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 DEPARTMENT OF  
 WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES  
 OF THE STATE OF IDAHO

|                                |   |                                 |
|--------------------------------|---|---------------------------------|
| IN THE MATTER OF APPLICATION   | ) |                                 |
| FOR PERMIT TO APPROPRIATE      | ) |                                 |
| WATER NO. 63-33321 IN THE NAME | ) | <b>APPLICANT'S POST HEARING</b> |
| OF ELK CREEK CORP.             | ) | <b>BRIEF</b>                    |
|                                | ) |                                 |
|                                | ) |                                 |
|                                | / |                                 |

At the hearing in this proceeding Protestant (Idaho City) argued that Elk Creek Corp's application for water right should be denied because:

- (a) Idaho City has an ordinance that prohibits the drilling of wells in the City;
- (b) Idaho City has the legal authority to annex Applicant's property;
- (c) If Elk Creek Corp's application is granted, it may drill its own well and disconnect its trailer park from the City's water system;
- (d) If Idaho City annexes Applicant's property and it has a private well on it, Idaho City will have violated its own ordinance, which was intended to insure that everyone in the City is connected to its municipal water system.

This argument is specious for a number of reasons.

First, Idaho City's ordinance (Exhibit B) only prohibits the drilling of a private well on property that is located in the City. It is undisputed that Applicant's property is located outside the City. The property is located within the City's area of impact, but territorial jurisdiction lies with the County, not

the City. Reardon v. Magic Valley Sand and Gravel, Inc., 140 Idaho 115, 90 P.3d 340 (Idaho 2004); Blaha v. Board of Ada County Com'rs, 134 Idaho 770, 9 P. 3d 1236 (Idaho 2000). If Applicant drills a well on its property neither it nor the City will be in violation of the City's ordinance. A subsequent annexation of Applicant's property by the City, if it ever occurred, would not create a violation of the ordinance, either by the City or by Applicant. The City's Ordinance is clearly inapplicable to Applicant's property.

Second, Idaho City does not have the legal authority to annex Applicant's property. Idaho City and Boise County entered into an area of impact agreement pursuant to Idaho Code section 67-6526. That agreement is implemented by Boise County Ordinance No. 30-2000, (Exhibit A-20). A copy of that ordinance is attached. It is the ordinance required to be adopted by Idaho Code Section 67-6526(a)(3).<sup>1</sup> That agreement prohibits Idaho City from annexing Applicant's property involuntarily. Section 4 of Boise County Ordinance 3-2000 states:

“The City of Idaho City has voluntarily limited its annexation authority as set forth in Idaho Code Section 50-222 as follows: The City of Idaho City *will not annex property without a request for annexation* by the owner of the property in question.”

It is undisputed that Applicant refuses to consent to annexation of its property by the City. Grant Hawk, president and principal owner of Elk Creek Corp., testified that he was adamantly opposed to the City's annexation. The Mayor of Idaho City testified that Applicant refused to be annexed by the City.

Third, it is clearly the law in Idaho that a city has no legal authority to unilaterally amend an area of impact agreement with the county. Idaho Code Section 67-6526(d) provides that: “Areas of city impact, plan and ordinance requirements *shall remain fixed* until *both* governing boards agree to renegotiate.” The City, by itself could not alter the area of impact agreement; nor could it amend the

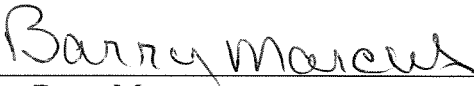
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<sup>1</sup> The ordinance implementing the area of impact agreement necessarily has to be a county ordinance because the county, and not the City, has jurisdiction over the area of impact. Even by agreement, the county cannot abdicate that jurisdiction to the City, because of the Idaho constitution. See Reardon, supra.

county ordinance, which implements that plan.<sup>2</sup> At this point any consideration of a possible future attempt by the City to involuntarily annex Applicant's property is pure conjecture and speculation. The Department must render its decision in this case based on the facts that constitute the record. Those facts require approval of the Application filed by Elk Creek Corp.

Respectfully submitted,

MARCUS, CHRISTIAN & HARDEE

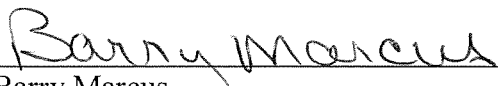
  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of November, 2011, I caused to be served a true and correct copy of the foregoing **POST HEARING BRIEF**, in the above-referenced matter by the method indicated below, and addressed to the following:

RICHARD K. LINVILLE, ATTY  
CITY OF IDAHO CITY  
PO BOX 671  
EMMETT, ID 83617

\_\_\_\_\_ *HAND DELIVER*  
☒ *U.S. MAIL*  
\_\_\_\_\_ *OVERNIGHT MAIL*  
\_\_\_\_\_ *TELECOPY (FAX)*  
\_\_\_\_\_ :

  
Barry Marcus

<sup>2</sup> The Mayor testified that the City has not sought any legal opinion regarding its authority to annex Applicant's property, nor has it adopted any ordinance which purports to authorize the City to implement an annexation of Applicant's property. She further testified that the City Council had not even taken a position on whether to attempt such an annexation.