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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 POST-HEARING
PERMIT NO. 37-22682 IN THE NAME OF) BRIEF
DAVID R. TUTHILL, JR.)

David R. Tuthill, Jr. provides this post-hearing brief.

The direction of the Idaho Legislature regarding ground water recharge is clear. Idaho Code Section 42-224 states as follows:

42-234. GROUND WATER RECHARGE -- AUTHORITY OF DEPARTMENT TO GRANT PERMITS AND LICENSES.

(1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the use of water to recharge ground water basins in accordance with Idaho law and the state water plan may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use.

(2) The legislature hereby declares that the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water. The director of the department of water resources is authorized to issue permits and licenses for the purpose of ground water recharge, pursuant to the provisions of this chapter and in compliance with other applicable Idaho law and the state water plan. Emphasis added.

Thus, when the Director is faced with the option of approving, denying, or approving with conditions, he is encouraged to approve the application if possible, recognizing that such approval must be in compliance with other applicable Idaho law. This brief addresses how Application for Permit No. 37-22682 can be approved in accordance with other applicable Idaho law, in light of opposition raised by the Protestants.

In some ways this application represents a crossroads for ground water recharge in Idaho. The IDWR online database now indicates that presently there are 53 approved water rights for ground water recharge in Idaho, comprised of 28 decreed water rights, four water right licenses, and 21 water right permits issued by IDWR. The Applicant believes that that only a few of these approvals were accompanied by modeling of any kind – those seven or fewer for which approval of withdrawal of the recharged water was requested at

the time of request for approval for ground water recharge. The Applicant concurs that modeling is required to accompany a request for withdrawal or use for water made available by ground water recharge – but this modeling should not be required for applications for solely ground water recharge, where any credit for such recharge will be addressed in a later process. In this way the State of Idaho can encourage ground water recharge without first identifying the ultimate use of all recharged water, relying on the statement by the Idaho Legislature that the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water.

The IDWR online database also indicates that presently there are 17 applications for permit, including No. 37-22682. We anticipate that in the future these pending applications will be reviewed with the same standards imposed on 37-22682. If the standards established in this proceeding include some of the provisions requested by the Protestants in this matter, the future of ground water recharge in Idaho will be much diminished. If prior to hearing an applicant must (1) have possessory interest in the point of diversion and all properties through which a canal passes, (2) model the amount of seepage, timing of return to the river, and location of storage in the aquifer, (3) wait until a fully approved ground water model is developed¹ (4) demonstrate a frequency of supply akin to the requirement for irrigation, (5) fully model and account for the potential of seepage injury to residents along any canal, (6) fully model the impacts of recovery of any future credit, (7) satisfy concerns about local public interest by limiting applicants to those who reside in the community, and (8) limit the uses to community uses, then the techniques for issuing all future water rights for ground water recharge in Idaho will change. Such a process would have a chilling effect on application of water to a beneficial use in Idaho, and would be contrary to the legislative guidance and the spirit of prior appropriation in Idaho. On the other hand, a decision by the Hearing Officer to issue this permit with appropriate conditions of approval to establish warranted protections would encourage ground water recharge projects around the state.

The Applicant has pursued approval of this permit in a diligent manner through the following:

- i. Held several meetings with Protestants in an effort to resolve protests.
- ii. Encouraged the development of an independent review to quantify instream needs for fisheries and geomorphologic changes. Endorsed the resulting report, prepared by Dr. Rob Van Kirk.
- iii. Successfully resolved protests from the U.S. Bureau of Land Management, the Idaho Department of Fish and Game, Trout Unlimited and Idaho Rivers United.
- iv. Incorporated lessons learned and conditions of approval from two highly similar permits, nos. 01-10625 and 01-10626.

The last-minute change of Applicant from Innovative Mitigation Solutions, LLC to David R. Tuthill, Jr. was a good faith effort to enable this project to be represented at the hearing by the member of Innovative Mitigation Solutions, LLC who has led this project and whose financial information was provided in advance of the hearing as ordered by the Hearing Officer. Both Lessors agreed to this change, and documentation in this regard was provided to the Hearing Officer and the parties immediately prior to the

¹ Presently the State of Idaho has only two basins with current and approved ground water models – the Eastern Snake Plain and the Rathdrum. The Wood River Basin model is partially developed and scheduled for completion later this year. The State has many other basins with either no model or outdated models.

hearing. This assignment of the application did not change the application or its approvability in any way, and did not disadvantage the Protestants in any way.

The remainder of this brief is organized in the same order as Rule 45 in the Water Appropriation Rules. Portions of Rule 45 are repeated verbatim below, followed by the Applicant's response where appropriate.

045. EVALUATION CRITERIA (RULE 45).

01. Criteria for Evaluating All Applications to Appropriate Water. *The Director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount of water or approved with conditions. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:*

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.*

The Applicant will rely upon the Watermaster to determine when this right is in priority. This is the same for every other junior water right in the basin. As an example, when Magic Dam was built, there was an increased need for Watermaster oversight to ensure delivery to senior downstream water rights. Nevertheless, Magic Dam has proven to be an excellent way to better manage and utilize water in the Wood River Basin. Upstream ground water recharge has the potential to further manage and utilize water supplies during times of plenty, such as on April 17, 2006, when the spillway outfall over Magic Dam was shown in IDWR Safety of Dam records to have been 5,526 cfs.

- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or*

Approval of this right will not create an undue burden on existing water rights. It will merely require the Watermaster to determine when the right is in priority, which is fully within his authority and responsibility.

- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.*

Diversion of this right will not adversely impact water quality.

- iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.*

This water right requires no mitigation.

- v. *The provisions of Subsection 045.01.a.v. are not intended to require compensation or mitigation for loss of flow to holders of subordinated hydropower rights or those from which trust water is reallocated.*

b. Criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval. In assessing such noneconomic factors, the Director will also consider the impact on other water rights if the project is abandoned during construction or after completion, the impact on public resource values, and the cost to local, state and federal governments of such an abandonment.

Reliability of water supply should be considered in light of the use proposed, as this factor is different for different uses. For example, for domestic use the source of supply needs to be available to provide for continuous use. For irrigation the source of supply needs to provide for reasonable certainty of availability. For ground water recharge, if the source of supply is available on an irregular basis, there can still be beneficial use. For example, water is not available every year for newly issued permits nos. 1-10625 and 1-10626, but the permits were nevertheless approved for appropriation to the extent water is available.

In the case of the Wood River aquifer, Dr. Jim Bartolino's USGS reports indicate that the ground water table has declined over the years. The addition of ground water recharge during periods of plenty has the potential to help reverse this trend. There is no requirement that the source of supply must be available during a specified percentage of the time.

Some Protestants commissioned a water availability analysis by Brockway Engineering. This analysis showed water is seldom available for appropriation under this application. However, the analysis is suspect because no availability whatsoever was found on April 17, 2006, when the spillway outfall over Magic Dam was shown in IDWR Safety of Dam records to have been 5,526 cfs – clearly in excess of other water rights in the basin. The Applicant's approach is that for the purpose of ground water recharge the water will be more available some years and less available during other years. As water management in the basin becomes more accurate during future years, the times when water is available should be used to recharge the aquifer. The number of days per year when water is available is not as important as the quantification of how much water should be left in the river to provide for other instream uses when water is diverted for aquifer recharge purposes.

Two IDWR guidance documents also relate to the water supply. One is *IDWR's January 22, 1980 Administrator's Memorandum*. The Applicant is familiar with the genesis of this memorandum from having drafted it for signature by Director Allred. In 1980, IDWR wanted to forestall the filing of new applications for consumptive uses in the Upper Big Wood River Basin. A similar memorandum was issued for new appropriations in the Upper Boise River Basin. At that time computers were not widely used by IDWR, water management techniques were coarse, and digital river basin models were non-existent.

Water management in Idaho has come a long way in the past 35 years. Areas that were coarsely considered to be fully appropriated can now be evaluated with a finer and more detailed review. For example, the U.S. Army Corps of Engineers Storage Study in the Boise River Basin would not have considered high runoff occurring later than June 15th to be unavailable due to the existence of the Boise basin memorandum. If a carefully regulated water right is in priority after June 15th it should be allowed, even though a staff memorandum is in existence. This staff memorandum provides guidance only and does not have the effect of rule or statute.

The other guidance document is the *IDWR Amended Moratorium Order dated April 30, 1993, signed by Director R. Keith Higginson, In the Matter of Applications for Permits for the Diversion and use of Surface and Ground Water within the Eastern Snake River Plain Area and the Boise River Drainage Area*. Item 9. of this moratorium order states as follows:

The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if:

- (a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium, and*
- (b) The director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.*

This application proposes to divert flows from the Big Wood River when in priority. Any diversion must recognize the existence of senior water rights, including those for Magic Reservoir. Any impacts to water supplies in the reservoir and other water rights must be mitigated to offset any potential injury. Diversion in priority limits impact to existing water rights. Flows returning to the river as a result of ground water recharge provide mitigation of any negative impacts. This application is in the public interest and will not injure other water rights. Thus the application is approvable under item 9.

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:

i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States

Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

iii. There are no obvious impediments that prevent the successful completion of the project.

This application was filed in good faith. The Applicant intends to provide water to ground water recharge in accordance with the legislative guidance. No aspect of this application is speculative.

One person who testified during the public comment period likened the application to the days of water speculators during the early settlement of the West. This is not the case. The Applicant has full intent of developing the application as a Lessee and applying the water to the beneficial use of ground water recharge. The business model for this application is not speculative – it combines the strengths of the land owner or canal company – to deliver the water, in combination with the strengths of the Lessee – to measure, model and account for the water, in a sustainable business process. While this business model is new to Idaho, it is not new to other states, where private entities enable ground water recharge in order to apply some of the water of the state to a beneficial use.

Much effort has been expended by the Protestants to demonstrate that the Applicant is not the owner of the land at the point of diversion, the conveyance reach, or the place of use. In Idaho, and throughout the West, one tenet of the prior appropriation doctrine has been the opportunity for someone with possessory interest in the place of use to appropriate water without being a riparian owner. The conclusions established in the case of *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. 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. This is not limited to irrigation. In fact the first cases of prior appropriation in the West were based on mining uses. IDWR has issued many, many water right

permits without the need for an applicant to demonstrate possessory interest in the point 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 IDWR 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.

As an example of how this process normally works, IDWR issued two permits for ground water recharge purposes on October 6, 2014, Permit No. 1-10625 in the name of Peoples Canal & Irrigation Co., and Permit No. 1-10626 in the name of Snake River Valley Irrigation District. One of the protestants to 1-10625 was the U.S. Bureau of Land Management, as the canal crosses BLM land. The technique for resolving this easement issue was the addition of a condition of approval, as follows:

During the development period of this permit, the permit holder agrees to obtain all land use authorizations that are required by the United States Department of the Interior, Bureau of Land Management under Title V of the Federal Land Policy and Management Act of 1976 as amended (43 U.S.C. 1761) and the regulations found in 43 CFR 2800, in order to transport water diverted under this right across BLM land or to conduct recharge activities on BLM land.

Note that the time for resolving the easement issues is “During the development period of this permit.” This has been an acceptable manner of issuing countless IDWR permits with federal easement issues. The coordination with BLM to implement this condition and accordingly receive a withdrawal of protest, as was the case with Application for Permit No. 37-22682, has traditionally been accepted by IDWR as meeting the requirements of this rule.

As the record reflects, Application for Permit No. 37-22682 was not filed with IDWR until the applicant had obtained leases from the owners of property at the place of use. This reflects sufficient possessory interest in this project to meet the spirit and letter of the statutes and rules in this regard.

d. Criteria for determining whether the applicant has sufficient financial resources to complete the project.

i. An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director. This showing is required as described in Subsection 040.05.c. or at the time the hearing provided by Subsection 040.05.c. is conducted.

ii. A governmental entity will be determined to have satisfied this requirement if it has the taxing, bonding or contracting authority necessary to raise the funds needed to commence and pursue project construction in accordance with the construction schedule.

The Applicant has sufficient financial resources to implement this project, due to the relationship between the Lessor and the Lessee. The Lessor will provide for the conveyance of water to the project. In the case of the Hiawatha Canal, the canal already exists. In the case of Walker Sand and Gravel, the Lessor has onsite major heavy equipment with full capability to pioneer canals from the river to their lands. The Applicant has the capability to complete its part of the agreement to measure, monitor, model and account for the recharged water in accordance with an agreement with Idaho Water Engineering, LLC, that is part of the record in this matter. The Applicant is the majority owner of Idaho Water Engineering, LLC, which has the capability to conduct all of this work with its employees and subcontractors. The business model embodied in the leases with Hiawatha and Walker Sand and Gravel constitute a business model designed to be cost effective, efficient, practical and in the spirit of meeting the goals of the Idaho Legislature by accomplishing ground water recharge in Idaho.

e. Criteria for determining whether the project conflicts with the local public interest. The Director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:

i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed use; and

iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

iv. An application which the Director determines will conflict with the local public interest will be denied unless the Director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.

This rule, adopted as of July 1, 1993, has not been updated to reflect the new legislative definition of local public interest in Idaho Code Section 42-202(b)(3), which states as follows:

"Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

Many times the local public interest is reflected by the local County Commissioners. In this case, Blaine County Commissioners (BCC) have been very active in their involvement in water. Their thoughtful and important letter to the Hearing Officer dated June 4, 2015 in this matter provides a wealth of helpful input regarding local public interest. This letter is consistent with Commissioner Schoen's testimony at the 37-22682 hearing. The Applicant agrees with these aspects of the Commissioners' letter:

- *The BCC generally supports Wood River Basin aquifer recharge for purposes of replenishing groundwater and for mitigation under certain circumstances.*
- *On the one hand, the Board of Commissioners supports various measures, including aquifer recharge, intended to conserve precious local water resources.*

The Applicant has concerns regarding the following statements in the Commissioners' letter:

- *On the other hand, the Applicant is not a water user in the basin.*

Being a water user in the basin is not a criterion for becoming a water right permit holder. Also, the Lessors are water users in the basin.

- *While aquifer recharge may be a recognized beneficial use and the Applicant has stated to the Board that this application is simply an application for recharge rights, which should be approved as such, the Applicant also makes plain that the intended purpose of the recharge is to provide mitigation for yet-to-be-determined junior groundwater users, who "could benefit." Such a proposal is speculative on its face. The purpose of the application is central to its evaluation. It is stated clearly that: IC42-203A (5): ... The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. The intended use is not merely recharge, it is recharge for mitigation, without the plan for mitigation.*

The Applicant respectfully disagrees. The Applicant is not aware that determination of ultimate use is a requirement. See for example Permits Nos. 1-10625 and 1-10626.

- *Furthermore, the BCC is concerned about the effects such speculation may have on the ability of the two newly forming local groundwater districts--which will represent the majority of citizens in Blaine County--to meet their yet-to-be-determined mitigation needs and goals.*

Ground water recharge in the Wood River Valley is available to more than one entity. Approval by IDWR of Permit No. 37-22682 will not use up all available supplies and take away other opportunities for ground water recharge. In fact, it would pave the way for implementation by others conducting ground water recharge in the valley. There is need for many ground water recharge efforts, including those conducted by the Ground Water Districts and those conducted by private entities.

- *Like the Applicant, IDFG is unsure of the outcome that will be produced by these recharge and mitigation efforts.*

As indicated above, IDFG withdrew their protest to this application, based on the Proposed Conditions of Approval and an associated settlement agreement.

- *Additionally, Blaine County has shown a strong preference, in its consideration of innumerable stream Alteration Permit applications, for protecting the natural characteristics of largely natural river systems. This includes during times of flood. The Board's first priority always is the protection of private property along and near rivers and creeks prone to flooding. In very close second place, however, is consideration for natural river processes. Riverine ecosystems have adapted to these over eons. While peak flows may threaten homes, they also*

reshape the Big Wood River annually, creating and recreating habitat and flow channels in various ways. The Board is therefore concerned about the effect of diverting peak flows out of mainstem channels. In this sense, the Application contravenes Blaine County's local public interest. If others were to pursue the same strategy as this Applicant, there would be no river-altering flood flows at all.

The Van Kirk report commissioned by IDFG quantified the need for geomorphologic flows. The Applicant has included provisions for these flows in the Proposed Conditions of Approval. It is difficult to imagine a scenario when all high flows in the Big Wood River can be diverted to ground water recharge.

- *Then there is the question of the value and use of the groundwater model currently under construction via joint effort of the US Geological Survey and the Department.*

The Applicant agrees with the value of and need for the ground water model – for the determination of any mitigation plan as contemplated by the Rules for Conjunctive Management of Surface and Ground Water. However, the Applicant does not see how a model helps to inform the approvability of the present application for permit. The application is for ground water recharge. As stated by the Idaho Legislature, this is a beneficial use in its own right. Any proposed subsequent mitigation opportunities will be subject to separate review, informed by the model.

- *The BCC does not think new diversions at this time, of a fully-appropriated natural surface water system for this purpose is in the public interest.*

There are times when the Wood River is fully appropriated. There are times when it is not, for example on April 17, 2006. This application seeks to place to beneficial use the flows in excess of those required to satisfy other rights and instream needs. Such flows are not available every year, but when they are available the Wood River Basin can benefit from ground water recharge.

- *We think Managed Aquifer Recharge (MAR) will need to be accomplished by other means.*

This position of the County is a slippery slope. For the County to endorse ground water recharge, but not the recharge proposed by this private sector application, is neither equitable, nor sustainable, nor optimal for the application of water to beneficial use.

The evening session of the hearing where members of the public were invited to speak offered some insights. First, it appeared that some or all of the speakers were not aware of the fact that (1) the Idaho Department of Fish and Game, (2) Idaho Rivers United and (3) Trout Unlimited had withdrawn their protests to the application based on a settlement. Second, it is clear that there is interest in conducting ground water recharge – but they prefer recharge to be conducted by others. Third, several of the speakers expressed concern that the Applicant does not reside locally. This is not a requirement to be a water appropriator.

In summary relative to local public interest, if “*the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource*” refers to popular endorsement, then this application should not be approved. On the other hand, if the local public interest relates to applying some of the water in the Big Wood River – what is available over and above instream needs – to beneficial use for ground water recharge, then this use of the water has been endorsed by the County Commissioners and by several of the local individuals who testified. The concept of “we like ground water recharge but we do not endorse this project” is not a good basis for denying an application.

02. Criteria for Evaluating Whether a Proposed Use of Trust Water Will Cause a Significant Reduction. *Reference: Section 42-203C(1), Idaho Code and Subsection 025.02.b. For purposes of reallocating trust water made available by the Snake River water rights agreement, an application for permit or a permit being reprocessed, will be presumed to not cause a significant reduction if the Director determines that it complies with both the individual and cumulative tests for evaluating significant reduction as provided in Subsections 045.02.a. and 045.02.b.*

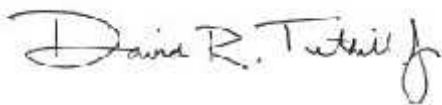
By its very nature this application proposes to divert during times of plenty – during high flows. Thus, most of the time when water will be diverted under Permit No. 37-22682, the flows over Swan Falls will exceed the requirements of Trust Water. The Applicant is open to conditioning the permit with standard Trust Water provisions. Idaho Power Company, a Protestant throughout these proceedings, has been represented by Mr. John Simpson. Mr. Simpson has stated during the proceedings that the Idaho Power Company concerns regarding Trust Water could be addressed by standard conditions used in the past by IDWR. Mr. Simpson’s cross examination during the 37-22682 hearing was consistent with this perspective. The Applicant remains open to the Hearing Officer adding any appropriate standardized IDWR conditions of approval relative to Trust Water considerations.

Regarding the requirement for a new appropriation to be consistent with the conservation of water resources in Idaho, the Applicant knows of no use of water which is more consistent with this requirement, as the intent of this application is to recharge aquifers with water which would otherwise flow from the state.

The applicant agrees with and endorses the additional conditions of approval proposed by the City of Hailey.

In summary, this application is very approvable with conditions. It marks the crossroads where the State of Idaho can either be encouraging to those who might be willing to conduct ground water recharge – or instead implement requirements that discourage ground water recharge. The Hearing Officer is requested to issue the application with appropriate conditions of approval.

Dated this 1st day of July, 2015



David R. Tuthill, Jr.