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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 63-34348 IN THE NAME OF
ELMORE COUNTY, BOARD OF COUNTY
COMMISSIONERS

**DITCH COMPANIES' RESPONSE TO
ELMORE COUNTY'S EXCEPTIONS
TO AMENDED PRELIMINARY
ORDER/RENEWED PETITION FOR
CLARIFICATION**

COME NOW, the Ditch Companies,¹ by and through their attorneys of record Sawtooth Law Offices, PLLC, and pursuant to Idaho Department of Water Resources Procedure Rule 730.02 (IDAPA 37.01.01.730.02(c)), and hereby submit the following Response to *Elmore County's Exceptions to Amended Preliminary Order/Renewed Petition for Clarification* filed on May 21, 2019, in the above-captioned matter (hereinafter "Elmore County's Exceptions"). The Ditch Companies submit this Response in opposition to Elmore County's Exceptions on the

¹ The Protestant "Ditch Companies" for purposes of this Response 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.

grounds that Elmore County's Exceptions should be rejected as previously determined by the Hearing Officer.

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 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 *Amended Preliminary Order Approving Permit upon Conditions* (May 7, 2019) ("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 granting Elmore County's requested adjustment of the irrigation place of use under the permit. APO, p. 6. In doing so, 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 those 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.

On May 21, 2019, the Ditch Companies filed *Exceptions to Amended Preliminary Order Approving Permit Upon Conditions* ("DC Amended Exceptions") concerning the Hearing Officer's decisions as to Criterion (g) and those remaining issues which were not addressed by

the Hearing Officer. On the same date, May 21, 2019, Elmore County filed its own Exceptions to the APO. This Response is to Elmore County's Exceptions.

II. ARGUMENT

A. The Hearing Officer Properly Determined that Elmore County's Permit, if issued, Should be Limited to a Total Volume of 10,000 Acre Feet Annually

Elmore County takes issue with the Hearing Officer's determination that Elmore County's Permit, if issued, should be conditioned consistent with quantities sought on the Application, including limitation of the total volume diverted to 10,000 acre feet. Elmore County also takes issue with Condition 6 of the Hearing Officer's APO which limits the diversion under the Permit for irrigation use to 50% of the total volume diverted or 5,000 acre feet. Elmore County raised these same issues in its Petition for Reconsideration and the Hearing Officer denied Elmore County's requests because the "plain language of the Application narrative supports the contention that the application was not intended for more than 10,000 AF" and any contradictory information or uncertainty should have been detailed by Elmore County in the Application narrative. APO, p. 2. The Hearing Officer further reiterated the need to condition the permit to limit the diversion for irrigation use to ensure that the primary public, community-sustaining benefit touted by Elmore County (stabilizing the local aquifer in and around the City of Mountain Home after years of annual pumping deficits via groundwater recharge) is not supplanted or subsumed by private irrigation use within Mountain Home Irrigation District ("MHID"). APO, p. 4. The Ditch Companies agree with the Hearing Officer's determinations; Elmore County's renewed arguments in its Exceptions should be denied.

First, Idaho Code section 42-203A(5) provides the Department with the authority to condition a permit, which may include approving a permit for a lesser quantity than applied for. This does not include the authority to approve a permit for a larger quantity than applied for and instead an applicant seeking a larger quantity than applied for must amend its application which would require re-advertisement of the amendment. *See* IDAPA 37.03.08.035.04. As the Hearing Officer correctly observed, notice and fair play preclude an applicant using “bait and switch” or a “moving target” as part of the application process only to later assert a larger quantity based upon the applicant’s own uncertainty and ambiguity. It is up to the applicant, in this case Elmore County, to clearly identify the amount sought to be appropriated and any uncertainty or ambiguity should be resolved *against* increasing the amount above that sought on the face of the Application. Elmore County can amend the Application and have it re-advertised if it seeks a larger quantity, or it can file a new application for the incremental amount not contained in this Permit.

Second, as correctly noted by the Hearing Officer, the plain language of the Application lists the total maximum annual diversion at 10,000 acre feet per year. While Elmore County now suggests that it intended a direct flow diversion rate of 200 cfs in addition to storage, this is contrary to the face of the Application and the presentation of the intended diversion by Elmore County at hearing. Indeed, the record is replete with statements of Elmore County and its witnesses that the intent of the Application is to divert water from Anderson Ranch Reservoir to Little Camas Reservoir (*i.e.*, all water diverted would physically funnel through Little Camas Reservoir—there is no provision for direct discharge to the MHID canal). *See* Pet. Ex. 1, p. 5, ¶ 12 (emphasis added) (Application Description: “Water will be pumped from the South Fork of the Boise River to Little Camas Reservoir for storage, *then* diverted through the existing

Mountain Home Irrigation District Canal . . .”). Elmore County continued with this description of its project even up to its last minute submission to the federal agencies Standard Form 299 which described the facilities as an intake and pump station and “[t]he facilities will terminate at a discharge into Little Camas Reservoir.” *See* Pet. Ex. 18, Item 7 (EC 014367) (emphasis added) (counsel for Elmore County not only described the project as terminating/discharging to Little Camas Reservoir, but went on to state “water will be **stored** in Little Camas Reservoir **until needed** by Mountain Irrigation District.”).

Elmore County suggests that the parties were afforded an opportunity to conduct discovery but this is a meritless excuse when the plain language of the Application and the documents prepared and submitted by Elmore County provided the intent to divert and store the water in Little Camas Reservoir. This was the intent expressed by Elmore County up to and including the Hearing. Elmore County provided no design plans or cost estimates for a direct flow diversion from Anderson Ranch Reservoir to MHID’s canal system which did not first get diverted into and stored in, even for a brief period of time, Little Camas Reservoir. *See, e.g.*, Pet. Ex. 10, Appendix C (Preliminary Design Report—Anderson/Little Camas Pipeline (Aug. 2, 2018) wherein design engineer Scott McGourty described the project as delivery of up to 200 cfs “from Anderson Ranch Reservoir to Little Camas Reservoir” via a “2.75 mile long, 78-inch diameter pipeline to Little Camas Reservoir. Water delivered to Little Camas Reservoir **would then be conveyed** through the existing [MHID] delivery system to Mountain Home Reservoir and Canyon Creek . . .”). The preliminary design schematics then further confirmed this design narrative—there is/was no direct flow component to the MHID canal system).

When asked during cross-examination, Elmore County’s expert, Terry Scanlan, acknowledged that he did not think the Application or construction designs showed direct flow to

the canal.² Tr. at 675-76 (“I don’t think it did show that, but a valve could be installed [for direct diversion to the canal]”). Scanlan’s testimony and recollection was correct. As discussed, *supra*, the Application and other submissions did not provide any direct flow designs or indications. The design, which Scanlan could not recall during his testimony, clearly provided for diversion from Anderson Ranch to Little Camas Reservoir. *See* Pet. Ex. 10, Appendix C (the design and cost estimate for the project was to construct a pipeline and diversion directly to Little Camas Reservoir). Thus, despite Scanlan’s uncertainty, it is clear that the plain language of the Application, design, estimates, and submissions by Elmore County provided that the water would be diverted into and stored in Little Camas Reservoir in its entirety prior to release into the MHID canal.

Elmore County agrees that it “does not propose to store more than 10,000 AF, and the Application, evidence and testimony reflect as much.” Elmore County Exceptions, p. 4.³ The

² Given the capacity limitations of the MHID’s canal system as being at most 80 cfs (*see Ditch Companies’ Exceptions* (Apr. 16, 2019), pp. 15-18, challenging the Hearing Officer’s conclusion that the capacity is limited to 100 cfs) there is insufficient evidence to support Elmore County’s unsupported claim that it may directly divert 200 cfs without it first entering Little Camas Reservoir. Even if it wanted to, and the Application clearly provided for direct flow to the canal (which it did not), Elmore County could not divert 200 cfs into an 80 cfs canal. Thus, the current arguments by Elmore County that it should not have a 10,000 AF volume limitation are largely moot given there is no evidence to support a direct flow diversion of 200 cfs. In other words, while the Ditch Companies continue to take issue that there is substantial evidence to support even a capacity of 100 cfs below Little Camas, there is clearly not sufficient evidence in the record to support a direct diversion of 200 cfs diversion below Little Camas.

³ Elmore County’s contention that the volume limitation could result in an annualized diversion of only 3,000 acre feet is misleading and incorrect. Elmore County’s annualized volume analysis is a meaningless number as the diversion of water has always been based upon on available flood flows which occur less than 50% of the years (9 out of the last 20 years). The annualized volume analysis was used to determine per acre foot costs of the proposed project, but the annualized volume calculation does not lessen the amount of water which may be available during those 9 flood control years or the ability of the County to divert up to 10,000 acre feet during those 9 years. Said differently, in a flood control year when more than 10,000 acre feet is spilled from Anderson Ranch Dam, and the rest of the conditions of the Permit are

Hearing Officer correctly determined that Elmore County's Application and related submissions provided the intent to first store all water diverted in Little Camas Reservoir and it failed to provide any analysis suggesting an intent for direct diversion to Mountain Home Irrigation District's facilities. Thus, the Hearing Officer correctly conditioned the approval of the Application with a combined use limitation of 10,000 AF.

As to Condition 6 of the Permit, which limits the diversion for irrigation to 50% of the total volume of water diverted, other than stating it takes issue with the condition, Elmore County provides no argument or basis for reversing the Hearing Officer's determination. The Hearing Officer correctly observed during the course of the hearing that while ground water recharge was an intended purpose of the Application, and there was much testimony from Elmore County's witnesses of an alleged need for aquifer recharge, MHID would have absolute control and discretion as to how and when the water was diverted, moved and stored in MHID's canal system and reservoirs. *See Ditch Companies' Post Hearing Brief* (Jan. 14, 2019), pp. 10-11, n. 14; Pet. Ex. 23 (Letter of Intent); Tr. at 415-17, 468-69, 486-89 (Ascuena stating that MHID will have absolute discretion and is going to get its full allotment before Elmore County gets any); and Tr. at 233 (Wooton stating that MHID is focused only on itself).⁴ In order to prevent such a private benefit boondoggle the Hearing Officer correctly exercised the authority to condition the Application pursuant to the local public interest by providing a limitation to the amount diverted for irrigation use. Condition 6 ensures that Elmore County and

met, Elmore County is not going to stop at 3,000 acre feet of diversion simply because the annualized average volume number says so.

⁴ As discussed, *supra*, counsel for Elmore County in submitting the SF299 form less than two months before hearing reiterated that water would be stored in Little Camas "until needed by" MHID. Pet. Ex. 18, Item 7 (EC 014367).

MHID do not circumvent the local public interest to simply use this Application as nothing more than a means to provide supplemental irrigation water to existing lands within MHID (an entity who *did not* apply for the water right because it lacked the taxable landmass to make economic sense of the project). Tr. at 455:17-456:14. The Hearing Officer correctly limited the diversion for supplemental irrigation water and Elmore County provides no basis or argument as to why Condition 6 should not be included in any Permit issued—nor can Elmore County given its public benefit, community-saving rhetoric in support of the Application.

B. Elmore County’s “Request for Clarification” Should be Denied

Characterized as a request for clarification, Elmore County contends that the Hearing Officer should further clarify Condition 14 of the Permit and then Elmore County raises “Constitutional Concerns” with Condition 14. This request was also raised as part of Elmore County’s Petition for Reconsideration and was rejected by the Hearing Officer because Elmore County’s questions concerning administration and the constitutionality of statutes are not properly before the Hearing Officer as part of an administrative proceeding concerning a new water right application. The Ditch Companies agree and further contend that clarification is not necessary, this is not the proper forum to challenge the constitutionality of a statute and, even if the Department had the authority to opine on the constitutionality questions raised by Elmore County for argument’s sake, the statute questioned by Elmore County is not unconstitutional.

First, the nature of Elmore County’s clarification request is unclear. Condition 14 provides that the Permit “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 day of allocation.” This is consistent with the representations of Elmore County’s at hearing, that they have no intentions to interfere with the physical filling of

the Boise River Reservoirs and only seek to divert unappropriated flood flows. Tr. at 170-171 (Corbus); 340-341 (Hofer). The Refill 1 and Refill 2 water rights are created to protect and preserve historic, long-standing reservoir storage and water use operations. Tr. at 1444; 1600-1603. Thus, even if these refill rights are not decreed, the Hearing Officer has the authority to condition Elmore County's Permit to ensure that the Permit does not interfere with the capture and retention of water in the existing on-stream reservoirs during and following flood control and there is no need for further clarification. It is axiomatic that the diversion of water under this Permit, if approved, is only for those unappropriated waters which are not being captured and retained in the on-stream reservoirs during and following flood control. Condition 14, as well as Condition 15 (providing that Elmore County must mitigate for any diversions that occur when water is not being released for flood control purposes) and Condition 18 (providing that the diversions are subject to the operations of the Boise River reservoirs), ensure that Elmore County does not interfere with the long-standing reservoir operations.

Second, as properly determined by the Hearing Officer, an administrative proceeding concerning a new permit is not the proper forum to challenge the constitutionality of a statute. The Department applies statutes as written and it does not have the authority to determine the constitutionality of the same. Indeed, Elmore County agrees and does not dispute Department's limited ability to address the constitutionality of a statute. Elmore County Exceptions, p. 10. Yet, Elmore County still asserts these constitutionality arguments to "preserve constitutional the questions relating thereto for an appropriate tribunal." *Id.* In other words, it raises these issues only for the purpose of preserving arguments for some later date before some other tribunal. The Director, as did the Hearing Officer, should reject Elmore County's invitation to address

questions it acknowledges are not properly before the Department even if it is solely to preserve the questions for some other tribunal in the future.

Third, a reoccurring theme from Elmore County in this matter is a misplaced reliance on an unfettered constitutional right to divert water. Elmore County fails to recognize that the right to divert water of this state is not absolute and unfettered, but rather subject to the evaluation criteria under Idaho Code section 42-203A(5) and the Department may reject, partially approve or condition an application for permit. *See* DC Amended Exceptions, p. 9; *see also and compare*, Tr. at 1625:10-1628:3 and 1635:18-1637:7 (Shaw testifying re: the intersection of water appropriation under the Idaho Constitution as tempered by application evaluation statutes and administrative rules). The Hearing Officer can condition the Permit to protect existing rights, including existing operations of on-stream reservoirs, to ensure that Elmore County does not interfere, as it agreed it would not, with the storage of water in said existing reservoirs. Such a condition is not based exclusively upon a statute. Indeed, the Hearing Officer has conditioned the Permit to protect other historic, operational aspects of the Boise River, including the operations flows in the South Fork of the Boise River and the Boise River below Lucky Peak Reservoir (Conditions 16 and 17) and the flood control operations of the Boise River (Condition 18), and Elmore County has not raised any issues with such conditions in its latest exceptions. While the Hearing Officer referred to Idaho Code section 42-115 as a basis for subordination, it is not the exclusive basis for the Hearing Officer and the Department to condition a water right to ensure protection of existing, operational conditions.

Fourth, while Idaho Code section 42-115 is not the sole basis for Condition 14 and the constitutionality of the statute is not before the Department, Elmore County's arguments lack merit. Subordination statutes such as Idaho Code section 42-115 can be found in parts of Idaho

law such as subordination of hydropower rights under Idaho Code section 42-203B and recharge under Idaho Code section 42-234. *See also*, DC's Amended Exceptions, p. 10. Idaho Code section 42-115 is not a novel or new concept of subordination which has never been addressed by the Idaho Legislature but rather is permissible and consistent with Idaho law.

Furthermore, there is no basis to the suggestion that the Idaho Code section 42-115 is special use legislation. A statute is not special use legislation if its terms apply to all persons and situations in a like situation. In *Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 96 P.3d 637 (2004), the Court held that despite a statute's particularized relevance to ten northern counties, including stricter requirements on North Idaho counties, the statute at issue was not local or specialized law because it applied to all counties. *Id.* at 548, 96 P.3d at 649. The plain reading of Section 42-115 is that it is applicable state wide to all reservoirs of this state. Nowhere in the statute does it state that it is only applicable to Anderson Ranch Reservoir or the Boise River Reservoirs. It is clearly not a local or specialized law. While the Ditch Companies agree with Elmore County that the Department does not have the authority to address Elmore County's constitutional "concerns," there is no basis to the concerns.


III. CONCLUSION

For the reasons stated above, the Ditch Companies respectfully request that the Director deny the exceptions and requests for clarification filed by Elmore County. The Application, evidence and testimony was that the Permit, if approved, intended to divert and store the water first through Little Camas Reservoir. Furthermore, the Hearing Officer appropriately conditioned/limited the irrigation use to prevent it from supplanting ground water recharge. Finally, the Hearing Officer correctly applied Condition 14 and there is no basis to Elmore

County's constitutional or other arguments against such a condition to protect existing historic rights to physically fill the Boise River Reservoirs.

DATED this 4th day of June, 2019.

SAWTOOTH LAW OFFICES, PLLC

By 
S. Bryce Farris
Attorneys for the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2019, I caused a true and correct copy of the foregoing **DITCH COMPANIES' RESPONSE TO ELMORE COUNTY'S EXCEPTIONS TO AMENDED PRELIMINARY ORDER/RENEWED PETITION FOR CLARIFICATION** to be served by the method indicated below, and addressed to the following:

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