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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR) APPLICANT’S RESPONSE TO
PERMIT NOS. 37-22682 AND 37-22852 IN) REPLY IN SUPPORT OF MOTION FOR
THE NAME OF INNOVATIVE) SUMMARY JUDGMENT
MITIGATION SOLUTIONS, LLC)

Innovative Mitigation Solutions, LLC provides this response to *Reply in Support of Motion for Summary Judgment* filed on May 5, 2015 by Protestants Thomas M. O’Gara Family Trust and Lower Snake Aquifer Recharge District (“Two Protestants”).

The Two Protestants have revised their motion to the Hearing Officer by withdrawing their request for oral argument. This helps to solve the timing problem with this *Motion for Summary Judgment*. However, the motion should be denied for many reasons. The first three reasons below were provided in the Applicant’s response dated April 30, 2015. The remaining reasons have been added in response to the May 5, 2015 *Reply in Support of Motion for Summary Judgment*.

1. The motion was made by only two of more than twenty Protestants.¹ Other Protestants identified many additional issues. This motion and associated documents do not provide a complete list of the protested issues to be considered in this matter.
2. The timing of this motion is inopportune. The hearing dates in this matter were determined in a pre-hearing conference held on February 4, 2015. The resulting *Scheduling Order and Notice of Hearing* was issued on March 13, 2015. The *Motion for Summary Judgment* was distributed on April 16, 2015. The *Applicant’s Response to Motion for Summary Judgment* was filed on April 30, 2015. The *Reply in Support of Motion for Summary Judgment* was filed on May 5, 2015. In this filing the Two Protestants withdrew their request for oral argument. This withdrawal would enable the Hearing Officer in this matter time to squeeze in a summary judgment decision prior to the hearing in this matter, which is scheduled to begin on June 8, 2015. Nevertheless the timing of the *Motion for Summary Judgment* is inopportune because the appeals by any party to the Hearing Officer’s ruling on the summary judgment would extend

¹A footnote added to the Two Protestants’ *Reply in Support of Motion for Summary Judgment* states “Furthermore the Big Wood Canal Company joined the Motion.” The Applicant has not seen this action by the Big Wood Canal Company.

beyond the hearing date, thus upsetting the orderly hearing process schedule established in the *Scheduling Order and Notice of Hearing* issued on March 13, 2015.

3. A summary judgment process at this time might not avoid the need for a hearing if the Two Protestants do not prevail. Conducting both a summary judgment process and a hearing process is not an efficient use of time, either for the Department or for the parties.
4. The Two Protestants base their motion largely on rules that do not apply in this administrative hearing. The Two Protestants state their reply is submitted “in support of their *Motion for Summary Judgment* seeking dismissal of the applications for permit as a matter of law pursuant to the Idaho Department of Water Resources’ (“IDWR”) Rules of Procedure (IDAPA 37.01.01 *et seq.*) and I.R.C.P. 56(c).” However, I.R.C.P. 56(c) does not apply. I.R.C.P. 56(c) is the rule for “Motion for summary judgment and proceedings thereon.” It provides the basis for court action regarding summary judgments. However, it does not apply to administrative hearings. I.R.C.P. Rule 1 (a), entitled “Scope of Rules” states as follows:

These rules govern the procedure and apply uniformly in the district courts and the magistrate's divisions of the district courts in the state of Idaho in all actions, proceedings and appeals of a civil nature whether cognizable as cases at law or in equity, including probate proceedings and proceedings in which a judge pro tempore is appointed pursuant to Idaho Court Administrative Rule 4; except that proceedings in the small claims department are governed by these rules only as provided by Rule 81. All references in these rules to the court or district court shall include the magistrate's division, and all references to judges or clerks shall include magistrates and their clerks and a judge pro tempore appointed pursuant to Idaho Court Administrative Rule 4, except as referred to in Rules 81, 82 and 83. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding. Emphasis added.

Administrative hearings are different from matters before the magistrate and district courts. This is the reason for promulgation of the Idaho Administrative Code, including Rule 37, the Rules of Procedure of the Idaho Department of Water Resources. These Rules of Procedure (IDAPA 37.01.01 *et seq.*) provide an orderly process for actions on administrative proceedings that allow Idaho citizens to receive a full and fair hearing on matters brought before the agency. These processes are different from judicial hearings. Rule 37.01.01.001.02 states as follows:

This chapter contains the rules of procedure which shall govern contested case proceedings before the Department of Water Resources and the Water Resource Board of the state of Idaho.

While motions are allowed as provided in Rule 37.01.01.260, the use of summary judgment is not even mentioned in IDAPA 37.01.01 *et seq.*, and it has not been a normal practice of IDWR to use summary judgment procedure in administrative actions before IDWR without advance provision in the hearing schedule with the likely concurrence of the parties. Summary judgment has never been used to dismiss applications prior to hearing. Such an action would be totally contrary to the process for a full and fair hearing allowed under the rules and required by Idaho statute. Section 42-203A (4) and (5), Idaho Code.

The hearing for Applications for Permit Nos. 37-22682 and 37-22852 provides a good case in point. In this case the Applicant participated in a pre-hearing conference on February 4, 2015, which included a discussion about a hearing date. The Applicant requested a hearing as soon as possible, in March or April, to provide an opportunity to use the water right this spring if the snowpack was sufficient.² At the pre-hearing conference one of the attorneys for the Two Protestants argued that more time was needed, and requested that the hearing date be set for June, more than four months hence, which was accepted by the Hearing Officer.

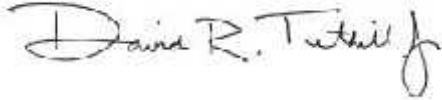
If the Two Protestants are allowed to take advantage of this delayed hearing date by swooping in prior to the hearing to request summary judgment based on a few of the many arguments in this matter, the purpose of the administrative hearing will be defeated. If this technique proves successful for the Two Protestants in this case, the technique could be used in other cases to provide an advantage for someone who would request summary judgment on even one small point, hoping the applicant would not find it worthy of providing a response prior to the already-set hearing date. Such a precedent would be an unfortunate manipulation of the administrative process which is designed to be fair to both protestants and applicants.

5. The Hearing Officer did not provide for motions such as the Motion for Summary Judgment Order, nor did any of the participants in the February 4, 2015 pre-hearing conference suggest that these be scheduled.
6. Issuing a summary judgment at this time would avoid and delay determination of the issues. The two applications in this matter are just two of five already filed with IDWR. The many issues identified by all of the protestants in this matter are now scheduled to be heard, starting on June 8, 2015, a little more than a month away. If IDWR dismisses these two applications via a summary judgment as requested by the Two Protestants, the issues will not be heard in a full and fair way that will serve as a guide for consideration of other similar applications.
7. The Two Protestants will have full opportunity to present all of the issues presented in their request for summary judgment, and more, in the hearing set for this matter. Even if they choose to not participate in the hearing, they can let stand the briefing already submitted and already a part of the record. Their interests will be fully protected.
8. All of the case law cited by the Two Protestants in their *Reply in Support of Summary Judgment* is case law before the courts, not binding before the administrative agency. As such the citations do not govern in this action for the administrative processing of an application for permit to appropriate the unappropriated waters of the State of Idaho as provided for under Article 15, Section 3 of the Idaho Constitution.

² As of January 29, 2015, there was a fifty percent chance of Magic Reservoir filling and spilling this year, per a memorandum provided by Dr. Charles G. Brockway.

In summary, the Hearing Officer is requested to dismiss this request for summary judgment, and allow the long-scheduled hearing to take place as already ordered.

Dated this 8th day of April, 2015

A handwritten signature in black ink that reads "David R. Tuthill, Jr." The signature is written in a cursive style with a large initial 'D' and a distinct 'Jr.' at the end.

David R. Tuthill, Jr.

Manager, Innovative Mitigation Solutions, LLC