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DEPARTMENT OF
WATER RESOURCES

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Nov 18, 2013

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Attorneys for Energy Resource Group LLC
and G.O. Investments Idaho, LLC

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

IN THE MATTER OF:

**APPLICATION FOR
PERMIT NO. 63-33467
IN THE NAME OF CITY OF BOISE
PUBLIC WORKS DEPARTMENT**

**AFFIDAVIT OF DANA L.
HOFSTETTER IN SUPPORT OF
RESPONSE TO CITY OF BOISE'S
MOTION TO QUASH SUBPOENA
AND OBJECTION TO NOTICE OF
INTENT TO CALL ROBBIN FINCH
AS A WITNESS**

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Dana L. Hofstetter, being first being duly sworn upon oath, deposes and says:

(1) I am Dana L. Hofstetter, counsel of record in this matter for Energy Resource Group LLC (“ERG”) and G.O. Investments Idaho, LLC.

(2) Since ERG/G.O. had not concluded their case in chief, and on the presumption that Mr. Finch had likely returned to Boise in the interim, ERG/G.O. served Mr. Finch with a Subpoena to appear on November 19, 2013, at 10 a.m. to testify briefly at the end of ERG/G.O.’s case in chief.

(3) Attached hereto as Exhibit A is a true and correct copy of excerpts from the transcript of Paul Woods’ Hearing Testimony in this matter.

(4) Attached hereto as Exhibit B is a true and correct copy of excerpts from the Deposition Transcript of Robbin Finch in this matter.

(5) Attached hereto as Exhibit C is a true and correct copy of excerpts from the transcript of Richard Kelsey’s Hearing Testimony in this matter.

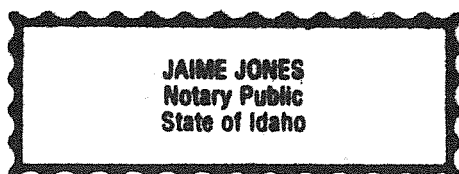
(6) Attached hereto as Exhibit D is a true and correct copy of the Subpoena served by the City of Boise on Norm Young in this matter.

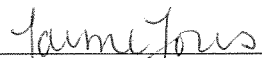
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 18th day of November, 2013.


Dana L. Hofstetter

SUBSCRIBED AND SWORN to before me this 18th day of November, 2013.




Notary Public in and for the State of Idaho
Residing at: Boise ID
My Commission Expires: 09/14/2018

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document (including attachments) this 18th day of November, 2013, by the pre-paid method(s) indicated below:

Original to:

Gary Spackman, Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
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Dana L. Hofstetter

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1 working in his capacity with the Department, reviewed
2 and made sure that I did my work properly.

3 And for him to do his job and for the
4 others that oversaw my work, I think they would say
5 that -- that they had to have a responsibility to
6 understand what I put in that document. And if they
7 didn't, they had an opportunity to ask questions or
8 pursue that.

9 MS. HOFSTETTER: Well, in a hearing or a court
10 of law, I mean a witness can only testify as to what
11 they have personal knowledge of. And based on the
12 depositions in this case, it's my understanding that
13 Mr. Woods did not perform the calculations, did not --
14 and may not be -- and is not aware fully of the
15 calculations that went into designating the 200 cfs
16 figure. That's my understanding from the depositions
17 in this case.

18 THE HEARING OFFICER: I think that's an
19 interesting line of questioning, and maybe you could go
20 there.

21 MS. HOFSTETTER: Okay. Okay. I'll do that.

22 THE HEARING OFFICER: Thank you.

23 MS. HOFSTETTER: Okay.

24 Q. Mr. Woods, who identified the 200 cfs
25 figure that is on Exhibit S1?

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1 A. So the initial calculation that was brought
2 for my review was done by Robbin Finch.

3 Q. And did you review those calculations?

4 A. I reviewed the calculations and discussed
5 the concepts that went into those calculations.

6 Q. Did you end up changing anything that's on
7 the application as a result of reviewing those
8 calculations?

9 A. I did not.

10 Q. And in arriving at the 200 cfs figure, is
11 it true you would need to utilize phosphorus
12 concentration?

13 A. Yes.

14 Q. And what phosphorus concentration did you
15 utilize in deriving the 200 cfs figure?

16 A. I do not recall the exact number. It seems
17 to me it was .31 or it was based on an average value at
18 that time, is my recollection today.

19 Q. But you don't recall what that number was?

20 A. I do not recall exactly what that number
21 was.

22 Q. And what was the time frame that Mr. Finch
23 was preparing Exhibit S1?

24 A. It was in the late summer and fall of 2010.

25 Q. So would that have been -- would he have

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1 been working on the application up til its filing on
2 January 5th, 2011?

3 A. He worked on it up until he had my review
4 and approval to sign it and submit it.

5 Q. And when would that have been?

6 A. Prior to January 5th, 2011.

7 Q. Do you remember when you reviewed and
8 approved the application for filing?

9 A. I don't recall the exact date, no.

10 Q. Would it have been shortly before when it
11 was actually filed, or was the filing delayed for some
12 reason?

13 A. The filing was not delayed for any reason
14 that I'm aware of. We were getting close to the
15 finalization of tech memo No. 2, and a lot of the
16 information that's in tech memo No. 2 was informative
17 in filing the application.

18 Q. And by "tech memo No. 2," are you referring
19 to Exhibit S5?

20 A. Yes.

21 Q. I believe you testified earlier that at the
22 time S1 was submitted that S1 was intended to cover
23 four cities.

24 A. Yes.

25 Q. Why did the City not designate water

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1 storage on this one?

2 A. The City relied on the expertise of Robbin
3 Finch and myself, who admittedly are not experts in
4 water right law. We did not see this project as being
5 a storage project. I think we always sort of
6 conveniently called this a wide spot in the drain. Our
7 intent was not to store water for any length of time
8 for any purpose other than to allow settling of the
9 flocculent for water-quality improvement. So I guess
10 it was our own limited knowledge of what to put on an
11 application.

12 Q. And again, S2, which is the amended
13 application, eliminates groundwater as a source; is
14 that correct?

15 A. Yes.

16 Q. And did you authorize Erika Malmen, City of
17 Boise's legal counsel, to make the amendments that are
18 identified in Exhibit S2?

19 A. Yes.

20 Q. And did any elected official authorize
21 Erika Malmen to make those amendments?

22 A. No.

23 Q. Does the City expect to encounter
24 groundwater in the construction and operation of its
25 ponds?

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1 it in the application.

2 Q. And what information did you have available
3 to you at the time?

4 A. We have flow -- well, we had Dixie
5 concentration data. We had -- we had Dixie flow data.
6 We have removal efficiency data.

7 Q. And is that information documented in any
8 documents at the time?

9 A. If -- I don't recall if they -- if they
10 exist or not in the working file. If they are, they're
11 in the working file that's been produced.

12 Q. With respect to Exhibit 5, would some of
13 the information you utilized perhaps come from
14 Exhibit 5 or drafts of Exhibit 5?

15 A. Hypothetically, yes, that is possible.

16 Q. Do you recall if the --

17 A. I do not recall specifically, but, you
18 know, we try and share information and base our work on
19 the best information available at the time.

20 MS. MALMEN: Counsel, what do you think about a
21 break?

22 MS. HOFSTETTER: Okay. That sounds fine.

23 MS. MALMEN: Okay.

24 (Recess.)

25 Q. (BY MS. HOFSTETTER): Did you utilize any

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1 A. Not that I'm aware of.

2 Q. So do you believe it's likely that that is
3 where you got the 200 cubic feet per second amount?

4 A. No, I don't believe that that's likely.

5 It's -- you know, we were discussing all of these
6 issues as to what was going on. And it was a moving
7 target, to a certain extent. So we were covering the
8 range, and we based the estimate on what we anticipated
9 was the best information and a likely target at the
10 time.

11 Q. So explain to me where the 200 cubic feet
12 per second came from.

13 A. The 200 feet per second came from the
14 information we had at the time and the need to meet the
15 obligation for the offset at Dixie.

16 Q. Are you aware of any other document besides
17 Exhibit 5 that was available -- or drafts of Exhibit 5
18 that was available at this time that would have
19 supported a 200 cubic feet per second amount?

20 A. I do not recall that there were any other
21 documents available.

22 Q. Was there any other information available
23 at this time that the Application for Permit was
24 prepared that would substantiate a 200 cubic feet per
25 second amount?

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1 information provided by Brown and Caldwell in
2 connection with designating this 200 cfs figure?

3 A. I do not recall specifically, but we used
4 all the information that we had available. So it's
5 very possible that we could have used -- relied on some
6 of their information.

7 Q. Again, if you could refer to Exhibit 5,
8 Mr. Finch. Could you turn to page 24 of this report.

9 A. I can.

10 Q. And do you see the paragraph on that page
11 that says "To remove" and it continues?

12 A. Yes.

13 Q. And do you see the sentence in that
14 paragraph that reads "The peak flow rate to be treated
15 to remove 250 pounds TP per day is 198 cubic feet per
16 second"?

17 A. Yes.

18 Q. Is it possible that that is where you got
19 the 200 cubic feet per second figure that you
20 designated on Exhibit 2?

21 A. It is -- I don't recall, but it's possible.

22 Q. Is there any other document or drafts of
23 documents that would have been available in this time
24 frame on which you would have substantiated the
25 200 cubic feet per second figure?

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1 A. Yes, there was plenty of information
2 available to be able to estimate what the various
3 amounts are. You can see in this particular paragraph
4 that there's a range presented there. So, you know, at
5 that particular point I think that probably represents
6 what the thinking was at the time that this document
7 was drafted.

8 Q. What represents what the thinking was at
9 the time?

10 A. The range of -- of different estimates of
11 flow that might be needed to meet the obligation.

12 Q. And what are you referring to specifically?
13 Are you referring to a document?

14 A. Paragraph 1 on page 24.

15 Q. And by that, do you mean the paragraph that
16 begins with "To remove"?

17 A. Yes.

18 Q. And so is it your testimony today that you
19 believe that that information is where you obtained the
20 200 cubic feet per second that you identified on
21 Application for Permit in Exhibit 2?

22 A. My testimony today is that this document
23 was developed for a different -- different purpose and
24 that we relied on all the information that was
25 available to us, not just this document.

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1 you might imagine, to help understand what the upper
2 and lower bounds are. And my understanding is that --
3 and the spreadsheet that we looked at earlier this
4 morning I think had some numbers that were in that
5 range.

6 So I would -- yes, I would presume that
7 there are some documents, including some that we've
8 seen today, that identify targets in that range.

9 Q. Would you have produced as part of this
10 deposition any documents referring to the 200 pounds
11 per day that was being discussed at that time?

12 A. In terms of the documents produced, all of
13 the -- all of my working files concerning -- and
14 e-mails concerning Dixie and the water right
15 application have been produced.

16 Q. Okay.

17 A. I think it's important to recognize that
18 these NPDES negotiations are, you know -- you know, in
19 my view, there was the water right issue and then
20 negotiations around what the offset might be. And
21 those are somewhat -- you know, they have relationship,
22 but they're, in my mind, different bodies of work.

23 Q. How are they related?

24 A. Well, ultimately the conclusion of the
25 negotiations would be put in the NPDES permit, and the

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1 A. The calculations in Exhibit 11 rely on the
2 1.5 to 1 ratio. And I do not recall the ratio
3 associated with the 200-pound-per-day target included
4 in the calculations on Exhibit 19.

5 Q. And with regard to the safety factor of
6 25 percent, would the calculations on Exhibit 19 have
7 utilized a safety factor of 25 percent?

8 A. The calculations did not include a safety
9 factor of 25 percent, which was an error and omission
10 on my part.

11 Q. I'm sorry. Could you repeat that?

12 MS. MALMEN: Can you read it back.

13 MS. HOFSTETTER: That would be better, yeah.

14 (The record was read as follows:

15 "QUESTION: The calculations did not
16 include a safety factor of 25 percent, which was
17 an error and omission on my part.")

18 Q. (BY MS. HOFSTETTER): I'm sorry. Could you
19 clarify which calculations did not include the safety
20 factor of 25 percent.

21 A. The calculations at 2 of Exhibit 19.

22 Q. Do you mean page 3, item 2?

23 A. Yes.

24 Q. And how do you know that they did not
25 include a safety factor of 25 percent?

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1 City would need to have adequate water right to be able
2 to satisfy that need.

3 Q. And at the time you filed the application,
4 Exhibit 2, is it true that many of those details needed
5 to be worked out with EPA?

6 MS. MALMEN: I'm going to object to the form.

7 Q. (BY MS. HOFSTETTER): At the time Exhibit 2
8 was submitted to the Idaho Department of Water
9 Resources, issues relating to water right quantities
10 that would be needed remained to be worked out with
11 EPA; is that correct?

12 A. To the best of my knowledge, my
13 recollection is that we were in the early stages of
14 negotiation with EPA and DEQ, and that we used the best
15 information available when the application was filed
16 to -- and what the City believed was necessary in the
17 Application for Permit for water right.

18 Q. Turning back to Exhibits 11 and 19,
19 comparing the two calculations again.

20 Would it be true that both sets of
21 calculations would have relied on the design flow of
22 39 million gallons per day?

23 A. That is correct.

24 Q. And would both sets of calculations have
25 relied on the 1.5 to 1 ratio?

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1 A. Because I conducted the calculation, and
2 there is no allowance for a 25 percent safety factor.

3 Q. So are you saying the 25 percent safety
4 factor should have been applied in Exhibit 19 but was
5 not?

6 A. Yes, it probably should have been included.
7 If I made an error, it was in -- you know, if the City
8 made an error, it was in not asking for enough water
9 based on the information that was available to us at
10 that time.

11 Q. Do you recall your earlier testimony where
12 you said that the 200-pound-per-day figure in
13 Exhibit 19 was analogous to the 171-pound-per-day
14 figure in Exhibit 11?

15 A. Yes.

16 Q. And so isn't it your testimony that the
17 200-pound-per-day figure on Exhibit 19 already
18 incorporates the 25 percent safety factor?

19 A. No, that is not my testimony, and that is
20 not the way the calculations were performed.

21 Q. I'm just referring back to your earlier
22 testimony where you indicated that the
23 200-pound-per-day figure in Exhibit 19 corresponded to
24 the 171-pound-per-day figure on Exhibit 11.

25 Was that your testimony?

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1 that foundation is that there are two methods by which
2 the calculations that are labeled May 2012 and
3 August 2013, which I think we've had some discussion
4 about where those come from, those differ from the
5 November 2011. One is in the daily concentration
6 number, the lowest average monthly number versus the
7 lowest ever recorded. And then --

8 MS. HOFSTETTER: Well, I think they all three
9 used the lowest ever recorded, all three of those used
10 the lowest at the time, correct. This chart
11 distinguishes from the prior calculations, the ones
12 that went before, if you will, November 2011, before
13 when they thought it would be four cities, when they
14 thought it would be four cities and they had the
15 200 cfs.

16 And then this is after when it was made to
17 go -- the EPA made the determination that the Dixie
18 project would cover only one city, then is when these
19 three calculations were performed.

20 THE HEARING OFFICER: All right. Maybe we need
21 to have Mr. Kelsey explain that.

22 Let me hear from the City of Boise first.

23 MR. PETERSEN: Just real quick. Just to speed
24 things along, I believe the testimony was the
25 calculations are taken from the exhibits, and so I

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1 not do that. Let's just have his testimony about this,
2 if we can.

3 MS. HOFSTETTER: Okay.

4 Q. So, Mr. Kelsey, did they -- starting in
5 November 2011, can you describe how in Exhibit S13 they
6 revised their prior calculations to justify the
7 continued use of the 200 cfs, although the
8 determination had been made by EPA that the Dixie
9 project would cover only one city.

10 A. Yes. In November 2011 there was a choice
11 to use the lowest daily concentration that had been
12 measured and was available at that time,
13 .260 milligrams per liter.

14 Q. Instead of?

15 A. Instead of the lowest monthly average of
16 .325 --

17 Q. Which had been used --

18 A. -- that was available at the time.

19 Q. Which had been used before?

20 A. By technical memo No. 2.

21 Q. And what was the other change that they
22 made in November -- in S13?

23 A. They used 200 pounds a day, as opposed to
24 140 for Boise City only, or the 250 for all
25 municipalities, which resulted in a 404 cfs.

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1 would object this may be duplicative at this time. If
2 the information is already there, then perhaps we could
3 move on.

4 MS. HOFSTETTER: I'm going to have to object
5 because, you know, what did counsel for the City of
6 Boise expect the protestant to do here, to just kind of
7 say, "Oh, it's all in the record. You dig through it,
8 Mr. Hearing Officer, and figure it out for yourself"?

9 I mean Mr. Kelsey has spent long hours
10 reading this material and a lot more. He's digested
11 it. He's synthesized it. He can make your job a lot
12 easier, Mr. Hearing Officer, and I think my client, two
13 of whom are sitting here, have a right with all the
14 resources they've put into this to have Mr. Kelsey
15 explain his opinion.

16 THE HEARING OFFICER: Let's have Mr. Kelsey
17 explain his opinion on this briefly, just a few
18 minutes.

19 Q. (BY MS. HOFSTETTER): Okay. Mr. Kelsey, so
20 we're going to really need to go fast.

21 Could you write down the new formula that
22 was used by the City of Boise in May 2012 and
23 August 2013.

24 THE HEARING OFFICER: Ms. Hofstetter, are you
25 going to offer to have what he's writing down -- let's

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1 Q. And do you know where they got the
2 200 pounds a day?

3 A. I have no idea.

4 Q. Okay. So moving on to May 2012 -- and that
5 would be document S9; correct?

6 A. Correct.

7 Q. Okay. What changes from the prior formula
8 in TM 1 and TM 2, Exhibits S4 and S5, did they make in
9 May 2012?

10 A. In May of 2012, they used 137 pounds per
11 day for P Dixie, which was negotiated with EPA at that
12 time. They used the 0.231 milligram per liter lowest
13 daily minimum, which was apparently measured sometime
14 back in June 2011. So they still -- they used a new
15 lowest daily minimum, and then they applied also a
16 factor of 1.25 to arrive at 197 cfs.

17 Q. So the two changes that they made from TM 1
18 and TM 2, S4 and S5, instead of using the monthly
19 average minimum concentration they used the all-time
20 minimum concentration; correct?

21 A. Lowest daily. They used the lowest daily
22 number instead of the lowest monthly average.

23 Q. And the lowest daily would be the all-time
24 measured lowest; correct?

25 A. Correct.

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1 Q. And then they also applied a factor of
2 1.25; correct?
3 A. Correct.
4 Q. Okay. With regard to Exhibit S20, which is
5 the Herr report and it came out in August 2013, just a
6 month ago, what changes from the original formula in
7 the Brown & Caldwell TM 1 and TM 2 -- and I don't think
8 you can refer to the chart because -- but I need you to
9 explain it for the record, what changes in S20, the
10 Herr report, from the original TM 1, TM 2 formula did
11 they make?
12 A. TM 2 used a number of 140 pounds per day.
13 The August 2013 report used 137 pounds per day. Those
14 are the same. They changed -- the differences between
15 technical memo No. 2 and the August 2013 report are in
16 the selection of the peak concentration from 0.325 to
17 0.231. And they also added a factor of -- a factor to
18 the August 2013 report, which was not reported in
19 technical memo No. 2.
20 Q. So again, they used the lowest all-time
21 measured concentration in the Dixie; correct?
22 A. Correct.
23 Q. Instead of using the lowest monthly average
24 concentration in the Dixie?
25 A. Correct.

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1 Q. And they applied the 25 percent factor;
2 correct?
3 A. Correct.
4 Q. And that factor was not applied in TM 1 and
5 TM 2; correct?
6 A. Correct.
7 MS. HOFSTETTER: Okay. So I think we've covered
8 it now.
9 THE HEARING OFFICER: Okay. Thank you.
10 MS. HOFSTETTER: Okay. So let's move on, if we
11 could. I think we should pull up E70, please. And
12 again, this is -- was produced as part of ERG 122.
13 Q. Mr. Kelsey, did you prepare this chart?
14 A. I did.
15 Q. And what data did you use in preparing this
16 chart?
17 A. I used data that was provided by the USGS,
18 I used data provided by the Idaho Department of --
19 Idaho State Department of Agriculture, and data
20 provided by the City of Boise through IDEQ.
21 Q. Okay. And could you just identify for us,
22 just describe the chart basically, what the four
23 different colors are and the axis in this chart,
24 please.
25 A. Okay. So what this chart depicts is the

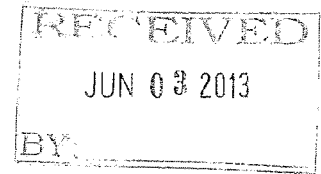
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1 flow requested, what you want versus the flow
2 available. The gray line is basically just a chart of
3 the flow that's available in the Dixie Drain. It's a
4 chart -- it's a graph of the flow records versus time.
5 So that is the flow available.
6 Q. Which color?
7 A. The gray is the flow available.
8 The green line is identified as 2042 Q
9 peak. I need to clarify that that is peak based upon
10 daily minimum concentrations. That's the worst case.
11 So the green line is the worst case based upon the
12 daily minimums that are available.
13 Q. Okay. So you're saying basically it's the
14 2042 Q peaks calculated based on the daily minimum
15 concentration, not the monthly average minimum;
16 correct?
17 A. That's correct. It's based on the
18 concentrations that were measured on those days. So
19 it's real data. It's a daily measurement.
20 Q. Okay. So it's the daily -- it's the actual
21 measurement on those days?
22 A. On those days. That's actual data on those
23 days.
24 Q. So not a monthly average there?
25 A. Yeah.

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1 Okay. The blue line I think we'll
2 recognize as 200 cfs, which is what has been requested.
3 The red line, or orange, is the 131 cfs
4 that we have calculated is the peak flow required at
5 full build-out, according to the lowest monthly average
6 method.
7 Q. And that's the same 131 that's identified
8 in your summary of opinions, S42, in paragraph 1A;
9 correct?
10 A. Correct.
11 Q. Which you previously described how you
12 obtained that; correct?
13 A. Correct.
14 Q. Okay.
15 A. So this.
16 MS. HOFSTETTER: Can I -- I'd like to ask that
17 this Exhibit E70 be admitted into evidence.
18 THE HEARING OFFICER: I want to make sure I
19 understand what this is representing.
20 So the flow in cfs is taken from where
21 again, Mr. Kelsey?
22 THE WITNESS: USGS, Idaho State Department of
23 Agriculture, and the City of Boise's data. It's just
24 the raw data.
25 THE HEARING OFFICER: Okay. And the 2042 Q

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Attorneys for City of Boise

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF:

**APPLICATION FOR
PERMIT NO. 63-33467
IN THE NAME OF CITY OF BOISE
PUBLIC WORKS DEPARTMENT**

**DEPOSITION SUBPOENA
(NORM YOUNG)**

**Date: Tuesday, August 20, 2013
Time: 9:30 a.m., Mountain Time**

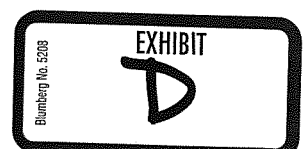
THE STATE OF IDAHO TO: NORM YOUNG
 ERO Resources
 3314 Grace Street
 Boise, ID 83703

YOU ARE COMMANDED:

☒ to appear at the place, date, and time specified below to testify in the above-captioned case.

☐ to produce or permit inspection and copying of the documents or objects, including electronically stored information, set forth in Schedule A below at the place, date, and time specified below.

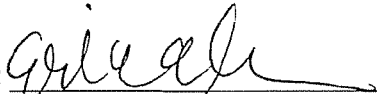
PLACE, DATE, AND TIME: at the offices of Perkins Coie, LLP, 1111 W. Jefferson Street, Suite 500, Boise, Idaho, on **Tuesday, August 20, 2013 beginning at 9:30 a.m.**



YOU ARE NOTIFIED that if you fail to appear at the deposition at the designated time, or if you fail to produce or permit copying or inspection as specified above, you may be held in contempt of court and the aggrieved party (City of Boise) may recover from you the sum of \$100.00 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED: May 30, 2013

PERKINS COIE LLP

By: _____

Robert A. Maynard

Erika E. Malmen

Attorneys for City of Boise