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DEPARTMENT OF  
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*Attorneys for the Ditch Companies*

**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

**DITCH COMPANIES' EXCEPTIONS  
TO AMENDED PRELIMINARY  
ORDER APPROVING PERMIT UPON  
CONDITIONS**

The Ditch Companies,<sup>1</sup> by and through their undersigned counsel of record and pursuant to Idaho Department of Water Resources Procedure Rule 730.02 (IDAPA 37.01.01.730.02), hereby submit the following exceptions to the Director (agency head) regarding the Hearing Officer's *Amended Preliminary Order Approving Permit Upon Conditions* (May 7, 2019) ("APO") in the above-captioned matter. The Ditch Companies submit these exceptions on the grounds that various Hearing Officer findings and conclusions are (and remain) unsupported by

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<sup>1</sup> The Protestant "Ditch Companies" for purposes of these Exceptions include Ballentyne Ditch Company, Canyon County Water Company, Eureka Water 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, and Thurman Mill Ditch Company.

substantial and competent record evidence, and others result from the misinterpretation and misapplication of applicable law.

## **I. PROCEDURAL BACKGROUND**

On April 2, 2019, the Hearing Officer issued his initial *Preliminary Order Approving Permit Upon Conditions* (“Order”). The Ditch Companies, City of Boise, and the Idaho Conservation League each filed exceptions to the Director while Elmore County sought reconsideration of the Order before the Hearing Officer. *See, e.g., Ditch Companies’ Exceptions to Preliminary Order Approving Permit Conditions* (Apr. 16, 2019) (“DC Exceptions”) and APO, p. 1, including n. 2. Elmore County later filed its *Consolidated Response to Exceptions* (Apr. 30, 2019).

The Hearing Officer issued his APO on May 7, 2019, denying Elmore County’s *Petition for Reconsideration/Petition for Clarification* (Apr. 16, 2019) with the exception of the County’s requested adjustment of the irrigation place of use under the proposed permit. APO, p. 6. The Hearing Officer also addressed the Ditch Companies’ arguments on exception concerning the interpretation and application of Idaho Code Section 42-203A(5)(g) (the trans-basin diversion criterion)(“Criterion (g)”), as well as related arguments of the City of Boise and the Idaho Conservation League. APO, pp. 8-9. The Hearing Officer did not address the remaining exceptions raised by the Ditch Companies and those issues remain live before the Director.

## **II. ARGUMENT**

### **A. The Ditch Companies Reincorporate the Entirety of Their Prior *Exceptions to Preliminary Order Approving Permit Upon Conditions* (Apr. 16, 2019)**

While the Ditch Companies appreciate the Hearing Officer’s willingness and effort to address its Criterion (g) exceptions, the Hearing Officer’s authority to do so under Procedure

Rule 730.02 (IDAPA 37.01.01.730.02) is unclear. The rule appears to provide the parties two alternative paths in response to a preliminary order: (1) petitioning a hearing officer for reconsideration; or (2) bypassing the hearing officer and filing exceptions with the Director (“superiors in the agency” or “agency head”). *Compare* IDAPA 37.01.01.730.02.a (providing the opportunity for reconsideration) and IDAPA 37.01.01.730.02.b (providing the opportunity to take exceptions directly to the agency head within 14 days of service of a preliminary order).

Because it appears that the Hearing Officer lacks the authority (or at least the final decision) concerning exceptions filed with the “agency head,” and because the Hearing Officer failed to address all of the exceptions raised in the DC Exceptions, the Ditch Companies incorporate by reference herein the entirety of the DC Exceptions filed with the Director on April 16, 2019. Therefore, all issues and exceptions raised by the DC Exceptions are renewed and incorporated herein as necessary. The Ditch Companies further supplement those prior exceptions with the additional arguments discussed below.

**B. The Hearing Officer’s Clarification of the Application of Criterion (g) is Welcome, But His Conclusion Remains Flawed**

In response to the Ditch Companies’ contentions that the Hearing Officer failed to properly apply Criterion (g) on the grounds, in part, that the statutory criterion (like that of (e)—the local public interest) is forward/future looking as opposed to constrained to consideration of the local economy of the source basin as it “currently exists,” the Hearing Officer agreed and corrected (or clarified) his prior *Preliminary Order* accordingly. *Compare* DC Exceptions, pp. 2-11 and APO, pp. 8-9; 35-36. Consequently, the Hearing Officer removed the following text from his April 2, 2019 *Preliminary Order*:

Further, the hearing officer *must focus the analysis on* whether Elmore County’s proposed use “will adversely affect *the local economy*” of the Boise River basin *as it exists, not speculate about* whether Elmore County’s proposed use will

adversely affect *the local economy* of the Boise River basin *as it might exist at some point in the future* if and when some industries expand.

The Hearing Officer replaced that text with the following in his APO:

Over 90% of the average flood flow volume . . . are *still available to support growth opportunities* in the seed, mint, and wine industries.

However, the Hearing Officer's ultimate conclusion remained the same in both his

*Preliminary Order* and his subsequent APO:

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

*Compare, Preliminary Order* (Apr. 2, 2019), p. 27 and APO, p. 36 (emphasis added in each).

The Ditch Companies agree with the Hearing Officer's temporal correction/clarification concerning the application of Criterion (g), but continue to disagree with the ultimate conclusion that Elmore County's proposed, wholly consumptive exportation of water from Basin 63 will not adversely affect the local economy in the Treasure Valley. As explained in the DC Exceptions (pp. 6-11), but going largely unaddressed in the APO, the record is replete with evidence and agreement that water diverted by Elmore County will be lost to Basin 63 forever; and that there is well (and long)-documented future need for additional surface water supplies in the Treasure Valley—the most populous, fastest growing, most economically diverse river basin in the state (if not the nation in terms of ongoing growth). *See also, Ditch Companies' Post-Hearing Brief* (Jan. 14, 2019) ("PH Brief"), pp. 20-24.

Though the Hearing Officer touched on *some* of the evidence in the record at least cursorily (hydropower, municipal, Anderson Ranch Dam raise, and the Batt testimony (seed, mint and wine industries)), the end conclusion seemingly focused on the "seed, mint, and wine industries" alone, and the analysis continues to miss the point regarding lost hydropower

generation potential. Instead, the sum and substance of the Hearing Officer's analysis of Criterion (g) amounts to nothing more than a hydraulic one:

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%."

APO, pp. 33-34; 36. The Hearing Officer reaches this conclusion in the absence of any competent economic analysis regarding the same from Elmore County, who bears the burden on the matter (discussed in further detail in Section B.1, below). And, regarding lost hydropower generation potential, in particular, the question is not one of existing water right injury and subordination evaluated under Idaho Code Section 42-203A(5)(a), rather it is one of considering the economic consequences flowing from lost hydropower generation potential owing to the undisputed wholly consumptive and depletive effect of the County's proposed diversion and use. *Compare*, APO, p. 34 and DC Exceptions, p. 9, n. 5; *see also*, Tr. at 850:2-8 (Elmore County economist acknowledging that the County's diversion and use would diminish available flood flows); 897:5-15 (same flow loss concession); and 906:11-908:9 (regarding lost hydropower generation potential).

While the Hearing Officer now addresses the first question posed by the Ditch Companies (that concerning the forward/future-looking prospective application of Criterion (g)) he still fails to address the second:

"[I]f trans-basin water depletions ranging between 2 and 10 percent are not concerning or problematic" especially in the context of the Treasure Valley as the source basin and in light of the robust and un rebutted record evidence of future demand and existing water user efforts to secure new/additional water rights now, "what percentages are concerning or problematic?"

DC Exceptions, pp. 10-11. All agree that the County's proposed diversion and use will have a depletive effect (the parties quarrel over scale of the depletion, not the fact of depletion itself).

All further agree that there are known future needs for additional surface water supplies in the Treasure Valley.<sup>2</sup> It is not the Ditch Companies' initial burden of production, nor ultimate burden of persuasion to prove adverse economic impacts arising from that depletive effect, rather it is the County's burden to disprove adverse economic impacts resulting from the depletive effect, and Dr. Taylor does no such thing. IDAPA 37.03.08.040.04.

**1. The County Incorrectly Framed the Application of Criterion (g), and its "Expert" Failed Accordingly**

The Hearing Officer latches onto Dr. Taylor's "opinion" that approval of the Application "will not adversely affect the economy of the Boise River Basin." APO, p. 34. The problem is that Dr. Taylor's opinion is wholly conclusory, and not supported by substantial and competent record evidence.

Consistent with Elmore County's erroneous support of the Hearing Officer's initial "here and now" (or "as it exists") application of Criterion (g), Dr. Taylor further perpetuated this flaw in his analysis by considering "impact of the pending application by Elmore County upon *existing water rights* in the Treasure Valley," ultimately concluding that the Application "would not have an adverse economic impact on . . . the water rights in the Treasure Valley *currently*." Tr. at 930:11-21 (emphasis added); *see also*, DC Exceptions, p. 9. Regardless of the well-chronicled testimony and other documentary evidence Dr. Taylor did not consider from the Treasure Valley (while he instead focused his analysis on local economic affects in the Mountain

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<sup>2</sup> Indeed, many of the future needs are well-documented by studies commissioned by IDWR, including Treasure Valley CAMP, DCMI studies, and an ongoing recharge study. Currently, Brown and Caldwell is reviewing and reporting on managed aquifer recharge opportunities in the lower Boise River basin below Lucky Peak Dam at the request of (and funded by) the Idaho Water Resource Board. The stated purposes of the study are to address ongoing population growth, increased water demands, and uncertain future water availability.

Home area), his focus on existing (*i.e.*, “current”) water rights and economic activity supported by those rights misconstrued and misapplied the prospective economic evaluation required under Criterion (g). DC Exceptions, pp. 6-11; *see also*, PH Brief, pp. 20-24 (both illustrating that the list of items/evidence Dr. Taylor did not consider or rebut is far longer than the list of items he did consider).

Dr. Taylor performed no prospective economic analysis concerning Basin 63 whatsoever. Instead, Dr. Taylor merely parroted Scanlan’s “2 percent” hydraulic depletion finding, summarily concluding that while there will be a flow depletion, a 2% depletion (assuming that is a universally accepted value—which it is not) is insignificant. As discussed above, the burdens of initial production and ultimate persuasion on Criterion (g) belong to Elmore County, and Dr. Taylor concedes he performed no prospective economic analysis in Basin 63 because the County clearly believes such analysis is not required under Criterion (g). *See, e.g.*, Tr. at 930:17-21; *see also*, *Elmore County’s Consolidated Response to Exceptions*, pp. 2-12.<sup>3</sup>

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<sup>3</sup> Careful review of Dr. Taylor’s testimony demonstrates the incorrect “here and now”/“current”/“existing” focus of his review and opinions. *See, e.g.*, Tr. at 826:23-827:15 (review and consideration of “existing” irrigation water rights); 830:10-11 (same “existing” focus); 930:11-21 (same “existing” and “currently” focus).

When Dr. Taylor did tangentially address “future” water supplies, his review was incomplete and based on incorrect assumptions. *See, e.g.*, Tr. at 886:15-889:20; 901:14-18 (Boise and Suez-focused only); 915:12-918:25; 928:20-929:9 (acknowledging need to meet future demand, in part, through new surface water/flood flow availability, but providing no economic analysis of what these facts mean); 832:10-20 (assumption that conversion of land from agriculture to urban landscapes yields water savings to be applied to future needs—a theory roundly rejected by Mark Zirschky (Tr. at 1450:24-1456:17) and Allen Funkhouser (Tr. at 1513:3-24), respectively).

Finally, Dr. Taylor conceded that if a feasible storage project presented itself (*e.g.*, the proposed Anderson Ranch dam raise) such a project would “[have] the potential to affect [his] conclusion.” Tr. at 828:16-18; 895:10-24 (not aware of the dam raise project, but opining that it likely is not feasible, and if it is the Elmore County project will not affect it).

Elmore County places great weight in the notion that it retained, consulted and presented an economic expert in this matter. *Elmore County's Consolidated Response to Exceptions*, pp. 10-12. The County was wise (and required) to do so given the nature of its evidentiary burdens. IDAPA 37.03.08.040.04. But this is not about “lawyers bumbling their way through half-baked criticisms” or playing “arm chair economist[]” or “power engineering expert[],” rather this is about taking County counsel and Dr. Taylor at their respective words and arguments regarding what they did not do—namely their collective failure to perform the requisite *prospective* economic analysis required under Criterion (g) because they fundamentally believe that Criterion (g) requires no such thing.

The consultation and use of an economic expert is only as relevant and persuasive as their analysis allows. Perhaps, Dr. Taylor provided some analysis under Criterion (a) concerning “existing” and “current” water rights (Idaho Code Section 42-203A(5)(a)), but he clearly did no such thing (by his own admission) concerning Criterion (g). Tr. at 930:11-21. One need not retain an expert to show what the opposing expert did not do/consider, particularly when Dr. Taylor’s failings were well-known during (and confirmed by) his pre-hearing deposition. Nothing at hearing addressed his analytical failings either, which makes sense because Elmore County continues to argue that Criterion (g) does not (and cannot) include such future-looking “speculation.”

Elmore County’s Application should be denied for its failure to adequately (let alone correctly) address Criterion (g). Dr. Taylor’s naked “no affect” conclusion is/was wholly conclusory and based on nothing more than the County’s “2%” hydraulic flow volume theory. And the Hearing Officer’s reliance on the same is not supported by substantial and competent evidence in the record.



## **2. Short of Rejecting the Application, Subordination of Elmore County Water Use is Appropriate**

Resting on its apparently unalienable constitutional right to appropriate water, Elmore County fails to appreciate (or at least address) that the right to appropriate water is not unilateral or unfettered. *See, e.g., Elmore County's Consolidated Response to Exceptions*, p. 13 (a subordinated water right for Elmore County is a “concept unsupported by the Idaho Constitution and the prior appropriation doctrine”). Rather, water right applications are evaluated against the express statutory criteria of Idaho Code Section 42-203A(5), under which the Director may “reject the application”; “partially approve” the application for a lesser amount of water; or “grant a permit upon conditions.” These statutory criteria are further supplemented by the requirements and considerations of the Department’s Water Appropriation Rules (IDAPA 37.03.08). Moreover, in-basin preferences and the reservation of Idaho’s water resources for future alternative uses is well-established and well within the Director’s discretion despite Elmore County’s protestations otherwise.

For example, the County fails to acknowledge or address the Director’s wide discretion under *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), wherein the Idaho Supreme Court cited with approval *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943) and *East Bay Municipal Utility Dist. v. Dept. of Pub. Works*, 1 Cal.2d 476, 35 P.2d 1027 (1934), each upholding their respective state water agencies’ decisions subjecting present requests for appropriations to alternative future uses of perceived greater importance. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. In doing so, the Idaho Supreme Court condoned this subordination-based “prioritizing among uses according to the public interest,” stating that the Director of the Idaho Department of Water Resources certainly “has the same considerable flexibility and authority.” *Id.*

The Idaho Legislature has likewise prioritized/subordinated water rights and uses in the context of hydropower and recharge purposes of use, in the context of creating in-basin preferences, and in the context of fully adjudicated versus statutory-exempt water rights. *See, e.g.,* IDAHO CODE §§ 42-203B (subordinating hydropower rights and codifying the in-basin preference for Basin 01 under the Milner Dam zero flow principle), 42-234 (authorizing the subordination of groundwater recharge water rights), and 42-607 (preferring fully-adjudicated, licensed and/or decreed water rights over those established based on beneficial use alone). Prioritization and subordination (or “protectionism” in the parlance of Elmore County) is both permissible and well-settled under Idaho law.

Finally, Elmore County fails to address Department precedent rejecting a proposed appropriation of water as contrary to the local public interest because alternative future uses of the same water source for other, competing beneficial uses should be protected and not impacted by the grant of the present day application; said differently, denying the pending application for the purpose of “protecting the possibility that the Bear River Narrows *may be needed in the future* as a storage site for critical future beneficial consumptive or other depletionary uses.” *Final Order Denying Application for Permit*, In the Matter of Application for Permit No. 13-7697 in the Name of Twin Lakes Canal Co. (Oct. 18, 2012), p. 50.

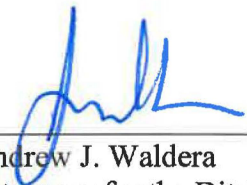
As suggested in the DC Exceptions (p. 11), if Elmore County’s so-called “2%” depletive effect is inconsequential because there is plenty of water to go around in flood control years (at least over the last 20 years of record proffered by Scanlan), then let Elmore County bear that risk under Idaho Code Sections 42-203A(5)(e) and (g). There is no question that further conditioning of any permit in this matter by including such an in-basin preference or subordination remark for the benefit of Basin 63 is well within the Director’s discretion.

### **III. CONCLUSION**

The Ditch Companies appreciate the Hearing Officer's rejection of Elmore County's erroneous Criterion (g) arguments—at least insofar as the County continues to argue that Criterion (g) only applies to consideration of existing, as opposed to future, conditions. In this regard, the Hearing Officer has correctly realigned himself with the plain language of statutory criteria (a) and (g), the legislative history concerning the same, and the holdings of *Shokal, supra*. But, the Ditch Companies continue to disagree with the Hearing Officer's ultimate Criterion (g) "no affect" conclusion. For the foregoing, and consistent with their prior DC Exceptions fully incorporated by reference herein, the Ditch Companies renew their request that the Application be denied in its entirety or, in the alternative, that the any permit that may be granted be further conditioned to be subordinate to future uses in Administrative Basin 63.

DATED this 21<sup>st</sup> day of May, 2019.

SAWTOOTH LAW OFFICES, PLLC

By   
\_\_\_\_\_  
Andrew J. Waldera  
Attorneys for the Ditch Companies

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of May, 2019, I caused a true and correct copy of the foregoing **DITCH COMPANIES' EXCEPTIONS TO AMENDED PRELIMINARY ORDER APPROVING PERMIT UPON CONDITIONS** to be served by the method indicated below, and addressed to the following:

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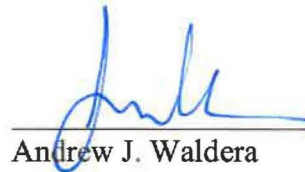
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