

RECEIVED

JUN 11 2015

DEPARTMENT OF WATER RESOURCES

David R. Tuthill, Jr.
Manager, Innovative Mitigation Solutions, LLC
2918 N. El Rancho Pl.
Boise, ID 83704

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 37-22852 IN)
THE NAME OF INNOVATIVE)
MITIGATION SOLUTIONS, LLC)

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

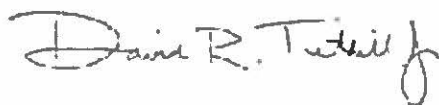
Innovative Mitigation Solutions, LLC (IMS) provides this reply to the *Protestants' Opposition to Request to Reconsider Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852*. The Protestants’ analysis regarding possessory interest is faulty and results in an erroneous recommendation to the Hearing Officer.

The Applicant concurs that Idaho law and Department regulations mandate that an Applicant "have legal access to the property necessary to construct and operate the proposed project," and that lack of a possessory interest in the property designated as the place of use is speculation, and that persons may not file an application for a water right and then seek a place of use thereof.

However, the Applicant does not concur with the position of the Protestants that possessory interest in the point of diversion is required at the time the application is filed. Nor does the Applicant need possessory interest in the entire reach of the canal when the application is filed. Such an easement can be obtained at a later time. *Lemmon v. Hardy* does not conclude that possessory interest in all locations is needed at the time the application is filed – just that possessory interest in the *place of use* is required.

As indicated previously, the Applicant acknowledges that the Lease for this application was not provided to the record during discovery. The Lease did exist, and the Applicant incorrectly thought a copy of the Lease had been provided, but this was not the case. If a remedy is required, perhaps a delay in date of priority to the date when the Lease was made available is appropriate. Cancellation of the application would be an unfortunate loss of resources for all concerned, would necessitate re-filing and costly statewide re-advertising, and this loss would greatly exceed any injury to the Protestants caused by not timely providing the Lease, which is similar in form to the other leases that were provided.

Dated this 10th day of June, 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