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DEPARTMENT OF  
WATER RESOURCES

**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

**CITY OF BOISE'S RESPONSE TO  
ELMORE COUNTY'S EXCEPTIONS  
TO AMENDED PRELIMINARY  
ORDER/RENEWED PETITION FOR  
CLARIFICATION**

COMES NOW, Protestant, the city of Boise City (the "City"), by and through its attorney of record, Abigail R. Germaine, and hereby respectfully submits this Response to Elmore County's Exceptions to Amended Preliminary Order/Renewed Petition for Clarification pursuant to Rules of Procedure of the Idaho Department of Water Resources, Rule 730 (IDAPA 37.01.01.730.02(c)), opposing Elmore County's exceptions to the Hearing Officer's Order on Reconsideration; Amended Preliminary Order Approving Permit Upon Conditions ("Amended Preliminary Order") issued on May 7, 2019.

**CITY OF BOISE'S RESPONSE TO ELMORE COUNTY'S EXCEPTIONS TO AMENDED  
PRELIMINARY ORDER/RENEWED PETITION FOR CLARIFICATION**

The City opposes Elmore County's exceptions filed to the Director on the same grounds as they were opposed by the City in response to Elmore County's Petition for Reconsideration/Petition for Clarification filed on April 16, 2019, as they raise the exact same arguments. The City respectfully requests the Director deny Elmore County's exceptions, affirming the Hearing Officer's original and amended Preliminary Orders as they relate to Elmore County's request, and amend the Preliminary Order in accordance with the City's Brief Taking Exception to the Preliminary Order Approving Permit Upon Conditions ("City's Exceptions"), filed April 16, 2019.

### **I. PRIOR PROCEEDINGS**

After a six (6) day contested hearing and the submittal of post-hearing briefing, the Hearing Officer issued his original Preliminary Order Approving Permit Upon Conditions on April 2, 2019 ("Preliminary Order"). On April 16, 2019, the Ditch Companies, the City, and the Idaho Conservation League all filed exceptions to the Director based on the Hearing Officer's Preliminary Order. On the same day, Elmore County filed its Petition for Reconsideration/Petition for Clarification. The City and the Boise Project Board of Control filed responses to Elmore County's Petition for Reconsideration/Petition for Clarification on April 23 and April 30, 2019, respectively.

On May 7, 2019, the Hearing Officer issued his Order on Reconsideration, Amended Preliminary Order Approving Permit Upon Conditions ("Amended Preliminary Order"). The Hearing Officer granted in part and denied in part, Elmore County's Petition for Reconsideration/Petition for Clarification. The Hearing Officer did not address the protestants', the City, Idaho Conservation League, and the Ditch Companies, exceptions as these were submitted to the Director and were not within the Hearing Officer's purview or authority to decide,

pursuant to Rule 730 of the Idaho Department of Water Resources Procedural (IDAPA 37.01.01.730.02). However, the Hearing Officer did take the opportunity to clarify specific language within his Preliminary Order. Nevertheless, his clarification did not address the protestants' exceptions before the Director. Those exceptions are still rightfully before the Director for consideration. As such, the City incorporates herein by reference its Brief Taking Exception to the Preliminary Order Approving Permit Upon Conditions in its entirety. The City also incorporates herein by reference its Response to Elmore County's Petition for Reconsideration/Petition for Clarification. The arguments raised by Elmore County in its Petition for Reconsideration/Petition for Clarification are the same arguments raised in its Exceptions to Amended Preliminary Order/Renewed Petition for Clarification. The City therefore renews and incorporates its opposition to Elmore County's Petition herein this response.

## **II. ARGUMENT**

### **A. The Director Should Deny Elmore County's Exceptions Requesting Removal of the Volumetric Limitation Because Elmore County's Application Listed a Maximum Volume Limit.**

Elmore County reiterates its argument made to the Hearing Officer in its Petition for Reconsideration/Petition for Clarification that it should not be bound by a volumetric limitation. As correctly determined by the Hearing Officer in both his original Preliminary Order and his Amended Preliminary Order, Elmore County is limited to a total annual quantity diverted of 10,000-acre feet (a/f). (Preliminary Order Approving Permit, April 2, 2019, at 5; Order on Reconsideration; Amended Preliminary Order Approving Permit Upon Conditions, May 7, 2019, at 4.) As the Hearing Officer correctly states in his Preliminary Order, an applicant is limited to what is requested on the face of the water right application. (Preliminary Order, at 5.) Elmore

County's Amended Application ("Application") clearly states, the total quantity to be appropriated is 200 cfs and/or 10,000 acre-feet. (Amended Application for Permit, at 1.)

Elmore County was not required to specify a volume limit on the Application and if it had intended to not limit the "total quantity to be appropriated" it could have chosen to not specify such a limit. However, Elmore County did specify a total quantity to be appropriated on the face of the Application, and those who reviewed and/or protested the Application, did so under the premise that such a limitation was the maximum volume being sought. In his Amended Preliminary Order, the Hearing Officer correctly states, that "[a]dequate notice of what the applicant is seeking is necessary in order to satisfy the requirements of due process in an administrative proceeding." (Amended Preliminary Order, at 3 citing *Grindstone Butte Mut. Canal Co. v. Idaho Power Co.*, 98 Idaho 860, 865, 574 P.2d 902, 907 (1978)).

If Elmore County does not wish to be limited to 10,000 AF annually, it may amend its application according to the Department of Water Resources, Water Appropriation Rules, IDAPA 37.03.08.035.04, which reads:

*An Amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department.*

IDAPA 37.03.08.035.04(c)(emphasis added). Elmore County would be required to re-advertise its application if it intends to seek more than 10,000 AF annually. *Id.*

Furthermore, Elmore County states in its Exceptions and Petition for Clarification that "a volumetric limitation is absolutely appropriate for purposes of storage-related beneficial uses." (Elmore County's Exceptions to Amended Preliminary Order/Renewed Petition for Clarification, May 21, 2019, at 2.) However, as shown by the Application itself and the testimony at hearing,

the project does not have a direct flow diversion. The following was the exchange at hearing between the City's counsel and Elmore County's expert witness, Terry Scanlan:

Q: One, where in the construction plans or the application does it specify a split of what could go to Little Camas Reservoir or go directly down into Mountain Home Irrigation District's canals and tunnels?

A: I don't think it did show that, but a valve could be installed there.

(Tr., Vol. III, p. 675, L. 25 through p. 676, L. 5.) The Application did not contemplate, and certainly did not illustrate such an intention to the public, that the Application would have a direct diversion component without storage in Little Camas Reservoir. The Permit must be limited to 10,000 acre-feet.

**B. The Idaho Department of Water Resources is not the Appropriate Venue to Challenge the Constitutionality of an effective Idaho Statute.**

Elmore County focuses a substantial amount of their argument within their Exceptions and Petition for Clarification challenging the constitutionality of Idaho Code § 24-115. Regardless of the merit or validity of Elmore County's challenge to the constitutionality of Idaho Code § 42-115, which will be discussed more fully below, the Idaho Department of Water Resources ("the Department") is not the proper venue for challenging an Idaho Code state statute. The Department does not have the authority to refuse to enforce the laws of the State. Elmore County itself appears to acknowledge this by stating, "As to constitutional questions, Elmore County recognizes and acknowledges the Director's limited ability to address the constitutionality of a legislative act." (Exceptions and Petition for Clarification, at 10.) Yet, Elmore County then attempts to assert that the Director must not follow a currently enacted statute if he believes it to be unconstitutional.

The Department is tasked with enforcing and implementing the water appropriation laws and rules of the state of Idaho as written. The Department does not have the authority to change or

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alter Idaho Code. Should Elmore County believe a rule or statute of the State is unconstitutional, that is an issue to be challenged in the courts, not the agency tasked with enforcing the laws.

**C. Elmore County Incorrectly Interprets the Law and Mischaracterizes the Hearing Officer's Holdings related to Condition 14.**

The City reiterates that the Department is not the appropriate venue for challenging the constitutionality of an enacted Idaho statute. However, to the extent Elmore County is attempting to challenge the language of Condition 14 of the Permit, separate from Idaho Code § 42-115, as contradictory to Idaho law, the City provides the following twofold response.

Elmore County centers its constitutional challenges around Article XV, Section 3, of the Idaho Constitution. Elmore County attempts to argue that Condition 14 is in conflict with Article XV, Section 3, which reads in pertinent part: "The right to divert and appropriate the unappropriated waters of any *natural stream* to beneficial uses, shall never be *denied*...." Article XV, Section 3 (emphasis added). Elmore County suggests that Condition 14 is unconstitutional because it conflicts with this provision by limiting and subordinating the Permit to the capture and retention of water in existing on-stream storage reservoirs operated for storage and flood control purposes. However, Elmore County has mischaracterized the applicability of this provision in multiple ways.

First, Condition 14 and Article XV, Section 3 are not contradictory because the hearing officer did not *deny* the right to appropriate water in his Preliminary Order, Amended Preliminary Order, or draft Permit. Article XV, Section 3 does not state for example, "the right to divert and appropriate water shall not be appropriately conditioned." It reads the right to appropriate water should not be *denied*. Idaho Const., art. XV, § 3 (emphasis added). Regardless of whether or not the Application actually met the statutory criteria of Idaho Code § 42-203A and should have been granted, as it currently stands, the Application was not denied. Elmore County's argument that

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Condition 14 is unconstitutional is misplaced to the extent it states their ability to appropriate water has been denied. It hasn't. The Application to appropriate water has not been denied, it has been appropriately conditioned to meet the requirements of Idaho Code, therefore this argument against Condition 14 fails on the plain language of the Idaho Constitution.

Second, Elmore County has based their constitutionality argument on Article XV, Section 3. However, this provision is not applicable to the water sought to be diverted under this Permit. Article XV, Section 3 relates to any "Water of Natural Stream." This Permit does not seek to divert the unappropriated waters of any natural stream. Instead, the permit seeks to appropriate diverted flood flows that have been captured in a reservoir. Elmore County has misplaced its reliance on this law to invalidate Condition 14.

The concept that water diverted and stored in a reservoir is no longer considered natural flow is well established Idaho law. *See generally, Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935); *see also* Idaho Const., art. XV, § 3, Compiler's Notes – Analysis, Reservoirs ("After water was diverted from a natural stream and stored in a reservoir it was no longer 'public water,' subject to diversion and appropriation under §§ 1, 2 and 3 of this article[XV]....", citing *Washington County Irrigation Dist. v. Tolboy*); *Memorandum Decision and Order on Cross-Motions for Summary Judgment RE: Bureau of Reclamation Streamflow Maintenance Claim*, September 23, 2008, at 19 (The SRBA District Court has discussed this very scenario in Basin 63, "On the other hand, the entire flow of river is diverted and then artificially released. In other words, the claim does not involve the appropriation of a natural flow within the channel." (referring to water diverted and stored in Lucky Peak Dam and reservoir)). Therefore, Elmore County's basis that Condition 14 is unconstitutional as it relates to Article XV, Section 3 is misplaced and inapplicable.

### III. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Director enter a final order denying Elmore County's exceptions to the Hearing Officer's Amended Preliminary Order and granting the City's exceptions to the Director by entering a final order revising the Hearing Officer's analysis related to the local public interest criteria and the adverse effect on the local economy, and finding that subordinating the Permit to future Basin 63 water rights will ensure protection related to both these criteria. The City respectfully requests that the Director amend the Permit to reflect the revised analysis in the final order, re-impose all 28 conditions initially placed on the Permit by the Hearing Officer, and implement an additional condition subordinating the Permit to future Basin 63 water rights.

DATED this 4 day of June 2019.

OFFICE OF THE CITY ATTORNEY

  
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## CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of June 2019, I served true and correct copies of the foregoing document to the following counsel of record:

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*On behalf of Elmore County Board of Commissioners*

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