BACKGROUND

On March 3, 2017, the Board of County Commissioners of Elmore County1 ("Elmore County") applied for Permit No. 63-34348 ("Application") with the Idaho Department of Water Resources ("Department").

Elmore County seeks to appropriate 200 cubic feet per second ("cfs") and/or 10,000 acre-feet ("AF") per year for storage from the South Fork of the Boise River ("SFBR"). Application at 1. The Application proposes beneficial use of water for diversion to storage, ground water recharge storage, ground water recharge from storage, ground water recharge, irrigation storage, irrigation from storage, and irrigation. Id. at Attachments p.2—Proposed Uses.

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

The pump station and pipeline are located on federal land. Place of use for recharge is Mountain Home Reservoir, a gravel pit area and the natural streambeds of East Fork Long Tom Creek, Long Tom Creek and Canyon Creek. [MHID] operates Mountain Home Reservoir that is located on federal land. Three separate parties own portions of the gravel pit area: Calvin Ireland, Bureau of Land Management and Mountain Home Highway District. The creek beds cross both private and federal lands. Applicant is in the process of securing agreements for the pumping station, gravel pit areas and use of MHID facilities.

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

1 The Director discloses that Wes Wootan, a current Elmore County Commissioner, is married to the Director’s wife’s first cousin. While not a conflict of interest as defined in Idaho law, see Idaho Code §§ 74-401 et seq., the Director is disclosing the relationship for transparency.

2 On September 25, 2017, Elmore County amended the Application, modifying the legal description of the point of diversion and place of use.
[W]ater will flow through an existing tunnel, which may be enlarged for additional flow, to the streambed of East Fork Long Tom Creek. Water will flow down the East Fork Long Tom Creek, through Long Tom Reservoir, Long Tom Creek, to Canyon Creek. Water will then flow down Canyon Creek to the [MHID] diversion. At the diversion, water can be diverted to Mountain Home Reservoir for ground water recharge (through reservoir leakage) and/or irrigation purposes, to the gravel pit area for ground water recharge, or can be allowed to flow downstream in Canyon Creek for ground water recharge via the Creek bed. A beginning point and ending point were used to describe the ground water recharge place of use via the creek beds.

Id.

The Department published notice of the Application in the Mountain Home News, the Post Register, the Times-News, the Idaho Statesman, and the Lewiston Tribune for two consecutive weeks on October 19 and October 26, 2017. The Boise Project Board of Control (“BPBC”); the group of protestants collectively referred to herein as the Ditch Companies; Idaho Power Company (“Idaho Power”); Cat Creek Energy, LLC; the City of Boise (“Boise”); Riverside Irrigation District; the Idaho Conservation League (“ICL”); and the United States Bureau of Land Management (“BLM”) timely protested the Application.

On November 13-16 and December 7-10, 2018, the hearing officer heard and received evidence in this contested case. Post-hearing briefs were authorized by the hearing officer and Elmore County, BPBC, Boise, the Ditch Companies, and ICL timely filed briefs.

On April 2, 2019, the hearing officer issued a Preliminary Order Approving Permit Upon Conditions (“Preliminary Order”). On April 16, 2019, Elmore County timely filed a Petition for Reconsideration/Petition for Clarification (“Petition”). Also on April 16, the following


4 Cat Creek Energy, LLC, withdrew its protest on August 28, 2018.

5 At the hearing, BLM and Elmore County submitted a Settlement Agreement to resolve BLM’s protest. Idaho Power and Elmore County submitted a Stipulation for Settlement of Protest to resolve Idaho Power’s protest. In lieu of the conditions agreed to in these settlements, the Director includes the Department’s Standard Condition 106. Standard Condition 106 states: “Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality monitoring and/or permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.” The Department’s Standard Condition 106 is substantively the same as the condition requested by BLM, Idaho Power, and Elmore County.

6 On April 23, 2019, Boise filed City of Boise’s Response to Elmore County’s Petition for Reconsideration/Petition for Clarification. On April 30, 2019, the Boise Project Board of Control filed Boise Project Board of Control’s Response to Elmore County’s Petition for Reconsideration/Petition for Clarification. Because the Department’s Rules of Procedure do not authorize responses to petitions for reconsideration, the responses were not considered by the hearing officer, an outcome with which the Director agrees. See generally IDAPA 37.01.01.
exceptions to the Preliminary Order were filed with the Director: (1) City of Boise’s Brief Taking Exception to the Preliminary Order Approving Permit Upon Conditions; (2) Idaho Conservation League’s Exceptions to April 2, 2019 Preliminary Order; and (3) Ditch Companies’ Exceptions to Preliminary Order Approving Permit Upon Conditions.7

Upon reconsideration, the hearing officer granted in part and denied in part the Petition and responded to the argument that the hearing officer did not consider the potential future impact of Elmore County’s application on Basin 63. The hearing officer issued an Order on Reconsideration; Amended Preliminary Order Approving Permit Upon Conditions (“Amended Preliminary Order”) on May 7, 2019.

On May 21, 2019, the Ditch Companies filed Exceptions to Amended Preliminary Order Approving Permit Upon Conditions and Elmore County filed its Exceptions to Amended Preliminary Order / Renewed Petition for Clarification.

On June 4, 2019, Boise filed its Response to Elmore County’s Exceptions to Amended Preliminary Order/Renewed Petition for Clarification.8 Also on June 4, 2019, Elmore County filed its Response to Protestant’s Exceptions.

The Director reviewed the exceptions to the Amended Preliminary Order, as discussed in detail below. The Director now largely adopts the hearing officer’s findings of fact and conclusions of law. The Director concludes that the Amended Preliminary Order should be modified in some places to address the exceptions. Accordingly, the Director modifies the Amended Preliminary Order as follows.

ANALYSIS

A. Criteria for Evaluating an Application for Permit

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

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or

7 The Director will not consider the exceptions filed in response to the hearing officer’s Preliminary Order because the hearing officer subsequently amended the Preliminary Order, rendering any exceptions thereto moot.

8 Boise attempts to revive its Brief Taking Exception to the Preliminary Order Approving Permit Upon Conditions by incorporating it by reference in its Response to Elmore County’s Exceptions to Amended Preliminary Order/Renewed Petition for Clarification. However, Boise did not timely file exceptions to the hearing officer’s Amended Preliminary Order. Therefore, while the Director will consider Boise’s Response to Elmore County’s Exceptions to Amended Preliminary Order/Renewed Petition for Clarification, he will not address or otherwise consider the exceptions raised in Boise’s Brief Taking Exception to the Preliminary Order Approving Permit Upon Conditions. See supra note 7.
(d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

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

B. Elmore County’s Proposed Use

As an initial matter, the Director must describe Elmore County’s “proposed use.” As stated above, Elmore County seeks to appropriate water for storage for the following specific uses: ground water recharge storage, ground water recharge from storage, irrigation storage, irrigation from storage. Application at 1, Attachments p. 2—Proposed Uses. In addition, Elmore County seeks to appropriate direct flow for ground water recharge and irrigation. Id. Elmore County seeks a year-round period of use for diversion to storage, ground water recharge storage, ground water recharge from storage, and ground water recharge. Id. Elmore County seeks a March 1 to November 15 period of use for irrigation from storage and irrigation. Id. Conditions and limitations will be imposed on Elmore County’s proposed use for the reasons described below.

1. Diversion volume and rate

   a. The 10,000 AF Volume Limitation

   The Application specifies a “[t]otal quantity to be appropriated” of 200 cfs and/or 10,000 AF. Elmore County’s expert applied a 20,000 AF total diversion volume limit in his Flood Water Availability Analysis for Application 63-34348 (“Water Availability Analysis”). Pet. Ex. 14 at 1; and Tr. Vol. III, pp. 674-77. BPBC, Riverside Irrigation District, and Boise requested that the permit be limited to a total volume of 10,000 AF. Post Hearing Brief of the Boise Project Board of Control and Riverside Irrigation District (“BPBC Brief”) at 3; City of Boise’s Post-Hearing Brief at 20; Boise Ex. 10 at 4.

   The Amended Preliminary Order concluded:

   If the Application had intended for more than 10,000 AF of total diversion for beneficial use, the application narrative should have detailed the diversions to
storage and additional simultaneous or subsequent diversion of water for direct delivery, but it did not. The hearing officer agrees with BPBC, Riverside Irrigation District, and Boise, that the Application proposes a total volume of 10,000 AF. Idaho Code § 42-203A(5) allows the Department to “approve and grant a permit for a smaller quantity of water than applied for,” but does not allow the Department to approve a permit for a greater amount of water than applied for. Accordingly, consistent with the face of the Application, Permit 63-34348 should be limited to a total quantity of 10,000 AF.

Amended Preliminary Order at 5 (footnote omitted). Therefore, the hearing officer included a 10,000 AF total volume limitation on both storage and direct flow diversions as a condition to Permit 63-34348 in both the Preliminary and Amended Preliminary Orders.

In its exceptions filed with the Director, Elmore County “seeks elimination of the 10,000 AF volume listed for ‘Maximum Diversion Volume,’ as well as the 5,000 AF volume listed for each of the direct flow irrigation and direct flow ground water recharge” components of Permit 63-34348.9 Elmore County’s Exceptions and Petition for Clarification at 2. Elmore County argues the volumetric limitation should not limit development of direct flow components of Permit 63-34348 because diversion rates and other conditions appropriately limit development of direct flow uses. Id. at 4-5.

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

Elmore County disagrees with the hearing officer’s decision to disallow recognition and use of the Department’s Instructions for Filing an Application for Permit (“Instructions”). It argues the Director should be able to “consider the content of a broadly utilized . . . document the Department itself generated in accordance with its statutory responsibilities.” Elmore County’s Exceptions and Petition for Clarification at 6. Elmore County argues its intent was clear and the Application shows its intent to utilize more than 10,000 AF. Id. at 8-9.

In response, the Ditch Companies counter that “[i]t is up to . . . 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 . . . if it seeks a larger quantity . . . .” Ditch Companies’ Response to Elmore County’s Exceptions to Amended Preliminary Order/Renewed Petition for Clarification at 4 (emphasis in original). Further, the Ditch Companies argue Elmore County “provided no design plans or cost estimates for a direct flow diversion from Anderson Ranch Reservoir to MHID’s

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9 The direct flow ground water recharge components of Permit 63-34348 was limited to 10,000 AF, not 5,000 AF as suggested by Elmore County.
canal system which did not first get diverted into and stored in, even for a brief time, Little Camas Reservoir.” *Id.* at 5.

Boise also argues “[t]he 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.” *City of Boise’s Response to Elmore County’s Exceptions to Amended Preliminary Order/Renewed Petition for Clarification* at 4-5. Therefore, Boise argues, Permit No. 34348 must be limited to a 10,000 AF total diversion volume. *Id.* at 5.

The Director concludes the direct flow components of Permit 63-34348 should not be limited to 10,000 AF. This conclusion follows partly from reference to the Department’s Instructions, which the Director recognizes as an integral and inseparable part of the Department’s sanctioned application materials, and, therefore, a part of the record under consideration. *See Idaho State Ins. Fund v. Hunnicut,* 110 Idaho 257, 264, 715 P.2d 927, 934 (1985). The lack of a direct flow volumetric limitation in the Application is allowed by the Department, as explained in its Instructions

Further, the report and testimony of Elmore County’s expert establishes the applicant’s intent to utilize more than 10,000 AF. Mr. Scanlan’s *Water Availability Analysis* assumed 20,000 AF as a potential maximum annual volume for purposes of studying water availability, showing Elmore County’s intent to apply for more than 10,000 AF. Mr. Scanlan explicitly stated at hearing that the Application contemplates diverting more than 10,000 acre-feet “because if you have a long enough diversion period, and a portion was going to direct use, and then the balance would go to that 10,000 acre-foot enumerated storage volume.” Tr. Vol. III, pp. 796-797. Further, when asked whether the intent of the Application is to limit it to 10,000 acre-feet, Mr. Scanlan stated: “[W]e intend to limit it to 10,000 acre-feet stored, but, no, we don’t intend to necessarily have a limit of 10,000 acre-feet combined diversion to storage, and combined with diversion to direct uses.” Tr. Vol. III, p. 677. Any confusion as to this issue was addressed and clarified at hearing.10

Elmore County presented evidence that natural flow could be directly diverted and not stored. If Elmore County diverts natural flow and delivers the natural flow directly without storing the water, its permit should not be limited to 10,000 AF. Mr. Scanlan stated “10,000 acre-feet could go into storage, and a portion could be diverted down the canal for direct use.” Tr. Vol. III, p. 675. Further, he stated “[t]he pipeline goes right over the canal, so you could divert out of the canal . . . or you could divert directly into Little Camas.” *Id.* Mr. Scanlan stated a valve could be installed in order to directly divert into MHID’s canals and tunnels. *Id.* at 676. Therefore, natural flow diverted as authorized by Permit 63-34348 and delivered directly for beneficial use will be credited to Elmore County’s permitted direct flow and will not accrue to the Permit’s 10,000 AF storage water volumetric limitation.

10 The public notices in this matter also support this outcome. Public Notice for Permit 63-34348 did not provide a volumetric limitation on Elmore County’s applied-for direct flow components. *See, e.g., Idaho Statesman Legal Proof of Publication* at 1.
b. The 5,000 AF Volume Limitation

Elmore County contests the hearing officer limiting its diversion of water for irrigation to 5,000 AF. Elmore County's Exceptions and Petition for Clarification at 2.

In section 8.e. of the Application, under the subheading “Other,” Elmore County wrote that a purpose of use is for “[g]round water recharge for present and future Elmore County water demands.” Application at 2. This line follows more detailed inquiries in the Application about specific purposes of use, and is a “catch all” for other purposes of use not previously described. The hearing officer viewed the reference to the recharge and municipal uses as the primary purposes of the Application. The hearing officer states that, without volumetric limitations on secondary uses, the intent of the Application could be frustrated:

“it would conflict with the local public interest to approve permit 63-34348 without proper conditioning to ensure the ground water recharge will occur pursuant to the Permit consistent with the intent of the Application.” Condition 6 of the Permit, along with a 5,000 AF volume limit on the “direct flow irrigation” component of the Permit, are necessary to ensure the local public interest is maintained in this matter and that ground water recharge under the Permit is not supplanted by supplemental irrigation.

Amended Preliminary Order at 4 (citations omitted).

Condition 6 of the Permit reads: “In any given year, water diverted for irrigation from storage and irrigation shall not exceed 50 percent of the total volume of water diverted for all uses described by the right.”

In its exceptions, Elmore County has not challenged Condition 6. Therefore, Condition 6 will remain on Permit 63-34348. However, the 5,000 AF natural flow volumetric limitation for irrigation will be removed. Because the 10,000 AF direct flow volumetric limitation has been removed, and a combined storage volume and directly delivered natural flow volume can exceed 10,000 acre-feet, there is no total base volume for computing the 5,000 AF limitation.

c. Rate of Diversion

In the Amended Preliminary Order, the hearing officer found that Permit 63-34348 should include a diversion rate limit of 200 cfs for diversion to storage, but a combined diversion rate of 100 cfs for direct delivery of ground water recharge and irrigation. Amended Preliminary Order at 13. In its response to Elmore County’s Exceptions, the Ditch Companies’ argue the existing canal system cannot convey upwards of 100 cfs, as the hearing officer found. “The record is clear that the existing canal and tunnel system cannot convey upwards of 100 cfs . . . .[S]hould a permit issue, the Ditch Companies request that the diversion rate downstream of Little Camas Reservoir be further reduced from 100 cfs to no more than 80 cfs . . . .” Ditch Companies’ Exceptions to Preliminary Order Approving Permit Upon Conditions at
The Director declines to reduce the 100 cfs rate limit as requested by the Ditch Companies. There is evidence in the record supporting the hearing officer’s finding that the facilities could convey up to 100 cfs. Elmore County’s expert testified that the facilities could convey “[s]omewhere between 50 and 100” cfs. Tr. Vol. III, pp. 711, 770; see Tr. Vol. III, pp. 672-63.

Furthermore, an application for a water right permit does not have to show that a project or system is already in place and can convey the amount of water applied for. Idaho Code § 42-203A(5). In this case, the capacity of the tunnel and canals may be enlarged. The Application states that “water will flow through an existing tunnel, which may be enlarged for additional flow . . . .” Application at Attachments p. 5—Narrative. If the tunnel is capacity deficient, Elmore County’s Water Supply Alternatives Analysis includes the potential for water to be conveyed over the top of the ridge above the tunnel. Pet. Ex. 9 at 77. Elmore County further testified that infrastructure improvements may also be utilized to divert rental pool water if, for example, additional storage is created at Anderson Ranch Dam. Tr. Vol. III, p. 800.

Requiring a project to be complete prior to the application for permit would be antithetical to the water permitting process under Idaho’s prior appropriation doctrine and elements of beneficial use. Accordingly, the Director will not reduce the 100 cfs limitation. 11 Permit 63-34348 will maintain a 200 cfs for diversion to storage with a combined diversion rate of 100 cfs for direct delivery for ground water recharge and irrigation.

2. Place of use for recharge

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

11 The Director notes that Elmore County did not challenge the 100 cfs limitation in its exceptions.

12 Elmore County petitioned for reconsideration of the place of use included in the Preliminary Order because “[t]he Department’s GIS shapefile of the [Mountain Home Reservoir] District and the listed place of use for the District in the Department’s database appear to not be the same.” Elmore County Petition for Reconsideration / Petition for Clarification at 8. The hearing officer’s Amended Preliminary Order states “[t]he Department . . . analyzed the District’s current GIS service area boundary shapefile on file with the Department and manually re-determined and updated the PLS description of the place of use on the Permit.” Id. at 6. Therefore, there is no longer a discrepancy between MHID’s current service area GIS shape file and the PLS description of the place of use.
3. **Period of use**

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

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

An April 18 date to begin the period of use for Permit 63-34348 would not be appropriate. Elmore County’s expert report states that water would have been available for appropriation beginning April 17 in 2012. Pet. Ex. 14 at “13190500: South Fork Boise River Anderson Ranch Dam,” p. 5. Further, the Ditch Companies’ expert report states that water would have been available for appropriation in January, February, and March in some years between 1956 and 2018. DC Ex. 34 at Table 1. In addition, while the Department’s 1980 Memorandum excluded June 15 to November 1 as a possible period of use for new applications for permit for consumptive use “on the Boise River and tributaries in the reach upstream from Lucky Peak Reservoir,” such exclusion was based on a conclusion that “no water is available for any additional consumptive uses.” *Id.*

No party disputes that water is available to divert from the SFBR when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Elmore County’s Water Availability Analysis demonstrates “there is a volume available for appropriation” in nine of the last twenty years (1999-2018). Tr. Vol. II, p. 567; *Water Availability Analysis* at 1; *Id.* at 5, Table 1. Boise’s expert and the Ditch Companies’ expert agree that water is available for appropriation during times when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Tr. Vol. IV, pp. 1060-67; Tr. Vol. VI, pp. 1575-76; DC Ex. 34 at Table 1. The June 15 limitation should not be imposed on Permit 63-34348.

In sum, a condition of approval limiting diversion from the SFBR to times when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam will appropriately limit the period of use for irrigation, ground water recharge, and diversion to
storage. Ground water recharge storage, ground water recharge from storage, and irrigation storage should be authorized year-round as requested in the Application. While the Application requests a March 1 to November 15 period of use for irrigation from storage and irrigation, a March 15 to November 15 period of use should be imposed because that is the period of use for MHID’s decreed water rights for those purposes. See DC. Ex. 57.

4. Place of use for irrigation and supplemental irrigation condition

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

Accordingly, a condition should be included on Permit 63-34348 which requires that water shall only be used for irrigation from storage and irrigation to supplement existing irrigation rights within MHID’s service area.13

C. Evaluation Criteria Analysis

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

Idaho Code § 42-203A(5)(a) requires the Director to evaluate whether Elmore County’s proposed use “will reduce the quantity of water under existing water rights.” The Department’s Water Appropriation Rule 45.01.a states that the proposed use will reduce the quantity of water under existing water rights if “[t]he amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.” IDAPA 37.03.08.045.01.a.i.14 Rule 45.01.a further states that “[a]n application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right . . . .” IDAPA 37.03.08.045.01.a.iv.

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

14 Rule 45.01.a.ii and iii are not at issue in this matter.
As discussed above, Elmore County only seeks to divert water from the SFBR during times of flood control releases from Anderson Ranch Dam and Lucky Peak Dam. Elmore County’s Water Availability Analysis establishes “there is a volume available for appropriation” in nine of the last twenty years (1999-2018). Tr. Vol. II, p. 567; Water Availability Analysis at 1; id. at 5, Table 1. Boise’s expert and the Ditch Companies’ expert agree that water is available for appropriation when water is released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Tr. Vol. IV, pp. 1060-67; Tr. Vol. VI, pp. 1575-76; DC Ex. 34 at Table 1.

a. Existing Storage Rights and Refill 1 and Refill 2 Water Rights

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

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

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

Elmore County takes exception to the hearing officer’s consideration of the Refill 1 and Refill 2 water rights in the Amended Preliminary Order. “Consideration of Refill 1 and Refill 2 is inappropriate and inconsistent with the prior appropriation doctrine.” Elmore County’s Exceptions to Amended Preliminary Order; Renewed Petition for Clarification at 9.

However, the Refill 1 and Refill 2 water rights have now been decreed. See Order Granting Motion to Decree Water Right No. 63-33734A – Order of Partial Decree (July 19, 2019) and Partial Decree Pursuant to I.R.C.P 54(B) for Water Right 63-3373A; and Order Granting Motion to Decree Water Right No. 63-33734B – Order of Partial Decree (July 19, 2019) and Partial Decree Pursuant to I.R.C.P. 54(B) for Water Right 63-3373B. Because the refill water rights have been decreed, the Director concludes it is appropriate to consider them here.

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The Refill 1 water right, water right no. 63-33734A, bears a priority date of September 30, 1965. *Partial Decree Pursuant to I.R.C.P 54(B) for Water Right 63-33734A.* The Refill 2 water right, water right no. 63-33734B, bears a priority date of March 16, 1973. *Partial Decree Pursuant to I.R.C.P. 54(B) for Water Right 63-33734B.* Permit 63-34348 will have a 2017 priority date. Accordingly, Permit 63-34348 is junior in priority to the Refill 1 and Refill 2 water rights.

The Refill 1 water right states:

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

*Id.* Because Elmore County’s proposed “uses” are not “within the IDWR Administrative Basin 63,” the Refill 1 water right is not subordinate to Permit 63-34348.

Similarly, the Refill 2 water right is subordinate to “[a]ll surface water rights within IDWR Administrative Basin 63 with a priority date earlier than May 1, 2014, with a decreed or licensed diversion rate of less than 0.1 CFS” and “[a]ll water rights listed on attachment A.” *Partial Decree Pursuant to I.R.C.P. 54(B) for Water Right 63-33734B.* Because Permit 63-34348 does not have a “diversion rate of less than 0.1 CFS” and is not “listed on attachment A,” the Refill 2 water right is not subordinate to Permit 63-34348.

Therefore, the Water District 63 watermaster’s distribution of water rights in accordance with the prior appropriation doctrine, as required by Idaho Code § 42-602, and the decrees for the Refill 1 and Refill 2 water rights, will ensure Permit 63-34348 will not interfere with the physical filling of the Boise River reservoirs.

**b. Bank Storage**

Next, the Ditch Companies argue that Permit 63-34348 will reduce the quantity of water under existing water rights because “the Boise River corridor below Lucky Peak Dam acts like/benefits from a ‘sponge’ mechanism.” *Ditch Companies’ Post Hearing Brief* at 2. The Ditch Companies assert that “[t]his hydraulic mechanism is supported by flood flows charging the shallow aquifer, which shallow groundwater then discharges back to the Boise River channel as river flows decline.” *Id.* The Ditch Companies further assert “[t]his mechanism prolongs river flow for the benefit of existing [natural flow] water rights, and lessens the need for irrigators to call upon their storage accounts for roughly four to five days approaching the Day of Allocation.” *Id. ; Tr. Vol. V, p. 1420.*
Evidence in the record suggests that Elmore County’s proposed use may have some impact on “bank storage.” Tr. Vol. V, pp. 1422-23. However, this reduction to “bank storage” does not constitute a reduction to the quantity of water under existing water rights as the Ditch Companies’ assert. While the “bank storage” may “prolong river flow for the benefit of existing [natural flow] water rights,” those natural flow water rights are not rights for “shallow groundwater” that is the “bank storage.” Accordingly, those natural flow water rights are not authorized to divert “bank storage.” See City of Blackfoot v. Spackman, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017) (holding that recharge “must be included in the purpose of use element before a water right may be used for recharge”); see Rangen, Inc. v. Idaho Dep’t of Water Res., 159 Idaho 798, 367 P.3d 193, 202-03 (2016) (holding that a water right holder was not entitled to divert from a point of diversion that “lies outside the specified point of diversion” of the partial decree for the water right). As a result, reduction to “bank storage” attributable to Permit 63-34348 is not a reduction to the quantity of water under existing water rights.

c. Diversion Outside of Flood Flows

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

Elmore County asserts that the concern it might divert water out of Anderson Ranch Reservoir when water is not being released for flood control purposes “is less of a concern in view of the fact that beginning next year, the Department will know every day when the system is in flood control, not days or a week in arrears.” Elmore County’s Post Hearing Brief at 10 (citing Elmore County’s expert testimony at Tr. Vol. II, p. 570, “that beginning next year, the watermaster will be informing the Department any time on all days when the system is in flood

15 The Ditch Companies suggest that diversion pursuant to Permit 63-34348 will reduce “bank storage” by “approximately 1,500 AF in typical flood control years.” Ditch Companies’ Post Hearing Brief at 3. However, the 1,500 AF estimate was the Water District 63 watermaster’s estimate of the total “bank storage” benefit from “flood flows.” See Tr. Vol. V, pp. 1419-23. Elmore County does not propose to divert all “flood flows” that occur below Anderson Ranch Dam. See Pet. Ex. 14 at 3 (estimating that Elmore County’s proposed diversion would “account for approximately 5% of the average available flow volume [at Anderson Ranch Reservoir] during the diversion period.”). Elmore County’s reduction to “bank storage” would be a small percentage of the watermaster’s 1,500 AF estimate.
control. So rather than waiting until . . . the accounting progresses a few days, the Department should know when they are in flood control at all times. The watermaster should know. So he should be able to notify us on a fairly immediate basis . . . when we can divert, and when we cannot divert.”)16 However, Elmore County agrees that “mechanisms exist” to mitigate for such diversions. Id. Elmore County proposes it could release “the calculated overage from Little Camas Reservoir back into Anderson Ranch Reservoir.” Id.; see Tr. Vol. II, p. 571. Elmore County also proposes it could rent water “through a rental pool rental to rent storage water to replace that.” Id.

Pursuant to Water Appropriation Rule 45.01.a.iv, the Director will impose a condition requiring that Elmore County mitigate its diversions out of Anderson Ranch Reservoir that occur when water is not being released for flood control purposes as authorized by Permit 63-34348. See IDAPA 37.03.08.045.01.a.iv. Elmore County correctly proposes that it can mitigate by releasing water from Little Camas Reservoir back into Anderson Ranch Reservoir or by renting water from the Water District 63 Rental Pool. Elmore County could also mitigate, as BPBC and Riverside Irrigation District propose, by “permanent transfer of a water right or portion of a water right.” BPBC Brief at Attachment A.17 Elmore County has met its burden to establish its proposed use will not “reduce the quantity of water under existing water rights.” I.C. § 42-203A(5)(a).

2. Sufficiency of the Water Supply

Idaho Code § 42-203A(5)(b) requires the Director to evaluate whether the “water supply itself is insufficient for the purpose for which it is sought to be appropriated.” To illustrate this statutory requirement Water Appropriation Rule 45.01.b states:

The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs

16 The Ditch Companies, BPBC, Riverside Irrigation District, Boise, ICL, and Elmore County all suggest that the potential injury to mitigate would be due to “accounting arrearage.” Elmore County’s Post Hearing Brief at 10; Ditch Companies’ Post Hearing Brief at 4; ICL Closing Brief at 3; City of Boise’s Post-Hearing Brief at 21-22; BPBC Brief at 7-8. But Elmore County will only divert pursuant to Permit 63-34348 when informed by the Water District 63 watermaster that water is being released for flood control purposes from Anderson Ranch Dam and Lucky Peak Dam. Accordingly, the potential injury to mitigate would be due the watermaster’s failure to inform Elmore County to stop diverting pursuant to Permit 63-34348 when water is no longer being released for flood control purposes. Because Elmore County will be restricted to diverting when water is being released for flood control purposes, no mitigation will be required from Elmore County for a failure to fill due to flood control operation.

17 The Ditch Companies asserted for the first time in their post-hearing brief that “evaporative losses associated with” the Application are “injury-producing” because such “[e]vaporative losses, absent mitigation, will reduce the quantity of water otherwise available in the [SFBR] as the County diverts additional water to mask or cover those losses . . . ” Ditch Companies’ Post-Hearing Brief at 3. Elmore County cannot divert “additional water” from the SFBR beyond what Permit 63-34348 will authorize. Evaporative losses to the “storage component of up to 10,000 AF annually stored” in Little Camas Reservoir will be borne by Elmore County, not by existing water rights downstream from Anderson Ranch Reservoir. Evaporative losses associated with Permit 63-34348 will not “reduce the quantity of water under existing water rights.”
to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment.

IDAPA 37.03.08.045.01.b.

The Ditch Companies and Boise criticize Elmore County for not conducting a cost-benefit analysis “demonstrating that the direct benefits of the project exceed the County’s direct costs.” *Ditch Companies’ Post Hearing Brief* at 5; *City of Boise’s Post-Hearing Brief* at 6-7. However, Water Appropriation Rule 45.01.b does not require that an applicant conduct a cost-benefit analysis to establish the water supply is sufficient for the proposed use. Rather, the Rule specifies more than one way an applicant, or person in opposition to an application, may establish the water supply is either sufficient or insufficient for the proposed use. If the evidence in the record establishes that “water is not available for an adequate time interval in quantities sufficient to make the project economically feasible,” the applicant can present evidence of noneconomic factors that could justify application approval.

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

The Ditch Companies’ and Boise’s argument assumes that individual farmers will bear the entire cost of the project. The project is not simply an irrigation project, nor are its benefits limited solely to farmers or a private entity purchasing additional water for irrigation. The argument also ignores that Elmore County is a governmental entity and “has the taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue the project construction in accordance with the construction schedule.” IDAPA 37.03.08.045.01.d; see *Elmore County’s Post-Hearing Brief* at 16.

Elmore County Commissioners who testified at the hearing acknowledged the County’s taxing and bonding authority and the role it will play in funding the proposed project. Tr. Vol. I, p. 64 (Commissioner Corbus testifying concerning the expense of the proposed project that “the citizens of Elmore County know and understand that’s a hurdle to come, and we’ll have to deal with it.”); Tr. Vol. I, p. 214 (Commissioner Wooten explaining that to fund the project, the County would pursue grants in addition to utilizing taxing and bonding authority); Tr. Vol. II, pp. 352-53 (Commissioner Hofer stating the county has bonding authority to fund the project). Individual farmers will not bear the entire cost of Elmore County’s proposed project such that “water is not available for an adequate time interval in quantities sufficient to make the project
economically feasible.” As a result, the hearing officer in the Amended Preliminary Order concluded that Elmore County had met its burden to establish sufficiency of supply.

In its Exceptions to Preliminary Order Approving Permit Upon Conditions, the Ditch Companies reiterate their arguments related to sufficiency of supply. They disagree with the hearing officer’s interpretation and application of Idaho Code § 42-203A(5)(b) and Water Appropriation Rule 45.01.b. Exceptions to Preliminary Order Approving Permit Upon Conditions at 12. Specifically, the Ditch Companies argue:

The Hearing Officer’s treatment of Rule 45.01.b violates the holdings of [Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985), (“Shokal”)], and the express provisions of Water Appropriation Rule 40.04 (IDAPA 37.03.08.040.04). The source sufficiency question is not merely whether flood flows potentially available for appropriation exist in the South Fork Boise River—they do; the additional question posed under Section 42-203A(5)(b) and Rule 45.01.b is whether the water that is available is available “for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant) in the absence of additional noneconomic factors that may, nonetheless justify application approval . . . .

Ditch Companies’ Exceptions to Preliminary Order Approving Permit Upon Conditions at 13 (emphasis in original). The Ditch Companies argue Elmore County failed to carry its burden, and the hearing officer failed to consider whether, in spite of the existence of unappropriated flood flows, the expense of the water or water project necessary to beneficially use those flows fits within the economic and non-economic factors alluded to in Rule 45.01.b. Id. at 14.

It is difficult to quantify or otherwise compare the costs and benefits of the project. It is also difficult to sharply distinguish between economic and noneconomic benefits to Elmore County if the project is built. There are a multitude of direct benefits, both economic and noneconomic, to Elmore County that negate criticism of proposed project costs and justify approval of the Application.

a. Costs to Elmore County

The capital costs of the project proposed by the Application are estimated to be approximately $32 million dollars. Tr. Vol. III, p. 683. However, even before any construction of the proposed project begins, MHID testified that it “is committed and willing to allow utilization of its facilities for Elmore County’s project.” See Pet. Ex. 23. MHID testified at hearing that it will operate Little Camas Reservoir, Long Tom Reservoir, and Mountain Home Reservoir as well as MHID’s “ditch system” to accommodate Elmore County’s proposed use. Tr. Vol. II, pp. 442-51, 459, 464-65. MHID’s Mr. Ascuena also testified there is current capacity “in our reservoirs” and “available capacity” in “the tunnel and the canals” for Elmore County’s proposed use. Tr. Vol. II, pp. 450-51, 459, 494-97. Therefore, Elmore County may be able to begin beneficially using water under an approved permit prior to the proposed project’s full
build-out. Moreover, Elmore County can recoup some costs by selling water.\textsuperscript{18} Furthermore, Elmore County, as a governmental entity, “has the taxing, bonding, or contracting authority necessary to raise the funds needed to commence and pursue the project construction in accordance with the construction schedule.” IDAPA 37.03.08.045.01.d; see Elmore County’s Post-Hearing Brief at 16. Elmore County will also seek grants for the project. Costs can be spread out to lessen the burden on Elmore County.

b. \textit{Economic Benefit to Elmore County}

The Director agrees with Elmore County that “the ability to begin to meaningfully resolve long-standing annual deficits in the local aquifer and provide more irrigation will in turn positively impact the local economy, which is heavily reliant on agriculture.” Elmore County’s Post Hearing Brief at 17-18. The project will also provide “[r]ecreational opportunities at Little Camas Reservoir and Mountain Home Reservoir, as well as the economic benefits related thereto . . . .” \textit{Id.} at 30. The economic benefits of spurring agriculture in Elmore County will also extend out from the additional crops and supply, multiplying to the surrounding area. Pet. Ex. 14, p. 7. Currently, Mountain Home Air Base, an entity that generates approximately $1 billion in economic activity in Idaho, and provides local and national security, relies on a groundwater supply which will benefit from approval of the Application.

c. \textit{Non-Economic / Mixed Benefit to Elmore County}

As discussed above, it is difficult to distinguish between economic and noneconomic benefits to Elmore County if the project is built. Many benefits represent mixed economic / non-economic benefits. These include: (1) preventing curtailment of existing groundwater rights due to water-level decline; (2) reducing costly well deepening or replacement; (3) stabilizing pumping water levels and costs; and (4) increasing water-supply certainty and, therefore, land values and agricultural investment. Elmore County Water Supply Alternatives at 84. Finally, if intermittent flood flows are not put to beneficial use by an appropriator, water leaves Basin 63, as well as the State of Idaho, entirely. Permit 63-34348 not only represents the direct benefits of recharge and irrigation to Elmore county, but also the state and Treasure Valley-wide benefit of conservation of water resources.\textsuperscript{19}

\textsuperscript{18} As discussed above, the costs will not be borne solely by farmers.

\textsuperscript{19} The Director has also considered the impact on other water rights if the project is abandoned during construction or after completion. This risk is minimal. MHID will continue to use and maintain its facilities whether or not the proposed project is carried out. As far as the effect of abandonment of the proposed project on “public resource values,” if the project is abandoned, Elmore County will have to pay any financial liabilities accrued to the project. However, again, Elmore County may utilize MHID’s system prior to construction or completion of the proposed project, so even if the project is abandoned, beneficial use may still occur under the permit. There are also no foreseeable costs to state and federal entities that arise if the project were to be abandoned. While abandonment may mean Elmore County’s citizens would be responsible for payment project costs expended, this does not lead the Director to conclude the “water supply itself is insufficient for the purpose for which it is sought to be appropriated.” See IDAPA 37.03.08.045.01.b.
The Director concludes that the above-outlined factors justify approval of the Application. The Application represents an opportunity for Elmore County to prove up, or perfect, an interest in a water right through a permit of use. *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993). Elmore County is a public, governmental entity, and can employ a variety of means for funding the proposed project. Where a governmental entity is seeking community or basin-wide benefits from a diversion of water, economic and noneconomic factors may be distinguished from, as one example, a private entity’s application to build an entirely new irrigation project for its sole use and economic benefit. In this case, the economic and noneconomic benefits to Elmore County outweigh the costs. The Director concludes the water supply itself is sufficient for the purposes for which it is sought to be appropriated.

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

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

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

Rule 45.01.c also states:

An application will be found to have been made in good faith if:

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way . . . ; and

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

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

IDAPA 37.03.08.045.01.c.

Rule 45.01.c further states: “Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence.”
The Ditch Companies assert the Application “lacks good faith” because Elmore County does not have “necessary land use entitlements.” *Ditch Companies’ Post Hearing Brief* at 11. The Ditch Companies acknowledge that Elmore County has “filed diversion point and pipeline right-of-way applications with the United States.” *Id.* The Ditch Companies acknowledge that Elmore County has “binding legal entitlement . . . located in and around the existing recharge gravel pits” that were “obtained in connection with the licensing of formerly lapsed Permit No. 61-7731.” *Id.* at 12.

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

Because Elmore County “has the authority to exercise eminent domain authority,” Elmore County also has “legal access to the [private] property necessary to construct and operate the proposed project.” IDAPA 37.03.08.045.01.c.i. The Ditch Companies acknowledge that Elmore County “possesses eminent domain authority,” but argue Elmore County has not initiated eminent domain “proceedings in furtherance of that authority as required under Rule 40.05.e.” *Ditch Companies’ Post Hearing Brief* at 13. The Department’s Water Appropriation Rule 40.05.e does not require that Elmore County exercise its eminent domain authority prior to obtaining a permit. Rather, Rule 40.05.e requires that, if the applicant can obtain a possessory interest in lands necessary for project facilities and the place of use via eminent domain proceedings, the applicant “must show that appropriate actions are being taken to obtain the interest.” IDAPA 37.03.08.040.05.e.i. Elmore County passed a motion to “take any actions deemed legally required under Idaho law to use the easements and rights of way of the [MHID] crossing privately owned real property, including eminent domain procedures, in order to divert, convey, store, deliver and use water under a permit of license approved under [the Application].” *Pet. Ex. 25 at EC 14323.* Elmore County has taken appropriate actions to obtain a possessory interest in private property necessary for the proposed project.20

20 The Ditch Companies refer to the hearing officer’s *Preliminary Order Rejecting Permit No. 37-22682* (Oct. 6, 2015), presumably to support a contention that the hearing officer should reject the Application because Elmore County has not yet secured agreements with all of the “private landowners . . . who own lands across which the County will need access.” *Ditch Companies’ Post Hearing Brief* at 12. That matter is distinguishable. The applicant for Permit 37-22862 presented no evidence demonstrating access to the points of diversion necessary to operate the proposed project, no evidence of authority from landowners adjacent to or near the Hiawatha Canal approving off-canal recharge activities, no evidence demonstrating legal access to lands over which ditches would have to be pioneered to convey water, and did not have authority to exercise eminent domain.
The Ditch Companies also criticize Elmore County for not contacting “the State of Idaho for land use authorization purposes,” as portions of MHID’s delivery system and reservoirs appear to reside on state land. *Ditch Companies’ Post Hearing Brief* at 12. But Elmore County is statutorily authorized to use Long Tom Creek and Canyon Creek to convey water across State land as proposed. See I.C. § 42-105. Accordingly, Elmore County does not need authorization from the State of Idaho to convey water in Long Tom Creek and Canyon Creek.

Regarding the possible location of portions of Little Camas Reservoir and Long Tom Reservoir on state lands, the BLM exhibit maps depict the reservoirs residing at least partially on state lands. BLM Ex. 1 at 3, 5. While the Mountain Home Co-Operative Company acquired much of the historic state land underlying the reservoirs in fee simple in 1913, it was not clear at hearing if the company acquired all underlying state land in fee simple. Further complicating the matter, the Department’s digital tax parcel spatial data layer received from Elmore County does not agree with BLM Exhibit 1, and depicts different portions of Little Camas Reservoir overlying state land. Because the record was not sufficiently clear to the hearing officer to determine whether Little Camas Reservoir and Long Tom Reservoir partially reside on state land and to what extent, the hearing officer conditioned the permit to require Elmore County to obtain authorization from the State of Idaho to use state lands underlying Little Camas Reservoir and Long Tom Reservoir.

Elmore County submitted a letter on June 28, 2019, (supplemented by email on July 1, 2019), stating it had contacted the Idaho Department of Lands (“IDL”) about the ownership of lands underlying the Little Camas and Long Tom reservoirs. *Letter from Sean Albertson to Nick Miller*, June 28, 2019. IDL responded stating that State-owned land under the two reservoirs was condemned in 1913 and conveyed to the Mountain Home Co-Operative Irrigation Company. Id. Elmore County’s expert, SPF Engineering, then prepared maps comparing the State lands condemned in 1913 to the land underlying the reservoirs. SPF concluded “there is no State land underlying either [reservoir].” Id. Elmore County provided the SPF mapping analysis, the condemnation documents and IDL’s response. Id. As a result of these submissions and IDL’s concurrence, the Director concludes Condition 23 has been satisfied and it will be removed from Permit 63-34348.

Next, the Ditch Companies argue that neither Elmore county nor MHID know the actual capacity of MHID’s system and all evidence related to capacity was based on “unsubstantiated generalizations.” *Ditch Companies’ Post Hearing Brief* at 15. They also assert Elmore County has not established an “operational plan demonstrating how” its water will be delivered through MHID’s facilities “during the irrigation season and the irrigation facility maintenance season.” Id. at 15. As a result, the Ditch Companies conclude the Application is facially deficient because

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

the evidence of system capacity and operational planning, and consequently the Application itself, is “speculative and lacks good faith.” *Id.* at 16.

Boise similarly asserts there is uncertainty as to “the availability of conveyance and storage capacity in the system . . . to convey any water diverted under this Application to its intended place of use.” *City of Boise’s Post-Hearing Brief* at 10.23 As a result, Boise argues the Application is speculative because the lack of any analysis of unused system capacity “could essentially render this Application inoperable.” *Id.* at 10.

Elmore County’s expert testified that the MHID “facilities, particularly the canal [and] the tunnel system between Little Camas and Long Tom divide” are “not adequate to convey 200 cfs.” Tr. Vol. III, p. 711. Elmore County’s expert testified that the facilities can currently convey “[s]omewhere between 50 and 100” cfs. *Id.; see* Tr. Vol. III, pp. 672-63. While the capacity of the facilities may constrain Elmore County’s proposed use, such constraint does not equate to an obvious impediment that will “prevent the successful completion of the project.” IDAPA 37.03.08.045.01.c.iii.

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

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

The record establishes that Elmore County has obtained support for the Application from the Mountain Home Mayor, the Mountain Home Chamber of Commerce, the Rotary Club of Elmore County, and the Mountain Home Irrigation District. *See* Pet. Ex. 16; Tr. Vol. II, pp. 414-27. Further, at least as early as 2015, Elmore County hired SPF Water Engineering, LLC

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23 Boise also asserts “no analysis or groundwater modeling has been completed to show whether it will be effective in recharging the aquifer.” *Id.* at 11. However, in 2017, both SPF Water Engineering, LLC, and the Department evaluated the ability of the recharge pits proposed as the place of use for the Application to “handle the recharge.” Tr. Vol. II, pp. 528-34. Elmore County’s expert testified these evaluations support “a conclusion that there is a beneficial effect to ground water levels from the aquifer recharge activities.” Tr. Vol. II, p. 533.
To investigate potential options for importing water “to the Mountain Home area for recharge of the local aquifer” to “support existing and future water supply needs in the vicinity of Mountain Home.” Pet. Ex. 5 at EC 1954. In 2017, SPF prepared another report for Elmore County to “explore possible sources of additional supply” to address concerns that “water supplies are insufficient to support existing uses and future development” in the Mountain Home Plateau and “curtailment of groundwater rights will result in substantial impacts to the local economy.” Pet. Ex. 9 at p. i. One of the alternatives considered in this report is the project proposed by the Application.  Id. at 75-76.

Elmore County filed the Application in 2017 and hired SPF in 2018 to prepare a “Flood Water Availability Analysis for Application 63-34348.” Pet. Ex. 14. Elmore County also hired an “agricultural and resource economist” in 2018 to prepare a report addressing whether the Application will “adversely affect the economy of the Boise River basin.” Pet. Ex. 12. Elmore County has pursued agreements with private landowners and MHID and has filed applications with federal entities to secure access necessary for Elmore County’s proposed use. Tr. Vol. I, pp. 44-74; Pet. Exs. 19, 20, 21, 22, 23. Elmore County also passed a motion to “take any actions deemed legally required under Idaho law to use the easements and rights of way of the [MHID] crossing privately owned real property, including eminent domain procedures, in order to divert, convey, store, deliver and use water under a permit of license approved under [the Application].” Pet. Ex. 25 at EC 14323.

Elmore County asserts these actions “demonstrate good faith.” Elmore County’s Post Hearing Brief at 14. Based on Elmore County’s substantive actions in pursuit of the Application, the Director is satisfied that the Application is “made in good faith” and not “for delay or speculative purposes.” Idaho Code § 42-203A(5)(c).

4. Sufficiency of the applicant’s financial resources

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

In their Exceptions, the Ditch Companies argue Elmore County did not establish it has the financial resources necessary to fund the proposed project but merely stated it will seek funding in the future. The Ditch Companies allege the Application is speculative because Elmore County does not appear ready to “fund the project on its dime (or revenue sources) alone.” Ditch Companies’ Exceptions to Preliminary Order Approving Permit Upon Conditions at 19. Elmore County responded to this criticism by reiterating the hearing officer’s treatment of Elmore County’s financial resources as they relate to the project: “Elmore County is a
government entity with taxing, contracting, and bonding authority,” which is sufficient, and the hearing officer did not err in relying upon that authority. *Elmore County’s Consolidated Response to Exceptions* at 17.

The Director agrees with the hearing officer. Elmore County “will be determined to have satisfied [whether it has sufficient financial resources to complete the project] if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project . . . .” IDAPA 37.03.08.045.01.d. As a governmental entity, Elmore County satisfies this requirement due to its taxing, bonding and contracting authority. Further, Elmore County does not need to have the funds currently available or fund the project wholly on its “own dime”—it must only have the proper authority necessary to raise the funds needed to commence and pursue the project. *Id.*

Elmore County has sufficient resources to complete the project.

5. **Conflict with the local public interest**

Idaho Code § 42-203A(5)(e) requires the hearing officer to evaluate whether Elmore County’s proposed use “will conflict with the local public interest as defined in section 42-202B, Idaho Code.” Idaho Code § 42-202B(3) defines “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such water use on the public water resource.”

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

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

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

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

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

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

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

[The Application] is concerning to me, because there are a lot of recreaters, like myself, and a whole bunch of others, who come to Boise specifically to recreate on our pristine wild rivers. And there are also species of fish, and of ecosystems and habitats that rely on a certain amount of water flying—or flowing—through the Boise River—sometimes flying. So something that would really help me with this water right if it were to be approved is some conditions that would protect the

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24 Elmore County’s expert also testified that, while Elmore County considered subordinating its water use pursuant to Permit 63-34348 to “storage developed by the [BOR],” such subordination would not be “useful for Elmore County” because it would shorten “our length of time to pump.” Tr. Vol. II, pp. 576-78. Further, “that future storage, would still have adequate time to fill, because they are not diverting out of the river. They are just taking everything that’s coming by.” Tr. Vol. II, p. 578. For these additional reasons, it would not be reasonable to subordinate Permit 63-34348 to storage created by the contemplated Anderson Ranch Dam raise.
instream flows in the Boise River. So that the current recreaters, the future generations, the future users of this water, the current species of fish, and the hopeful future species of fish will be able to use this water as we have used it, and enjoyed it for many, many years prior.

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

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

Tr. Vol. VI, p. 1711.

In his water availability analysis, Elmore County’s expert accounted for the BOR policy to try to “maintain a 600 cfs minimum flow in the [SFBR] downstream of Anderson Ranch Dam during the irrigation season” and “300 cfs in the winter.” Pet. Ex. 14 at 2; Tr. Vol. II, p. 556. Elmore County’s expert testified that Elmore County has no “desire to deplete those [minimum] flows.” Tr. Vol. III, p. 620. Elmore County’s expert even testified that the Applicant “would not turn on, unless [flow past Anderson Ranch Dam] was over 800 actual flow.” Id. In his water availability analysis, Elmore County’s expert also accounted for the 240 cfs “minimum operational river flow” in the Boise River near Middleton. Pet. Ex. 14 at 4.

Further Elmore County’s expert testified that Elmore County did not “have any discomfort with” the Department’s Standard Condition 907, which defines when the diversion of flood releases may occur. Tr. Vol. III, p. 809. Consistent with Elmore County’s expert testimony, the Director will impose conditions on Permit 63-34348 limiting diversion to times when 800 cfs of water or more is being released from the Anderson Ranch Reservoir for flood control purposes.

ICL asserts the IDFG letter “indicates that” the “600/300 cfs operational flows are not enough to maintain long-term river health, and thus, fishery health” and “period flows greater than 2400 cfs for more than 8 days in a row are the minimum needed to maintain the river and fishery.” ICL Closing Brief at 7 (emphasis in original).25 ICL asked the hearing officer to impose this condition on Permit 63-34348.26 Id. at 7-8.

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

26 ICL also asserts the hearing officer should deny the Application because of the “dangerous direction it takes Idaho water management by authorizing new inter-basin transfers.” ICL Closing Brief at 4. However, as Elmore County’s expert testified, and ICL acknowledges, other inter-basin transfers have occurred in Basin 65, Basin 63, and Basin 02, specifically Black Canyon Irrigation District, MHID, Big Bend Irrigation District, and Farmers Co-op. Tr. Vol.
The IDFG letter states that “the high flow events required to maintain instream habitat and riparian dynamics are likely in excess of 2400 cfs. Based on the analyses presented here, we regard 2400 cfs for > 8 days to be a minimal flow required to maintain stream channel substrates required by trout.” ICL Ex. 7 at 16. But Elmore County cannot control how the “dam operators” operate the Boise Reservoir system to “shape” flood releases. Tr. Vol. III, pp. 622-23. It would not be reasonable to condition Permit 63-34348 to require that Elmore County ensure that “period flows greater than 2400 cfs” happen for “more than 8 days in a row.” As Elmore County’s expert testified: “If [the dam operators] have to take [flows] up to 3,000 or 3,500 to get [] whatever deemed necessary for flushing, there ought to be a way to do that.” Tr. Vol. III, p. 630; see Tr. Vol. III, p. 623 (Elmore County’s expert stating “if they need to get up to a certain flow for scour, or annual channel maintenance, what have you, they have some flexibility to do that.”)

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

Nothing in the record establishes that Boise’s requested limit is necessary to “ensure that the effects on the flows in the SFBR are minimal.” City of Boise’s Post-Hearing Brief at 12-15. Rather, as discussed above, the record establishes the importance of maintaining operational flow targets of 300 cfs and 600 cfs on the SFBR agreed to by BOR and IDFG. Elmore County has agreed not to interfere with these operational flows, and then some—Elmore County will not even divert “unless [flow past Anderson Ranch Dam] was over 800 [cfs] actual flow.” Tr. Vol. III, p. 644. These limitations help ensure that Elmore County’s proposed use does not conflict with the local public interest.

Boise asserts the Application conflicts with the local public interest because Elmore County “has other more reliable, cost effective, remedies available.” City of Boise’s Post-Hearing Brief at 8. Specifically, Boise asserts that: 1) Elmore County’s pending “Snake River Application has the potential to deliver 14,000 [AF] annually to the Mountain Home Area,” the “place of use for the recharge” proposed by the Application, so the Application is not necessary to address “the [7,000 AF] deficit in the proposed place of use,” and 2) Mountain Home is pursuing “conservation measures . . . to reduce water consumption and mitigate the pumping deficit it is experiencing.” Id. at 8-9.
There is no assurance that Elmore County’s application to appropriate water from the Snake River will be approved. Elmore County cannot rely at this time upon water diverted from the Snake River to address the ground water deficit in the Mountain Home area. Further, the fact that Mountain Home is pursuing conservation measures to help mitigate the pumping deficit does not render the Application in conflict with the local public interest. While Mountain Home’s conservation measures may help reduce the ground water balance deficit, no evidence in the record quantifies the benefit of those conservation measures such that the Director can conclude the Application is unnecessary.

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

Those who hold NPDES permits and discharge into the Boise River are responsible for taking actions to ensure the conditions of their NPDES permits are satisfied. As discussed herein, Elmore County proposes to divert a small percentage of unappropriated floodwater from Anderson Ranch Reservoir that otherwise flows out of the Boise River Basin. Elmore County has also agreed to a condition that will maintain operational river flows in the Boise River below the Lucky Peak Dam. If NPDES permit holders require additional flows to satisfy permit conditions, those permit holders have other remedies to secure the water necessary to satisfy the conditions of their NPDES permits.27

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

Elmore County asserts its proposed use is not in conflict with the local public interest because: 1) “there is resounding public support for the project,” 2) “the ability to begin to meaningfully resolve long-standing annual deficits in the local aquifer and provide more

27 Possible remedies include, but are not limited to, filing a new water right application, renting storage water from the WD63 rental pool, or petitioning the Idaho Water Resource Board to establish a minimum stream flow.
irrigation will in turn positively impact the local economy, which is heavily reliant upon agriculture,” 3) “[t]he project will begin to stabilize the water supplies of the City of Mountain Home,” and 4) “recreational opportunities at Little Camas Reservoir and Mountain Home Reservoir, as well as the economic benefits related thereto, will also be improved by the proposed influx of flood flows that are otherwise leaving the state of Idaho.” Elmore County’s Post Hearing Brief at 17-18. Elmore County also points “to the State Water Plan relative to the Snake River for guidance on matters of local public interest” and notes “that the Application involves the development of new aquifer storage, ensuring the availability of water for future DCMI uses in the Snake River Basin, and developing supplemental water supplies to sustain existing agricultural development.” Id. at 18. Elmore County asserts “such factor supports a finding that the Application is in the local public interest.”

As discussed above, the record establishes that Elmore County has obtained support for the Application from the Mountain Home Mayor, the Mountain Home Chamber of Commerce, the Rotary Club of Elmore County, and the Mountain Home Irrigation District. See Pet. Ex. 16; Tr. Vol. II, pp. 414-27. Further, at least as early as 2015, Elmore County hired SPF to investigate potential options for importing water “to the Mountain Home area for recharge of the local aquifer.” Pet. Ex. 5 at EC 1954. In 2017, SPF prepared another report for Elmore County to “explore possible sources of additional supply” because “ground water pumping in portions of the Mountain Home Plateau in Elmore County has resulted in chronic water-level declines.” Pet. Ex. 9 at p. i. One of the alternatives considered in this report is the project proposed by the Application. Id. at 75-76.

Public witnesses who testified at the hearing emphasized the importance of the Application’s ground water recharge purpose. Senator Bert Bracket stated: “Water is badly needed in Elmore County as the Mountain Home aquifer is declining approximately two feet per year. Future viability of the City of Mountain Home and the surrounding area is at risk without additional water.” Tr. Vol. VI, p. 1721. Representative Christy Zito testified: [The Application] is not taking water from any prior use, from any prior water rights. It’s simply overflow flood waters that would be used to help recharge the aquifer in Elmore County.” Tr. Vol. VI, p. 1739.

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

The Letter of Intent includes some “basic terms that would form the ‘back-bone’ of such an Agreement.” Pet. Ex. 23 at 1. One term is that “MHID agrees to allow Elmore County to use
MHID’s water conveyance facilities to deliver water to authorized places of use under any new water right obtained from the [SFBR] by Elmore County, pursuant to such limitations and operational restrictions determined by the MHID, at its sole discretion.” Id. at 2. Ascuena described the Agreement as follows: “We will allow Elmore County to use our system to convey water to the Mountain Home area for recharge. With the stipulation is, that in the action thereof, we won’t accept any liabilities for their part of the system. We will be the only ones to manipulate our system, open headgates, close headgates, that whole thing. We operate our equipment. That’s it.” Tr. Vol. II, p. 417.

Ascuena also testified that, in return, it is his “understanding that the district membership, or the district patrons, are going to receive supplemental irrigation.” Id. Ascuena testified “there is maybe seven out of ten years we do not get our full irrigation allotment, we’re short of. Supplement up to that full allotment. Once we get our full allotment, if there is more than that, then the County could use their gravel pits for recharge.” Id. The Ditch Companies point to this testimony to support their contention that “MHID is going to get its full allotment before the County sees a drop of water.” Ditch Companies’ Post Hearing Brief at 10-11, 11 n.14. However, Ascuena testified his understanding is that “[t]he main purpose of the [A]pplication is for ground water recharge.” Tr. Vol. II, p. 415.

While a majority of the evidence presented at the hearing supports that Elmore County is pursuing Permit 63-34348 for the main purpose of ground water recharge to begin to address chronic water level declines in the Mountain Home area, the evidence also suggests a possibility that water diverted pursuant to Permit 63-34348 may only be delivered for “supplemental irrigation” to MHID patrons. It would conflict with the local public interest to approve Permit 63-34348 without proper conditioning to ensure that ground water recharge will occur pursuant to the Permit consistent with the intent of the Application. Accordingly, the Director will condition Permit 63-34348 to ensure that, in any given year, at least 50% of the water diverted pursuant to the Permit is delivered for ground water recharge.28

6. Conservation of water resources

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

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

28 To ensure proper administration of Permit 63-34348, the Director will also include a condition requiring Elmore County to install measurement devices and report diversions so that Elmore County can demonstrate at the time of licensing that, in any given year, at least 50% of beneficial use was for ground water recharge.
The Ditch Companies assert that Elmore County’s proposed use “is inconsistent with the conservation of water resources” because it will “export water” available as a result of “periodic flood flows” from “a high population, high growth, and high need area to one of much smaller population growth potential” where there is “comparatively little need (north Mountain Home groundwater supplies are largely stable and resilient).” *Ditch Companies’ Post Hearing Brief* at 19-20.

The Director disagrees with the Ditch Companies. Elmore County proposes to divert a small portion of unappropriated flood flows that currently flow out of the state of Idaho. The remainder of flood flows are available for others, including users in Basin 63, to seek to appropriate. Further, the evidence in the record contradicts the Ditch Companies’ assertion that Elmore County’s proposed use will only benefit north Mountain Home ground water supplies. Elmore County’s expert testified that “ground water contour maps show waters flowing generally north to south, from [the proposed] area of recharge, down south beneath Mountain Home. So I think that any water you can put into the aquifer north of Mountain Home eventually gets into the aquifer beneath Mountain Home. . . . I think our benefit will flow south.” *Tr. Vol. II, pp. 582-84.*

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

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

Idaho Code § 42-203A(5) states:

[W]here the proposed use is such: ... that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Elmore County asserts the Application will not adversely affect the Treasure Valley’s local economy.* Elmore County’s Post Hearing Brief* at 20. It asserts that its expert’s water availability analysis demonstrates: 1) there are “substantial unappropriated flood flows in the Boise River system on certain good water years,” 2) the “comparatively nominal diversion in priority under the proposed permit” will have “nominal impact on water flowing in the system during such years,” and 3) its proposed use will not adversely impact “potential storage in the Boise River reservoir system” or operational flows in the SFBR or Boise River. *Id.*

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29 Elmore County retained an expert agricultural and resource economist to address Idaho Code § 42-203A(5)(g).
Elmore County’s expert concluded that Elmore County’s proposed diversion “would only account for approximately 5% of the average available flow volume [past the Anderson Ranch Reservoir gage] during the diversion period.” The 5% is a small fraction of flood flows now exiting the Boise River system. Pet. Ex. 14 at 3. Elmore County’s proposed use would reduce “the volume of water available for subsequent new appropriations from the Boise River at Glenwood Bridge by approximately 2%.” Id. at 1. In years water would have been available for Elmore County to divert as proposed, the volumes available “at Anderson” were between 100,000 AF and 800,000 AF. Id. at 5, Table 1. Elmore County has also agreed to, and the Director will impose, conditions on Permit 63-34384 to protect operational flows on the Boise River and to protect operational flows on the SFBR below Anderson Ranch Dam.

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

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

**Hydropower**

First, in relation to hydropower, the Amended Preliminary Order concluded:

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

Amended Preliminary Order at 34. In their Exceptions to Amended Preliminary Order Approving Permit Upon Conditions, the Ditch Companies argue the hearing officer “missed the point” of its arguments related to “the lost economic benefit of the lost hydropower generation potential caused by the County’s proposed diversion under Criterion (g).” Ditch Companies Exceptions to Amended Preliminary Order Approving Permit Upon Conditions at 9. The Ditch Companies assert the economic benefits of hydropower generation may be harmed by decreased flow and, therefore, the issue should have been considered by the hearing officer. Id.

Elmore County argues the hearing officer appropriately “ignored the Ditch Companies’ hydropower argument . . . because there was . . . no record evidence to support it. Neither the Ditch Companies, nor their counsel, were qualified as power engineers or economists,” and, therefore, the Director should refuse their efforts to act as such. Elmore County’s Consolidated Response to Exceptions at 11-12.

The hearing officer properly discounted the relative importance of the Ditch Companies arguments related to hydropower by referring to Idaho Code § 42-203(b). There is no record evidence that at the time flood flows are diverted, hydropower production is adversely affected. Therefore, the Director cannot make a determination of whether hydropower is adversely affected under the facts presented in the conditioned approval of Permit 63-34348.

Operational Flows

As discussed herein, Elmore County has agreed to, and the Director will impose conditions on Permit 63-34348 to protect the operational flows on the Boise River below Lucky Peak Dam and on the SFBR below Anderson Ranch Dam consistent with Elmore County’s expert testimony. These conditions will ensure Elmore County’s proposed use does not adversely impact operational flows.

NPDES Permitting

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

**Anderson Ranch Dam Raise**

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

**Micron**

Micron Technology filed its “new water right application” after Elmore County filed the Application. DC Ex. 19. Elmore County’s burden does not require it to present evidence of adverse impact on the basin of origin from pending or future water permit application submissions or approvals. While Elmore County may be aware of an application made by Micron Technology, Micron does not now hold water permits or rights that might be affected by Elmore County’s proposed diversion. Again, Elmore County’s expert testified that the Application proposes to divert floodwater that would otherwise leave the Boise River basin and Elmore County’s proposed diversion would reduce the availability of flood flow water for future appropriations by approximately 2 percent. *Elmore County’s Post Hearing Brief* at 4-5. If Elmore County is permitted to divert water that might have otherwise been available for Micron Technology to divert, that is the result of the statutory application for permit process and prior appropriation doctrine.

**Cloud Seeding Efforts**

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

**Boise River Basin Local Agricultural Industry**

Finally, the Ditch Companies assert that Elmore County’s proposal will adversely affect the Treasure Valley’s local economy because “there is ongoing growth and expansion” of the seed industry, “there are future growth opportunities” for the mint industry, and “there is a demand for future growth/expansion” of the wine industry. *Ditch Companies’ Post Hearing Brief* at 22-23.
As stated above, Elmore County’s proposed use “would only account for approximately 5% of the average available flow volume [past the Anderson Ranch Reservoir gage]” during flood control operations and reduce “the volume of water available for subsequent new appropriations from the Boise River at Glenwood Bridge by approximately 2%.” Id. Pet. Ex. 14 at 1, 3. Over 90% of the average flood flow volume past Anderson Ranch Dam and Glenwood Bridge is still available for future appropriations to support growth opportunities in the seed, mint, and wine industries.

**Impact on Boise River Basin**

In the Preliminary Order, the hearing officer limited his analysis under Idaho Code § 42-203A(5)(g) to the state of the local economy in the Boise River basin “as it exists.” See Preliminary Order at 27. On reconsideration, the Ditch Companies asserted that future impacts may be taken into account under the statutory analysis. The hearing officer agreed and amended the preliminary order accordingly. The Amended Preliminary Order states:

Future economic impacts under this analysis may be valuable in the Department’s considerations of transfers under Idaho Code § 42-203A(5)(g). The Hearing Officer did not foreclose or discount potential future economic impacts to Basin 63 as a result of the Preliminary Order. The Hearing Officer specifically addressed future growth opportunities, but to ensure there is no confusion as to this issue, the Hearing Officer will remove references to economic considerations “as it exists.” Amended Preliminary Order at 9.

In their exceptions, the Ditch Companies continued to disagree with the hearing officer’s ultimate conclusion. “[W]ater diverted by Elmore County will be lost to Basin 63 forever . . . [but] there is well . . . documented future need for additional surface water supplies in the Treasure Valley.” *Ditch Companies’ Exceptions to Amended Preliminary Order Approving Permit Upon Conditions* at 4. Therefore, it argued, “Elmore County’s Application should be denied for its failure to adequately (let alone correctly) address Criterion (g). Dr. Taylor’s naked ‘no affect’ [sic] conclusion is/was wholly conclusory and based on nothing more that the County’s ‘2%’ hydraulic flow volume theory.” Id. at 8.

The Ditch Companies argue that “[u]nder *Shokal v. Dunn* the applicant must overcome any allegations about the impact on the local public interest presented by the protestant” and “the idea is if there is an area with a water supply and the effect of the appropriation would be to dewater that area for the benefit of another . . . [t]he effect of the local economy needs to be considered in that context.” *Ditch Companies’ Exceptions to Preliminary Order Approving Permit Upon Conditions* at 4. This analysis, the Ditch Companies argue, necessarily involves “consideration of the future-looking, interrelated public interest-based effect of” the loss of alternative uses of water within a reasonable time. Id. at 6.

In response to the Ditch Companies’ questioning of the percentage of flood flow diversion that should cause concern to the Director, Elmore County concludes “the substantial evidence before the Director, and relied upon by the hearing officer, is sufficient to show that the
permit will not have an adverse impact on the Treasure Valley economy.” Elmore County’s
Response to Protestant’s Exceptions at 4. Elmore County continued that “[t]he purpose of
subpart (g) was not to ensure the protection of all ‘future water rights’ in Basin 63, as the Ditch
Companies and other protestants propose . . . [T]he idea is if there is an area with a water
supply and the effect of the appropriation would be to dewater that area for the benefit of
another . . . [t]he effect of the local economy needs to be considered in that context.” Elmore
County’s Consolidated Response to Exceptions at 5 (emphasis in original).

Elmore County argues the hearing officer correctly conditioned the permit. The hearing
officer “found that Elmore County met its burden to demonstrate the benefits of the project for
purposes of the public interest evaluation, as well as the absence of economic harm to the
Treasure Valley, then he conditioned the Permit to ensure protection for the protestants.” Id. at
7-8. Elmore County argues the dewatering of a basin after an interbasin transfer, as was the case
in Shokal, is not present here—nor does the Court in Shokal suggest speculation about economic
interest 50 years hence—therefore, the hearing officer did not err. Id. at 9.

The Director finds that Elmore County’s proposed use will not adversely affect the
Treasure Valley’s local economy and declines to reject the Application on the basis of Idaho
Code § 42-203A(5)(g). That statute requires the Department, when the place of use is outside
the watershed or local area where the source of water originates, to consider whether an
application “will adversely affect the local economy of the watershed or local area within which
the source of water for the proposed use originates.” This is one consideration under the
Director’s authority to approve a permit to divert water, and the record supports that a permit to
divert a small portion of available flood flows that would otherwise leave the state will not
adversely affect the Treasure Valley.

Further, the Director cannot condone unlimited speculative posturing or argument of
purely hypothetical facts when attempting to determine whether a proposal will adversely affect
the local economy. The Ditch Companies argue Idaho Code § 42-203A(5) and Shokal stand
for the notion that “future-looking, interrelated public interest-based effects” of the loss of
alternative uses of water may be analyzed within a reasonable time. See Ditch Companies’
Exceptions to Preliminary Order Approving Permit Upon Conditions at 6. The Director agrees
insofar that the length of time related to this analysis must be reasonable. While the analysis can
consider both present and future facts, the future facts must be of sufficient certainty and of
sufficient magnitude that the adverse economic affect is reasonably predictable.

In this case, there is a lack of sufficient record evidence showing adverse economic effect.
Elmore County’s diversion of sporadically available flood flows, subject to conditions already
imposed to protect senior appropriators, prior use, and future reservoir storage in the Boise River
Basin, would in no way lead to the dewatering conditions alluded to in Shokal. Every approved
diversion of water reduces total water supply—this is the nature of appropriation—but a
reduction in supply does not automatically equate to adverse economic effect.
D. Elmore County Petition for Clarification of Condition 14

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

42-115. STORAGE. To ensure that new or proposed projects to store more than one thousand (1,000) acre feet of surface water do not interfere with the storage of water in existing on-stream storage reservoirs operated for storage and flood control purposes, the director of the department of water resources shall subordinate permits and licenses for projects to store more than one thousand (1,000) acre feet of surface water issued after the effective date of this section to the capture and retention of water in existing on-stream storage reservoirs during and following flood control operations until the date of allocation.


Elmore County proposes to store more than 1,000 AF of surface water in the Little Camas reservoir. Because the original project permit was issued after February 13, 2019, the hearing officer was required to “subordinate” the permit “to the capture and retention of water in existing on-stream storage reservoirs during and following flood control operations until the date of allocation.” Condition 14 is language taken directly from House Bill 1 and the statute. Condition 14 effectuates the statute’s subordination requirements.

In its Exceptions to Amended Preliminary Order / Renewed Petition for Clarification, Elmore County renewed its arguments related to the “clarification regarding the meaning and effect” of Condition 14. Condition 14 states: “This right is subordinated to the capture and retention of water in existing on-stream storage reservoirs during and following flood control operations until the date of allocation.”30 While Elmore County recognizes the Director’s limited authority in determining statutory constitutionality, it argues it “nevertheless is entitled to understand how the Department will administer Condition 14 . . . .” Elmore County’s Exceptions to Amended Preliminary Order / Renewed Petition for Clarification at 10.

The hearing officer framed the issue as follows:

Elmore County believes that if flood control releases from the relevant on-stream reservoirs are not captured or retained then it should be allowed to divert and use water that otherwise would be released from those reservoirs. It is unclear to

30 Elmore County also argues Idaho Code § 42-115 violates its constitutional right to equal protection under federal and Idaho law. Id. at 13. “The Statute and the condition imposed pursuant to the statute illegally categorize the type of water permit acquired by the County and subject the County to disparate treatment under the law without a legitimate legal basis,” especially in light of the distinction made between permits and licenses that involve storage reservoirs of 1000 AF or less. Id. at 13-14. The Director has no authority to address the issue of whether Elmore County’s constitutional right to equal protection may or may not be violated under Idaho Code § 42-115, and its arguments pertaining thereto will not be addressed in this Order.
Elmore County whether the Department reads Condition 14 in the same manner or whether the Department reads the condition “to mean that Elmore County cannot divert any water ‘during and following flood control operations until the date of allocation.’” Such a reading, Elmore County argues, would render the new permit worthless from an economic and political perspective and be in violation of Elmore County’s constitutional rights.

Amended Preliminary Order at 9-10 (citations omitted).

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

The Ditch Companies assert Elmore County’s clarification request related to Idaho Code § 42-115 should be denied for the following reasons: (a) forum is improper for clarification of the constitutionality of a statute; (b) the Department has the authority to condition the Permit to ensure it does not interfere with capture and retention in existing on-steam reservoirs; (c) Elmore County does not, as it repeatedly argues, have “an unfettered constitution right to divert water,” rather the right to divert water is subject to the criteria under Idaho Code §42-203A(5) and the Department’s discretion in approving, denying and conditioning permits; (d) subordination is permissible and consistent with Idaho law; and (e) Idaho Code § 42-115 is not “special use legislation,” because it applies to all persons in a like situation. Ditch Companies’ Response to Elmore County’s Exceptions to Amended Preliminary Order/Renewed Petition for Clarification at 8-11.

Boise takes issue with Elmore County’s repeated attempts to challenge the constitutionality of Idaho Code 42-115 when “[t]he Department does not have the authority to refuse to enforce the laws of the State.” City of Boise’s Response to Elmore County’s Petition for Reconsideration/Petition for Clarification at 5. Boise asserts the Director has no authority to determine constitutionality and he should follow the law and constitutional challenges should be brought in the courts. Id. It argues: “(1) Elmore County’s ability to appropriate water has not been denied, it has been appropriately conditioned; and (2) Elmore County’s arguments fail because Article XV, Section 3 relates to any “Water of Natural Stream,” where Elmore County seeks to appropriate flood flows captured in reservoirs, which is not natural flow. Id. at 7.

In the Amended Preliminary Order, the hearing officer declined to address the constitutional arguments raised by Elmore County, concluding the Department lacks the authority to declare a statute unconstitutional. Amended Preliminary Order at 8. The hearing officer also declined to opine on how Condition 14 will be administered by the Department
because the condition was effectively mandated by statute and the issue of how the Director will administer the condition is a question for the Director. *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532, 163 Idaho 144, 157, 408 P.3d 899, 912 (2018)* ("It is well settled that the administration of water is a matter committed to the Director's discretion.")

The Director agrees with the hearing officer regarding the constitutional arguments raised by Elmore County. The ability of the Department to consider constitutional issues is limited. IDAPA 37.01.01.415. If Elmore County believes a statute has not been validly enacted, or is otherwise unconstitutional, it must seek relief in the proper venue: The courts.

The Director will address the issue of how the Department will administer Condition 14. Elmore County suggests there is ambiguity in Condition 14 and asks whether the county will be prohibited from diverting water under its new permit until the day of allocation. *Elmore County's Exceptions to Amended Preliminary Order / Renewed Petition for Clarification* at 11. The plain language of Condition 14 answers Elmore County’s question. The condition states that Permit 63-34348 shall be subordinate “to the capture and retention of water in existing on-stream reservoirs operated for storage and flood control purpose . . . .” If water is being released from storage for flood control, it is not being “capture[d] and retain[ed]” in the reservoir system. When flood control releases occur, so long as the conditions imposed in Permit 63-34348 are met, water should be available to Elmore County for diversion.

**ORDER**

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

DATED this 13th day of August 2019.

[Signature]
GARY SPACKMAN
Director
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August 2019, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

Scott L. Campbell  
Campbell Law Chtd.  
PO Box 170538  
Boise, Idaho 83717  
scott@slclehx2o.com  
☐ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

For Elmore County, Board of County Commissioners, Applicants

Terry Scanlan  
SPF Water Engineering, LLC  
300 E. Mallard Dr. Ste. 350  
Boise, Idaho 83706  
Facsimile: (208) 383-4156  
tscanlan@spfwater.com  
☒ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

For Elmore County, Board of County Commissioners, Applicants

Abigail Germaine  
City of Boise  
P.O. Box 500  
Boise, Idaho 83701-0500  
Facsimile: (208) 384-4454  
agermaine@cityofboise.org  
☒ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

For the City of Boise, Protestant

Idaho Power Company  
John K. Simpson  
Barker Rosholt & Simpson, LLP  
1010 Jefferson St., Ste. 102  
PO Box 2139  
Boise, Idaho 83701-2139  
Facsimile: (208) 344-6034  
jks@idahowaters.com  
☒ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile  
☒ Email

For Idaho Power Company, Protestant
For Idaho Conservation League, Protestant

Cat Creek Energy LLC
Dave Tuthill
Idaho Water Engineering
2918 N. El Rancho Pl.
Boise, Idaho 83704
dave@idahowaterengineering.com

For Cat Creek Energy, Protestant

United States Department of Interior
Bureau of Land Management
Idaho State Office
Fred Price
1387 South Vinnell Way
Boise, Idaho 83709-1657
fwprice@blm.gov

For the Department of Interior, Protestant

S. Bryce Farris
Daniel V. Steenson
Andrew J. Waldera
Sawtooth Law Offices, PLLC
1101 W. River St., Ste. 110
P.O. Box 7985
Boise, Idaho 83707
Facsimile: (208) 629-7559
bryce@sawtoothlaw.com
dan@sawtoothlaw.com
andy@sawtoothlaw.com

For Ballantyne Ditch Company, Boise Valley
Irrigation Ditch Company, Farmers' Cooperative Ditch Company, Middleton Mill

Albert P. Barker
Barker, Rosholt & Simpson, LLP
1010 W. Jefferson, Ste. 102
P.O. Box 2139
Boise, Idaho 83701-2139
Facsimile: (208) 344-6034
apb@idahowaters.com

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

Christopher H. Meyer
Michael P. Lawrence
Givens Pursley LLP
601 W Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Facsimile: (208) 388-1300
chrismeyer@givenspursley.com
mpl@givenspursley.com

For SUEZ Water Idaho Inc., non-party

Kimberle English

ORDER ON EXCEPTIONS; FINAL ORDER - Page 41
Permit to Appropriate Water
No. 63-34348

Priority: March 03, 2017
Maximum Diversion Rate: 200.00 CFS

This is to certify that

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

has applied for a permit to appropriate water from:

Source: SOUTH FORK BOISE RIVER  Tributary: BOISE RIVER

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

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Right Acre Limit: 7,420.2
Total Acres: 12,712.7
State of Idaho
Department of Water Resources

Permit to Appropriate Water
No. 63-34348

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

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Conditions of Approval

1. Proof of application of water to beneficial use shall be submitted on or before April 01, 2024.
2. Subject to all prior water rights.
3. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use.
4. This right when combined with all other rights shall provide no more than 5.0 afa per acre for irrigation storage and irrigation from storage for the place of use.
5. Rights 61-263, 61-264, 61-266, 61-363, 61-10417, 61-10419, 61-10421, 63-19893, 63-2188, 63-2214, 63-20139 and 63-34348 when combined shall not exceed the irrigation of 7,420.2 acres within the boundaries of the Mountain Home Irrigation District.
6. In any given year, water diverted for irrigation from storage and irrigation shall not exceed 50 percent of the total volume of water diverted for all uses described by the right.
7. The storage of water under this right occurs in the storage facilities for the Mountain Home Irrigation District: Little Camas Reservoir, Long Tom Reservoir, and Mountain Home Reservoir.
8. In any given year, this right may only be used for irrigation from storage and irrigation on the same lands irrigated within the Mountain Home Irrigation District service area with Rights 61-263, 61-264, 61-266, 61-363, 61-10417, 61-10419, 61-10421, 63-19893, 63-2188, 63-2214, 63-20139 and 63-34348.
9. Water shall only be used for irrigation from storage and irrigation to supplement existing rights 61-263, 61-264, 61-266, 61-363, 61-10417, 61-10419, 61-10421, 63-19893, 63-2188, 63-2214, 63-20139 and 63-34348.
10. Diversion of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, the source of water and point of diversion for this right is within Water District No. 63.
11. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.
12. Prior to diversion of water under this right, the right holder shall develop a plan acceptable to the watermaster(s) and the Department that includes the installation of measuring devices as necessary to understand and monitor water use under this right. The Department may require modification of the plan, now and in the future, as required.
13. The watermasters of Water Districts 63, 63C, and 61A shall coordinate administration of this right to ensure beneficial use occurs in a manner consistent with the limitations and conditions of the right.
14. This right is subordinated to the capture and retention of water in existing on-stream storage reservoirs operated for storage and flood control purposes during and following flood control operations until the date of allocation.
15. The right holder must mitigate for diversions out of Anderson Ranch Reservoir that occur when water is not being released for flood control purposes as authorized by this right.
16. If measured or calculated Boise River flows immediately downstream of the New York Canal diversion are less than 240 cfs during the period beginning June 16 and ending February 29, water shall not be diverted pursuant to this right. If measured or calculated Boise River flows immediately downstream of the New York Canal diversion are less than 1,100 cfs during the period beginning March 1 and ending May 31, water shall not be diverted pursuant to this water right. If the benchmark stream maintenance flows of 240 cfs (from June 16 to February 29) and 1,100 cfs (from March 1 to May 31) subsequently change, then the diversion of South Fork Boise River flows under this right will be limited to provide for the new benchmark flows.
17. If measured or calculated South Fork Boise River flows downstream from Anderson Ranch Dam are less than 800 cfs, water shall not be diverted pursuant to this right.
18. The right holder shall exercise this right only when authorized by the District 63 watermaster when the
Boise River is on flood release below Anderson Ranch dam/outlet and when the Boise River is on flood release below Lucky Peak dam. Flood releases shall be determined based upon the Memorandum of Agreement between the Department of Army and the Department of Interior for Flood Control Operations of Boise River Reservoirs, dated November 20, 1953, contracts with Reclamation contract holders in the Boise River Reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right holder shall not seek, directly or indirectly, any change to the flood control operations of the 1985 Water Control Manual for Boise River reservoirs. This water right may not be used to divert water released from storage to augment lower Snake River flows during the migration of Snake River salmon as authorized under Idaho law.

19. Pursuant to Idaho Code § 42-234(4), to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.

20. Pursuant to Idaho Code § 42-234(3), the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.

21. This approval does not constitute approval by the Idaho Water Resource Board, which may also be required pursuant to Idaho Code § 42-1737.

22. This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Idaho Code § 42-14168, or any other proposal to utilize credit for the recharge effort.

23. This right does not grant any right-of-way or easement across the land of another.

24. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality monitoring and/or permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.

25. Prior to diversion and use of water under this approval, the right holder shall obtain authorization from United States agencies necessary to access the point of diversion or place of use or to convey water across federal land.

26. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

27. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.
State of Idaho
Department of Water Resources

Permit to Appropriate Water
No. 63-34348

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

Signed this 13th day of August, 2019.

GARY SPACKMAN
Director
EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

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Revised July 1, 2010
The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

**PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

**APPEAL OF FINAL ORDER TO DISTRICT COURT**

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

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

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.