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DEPARTMENT OF WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	APPLICANT'S RESPONSE TO ORDER
PERMIT NO. 37-22852 IN)	DENYING PETITION FOR
THE NAME OF INNOVATIVE)	RECONSIDERATION OF PRELIMINARY
<u>MITIGATION SOLUTIONS, LLC</u>)	ORDER GRANTING MOTION FOR
		SUMMARY JUDGMENT WITH RESPECT TO
		APPLICATION FOR PERMIT NO. 37-22852

Innovative Mitigation Solutions, LLC (IMS) provides this response to the *Order Denying Petition for Reconsideration of Preliminary Order Granting Motion for Summary Judgment with Respect to Application for Permit No. 37-22852*. The Applicant accepts the denial of the petition for reconsideration due to not timely providing a copy of the Lease for the place of use, if this remedy is justified as compared with the suggested remedy of advancing the date of priority. However, the Applicant disagrees with the Hearing Officer's analysis regarding the need to have possessory interest in the point of diversion or other lands in the canal at the time of filing the application. Accordingly, the Applicant objects to the decision of the Hearing Officer in this regard.

The Hearing Officer states as follows:

Even assuming the Place of Use Lease supplies the Applicant legal access to the portion of the Comstock Canal that runs through property owned by members of Cliffside Homeowners Association, Inc., the Applicant has submitted no information evidencing any legal access to the headgate of the Comstock Canal (the point of diversion identified on Application 37-22852) or the portion of the Comstock Canal between the headgate and the "Start Point for Cliffside Homeowners Association, Inc." In other words, the Applicant has not provided any information or evidence that it has acquired any authority to divert water at the headgate of the Comstock Canal or to deliver water through the Comstock Canal outside of the "Start" and "End" points for Cliffside Homeowners Association, Inc. as depicted on Exhibit A.

The Hearing Officer disagrees with the Applicant's assertions that it did not need to demonstrate a possessory interest in the headgate of the Comstock Canal or the reach of the Comstock Canal necessary to operate the proposed recharge project at the time Application 37-22852 was filed. Rule 45.01.c of the Department's Water Appropriation Rules clearly requires that an application will be found to have been made in good faith if the applicant "shall have legal access to the property necessary to construct and operate the proposed project." The recharge project proposed by Application 37-22852 proposes use of the headgate of the Comstock Canal as the point of diversion and, as Exhibit A demonstrates, requires use of the Comstock Canal outside of the "Start" and "End" points for Cliffside Homeowners Association, Inc. The Place of Use Lease does not provide the Applicant legal access to these properties, which are necessary to construct and operate the recharge project proposed by Application 37-22852. To hold otherwise would allow a water right to be initiated by trespass, in violation of principles set forth in *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974) ("a water right initiated by trespass on private property is invalid.")¹

The Applicant disagrees with this analysis. The conclusions established in *Lemmon v. Hardy* do not include the requirement that an applicant have possessory interest in the point of diversion at the time the application is filed. While the citation provided by the Hearing Officer is embedded in the *Lemmon v. Hardy* decision, the conclusion of the Idaho Supreme Court in this decision reads as follows:

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 for use** thereof. (Emphasis added)

The absence of "point of diversion" in this conclusion by the Idaho Supreme Court was intentional. In this way the Court remained consistent with widely held interpretations throughout the western United States that an applicant need not have possessory interest in the point of diversion at the time an application is filed. This issue is discussed in a 1980 Idaho Supreme Court case, *Canyon View Irrigation v. Twin Falls Canal Company* (619 P. 2d 122 (1980)), wherein the Court states as follows:

In order to assist owners of water rights whose lands are remote from the water source, the state has partially delegated its powers of eminent domain to private individuals. I.C. §§ 42-1102 and -1106. *See White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975). These statutes permit landlocked individuals to condemn a right of way through the lands of others for purposes of irrigation.

The concept of landlocked individuals obtaining easements to gain access to water is a widely accepted practice in prior appropriation doctrine states. The Idaho Department of Water Resources has issued many, many water right permits without the need for an applicant to demonstrate possessory interest in the point

¹ The Court also explained: "In the case at bar the land designated as the point of diversion and place of use in appellants' original application was private property not owned by the appellants and therefore no valid water right could be developed on it. Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right" *Lemmon v. Hardy*, 95 Idaho at 780, 519 P.2d at 1170.

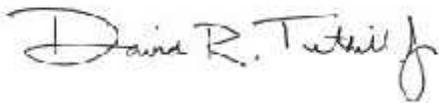
of diversion or the intervening lands at the time of filing the application. The traditional approach of the Department in these cases is to issue a water right permit with the following standard condition:

This right does not grant any right-of-way or easement across the land of another.

If the Department of Water Resources now begins to require a showing that an applicant have possessory interest in the point of diversion and in intervening lands when the application is filed, this would require a major change in the processing of new applications for permit to appropriate the waters of the state. This would be contrary to the constitution, statutes, rules and case law in our prior appropriation state, and it would have a chilling effect on new applications for any potential water users other than riparian owners.

The Applicant accepts the denial of the application for failure to timely report the Lease agreement that was signed prior to the filing of the Application, if this remedy is justified as compared with advancing the date of priority. However, the Applicant must take issue with the possessory interest discussion in the Hearing Officer's decision, and accordingly respectfully requests a review of this issue by the Director.

Dated this 26th 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 long, sweeping tail on the 'l'.

David R. Tuthill, Jr.

Manager, Innovative Mitigation Solutions, LLC