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DEPT OF WATER RESOURCES

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Attorney for City of Boise

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

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-34348

In the name of Elmore County, Board of
County Commissioners

**CITY OF BOISE'S OBJECTION TO
ELMORE COUNTY, BOARD OF
COUNTY COMMISSIONERS'
NOTICE OF INTENT TO
PARTICIPATE AS PUBLIC
WITNESS**

COMES NOW, Protestant, city of Boise City, ("City") by and through its attorney of record, Abigail R. Germaine, and pursuant to the Rules of Procedure of the Idaho Department of Water Resources, Rule 355 and 510 (IDAPA 37.01.01.355 and .510), the Hearing Officer's *Amended Scheduling Order* entered on July 20, 2018, and the Hearing Officer's email, the subject of which was: *Participation as a Public Witness in the Contested Case for Application 63-34348 in the Name of Elmore County, County Commissioners*, dated November 15, 2018, at 6:11 PM, hereby respectfully submits this Objection to Elmore

CITY OF BOISE'S OBJECTION TO ELMORE COUNTY, BOARD OF COUNTY
COMMISSIONERS' NOTICE OF INTENT TO PARTICIPATE AS PUBLIC WITNESS

County, Board of County Commissioners' Notice of Intent to Participate as Public Witness. The Elmore County, Board of County Commissioners' ("Applicant") Notice of Intent to Participate as Public Witness should be denied because: 1) Rule 355 of the Department's Rules of Procedure require five (5) days prior notice of intent to testify as a public witness and a party to the hearing may not call public witnesses; 2) pursuant to the Hearing Officer's *Amended Scheduling Order*, dated July 20, 2018, the time for parties to disclose witnesses for hearing was October 30, 2018; and 3) on November 16, 2018, the Applicant concluded its case in chief and the presentation of witnesses and testimony.

A. Public Witnesses Intending to Testify Needed to Give the Department Notice by November 8, 2018.

As illustrated by the Rules of Procedure of the Idaho Department of Water Resources, Rule 355, "[a] person intending to present public witness testimony shall provide five (5) days notice prior to hearing." IDAPA 37.01.01.355. This requirement made it necessary for all public witnesses intending to testify in this hearing to provide the Department notice by November 8, 2018. These new individuals listed by the Applicant did not provide notice on or prior to November 8, 2018.

This requirement was reiterated by the Hearing Officer himself in his e-mail dated November 15, 2018. In that e-mail, the Hearing Officer sends scheduling information to those public witnesses who have "timely contacted the Department." See Matthew Weaver e-mail, subject: *Participation as a Public Witness in the Contested Case for Application 63-34348 in the Name of Elmore County*, dated November 15, 2018, 6:11 PM. Likewise, the Hearing Officer limits and lists those individuals who have "timely requested to participate as a Public Witness." *Id.* None of the individuals listed in Elmore County, Board of County

Commissioners' Notice of Intent to Participate as a Public Witness provided timely notice to participate and were not listed as public witnesses in the Hearing Officer's e-mail.

Furthermore, the Hearing Officer's e-mail was partially sent in response to the discussion that occurred prior to the start of testimony on November 15, 2018, in which the Hearing Officer discussed how he intended to schedule those that had provided notice of their intent to testify as a public witness. In discussing this topic, Mr. Campbell, counsel for the Applicant, himself states, "Mr. Hearing Officer, if you didn't see it, there was a newspaper article in today's paper that described the hearing, public hearing on the 7th and 10th, I believe, and implied that people could just arrive at the time and testify. And I would hope that that would not be the case. That they have to comply with the rule that requires five days prior notice; is that correct?" Transcript of Record, Volume III, (November 15, 2018), at 607: 4-11. However, Mr. Campbell, now seeks to try and do the very thing he requested the Hearing Officer prevent by requiring proper and timely notice.

In addition, the very definition of Public Witnesses under Rule of Procedure 355, prevents the Applicant, a party to the hearing, from calling public witnesses as they are attempting to do. IDAPA 37.01.01.355. The Rule itself states public witnesses are "[p]ersons not parties and not called by a party." *Id.*

B. The Parties Were Required to Disclose Hearing Witnesses by October 30, 2018.

Pursuant to the Hearing Officer's July 20, 2018, *Amended Scheduling Order*, the deadline for parties to submit a list of lay witnesses they intend to call to testify at the hearing was October 30, 2018. None of the individuals listed in the Applicant's Notice of Intent to

Participate as Public Witness were disclosed in its October 30, 2018, Elmore County's Lay Witness Disclosure.

The Applicant now attempts to circumvent the scheduling order and hearing disclosure requirements by making this late witness disclosure. The Applicant cannot fail to disclose a potential hearing witness and then attempt to elicit their testimony through an alternative means.


C. The Applicant Concluded its Case in Chief and Presentation of Witnesses and Testimony on November 16, 2018.

The Applicant has concluded its case in chief. Any witness or testimony the Applicant desired to present during this hearing should have occurred prior to it resting its case. On November 16, 2018, the Applicant was asked whether they had any additional witnesses or desired to offer any additional evidence. With the exception of Mr. Fred Price, Mr. Campbell did not reserve the right to call any additional witnesses. Transcript of Record, Volume IV (November 16, 2018), at 931: 11-20. The Applicant rested and the presentation of its evidence was concluded.

Based on the foregoing the city of Boise City, respectfully requests the Hearing Officer deny the Applicant's Notice of Intent to Participate as Public Witnesses.

DATED this 4 day of December 2018.

OFFICE OF THE CITY ATTORNEY



ABIGAIL R. GERMAINE, Deputy City Attorney
Attorney for City of Boise

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of December 2018, I served true and correct copies of the foregoing document to the following counsel of record:

Original to:

Idaho Department of Water Resources
Idaho Water Center
P.O. Box 83702
Boise, Idaho 83702

- U.S. Mail
- Personal Delivery
- Facsimile
- Electronic Means w/ Consent
- Other: _____

Copies to:

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- U.S. Mail
- Personal Delivery
- Facsimile
- Electronic Means w/ Consent
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- Electronic Means w/ Consent
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Attorney for Elmore County Board of Commissioners

With electronic copies to:

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On behalf of Elmore County Board of Commissioners

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ABIGAIL R. GERMAINE
Deputy City Attorney

Hersley, Jean

From: English, Kimberle
Sent: Wednesday, December 05, 2018 8:28 AM
To: Hersley, Jean
Subject: FW: City of Boise's Objection to Elmore County's Notice of Participation as Public Witness -- App. for Permit 63-34348 - Elmore County
Attachments: 2018-12-04 BC_Obj to Elmore Public Witness Participation'.pdf

Do you have a date-stamp or should I print it and date-stamp it? ☺

From: Debbie Allen [mailto:DAllen@cityofboise.org]
Sent: Tuesday, December 04, 2018 4:36 PM
To: English, Kimberle <Kimberle.English@idwr.idaho.gov>
Subject: City of Boise's Objection to Elmore County's Notice of Participation as Public Witness -- App. for Permit 63-34348 - Elmore County

Kimberle,

Please find attached the City of Boise's Objection to Elmore County's Notice of Participation as Public Witness.

An original has been hand delivered to the Department and copies have been mailed to Mr. McGee and Mr. Campbell. No other print copies will be mailed unless requested.

Thank you,



CITYOFBOISE.ORG

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