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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-34348 In the name of Elmore County, Board of County Commissioners	**ELMORE COUNTY'S EXCEPTIONS TO AMENDED PRELIMINARY ORDER / RENEWED PETITION FOR CLARIFICATION**

Elmore County, by and through undersigned counsel, submits to the Director of the Idaho Department of Water Resources the following Exceptions to the Amended Preliminary Order in accordance with IDAPA 37.01.01.730 for the reasons articulated below, and also seeks clarification of the Amended Preliminary Order pursuant to IDAPA 37.01.01.770.

I. EXCEPTIONS TO AMENDED PRELIMINARY ORDER

A. The Record Does Not Support an Overall Volumetric Limitation of 10,000 Acre-Feet.

Elmore County seeks reconsideration of certain volumetric limitations placed upon its ability to develop a water right under Permit No. 63-34348 (the "Permit"). Specifically, the 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. While a volumetric limitation is absolutely appropriate for purposes of storage-related beneficial uses, it should not limit development of direct flow components of the right under the Permit. The diversion rates, and other conditions (*see e.g.* Condition Nos. 3, 4 and 5) appropriately limit development of the direct flow uses.

1. Elmore County should not be penalized for following Department Instructions.

In his original order, the hearing officer determined that because the Application did not list a quantity greater than 10,000 AF, Elmore County was not entitled to a Permit to divert more than 10,000 AF. *See* Preliminary Order at 4-5. That was the exclusive basis for that limitation. *See id.* An examination of the Application form itself, as well as the instructions attached to the form, reflects that was erroneous. The County's Application did not limit the total proposed diverted quantity to 10,000 AF, as the hearing officer has determined, and the testimony presented at hearing made that very clear. Testimony reflected a limitation on storage capability in that amount, which is the reason that amount is set forth in the Application, but did not limit total diversion quantity.

An examination of the "Instructions for Filing an Application for Permit" which is located at https://idwr.idaho.gov/files/forms/application-for-permit-instructions.pdf, illustrates the issue. Under No. 5 of the Instructions, it states: "Estimate the rate of diversion in cubic feet

per second (cfs) ***or*** the amount of storage in acre-feet (af) to be used for each purpose shown." (emphasis added) The example reflects 6.4 cfs for irrigation, 100 AF for irrigation storage, and 6.4 cfs for fish propagation.

Then, under No. 6, the Instructions state "State the total ***rate of diversion*** after accumulating flows for each use. . . . ***The acre-foot amount need not be shown unless water will be stored***." (emphasis added). The exemplar from Instruction No. 5 is continued under Instruction No. 6, and it illustrates why the hearing officer erred in relying upon the stated quantity set forth in the Application to limit development of a direct flow water right under the Permit. In the examplar, the diverted volume for irrigation at an applied-for diversion rate 6.4 cfs for the stated season of use would be well in excess of 100 AF. Likewise the diverted volume for fish propagation at an applied-for diversion rate of 6.4 cfs for the full year would be in excess of 100 AF. Yet the Instructions propose that an Applicant set forth 100 AF because ***that is the proposed storage volume*** under a proposed water right that will include both direct flow diversion (for fish propagation and irrigation) and storage. If approved, a permit under the example would ***not*** have an overall volumetric limitation of 100 AF, because that would effectively nullify the direct flow components of the applied-for permit. The Instructions propose setting forth the storage volume, which is consistent with the statement that "the acre-foot amount need not be shown unless water will be stored."

The note that follows the example hammers the point home: "If the project proposes storage of water and also a direct flow diversion, both the storage and direct flow components can be shown on the same form."

In this case, that is exactly how the County prepared the Application. There are both direct flow and storage components. Each is set forth on the same form. In theory, after a

hearing, the hearing officer might have only allowed for irrigation and recharge to and from storage, and disallowed the direct flow components of the Application, in which case the volumetric limitation would have been appropriate (hence the "and/or" in the Application), but he did not. Elmore County should not be limited in its ability to beneficially use otherwise unappropriated waters, as the hearing officer determined here, due solely to Instructions that leave something to be desired respecting clarity. Elmore County does not propose to store more than 10,000 AF, and the Application, evidence and testimony in support reflect as much. The County inserted 10,000 AF in accordance with the Instructions because that is the total proposed storage volume. Elmore County also proposed direct diversion for irrigation and aquifer recharge. At the permit stage, such direct flow uses of unappropriated water should not be limited in total volume as the hearing officer suggests (again, they are already limited as to rate and other conditions), and the record does not support such limitation.

Put simply, the 10,000 AF storage component listed in the Application did not intend to, nor did it operate to, limit the County's total volumetric diversion to 10,000 AF, if one follows the language of the Instructions. In accordance with the Instructions, it operated only to limit the County's storage volume. If Elmore County can beneficially use 10,000 AF through storage, and beneficially use additional unappropriated water as a result of direct flow, subject to other appropriate and lawful conditions, the County should have the opportunity to develop and prove up such beneficial use during the permit stage. Indeed, in view of the nature of the Permit, which proposes diverting floods flows only in years when such flood flows are available (less than half of water years, yet at significant levels, according to the record), placing such a volumetric limitation on the Permit negatively impacts the efficiency and sufficiency of the

project for the stated purpose, is contrary to the conservation of water resources in Idaho, and conflicts with the local public interest.

The County does not take issue with applying volumetric limitations to the various storage components under the right (ground water recharge storage, irrigation storage, irrigation from storage, ground water recharge from storage). It should, however, be able to develop direct flow components beyond the scope of such volumetric limitations as it applied to do (subject to appropriate conditions relating to beneficial use, as already set forth in the Permit). There is no articulated basis to prevent such development in the Preliminary Order, other than citing to Elmore County's Application. As the foregoing illustrates, that basis does not support the conclusion reached.

2. On reconsideration, the hearing officer should have considered the Instructions, and should have removed the overall volumetric limitation.

As set forth above, Elmore County followed the Instructions issued by the Department in seeking direct diversion of 200 cfs, with a volumetric limitation only on storage-related uses of up to 10,000 AF. Even the example set forth in such Instructions supports the conclusion that Elmore County appropriately sought, and provided evidence to support, such a permit.

In response to Elmore County's petition for reconsideration of the 10,000 acre-foot overall volumetric limitation, the hearing officer suggests that the Department's Instructions were not in the record, and therefore it would constitute legal error to consider such Instructions. First, the hearing officer was entitled under the Department's procedural rules in a contested case to take notice of the Instructions. *See* IDAPA 37.01.01.600. Critically, as the Director is aware, the Instructions at issue are broadly distributed and utilized in conjunction with one of the Department's primary functions, receiving and processing applications to divert water for beneficial use, and are relied upon by the Department in the conduct of its affairs. Second, the

fact that the hearing officer did not take judicial notice during the hearing does not preclude the hearing officer, or the Director, from considering the Instructions at issue. The Director is well within his authority to take notice of and consider its own Instructions at this stage of the proceeding. *See Idaho State Ins. Fund v. Hunnicut*, 110 Idaho 257, 264, 715 P.2d 927, 934 (1985) (hearing officer's failure to consider or notice a departmental job description created by the Commission did not preclude Commission from taking notice of the same on appeal to Commission from the hearing officer's findings). Indeed, the Court in *Hunnicut* observed that "it is difficult to comprehend how the Commission, or the hearing officer in the first instance, could evaluate Hunnicut's job performance without reference to his job description." *Id.* Similarly, it is difficult to comprehend how the Director, or the hearing officer in the first instance, can evaluate whether Elmore County adequately submitted an application for direct diversion and, separately, storage limited to 10,000 acre-feet, without reference to the Department's own instructions for filling out such application. The idea that the Director of the Department of Water Resources may not consider the content of a broadly utilized "Instructions" document the Department itself generated in accordance with its statutory responsibilities makes no sense.

Furthermore, and addressing each of the hearing officer's bases to deny Elmore County's reconsideration request, a review of the published notice of the application (which is part of the hearing record) reflects a clear statement of the nature of Elmore County's proposed diversion. This published notice, in theory, is the information protestants' relied upon when electing to protest the application in question. The published notice accurately reflects Elmore County's application, as intended, further evidencing that Elmore County appropriately filled out the

Application and sought 200 cfs total diversion, with volumetric limitations on storage uses. In pertinent part, the published notice states as follows:

> Use: DIVERSION TO STORAGE 01/01 to 12/31 200 CFS
> Use: GROUND WATER RECHARGE 01/01 to 12/31 200 CFS
> Use: GROUND WATER RECHARGE FROM STORAGE 01/01 to 12/31 10000 AF
> Use: GROUND WATER RECHARGE STORAGE 01/01 to 12/31 10000 AF
> Use: IRRIGATION 03/15 to 11/15 200 CFS
> Use: IRRIGATION FROM STORAGE 03/15 to 11/15 10000 AF
> Use: IRRIGATION STORAGE 01/01 to 12/31 10000 AF
> ***Total Diversion: 200 CFS***
> Date Filed: 3/3/2017

Legal Proof of Publication for dates of publication October 19 & 26, 2017 (emphasis added).

As the foregoing plainly illustrates, the only volumetric limitations are those related to storage. The total diversion sought was 200 CFS, ***not*** 10,000 AF. The protestants, Department staff drafting the notice, and the hearing officer all knew, or should have known based on the application and the foregoing notice, that Elmore County sought a ***total diversion*** of 200 CFS, with volumetric limitations on storage-related ***uses***. That is consistent with not only the Department's Instructions, but with the development and optimal beneficial use of a water right in Idaho. If Elmore County can directly and beneficially use unappropriated water for ground water recharge or irrigation, the permit should not limit such use beyond the conditions already imposed, such as Conditions 3 and 4.

Finally, even accepting the contention that the foregoing published notice reflected any ambiguity as to the nature of the application (which it does not), such ambiguity was clearly eliminated by Mr. Scanlan's expert report dated and filed in this matter August 7, 2018, well in advance of the hearing. In describing the Application, Mr. Scanlan stated as follows:

> Application for permit 63-34348 seeks authorization for diversion of up to 200 cfs from the South Fork Boise River for diversion to storage at Little Camas Reservoir, and for groundwater recharge and irrigation purposes in the vicinity of Mountain Home, Idaho.

See Petitioner's Exh. 10 at 1. There is no volume limitation expressed. The next sentence continues: "The application seeks ***storage*** of up to 10,000 afa for ground water recharge and irrigation purposes." *See id.* (emphasis added).

The report continues as follows, describing Mr. Scanlan's water availability analysis:

> Assuming continuous diversion of 200 cfs, up to a maximum annual volume of 20,000 af, the average volume that could have been diverted in the nine years with available water was approximately 16,797 af.

See id. at 3.

His water availability analysis itself states as follows:

> The application proposes to divert 200 cfs from the South Fork Boise River upstream of Anderson Ranch Dam for diversion to storage at Little Camas Reservoir, ***and*** for irrigation and ground water recharge purposes near Mountain Home. . . . Based on Little Camas Reservoir capacity and downstream canal capacity, the maximum annual 63-34348 diversion volume was limited to 20,000 af for the purpose of this analysis.

See Petitioner's Exh. 14 at 1 (emphasis added).

Mr. Scanlan stated plainly, and without any ambiguity, that the 10,000 acre-feet limitation was related to storage, not total diversion volume. The application was for diversion of 200 cfs for irrigation, recharge and storage uses when water was available, with storage uses not to exceed 10,000 AF.

Moreover, Mr. Scanlan's evaluation reflected historical water availability in 9 of 20 years, with an annual potential diversion volume of 7,559 AF. In other words, in order to achieve that annual potential diversion volume over a sample period in which water availability is zero (0) for over half of the years, there must be a potential diversion volume much greater than 10,000 AF when water is available. *See id.* That is consistent with Mr. Scanlan's testimony that generally, when water is available, a lot of water is available. *See* Petitioner's Exh. 10 at 12 ("Furthermore, on any year when 63-34348 theoretically could have been diverted in the past 20

years, there has been at least 200,000 af of additional unappropriated streamflow that could have been stored."). Even assuming that 10,000 AF could be diverted under the permit every single year that water is available (which may not be the case), if the proposed condition were in effect over the historical period of Mr. Scanlan's analysis, the annual potential diversion volume is reduced from in excess of 7,500 AF to 4,500 AF (90,000 total AF over 9 years divided by the 20 year sample period). The condition at issue effectively reduces Elmore County's ability to divert unappropriated water to the annualized tune of at least 3,000 AF. That is inconsistent with ensuring the maximum beneficial use of otherwise unappropriated water, and also with the conservation of water resources within Idaho.

Finally, the hearing officer afforded the parties the opportunity to conduct discovery, and Mr. Scanlan sat for two days of deposition testimony well in advance of the hearing. The parties and their respective experts had ample opportunity to clarify any real confusion about the nature of Elmore County's application and the diversion volume, and indeed did so clarify.

B. Refill 1 and Refill 2 Are Not Decreed Water Rights to Consider Under the Statutory Criteria.

Elmore County notes the discussion of Refill 1 and Refill 2 on pages 16-17 of the Amended Preliminary Order, in the discussion of statutory criteria relative to reduction under existing water rights. First, Refill 1 and Refill 2 are not "existing water rights," and therefore any findings or conclusions relating thereto should so reflect. Idaho Code Section 42-203A(5) requires the Director to evaluate whether the proposed permit "will reduce the quantity of water under existing water rights." I.C. § 42-203A(5)(a). Consideration of Refill 1 and Refill 2 is inappropriate and inconsistent with the prior appropriation doctrine because they are not "existing water rights."

Second, there is some discussion by the hearing officer relative to "subordination," a matter about which Elmore County seeks clarification *infra*, including the constitutionality thereof. The hearing officer's discussion of whether Refill 1 or Refill 2 will be subordinate to water diverted under the permit, and what that means in administration, is inappropriate short of the Director's clarification thereof. Elmore County requests that the Director address the hearing officer's discussion relative to "subordination," either in the context of his review of the hearing officer's Amended Preliminary Order, or in response to Elmore County's request for clarification.

II. RENEWED PETITION FOR CLARIFICATION

Elmore County renews its petition for clarification concerning Condition 14. In addressing it, the hearing officer first notes that questions relating to administration of a water right are to be addressed by the Director. Therefore, Elmore County incorporates by reference herein the entirety of its Petition for Clarification, filed April 16, 2019, relating to how the Department will administer the "subordination" language of Condition 14, for the Director's consideration.

As to constitutional questions, Elmore County recognizes and acknowledges the Director's limited ability to address the constitutionality of a legislative act. Elmore County nevertheless is entitled to understand how the Department will administer Condition 14, and to raise and preserve constitutional questions relating thereto for an appropriate tribunal.

Ultimately, Elmore County seeks clarification from the Director regarding the meaning and effect of Condition 14. This condition is the apparent result of the recently enacted Idaho Code Section 42-115, adopted by the Idaho Legislature in the 2019 Session. Condition 14 reads as follows:

> 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.[1]

Permit Condition No. 14.

How will this condition language effect the development and exercise of Permit No. 63-34348? Elmore County desires the Department to clarify the meaning and impact of this condition. It is not clear from the plain language of the condition how it would impact the exercise of Elmore County's permit.

Does Condition 14 mean that Elmore County will be prohibited from diverting water under its new permit "during and following flood control operations until the date of allocation" regardless of flood control releases from the "on-stream reservoirs operated for storage and flood control purposes?" If flood control releases from those reservoirs are not "capture(d)" or not "re(tained)" in "existing on-stream reservoirs," does that mean Elmore County is allowed to divert and use water that otherwise would be released from those reservoirs? The County believes that is should be able to do so under its new permit.

In contrast, if Condition 14 is read by the Department to mean that Elmore County cannot divert any water "during and following flood control operations until the date of allocation," such a reading would prevent Elmore County from exercising its constitutionally protected right to "divert and appropriate the unappropriated waters of any natural stream to beneficial uses." Article XV, Section 3, Idaho Constitution.

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[1] "Date of allocation" is not a phrase defined in Idaho Code Section 42-115 or any other provision of the Idaho Code. Consequently, Elmore County believes use of this phrase in the statute renders it unconstitutionally vague. However, to the extent the Department renders its interpretation of "date of allocation," it should adhere to the definition of the phrase "day of allocation," contained in the Memorandum from Liz Cresto, Technical Hydrologist, to the Director, dated November 4, 2014, Subject: Accounting for the distribution of water To the federal on-stream reservoirs in Water District 63.

If Condition 14 is interpreted by the Department in this fashion, Elmore County's new permit would be rendered worthless and could not be used to develop a critically needed water right. Although Elmore County is hopeful that the Department would never interpret Condition 14 in this manner, the County needs to have clarification of this issue in order to invest the time, efforts, and money that will be required to put water to beneficial use under the Permit. It would simply not be economically prudent or politically possible to proceed with development of the Permit if the administrative uncertainty of this new condition language has not been resolved.

Constitutional Concerns

A. Article XV, Section 3, Idaho Constitution

As stated, Elmore County believes the Department should not interpret Condition 14 in a manner that would prevent or unreasonably restrict the County's diversion of unappropriated flood water in the South Fork Boise River. Such implementation of the language of Idaho Code Section 42-115 would render the statute and the condition unconstitutional. Elmore County bases this position on the following discussion.

Article XV, Section 3 of the Idaho Constitution states, in pertinent part, as follows:

> Section 3. WATER OF NATURAL STREAM – RIGHT TO APPROPRIATE – STATE'S REGULATORY POWER – PRIORITIES. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water…

Three fundamental constitutional principles arise from these phrases. First, if there is unappropriated water in any natural stream, "the right to divert and appropriate" the water and apply it "to beneficial uses, shall ***never be denied***." (Emphasis added.) Second, the only limitation on this protected right applies to the use of unappropriated water for power purposes,

for which "the state may regulate and limit the use." Third, "(P)riority of appropriation shall give the better right as between those using the water..."

All of these principles are potentially implicated in the Department's interpretation of the language of Condition 14 and Idaho Code Section 42-115. Elmore County asserts that the Department's interpretations must be consonant with these constitutional principles. Any interpretations that conflict with the principles would be legally invalid. *See Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 807, 252 P.3d 71, 88 (2011) (legislature cannot modify the prior appropriation doctrine of Article XV, Section 3 of Idaho Constitution by statute).

Regarding the first principle, the administrative record unequivocally establishes that unappropriated water occurs in the South Fork Boise River. All of the hydrology experts in this matter confirmed that unappropriated flood flow water is present and available for appropriation in the Boise River system, including the South Fork of the river, during years of good snow accumulation and precipitation. *See* Preliminary Order at 12-13. Elmore County properly sought permission of the Department for a water permit to appropriate some of this unappropriated water and put it to beneficial uses, as allowed under the Idaho Constitution.

Regarding the second principle, the State of Idaho's only previous use of the term "subordinate" as to a water permit, license, or right arose in the context of the Swan Falls litigation and ultimate settlement. *See Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 661 P.2d 741 (1983); State Water Plan and its implementing legislation. Idaho Code Section 42-203B was part of the package of legislation agreed upon in the Swan Falls Settlement. It states, in pertinent part, as follows:

> 42-203B AUTHORITY TO SUBORDINATE RIGHTS – NATURE OF SUBORDINATED WATER RIGHTS AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION – AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. (1) The legislature finds and declares that it is in the

> public interest to ***specifically implement the state's power to regulate and limit the use of water for power purposes*** to the extent such right exceeds an established minimum flow...

I.C. § 42-203B (emphasis added).

Prior to enactment of Idaho Code Section 42-115, no Idaho Legislature ever attempted to "subordinate" any water rights, permits, or licenses. Most significantly, Idaho Code Section 42-203B recognized the unprecedented nature of the Legislature's action to pass a statute imposing "subordination" of rights. It did so by specifically utilizing the language of Article XV, Section 3, that says "the state may regulate and limit the use thereof for power purposes..." This is the sole exception to the primary constitutional right providing "the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied..." Article XV, Section 3, Idaho Constitution. Moreover, the Idaho Power Company voluntarily **agreed** to subordinate its Swan Falls water rights under the settlement agreement.

Significantly, Idaho Code Section 42-115 contains no similar declaration of legislative intent or attempt to identify the constitutional basis for the Legislature's authority to impose this severe "subordination" restriction on new water permits or licenses that seek to divert and appropriate water that had not been previously appropriated. Obviously, there is no such authority. Such action is specifically prohibited by Article XV, Section 3.

The Department is required to follow state statues, but it is also required to follow the Idaho Constitution. In the event of a conflict between a statute and the Constitution, the statute loses. *See e.g. Bingham County v. Idaho Com'n for Reapportionement*, 137 Idaho 870, 874, 55 P.3d 863, 867 (2002) ("It is clear that if the State Constitution and a statute conflict, the State Constitutional provision prevails."). Consequently, in its interpretation and implementation of Idaho Code Section 42-115 and Condition 14, the Department is obliged to render an

interpretation that does not interfere with the constitutionally protected rights of Elmore County, the Permit owner. The County seeks such an interpretation here.

The third constitutional principle discussed above is also implicated. This is the bedrock principal that "(P)riority of appropriation shall give the better right as between those using the water..." Article XV, Section 3, Idaho Constitution. The Department's interpretation of the Condition 14 language and Idaho Code Section 42-115 must also comport with this constitutional mandate. However, a Department interpretation that unreasonably restricts the County's exercise of its water permit would violate this constitutional rule.

In short, the prior appropriation doctrine, as set forth in the Idaho Constitution is the method of restricting the exercise of competing water rights. Yet, Idaho Code Section 42-115 and Condition 14, depending on how the Department interprets and implements these, would impose additional restrictions via "subordination" that are not authorized by, and are implicitly prohibited by, the Idaho Constitution. In essence, Elmore County could have a water permit with a March 3, 2017 priority date that is junior to all water rights for the on-stream reservoirs in the Boise River system. Furthermore, in addition to this junior priority date, the County's water permit and any subsequent license will be "subordinated" to the "capture and retention of water in existing on-stream storage reservoirs..." I.C. § 42-115; Condition 14. This imposes a second-class status on the County's water permit that conflicts with the prior appropriation doctrine provisions of the Idaho Constitution.

B. Other Constitutional Considerations.

Respecting the imposition of a second-class water right, Idaho Code Section 42-115 and Condition 14 may facially constitute an invalid infringement upon the constitutional right to equal protection under the laws of the United States and under Idaho law. 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.

Even more obvious, the limitations imposed by the statute do not apply to permits or licenses that involve storage reservoirs of 1000 acre feet or less. Consequently, the County's Permit for storage of water is treated in a disparate manner, because it exceeds the 1000 acre feet threshold. However, no legislative justification for this disparate treatment is given in the statute. This is clearly a denial of constitutionally mandated equal protection.

Idaho Code Section 42-115 is legally defective for another reason. The Legislature enacted the statute specifically as part of a settlement agreement to resolve pending litigation involving water rights for the operation of the Boise River on-stream reservoirs, yet it included the subordination provision sought by the protestors in this matter. The Speaker of the House of Representatives, the sponsor of the legislation, clearly stated this was the purpose of the statute. *See* Minutes of the Senate Resources & Environment Committee (January 30, 2019), attached to previously filed Petition for Clarification.[2] Such action constitutes improper special legislation. This is not a valid basis for legislative action in Idaho. *See* Article III, Section 19, Idaho Constitution; *ISEEO v. State of Idaho*, 140 Idaho 586, 591, 97 P.3d 453, 458 (2004). Therefore, since Condition 14 stems from the statute, the condition is legally defective.

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[2] The minutes and audio can be downloaded at the Idaho legislature website:

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/standingcommittees/190130_sr&e_0130PM-Minutes.pdf

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/standingcommittees/190130_sr&e_0130PM-Minutes_Attachment_1.pdf (audio)

This legislative action is doubly disturbing, because the County's application for water permit No. 63-34348 was under consideration for decision by the Department at the time of legislative consideration and enactment of Idaho Code Section 42-115. The County raised this concern during the administrative hearing in this matter and the legislative action justified the County's concern. Condition 14 now imposes the restrictions adopted by the special private legislation of Idaho Code Section 42-115. The Departments interpretation of this statute and the resulting Condition 14 should avoid improper consequences to the County's rights.[3]

DATED this 21st day of May 2019.

CAMPBELL LAW, CHARTERED

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

DATED this 21st day of May 2019.

SPINK BUTLER, LLP

By: _____
Matthew J. McGee
Attorneys for Elmore County, Board of County Commissioners

[3] The administrative record includes numerous questions from counsel for protestors to County witnesses regarding voluntary consent of the County to subordinating any approved permit to the existing water rights for storage in the on-stream Boise River reservoirs. See, Hearing Transcript, pages 171, ln. 4; 321, ln. 20; 340, ln. 11,17,20,24; 386, ln. 2,13; 578, ln.6,9; 579, ln. 4; 806, ln. 23; 897, ln. 1-5; 809, ln. 23; 810, ln. 6; 1400, ln. 21; 1473, ln. 20; 1474, ln. 22; 1478, ln. 25; 1479, ln. 17; 1480, ln. 2. The County did not agree to subordination in the hearing. Consequently, while this matter was pending before the Hearing Officer, the protestors successfully lobbied the Legislature to adopt Idaho Code Section 42-115. This set of circumstances renders the statute invalid, as special legislation, allowing the protestors to accomplish by legislative actions what they were unable to accomplish via administrative litigation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May 2019, I caused a true and correct copy of the above to be served upon the following individuals in the manner indicated below:

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