

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

RECEIVED
JUN 05 2015
DEPARTMENT OF
WATER RESOURCES

Attorneys for Heart Rock Ranch, Golden Eagle HOA, Rinker Co., Spencer Eccles, Lower Snake River Aquifer Recharge District and the Thomas M. O'Gara Family Trust

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

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 37-22682 & 37-22852 in the
name of Innovative Mitigation Solutions, LLC

**OPPOSITION TO APPLICANT'S
REQUEST TO RECONSIDER
PRELIMINARY ORDER
GRANTING MOTION FOR
SUMMARY JUDGMENT WITH
RESPECT TO APPLICATION FOR
PERMIT NO. 37-22852**

COME NOW, Protestants, the HEART ROCK RANCH, GOLDEN EAGLE HOA, RINKER CO., SPENCER ECCLES, LOWER SNAKE RIVER AQUIFER RECHARGE DISTRICT AND THE THOMAS M. O'GARA FAMILY TRUST, by and through counsel of record, and submit this opposition to the *Applicant's Request to Reconsider Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852*.

On May 26, 2015, the Hearing Officer issued an order dismissing Application for Permit No. 37-22852 due to the Applicant's failure to provide any lease evidencing authority to use the Comstock Canal for recharge. Such evidence was required to have been submitted with the Application. In addition, the Protestants submitted discovery requests to the Applicant in December, 2014, seeking information regarding any lease or other possessory interest in the Comstock Canal. *Arrington Aff.* at Ex. B. No information was provided.

**OPPOSITION TO APPLICANT'S REQUEST TO RECONSIDER PRELIMINARY ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO APPLICATION FOR
PERMIT NO. 37-22852**

On May 27, 2015, the Applicant submitted its request for reconsideration of the dismissal. In doing so, the Applicant, for the first time, submitted a document entitled “Place of Use Lease Between Cliffside Homeowners Association, Inc., Landlord and Innovative Mitigation Solutions, LLC, Tenant.” According to the Applicant, this lease, dated October 19, 2013, evidences authority to divert water for recharge into the Comstock Canal. In fact, it does not.

Idaho law and Department regulations mandate that an Applicant “have legal access to the property necessary to construct and operate the proposed project.” IDAPA

37.03.08.045.01.c. Indeed,

Lack of a possessory interest in the property designated as the place of use is speculation. ***Persons may not file an application for a water right and then seek a place of use thereof.***

Lemmon v. Hardy, 95 Idaho 778, 781 (1974) (emphasis added).

The lease provided by the Applicant is not sufficient to demonstrate a possessory interest in the Comstock Canal. First, the lease only speaks to the “place of use” for the recharge activities. Nothing in the lease gives any authority to the Applicant to divert water from any point of diversion identified on the application. In particular, there is no agreement speaking to the diversion of water from the headgate of the Comstock Canal. This is especially important here, where the headgate is not on any property within the Cliffside Homeowners Association (“Cliffside HOA”). *See* attachment to Lease.

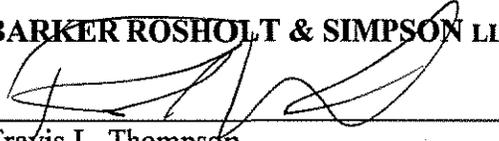
Furthermore, by its own terms, the lease recognizes that only “a portion of the Comstock Ditch” runs through the area of the Cliffside HOA. The aerial photo attached to the lease shows that the Comstock Canal diverts from the Big Wood River at a point north of the Cliffside HOA property. The Comstock Canal then travels a significant distance before it reaches the Cliffside

HOA. After exiting the Cliffside HOA property, the Comstock Canal travels an additional distance before its terminus. Nothing in the lease provided by the Applicant demonstrates any authority to deliver water through the Comstock Canal as it passes through property outside of the Cliffside HOA.

Importantly, water cannot get to the Cliffside HOA unless it passes through property for which Cliffside HOA has no interest. Yet, the Applicant has not provided any information or evidence that it has acquired any authority to divert water at the Comstock Headgate or to deliver water through the Comstock Canal as it passes property outside of the Cliffside HOA. Since the Applicant has not demonstrated that it has “legal access to the property necessary to construct and operate the proposed project,” IDAPA 37.03.08.045.01.c, the Hearing Office should deny the request for reconsideration.

DATED this 5th day of June, 2015.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Paul L. Arrington

*Attorneys for Lower Snake River Aquifer Recharge
District, et al.*

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2015, I served a true and correct copy of the foregoing, via email to the following:

Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Innovative Mitigation Solutions
2918 N. El Rancho Pl.
Boise, Idaho 83704

Harriet Hensley
Office of Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

Frank Erwin
711 East Ave. N.
Hagerman, Idaho 83332

Bureau of Land Management
Idaho State Office
Attn: Fred Price
1387 South Vinnell Way
Boise, Idaho 83709-1657

Idaho Rivers United
Kevin Lewis, Conservation Director
P.O. Box 633
Boise, Idaho 83701

Michael Lawrence
Givens Pursley LLP
Representative for Redstone Partners, LP
P.O. Box 2720
Boise, Idaho 83701-2720

Peter Trust, LP
Thomas A. Thomas, General Partner
P.O. Box 642
Sun Valley, Idaho 83353

Peter L. Sturdivant
P.O. Box 968
Hailey, Idaho 83333

Wood River Land Trust
Attn: Patti Lousen
119 E. Bullion St.
Hailey, Idaho 83333

Valley Club Owners Association
Jack Levin, President
P.O. Box 6733
Ketchum, Idaho 83340

Trout Unlimited, Inc.
Peter R. Anderson
910 W. Main St., Suite 342
Boise, Idaho 83702

Idaho Conservation League
c/o Bryan Hulbutt, attorney
Advocates for the West
P.O. Box 1612
Boise, Idaho 83701

Board of Blaine County Commissioners
Lawrence Schoen, Commissioner
206 First Ave. South, Suite 300
Hailey, Idaho 83333

Lane Ranch Homeowners Association
c/o Sun Country Management
Marc E. Reinemann
P.O. Box 1675
Sun Valley, Idaho 83353

USDA Forest Service
Attn: Steve Spencer
1805 Hwy 16, Rm 5
Emmett, Idaho 83617

Idaho Power Company
c/o Barker Rosholt & Simpson
Attn: John K. Simpson
P.O. Box 2139
Boise, Idaho 83701-2139

Redstone Partners LP
1188 Eagle Vista Ct.
Reno, Nevada 89511

The Valley Club, Inc.
c/o Givens Pursley, LLP
Attn: Michael Creamer
P.O. Box 2720
Boise, Idaho 83701-2720

Western Watersheds Project
Jon Marvel, Executive Director
P.O. Box 1770
Hailey, Idaho 83333

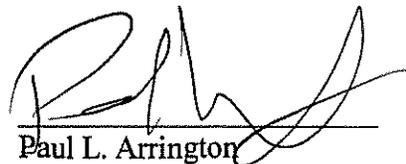
Brad Walker
Walker Sand & Gravel, Ltd. Co.
P.O. Box 400
Bellevue, Idaho 83313

Idaho Dept. of Fish & Game
Magic Valley Region
324 S. 417 E., Ste. 1
Jerome, Idaho 83338

Big Wood Canal Company
c/o Craig Hobdey
P.O. Box 176
Gooding, Idaho 83330

Brockway Engineering
2016 N. Washington St., Ste. 4
Twin Falls, Idaho 83301

City of Hailey
c/o Givens Pursley LLP
Attn: Michael Creamer
P.O. Box 2720
Boise, Idaho 83701-2720



Paul L. Arrington