this right.'" *Elmore County's Post Hearing Brief* at 20-21, n.3. As such, the holders of the "at-issue hydropower generation water rights" cannot raise any claim of adverse impact against Permit 63-34348.

As discussed herein, Elmore County has agreed to, and the hearing officer will impose conditions on Permit 63-34348 to protect the operational flows on the Boise River below Lucky Peak Dam and on the SFBR below Anderson Ranch Dam consistent with Elmore County's expert

testimony. These conditions will ensure Elmore County's proposed use does not adversely impact those operational flows.

As also discussed herein, those who hold NPDES permits and discharge into the Boise River are responsible for taking actions to ensure the conditions of their NPDES permits are satisfied. Elmore County proposes to divert a small percentage of unappropriated floodwater from Anderson Ranch Reservoir that otherwise flows out of the Boise River basin. Elmore County has also agreed to a condition that will maintain operational river flows in the Boise River below the Lucky Peak Dam. If NPDES permit holders require additional flood flows to satisfy permit conditions, those permit holders can take such steps as they deem necessary to meet the conditions of their NPES permit. Similarly, if there are "current or future municipal needs" for municipalities in Basin 63 which require unappropriated flood flows to satisfy those needs, those communities can apply for municipal water rights to seek to appropriate such unappropriated flows.

As also discussed herein, Elmore County's expert testified that, "if they raise Anderson as proposed to create 29,000 acre-feet of storage, it would have filled in every one of those years [that historically Elmore County would have been able to divert]." Tr. Vol. II, p. 576. Elmore County's expert report estimates that, in years water would have been available for Elmore County to divert, between 100,000 and 800,000 AF were available "at Anderson." Pet. Ex. 14 at 5, Table 1. Elmore County's proposed use will not interfere with the contemplated "Anderson Ranch raise."

Micron Technology Inc. filed its "new water right application" after Elmore County filed the Application. DC Ex. 19. If Elmore County gains authorization to divert water before Micron Technology Inc. that might have otherwise been available for Micron Technology Inc. to divert, that is the simple and contemplated result of the statutory application for permit process and prior appropriation doctrine. This fact does not mean that Elmore County's proposed use adversely affects the Treasure Valley's local economy. Further, nothing in the record establishes that Micron Technology Inc.'s application will be affected, or not approved, because of Elmore County's proposed use.

The "economic cost of the Basin 63 water users from cloud seeding efforts" are "borne or paid for by" surface water users with points of diversion in Water District 63. Tr. Vol. V, p. 1415. Because Permit 63-34348 will have a point of diversion in Water District 63, as Elmore County acknowledges, Water District 63 will also assess Elmore County for cloud seeding efforts. Tr. Vol. V, p. 1212. Elmore County's proposed use will result in additional funds for cloud seeding efforts in Basin 63.

Finally, the Ditch Companies assert that Elmore County's proposed use "will adversely affect the local economy" of the Treasure Valley because "there is ongoing growth and expansion" of the seed industry, "there are future growth opportunities" for the mint industry, and "there is a demand for future growth/expansion" of the wine industry. *Ditch Companies'*

Post Hearing Brief at 22-23. As stated above, Elmore County's proposed use "would only account for approximately 5% of the average available flow volume [past the Anderson Ranch Reservoir gage]" and reduce "the volume of water available for subsequent new appropriations from the Boise River at Glenwood Bridge by approximately 2%." *Id.* Pet. Ex. 14 at 1, 3. Over 90% of the average flood flow volume past Anderson Ranch Dam and Glenwood Bridge are still available for future appropriations to support growth opportunities in the seed, mint, and wine industries.

The record does not support a finding that Elmore County's proposed use will adversely affect the Treasure Valley's local economy now or in the future. The hearing officer will not reject the Application on the basis of Idaho Code § 42-203A(5)(g).

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Application is APPROVED with limitations and conditions as reflected in the attached document.

DATED this 7 day of May 2019.

MATHEW WEAVER
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of May 2019, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

Scott L. Campbell Campbell Law Chtd. PO Box 170538 Boise, Idaho 83717	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

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For Elmore County, Board of County Commissioners, Applicants

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For Idaho Power Company, Protestant

Idaho Conservation League Marie Callaway Kellner PO Box 844 Boise, Idaho 83701 mkellner@idahoconservation.org	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

For Idaho Conservation League, Protestant

Cat Creek Energy LLC Dave Tuthill Idaho Water Engineering 2918 N. El Rancho Pl. Boise, Idaho 83704 dave@idahowaterengineering.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

For Cat Creek Energy, Protestant

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For Ballantyne Ditch Company, Boise Valley Irrigation Ditch Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company, Protestants

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For Boise Project Board of Control and Riverside Irrigation District, Protestants

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For SUEZ Water Idaho Inc., non-party

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☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Kimberlie English

Kimberlie English

State of Idaho
Department of Water Resources

Permit to Appropriate Water

No. 63-34348

Priority: March 03, 2017

Maximum Diversion Rate: 200.00 CFS
Maximum Diversion Volume: 10,000.0 AF

This is to certify that

ELMORE COUNTY BOARD OF COMMISSIONERS ELMORE COUNTY COURTHOUSE
150 S 4TH E STE 3 MOUNTAIN HOME ID 83647

has applied for a permit to appropriate water from:

Source : SOUTH FORK BOISE RIVER **Tributary:** BOISE RIVER

and a permit is APPROVED for development of water as follows:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
GROUND WATER RECHARGE STORAGE	01/01 to 12/31		10,000.0 AF
IRRIGATION	03/15 to 11/15	100.00 CFS	5,000.0 AF
IRRIGATION STORAGE	01/01 to 12/31		5,000.0 AF
IRRIGATION FROM STORAGE	03/15 to 11/15		5,000.0 AF
GROUND WATER RECHARGE	01/01 to 12/31	100.00 CFS	10,000.0 AF
GROUND WATER RECHARGE FROM STORAGE	01/01 to 12/31		10,000.0 AF
DIVERSION TO STORAGE	01/01 to 12/31	200.00 CFS	

Location of Point(s) of Diversion

SOUTH FORK BOISE RIVER L1 (NW¼ NW¼), Sec. 7, Twp 01S, Rge 09E, B.M. ELMORE County

Place of Use: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE					Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	No QQ	
02S	06E	35													40.0			40.0		80.0
02S	06E	36									40.0	40.0	40.0	40.0						160.0
03S	06E	1					0.1 L3	40.0 L4												40.1
03S	06E	2	40.0 L1	40.0 L2	40.0						0.4		40.0	40.0		40.0	40.0			280.4
03S	06E	9	40.0	40.0	40.0	40.0	40.0			40.0	40.0				40.0	40.0	40.0	40.0		440.0
03S	06E	10							0.6	0.2	40.0	40.0	40.0	40.0	0.2	40.0	40.0	40.0		281.0
03S	06E	11		40.0	40.0		40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		560.0
03S	06E	12									40.0	40.0	40.0	40.0						160.0
03S	06E	13					40.0	40.0												80.0
03S	06E	14					40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0						320.0
03S	06E	15	40.0	40.0	40.0	40.0	40.0	0.3	0.3	40.0					40.0	40.0	40.0	40.0		400.6
03S	06E	22	0.5	0.4																0.9
03S	06E	23			40.0		40.0	40.0	39.0	40.0	40.0		0.3	40.0		40.0	40.0	40.0		399.3
03S	06E	24											40.0	40.0			40.0	40.0		160.0
03S	06E	25	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		640.0
03S	06E	26	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	0.1	0.1	40.0	40.0	40.0	40.0	40.0		560.2
03S	06E	27	0.3			0.1														0.4
03S	06E	36	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		640.0

State of Idaho
Department of Water Resources

Permit to Appropriate Water

No. 63-34348

03S	07E	19					0.1					40.0 L3	40.0 L4	40.0						120.1
03S	07E	30					40.0	41.0 L1	41.0 L2	40.0	40.0	41.0 L3	41.0 L4	40.0			40.0			364.0
03S	07E	31		40.0	40.0		40.0	42.0 L1	42.0 L2	40.0	40.0	43.0 L3	43.0 L4	40.0	40.0	40.0	40.0	40.0		570.0
04S	06E	1	40.0 L1	40.0 L2	40.0	40.0	40.0 L3	40.0 L4	40.0	40.0	40.0	40.0	0.5	40.0	40.0	40.0	40.0	40.0		600.5
04S	06E	11	0.3																	0.3
04S	06E	12	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	0.7	0.5		0.3	40.0	40.0	40.0	40.0		481.5
04S	06E	13	0.9	0.4																1.3
04S	06E	24	0.1	0.2											0.3					0.6
04S	06E	25	0.5			0.6									0.7			0.8		2.6
04S	07E	5											40.0	0.1						40.1
04S	07E	6	39.0 L1	40.0 L2	40.0	40.0	40.0 L3	43.0 L4	42.0 L5	39.0	39.0	42.0 L6	41.0 L7	39.0	40.0	41.0	41.0	41.0		647.0
04S	07E	7	40.0	40.0	40.0	40.0	39.0	41.0 L1	41.0 L2	39.0	40.0	41.0 L3	41.0 L4	40.0	41.0	41.0	40.0	41.0		645.0
04S	07E	8					39.0	40.0	40.0	39.0	40.0	41.0	41.0	39.0			39.0			358.0
04S	07E	16							39.0	38.0	40.0	40.0	40.0	40.0		39.0	40.0			316.0
04S	07E	17	39.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		639.0
04S	07E	18	40.0	40.0	40.0	40.0	40.0	41.0 L1	41.0 L2	40.0	0.7	0.7 L3		0.2	40.0	0.6	39.0	40.0		443.2
04S	07E	19	40.0	40.0	40.0	40.0	40.0	40.0 L1	40.0 L2	40.0	40.0	40.0 L3	1.5 L4	40.0	40.0	40.0	40.0	40.0		601.5
04S	07E	20	1.4	1.0			40.0	40.0	40.0	40.0	41.0	41.0	41.0	41.0		39.0	40.0			405.4
04S	07E	21		40.0	0.6		40.0	40.0	1.0	0.8										122.4
04S	07E	28					6.9	39.0	40.0	28.0						0.3				114.2
04S	07E	29	39.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	39.0	40.0	0.2	0.1	0.3	0.3				398.9
04S	07E	30	40.0	40.0	40.0	40.0	40.0	40.0 L1	40.0 L2	40.0	40.0	40.0 L3	40.0 L4	40.0	40.0	40.0	40.0	38.0		638.0
04S	07E	31	0.1	0.1																0.2

Right Acre Limit:7,420.2
Total Acres: 12,712.7

Place of Use: IRRIGATION FROM STORAGE

Twp	Rng	Sec	NE				NW				SW				SE					Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	No QQ	
02S	06E	35													40.0			40.0		80.0
02S	06E	36									40.0	40.0	40.0	40.0						160.0
03S	06E	1					0.1 L3	40.0 L4												40.1
03S	06E	2	40.0 L1	40.0 L2	40.0						0.4		40.0	40.0		40.0	40.0			280.4
03S	06E	9	40.0	40.0	40.0	40.0	40.0			40.0	40.0				40.0	40.0	40.0	40.0		440.0
03S	06E	10							0.6	0.2	40.0	40.0	40.0	40.0	0.2	40.0	40.0	40.0		281.0
03S	06E	11		40.0	40.0		40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		560.0
03S	06E	12									40.0	40.0	40.0	40.0						160.0
03S	06E	13					40.0	40.0												80.0
03S	06E	14					40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0						320.0
03S	06E	15	40.0	40.0	40.0	40.0	40.0	0.3	0.3	40.0					40.0	40.0	40.0	40.0		400.6
03S	06E	22	0.5	0.4																0.9
03S	06E	23			40.0		40.0	40.0	39.0	40.0	40.0		0.3	40.0		40.0	40.0	40.0		399.3
03S	06E	24											40.0	40.0			40.0	40.0		160.0
03S	06E	25	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		640.0
03S	06E	26	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	0.1	0.1	40.0	40.0	40.0	40.0	40.0		560.2
03S	06E	27	0.3			0.1														0.4
03S	06E	36	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		640.0

State of Idaho
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Permit to Appropriate Water

No. 63-34348

03S	07E	19									0.1	40.0 L3	40.0 L4	40.0						120.1
03S	07E	30					40.0	41.0 L1	41.0 L2	40.0	40.0	41.0 L3	41.0 L4	40.0			40.0			364.0
03S	07E	31		40.0	40.0		40.0	42.0 L1	42.0 L2	40.0	40.0	43.0 L3	43.0 L4	40.0	40.0	40.0	40.0	40.0		570.0
04S	06E	1	40.0 L1	40.0 L2	40.0	40.0	40.0 L3	40.0 L4	40.0	40.0	40.0	40.0	0.5	40.0	40.0	40.0	40.0	40.0		600.5
04S	06E	11	0.3																	0.3
04S	06E	12	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	0.7	0.5		0.3	40.0	40.0	40.0	40.0		481.5
04S	06E	13	0.9	0.4																1.3
04S	06E	24	0.1			0.2									0.3					0.6
04S	06E	25	0.5			0.6									0.7			0.8		2.6
04S	07E	5											40.0	0.1						40.1
04S	07E	6	39.0 L1	40.0 L2	40.0	40.0	40.0 L3	43.0 L4	42.0 L5	39.0	39.0	42.0 L6	41.0 L7	39.0	40.0	41.0	41.0	41.0		647.0
04S	07E	7	40.0	40.0	40.0	40.0	39.0	41.0 L1	41.0 L2	39.0	40.0	41.0 L3	41.0 L4	40.0	41.0	41.0	40.0	41.0		645.0
04S	07E	8					39.0	40.0	40.0	39.0	40.0	41.0	41.0	40.0			39.0			359.0
04S	07E	16							39.0	38.0	40.0	40.0	40.0	40.0		39.0	40.0			316.0
04S	07E	17	38.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		638.0
04S	07E	18	40.0	40.0	40.0	40.0	40.0	41.0 L1	41.0 L2	40.0	0.7	0.7 L3		0.2	40.0	0.6	39.0	40.0		443.2
04S	07E	19	40.0	40.0	40.0	40.0	40.0	40.0 L1	40.0 L2	40.0	40.0	40.0 L3	1.5 L4	40.0	40.0	40.0	40.0	40.0		601.5
04S	07E	20	1.4	1.0			40.0	40.0	40.0	40.0	41.0	41.0	41.0	41.0		39.0	40.0			405.4
04S	07E	21		40.0	0.6		40.0	40.0	1.0	0.8										122.4
04S	07E	28					6.9	39.0	40.0	28.0		0.3								114.2
04S	07E	29	39.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	39.0	40.0	0.2	0.1	0.3	0.3				398.9
04S	07E	30	40.0	40.0	40.0	40.0	40.0	40.0 L1	40.0 L2	40.0	40.0	40.0 L3	40.0 L4	40.0	40.0	40.0	40.0	38.0		638.0
04S	07E	31	0.1	0.1																0.2

Right Acre Limit:7,420.2
Total Acres: 12,712.7

Place of Use: GROUND WATER RECHARGE

Twp	Rng	Sec	NE				NW				SW				SE					Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	No QQ	
03S	06E	2											X							
03S	06E	10	X			X														
03S	06E	11						X												

Place of Use: GROUND WATER RECHARGE FROM STORAGE

Twp	Rng	Sec	NE				NW				SW				SE					Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	No QQ	
03S	06E	2											X							
03S	06E	10	X			X														
03S	06E	11						X												

State of Idaho
Department of Water Resources

Permit to Appropriate Water

No. 63-34348

Conditions of Approval

1. Proof of application of water to beneficial use shall be submitted on or before **April 01, 2024.**
2. Subject to all prior water rights.
3. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
4. This right when combined with all other rights shall provide no more than 5.0 afa per acre for irrigation storage and irrigation from storage for the place of use.
5. Rights 61-263, 61-264, 61-266, 61-363, 61-10417, 61-10419, 61-10421, 63-19893, 63-2188, 63-2214, 63-20139 and 63-34348 when combined shall not exceed the irrigation of 7,420.2 acres within the boundaries of the Mountain Home Irrigation District.
6. In any given year, water diverted for irrigation from storage and irrigation shall not exceed 50 percent of the total volume of water diverted for all uses described by the right.
7. The storage of water under this right occurs in the storage facilities for the Mountain Home Irrigation District: Little Camas Reservoir, Long Tom Reservoir, and Mountain Home Reservoir.
8. In any given year, this right may only be used for irrigation from storage and irrigation on the same lands irrigated within the Mountain Home Irrigation District service area with Rights 61-263, 61-264, 61-266, 61-363, 61-10417, 61-10419, 61-10421, 63-19893, 63-2188, 63-2214, 63-20139 and 63-34348.
9. Water shall only be used for irrigation from storage and irrigation to supplement existing rights 61-263, 61-264, 61-266, 61-363, 61-10417, 61-10419, 61-10421, 63-19893, 63-2188, 63-2214, 63-20139 and 63-34348.
10. Diversion of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, the source of water and point of diversion for this right is within Water District No. 63.
11. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.
12. Prior to diversion of water under this right, the right holder shall develop a plan acceptable to the watermaster(s) and the Department that includes the installation of measuring devices as necessary to understand and monitor water use under this right. The Department may require modification of the plan, now and in the future, as required.
13. The watermasters of Water Districts 63, 63C, and 61A shall coordinate administration of this right to ensure beneficial use occurs in a manner consistent with the limitations and conditions of the right.
14. This right is subordinated to the capture and retention of water in existing on-stream storage reservoirs operated for storage and flood control purposes during and following flood control operations until the date of allocation.
15. The right holder must mitigate for diversions out of Anderson Ranch Reservoir that occur when water is not being released for flood control purposes as authorized by this right.
16. If measured or calculated Boise River flows at the Middleton Gage are less than 240 cfs during the period beginning June 16 and ending February 29, water shall not be diverted pursuant to this right. If measured or calculated Boise River flows at the Middleton Gage are less than 1,100 cfs during the period beginning March 1 and ending May 31, water shall not be diverted pursuant to this water right. If the benchmark stream maintenance flows of 240 cfs (from June 16 to February 29) and 1,100 cfs (From March 1 to May 31) subsequently change, then the diversion of South Fork Boise River flows under this right will be limited to provide for the new benchmark flows.
17. If measured or calculated South Fork Boise River flows downstream from Anderson Ranch Dam are less than 800 cfs, water shall not be diverted pursuant to this right.
18. The right holder shall exercise this right only when authorized by the District 63 watermaster when the Boise River is on flood release below Anderson Ranch dam/outlet and when the Boise River is on

flood release below Lucky Peak dam. Flood releases shall be determined based upon the Memorandum of Agreement between the Department of Army and the Department of Interior for Flood Control Operations of Boise River Reservoirs, dated November 20, 1953, contracts with Reclamation contract holders in the Boise River Reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right holder shall not seek, directly or indirectly, any change to the flood control operations of the 1985 Water Control Manual for Boise River reservoirs. This water right may not be used to divert water released from storage to augment lower Snake River flows during the migration of Snake River salmon as authorized under Idaho law.

19. Pursuant to Idaho Code § 42-234(4), to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
20. Pursuant to Idaho Code § 42-234(3), the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
21. This approval does not constitute approval by the Idaho Water Resource Board, which may also be required pursuant to Idaho Code § 42-1737.
22. This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Idaho Code § 42-1416B, or any other proposal to utilize credit for the recharge effort.
23. Prior to the diverting of water under this permit, the permit holder shall submit to IDWR authorization from the Idaho Department of Lands to use state land underlying Little Camas Reservoir and Long Tom Reservoir, or proof from Idaho Department of Lands that such authorization is not necessary.
24. This right does not grant any right-of-way or easement across the land of another.
25. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality monitoring and/or permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
26. Prior to diversion and use of water under this approval, the right holder shall obtain authorization from United States agencies necessary to access the point of diversion or place of use or to convey water across federal land.
27. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
28. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

State of Idaho
Department of Water Resources

Permit to Appropriate Water

No. 63-34348

This permit is issued pursuant to the provisions of Idaho Code § 42-204.

Signed this 7 day of MAY, 2019.

MATHEW WEAVER
Deputy Director

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.