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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

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

COME NOW, Protestants, the THOMAS M. O’GARA FAMILY TRUST and LOWER SNAKE RIVER AQUIFER RECHARGE DISTRICT, by and through counsel of record, and submit this memorandum 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’ Rules of Procedure (IDAPA 37.01.01 *et seq.*) and I.R.C.P. 56(c).

**INTRODUCTION**

Innovative Mitigation Solutions, LLC (“IMS”) filed multiple applications for permit seeking to divert surface water for groundwater recharge in the Big Wood River basin. IMS is a private limited liability company in Idaho headed by former Department employees. IMS is not a water user in the Wood River Valley. IMS’ goal in this process is to acquire recharge water rights that can then be used to develop recharge credits, which IMS hopes will be sold to unidentified water users in the Wood River Valley to offset depletions from existing and new

groundwater diversions. These Applications fail, however, to meet the legal standards required for new appropriations and, therefore, must be dismissed as a matter of law.

Idaho law sets strict standards for the development of the State's water resources. The law places a burden on an applicant, such as IMS, to show, among other things, that the water supplies are sufficient for the intended use, that the application is not filed in bad faith or for speculative purposes, and that the application does not conflict with the local public interest. For over 30 years, the Department has considered the surface water supplies of the Wood River Valley to be fully appropriated and has rejected any new consumptive use appropriations. Likewise, the Department has considered groundwater resources of the Wood River Valley to be fully appropriated for nearly 25 years as well.

IMS cannot meet even the minimum standards necessary to allow for new diversions in the Wood River Valley. Indeed, IMS cannot even meet the threshold requirement of having acquired the necessary authority to conduct the recharge activities on the property identified. For example, Courts have made it clear that, absent an interest in the property on which the water will be used – which interest must be acquired before the application is filed – an application is speculative and must be rejected. Although IMS has provided leases purporting to authorize any use of the Hiawatha Canal, there is no evidence that the underlying landowners have authorized the expansion of the canal right-of-way over their properties. Further, IMS has provided no evidence of authorization to divert water from the Big Wood River to the Walker Sand & Gravel place of use. Without the required authorizations from underlying landowners, IMS cannot acquire the water rights that it seeks.

Moreover, IMS' confessed intent is to acquire "recharge credits" for the recharge activities contemplated under the Applications. Yet, Idaho does not even have a system in place

for acquiring such recharge credits. Furthermore, when, and if, such a credit system is ever created, there is no way to know whether the activities contemplated under the Applications will even be eligible for credits under that future, undefined program.

Make no mistake, through these Applications, IMS seeks to unlawfully “hoard” an already stressed water resource and increase the consumptive use of groundwater in the Wood River Valley to the detriment of existing water users. *See AFRD #2 v. IDWR*, 143 Idaho 862, 880 (2007). Indeed, IMS intends to use any credits received to allow further consumptive uses under new and/or existing water rights. Neither the law nor Department policy supports such speculative water appropriation activities. Accordingly, the Hearing Officer should dismiss the Applications as a matter of law.

### STATEMENT OF FACTS

On June 28, 1991, Keith Higginson, then Director of the Idaho Department of Water Resources, issued a final order *In the Matter of Designating the Big Wood River Ground Water Management Area. Arrington Aff.* at Ex. A. Through that Order, the Director reaffirmed the Department’s longstanding determination that the surface water supplies in the Big Wood River were “fully appropriated” and “changed” its policy as it relates to groundwater – determining that groundwater resources were also fully appropriated:

In 1980, the Director of the Department of Water Resources issued a policy memorandum by which he declared that the surface water of the Big Wood River upstream from Magic Reservoir was fully appropriated. Since that date, ***no new permits for consumptive purposes have been issued for the use of the river or any of its tributaries.*** The department has continued, however, to issue permits for the use of ground water within the watershed. ***It now appears that this policy must be changed with respect to new consumptive uses of ground water.***

*Id.* at Management Policy pp.2-3 (emphasis added). Accordingly, since 1980 for surface water, and 1991 for groundwater, the Department has considered the water resources in the Wood River

Valley to be fully appropriated and has rejected any new consumptive development of the water resources.

Notwithstanding this determination, IMS has filed five separate applications for permit<sup>1</sup> seeking to divert a total of 175 cfs of the Big Wood River for recharge. Specific to these proceedings are the following applications:

- 37-22682: This application seeks to divert a total of 154 cfs<sup>2</sup> through the Hiawatha Canal and Walker Sand & Gravel Site.
- 37-22852: This application seeks to divert a total of 10 cfs through the Comstock Canal.

Through these Applications, IMS seeks to recharge surface water in the hopes that, perhaps, someday the State will allow IMS to acquire credits for those activities that can then be sold to offset the depletive consumptive uses of new and/or existing ground water rights.

## STANDARD OF REVIEW

### I. Summary Judgment Standard

A motion for summary judgment should be granted if the Hearing Officer determines that there is no genuine issue of material fact based on the pleadings, depositions, admissions and affidavits, and the moving party is entitled to judgment as a matter of law. IDAPA 37.01.01.260; Idaho R. Civ. P. 56(c); *see also, e.g., Harris v. State Dept. of Health*, 123 Idaho 295 (1992); *Farmers Insurance Co. v. Brown*, 97 Idaho 380 (1976).

The nonmoving party may not rest upon mere allegations or denials to avoid summary judgment. *McCoy v. Lyons*, 120 Idaho 765, 770 (1991); *Theriault v. A.H. Robbins Co.*, 108

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<sup>1</sup> The Applications are: 37-22682 (154 cfs through Hiawatha Canal & Walker Sand & Gravel); 37-22851 (3 cfs through Adams Gulch Creek); 37-22852 (10 cfs through Comstock Canal); 37-22853 (3 cfs through Oregon Gulch Creek); and 37-22854 (5 cfs through Willey Ditch).

<sup>2</sup> The original application sought authority to divert up to 63 cfs into the Hiawatha Canal and 91 cfs into the Baseline Canal. The amended application seeks to divert the water previously identified for the Baseline Canal into the Walker Sand and Gravel property.

Idaho 303, 306-07 (1985). Likewise, immaterial issues of fact do not preclude the granting of summary judgment. *J.R. Simplot Co. v. Dosen*, 144 Idaho 611 (2006). If the moving party asserts that there is no genuine issue of material fact, the burden shifts to the non-moving party to “produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact.” *McCoy, supra* at 770. Conclusory assertions unsupported by specific facts do not create a genuine issue of material fact. *Mareci v. Coeur d’Alene School Dist. No. 271*, 150 Idaho 740 (2011). Likewise, mere speculation or a scintilla of evidence is not sufficient to create a genuine issue of material fact. *McCoy*, 120 Idaho at 769; *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84 (2000). In the absence of genuine disputed issues of material fact, only questions of law remain, and the Court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701 (2011).

## **II. Statutory Standard for New Permits**

The Hearing Officer’s review of the IMS Applications is guided by Idaho Code § 42-203A(5), which provides:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

## ARGUMENT

### **I. The Hearing Officer Should Dismiss the Applications Because They are Not Made in Good Faith and are Speculative.**

The Director may reject any application “where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes.” I.C. § 42-203A(5)(c). Department regulations further discuss this requirement.

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.

IDAPA 37.03.08.045.01.c. Further,

Information relative to good faith, delay, or speculative purposes of the applicant, Section 42- 203A(5)(c), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.
- ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department

apprised of the status of the applications and any subsequent approvals or denials

IDAPA 37.03.08.040.05.e.

As to the use of property, the Idaho Supreme Court has clarified that all necessary interests must be secured prior to the filing of the application:

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).

Relying on the above regulations, the Director recently confirmed that the intent of the Application must be considered as a part of the good faith and speculation analysis:

The criteria requiring 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 application 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 (IDAPA 37.03.08.045.01.c).

*Final Order Denying Application No. 36-16976*, at 14, In the name of North Snake Ground Water Dist., *et al.* (Feb. 6, 2015) (“36-16976 Order”) (emphasis added).

IMS has produced no evidence that the Applications are filed in good faith or for non-speculative purposes. Just the opposite, the appropriation of a water right by a private company based in Boise for the sole purpose of making a profit through a speculative venture is the very definition of “bad faith.” Idaho’s water resources are too precious to be locked up in such schemes, and the law forbids such actions. Since these applications are not made in good faith and are speculative, they should be dismissed as a matter of law.

**A. IMS Has Not Provided Proper Authority From the Hiawatha Water Users.**

IMS has only submitted a copy of a document entitled *Hiawatha Canal Lease*, dated February 1, 2012. *Arrington Aff.* at Ex. C. That agreement has been signed by three individuals, one identified as the “Chairman” of the Hiawatha Canal Water Users’ Association of Lateral or Laterals. IMS has provided no evidence that the Hiawatha Canal water users provided any authority to enter into such an agreement. The bylaws of the Hiawatha Canal Water Users’ Association provide the board with the authority to “manage the property, business and affairs of the Association.” *Arrington Aff.* Ex. F at 5. However, the use of the Hiawatha canal to divert and deliver “recharge” water including at times outside of the normal irrigation season, cannot be considered the “property, business and affairs of the Association.” Any such agreements that fall outside of the normal business of the Association must be brought to the water users for approval by a vote of all members. By failing to bring this matter to the members, there is no enforceable agreement to use the Hiawatha Canal. Consequently, the Hearing Officer should dismiss the Application as to the Hiawatha Canal.

**B. IMS Does Not Have Proper Authority to Divert Any Water for Recharge.**

Next, IMS has not provided evidence that it can actually divert water to the places of use identified on the Applications. IMS has only provided two temporary and revocable leases with the Applications. The first, entitled *Hiawatha Canal Lease*, purports to authorize IMS to divert water into the Hiawatha Canal for recharge purposes. The second, entitled *Place of Use Lease Between Walker Sand & Gravel, Landlord (Lessor) and Innovative Mitigation Solutions, LLC, Lessee (Tenant)*, purports to authorize the use of certain gravel permits for recharge. These leases, however, are insufficient for purposes of seeking an appropriation of water, a permanent property right interest under Idaho law.



First, as to Application No. 37-22852, IMS has not provided any lease evidencing any authority to use the Comstock Canal for recharge. Nor has IMS provided any evidence that it has sought to exercise eminent domain to use the Comstock Canal for recharge purposes. On its face, therefore, this application must be dismissed. *Lemmon*, 95 Idaho at 781 (“Persons may not file an application for a water right and then seek a place of use thereof”).

Second, as to both Applications, IMS has not provided any evidence of authority from the underlying landowners of the Hiawatha Canal and/or Comstock Canal to run recharge water over their property or to divert it to unidentified off-canal locations. Neither the Hiawatha Canal Water Users Association nor any other entity owns the properties underlying the Hiawatha Canal or Comstock Canal. *Runser Aff.* Rather, the canals are subject to existing rights-of-way in their present location, which rights-of-way are limited in scope for the specific water rights for which they are being used. There is no evidence that the underlying landowners have granted any authority to run any water in the canal in the non-irrigation season or to increase the burden on those lands to run recharge water through the canals on their properties. Neither the Hiawatha Canal nor the Comstock Canal can unilaterally increase the burden on the underlying properties. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548 (1991) (“It is well established in this jurisdiction that an easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. ... [T]he general rule concerning easements is that the right of an easement holder may not be enlarged and may not encompass more than is necessary to fulfill the easement.”) Indeed, “an easement does not include the right to enlarge the use to the injury of the servient land.” *Id.*

Allowing additional water to run through a canal will increase the burden to the underlying properties and servient landowners. Additional water in the canals results in

additional risks to the underlying landowners – including icing problems, breaches and/or overrunning of the banks. These concerns are particularly acute in the Hiawatha Canal, which does not return water to the Big Wood River. Any extra water will either run over the banks or seep into the ground if it is not diverted out of the canal under existing water rights.<sup>3</sup> In addition, whereas the current use of the canals is limited to the irrigation season, the period of use for the Applications contemplates year-round diversions. There is no evidence that any landowner has agreed to the expanded season of use or has agreed to undertake these additional risks or that the rights-of-way may be expanded and enlarged. IMS has not provided any authority to enlarge the rights-of-way for the Hiawatha or Comstock Canals. Nor has IMS submitted any evidence that it is attempting to use eminent domain to acquire the necessary authorities. As such, the Applications should be dismissed. *Lemmon*, 95 Idaho at 781 (“Persons may not file an application for a water right and then seek a place of use thereof”).

Third, to the extent that IMS intends to re-divert water out of the Hiawatha Canal and/or Comstock Canal for recharge at any other location, IMS has not provided any lease authorizing such use and has not provided evidence that IMS is seeking to condemn such a right. As such, under the holding in *Lemmon*, the Applications must be dismissed.

Fourth, IMS has failed to provide any leases evidencing authority to divert the water from the Big Wood River to the Walker Sand and Gravel property. Walker Sand and Gravel does not own the properties at the points of diversion for Application No. 37-22682. *Runser Aff.* IMS has not provided any leases authorizing the installation of headgates on other property or the delivery of recharge water to the gravel pits. Absent such authority, which must be acquired before the application is filed, the Applications should be dismissed. *Lemmon, supra*.

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<sup>3</sup> IMS has never explained what will happen to the additional water it intends to divert into the Hiawatha Canal or how the neighboring properties will be protected from flooding and other damage resulting from the increased diversions into the canal.

**C. There is No Mechanism in the State of Idaho for Recharge Credits.**

In reviewing the Applications, the Department must consider the intent of the Applicant (i.e. IMS) in filing the Applications. As Director Spackman recently confirmed, the “criteria requiring 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 application with respect to the filing and diligent pursuit of application requirements.*” 36-16976 Order at 14 (emphasis added). IMS is not a water user in the Wood River Valley. IMS is a private company based in Boise headed by former Department employees. Here, there is no question as to the true intent of IMS in filing these applications: to seek recharge credits to make a future profit. *See Arrington Aff.* at Ex. B (excerpts from Discovery responses indicating that IMS has already had discussions with water users about “mitigation credits that may result from the use of water” under these applications); *see also Id.* at Ex. C (Payment for use of Hiawatha Canal is “1/2 of all Credits acquired and issued to Tenant [IMS] during the prior calendar year ...”); Ex. D (Payment for use of the Walker Gravel pits is “55% of all Credits acquired and issued to Tenant during the prior calendar year ...”).

Presently, Idaho has no mechanism for the application and use of credits for recharge activities. Furthermore, if such a system is ever created in Idaho, there is no way to know whether or not the activities proposed by IMS under these applications would even qualify for such recharge credits.

Since there is no credit system, and there is no certainty that the action proposed by IMS would even qualify for credits under a future credit system, the Applications are not filed in good faith, are speculative, and should be dismissed.

**D. Decreed Water Rights Exist for the Seepage Loss from the Hiawatha Canal.**

The Snake River Basin Adjudication District Court has already decreed five separate water rights for the seepage loss in the Hiawatha Canal and lateral system. *Arrington Aff.* at Ex. E (Partial Decrees for water rights 37-577B, 37-22630, 37-22631, 37-22632 & 37-22633). Each water right was decreed with “Mitigation” as the purpose of use and each includes a remark specifying that the water is to be used for seepage loss in the Hiawatha system. *Id.* (Water Right No. 37-22630 includes the following remark: “This right is limited to conveyance loss associated with delivery of water by the Hiawatha Canal Water Users Association of Lateral or Laterals through its canal and lateral system”). Accordingly, whenever irrigation water rights are in use in the Hiawatha system, any losses associated with the conveyance of water will be accounted to the seepage loss water rights. Since the seepage that will occur in the system is already dedicated to existing water rights, IMS has no right to claim those losses for recharge under these Applications. As such, the part of the Application as to the Hiawatha Canal should be dismissed for this reason as well.

**E. IMS Will not Construct any “Project” for the Development of the Water Rights.**

In a recent decision, the Director addressed the obligation for the Applicant to construct a “project” for the development of a water right. There, certain Ground Water Districts sought to divert water through an existing diversion system for use as mitigation. In denying the application, the Director held:

The District's Application was filed in bad faith because, for a majority of the quantity of water sought to be appropriated, there is a threshold impediment to “completion of the project.” To perfect a project for a water right, there inherently must be completion of works for beneficial use. The testimony of Lynn Carlquist quoted above demonstrates the Districts’ intent at the time of filing the Districts' Application was to simply obtain the Permit and assign it to Rangen to perfect by utilizing the water in the Rangen facility the way Rangen

has done for the last fifty years. The initial filing by the Districts did not contemplate any construction of works and completion of any project. Furthermore, even at this point, with respect to at least 8.0 cfs of the 12 cfs the Districts propose for appropriation, Rangen will continue to divert through its existing Bridge Diversion. There is no “project” and consequently cannot be a “completion of the project” for the 8.0 cfs, because the 8.0 cfs will be diverted through the existing Bridge Diversion without any construction of a project or any completion of works for beneficial use. The Districts’ Application fails the bad faith test based on the threshold question of whether there will be a project, and whether there will be any construction of works for perfection of beneficial use.

*36-16976 Order at 14.*

Similar analysis confirms that the Applications filed in this matter were filed in bad faith. Indeed, as to the Hiawatha Canal and Comstock Canal, IMS intends only to recharge water that is being diverted into the canals through their existing headgates. There is no intent to construct new diversion works or to enhance the existing diversion works – only to claim water diverted into the canal for recharge. Rather, the diversion works were previously constructed by the owners of the canals. The owners of the canal have not applied for these water rights. Rather, IMS seeks to divert water through the works which it does not own and did not construct. Absent the construction of any project, the Applications should be dismissed.

## **II. The Applications Should be Dismissed Because They Conflict with the Local Public Interest.**

The Director may reject an application where it is determined that it “will conflict with the local public interest as defined in section 42-202B.” I.C. § 42-203A(5)(e). Idaho Code further defines the “local public interest” 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.” I.C. § 42-202B(3). In this case, approval of the Applications would conflict with the local public interest.

### **A. Mitigation Rights Already Exist in the Hiawatha Canal.**

As discussed above, there are already mitigation water rights accounting for the seepage in the Hiawatha Canal. *Supra*. In other words, seepage that IMS seeks to claim as a “recharge” is already accounted for under existing water rights. It would be against the local public interest to allow IMS to develop a separate water right based on seepage that is already accounted for under existing water rights. *C.f.* I.C. § 42-234(5) (“However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right”).

**B. The Use of Recharge Credits to Mitigate for New Consumptive Uses will Violate Department Policies.**

As discussed above, Idaho presently has no system for the development and marketing of credits associated with recharge activities. It is against the local public interest to approve a water right that contemplates activities that are not authorized under Idaho Law.

Even if a credit system were established, however, these water rights would still be contrary to public interest. Since 1980 (surface water) and 1991 (ground water), the Department has maintained a policy and practice of preventing any new permits for consumptive uses. As the Department stated:

In 1980, the Director of the Department of Water Resources issued a policy memorandum by which he declared that the surface water of the Big Wood River upstream from Magic Reservoir was fully appropriated. Since that date, no new permits for consumptive purposes have been issued for the use of the river or any of its tributaries. The department has continued, however, to issue permits for the use of ground water within the watershed. It now appears that this policy must be changed with respect to new consumptive uses of ground water.

*Arrington Aff.* at Ex. A at Management Policy pp.2-3.

Any attempt to use credits to offset the depletive effects of new diversions will violate this policy. Indeed, in such an instance, the use of water recharged pursuant to these

Applications would become *fully consumptive*. The authorization of new consumptive uses is against the local public interest. As such, the Hearing Office should dismiss the Applications.

**C. IMS Seeks to Hoard Water Resources Even Though There is No Demonstration that the Anticipated Recharge will Benefit the Aquifer.**

The Applications seek to hoard water supplies in the hopes that, perhaps, someday a credit system will be developed that will allow IMS to receive mitigation credits for its recharge activities and that such system will actually apply to the activities contemplated under the Applications. Such speculative stockpiling of the State's water resources is contrary to the local public interest and existing case law. *See AFRD #2*, 143 Idaho at 880.

The Department has developed policies regarding the relationship between surface water and groundwater. For transfers seeking to change the source of a water right – from groundwater to surface water and vice versa – the Department's Transfer Processing Memorandum No. 24, at 20, provides the following:

An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day). The existing point of diversion and proposed point of diversion must be proximate such that diversion and use of water from the proposed point of diversion would have substantially the same effect on the hydraulically-connected source as diversion and use of water from the original point of diversion.

Similarly, under the *Water Supply Bank Interim Ground Water Rental Policy for the Wood River Valley*, the Idaho Water Resource Board has determined that “due to the ***direct and immediate connection between surface and ground waters within this two hundred foot wide river zone***, all ground water pumping within the river zone will have a direct and ***immediate impact on surface water resources***.”<sup>4</sup>

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<sup>4</sup> [https://www.idwr.idaho.gov/files/water\\_supply\\_bank/20150129\\_WRV\\_Interim\\_Ground\\_Water\\_Rental\\_Policy.pdf](https://www.idwr.idaho.gov/files/water_supply_bank/20150129_WRV_Interim_Ground_Water_Rental_Policy.pdf)

This was further explained in the Brockway memorandum, where Charles G. Brockway concluded that much of the water recharged at the designated locations will return to the river very quickly – most during the same irrigation season. *Arrington Aff.* Ex. G. In such instances, there would be very little, if any, benefit to the aquifer.

It is against the public interest to authorize recharge activities that will not benefit the aquifer. Yet, IMS seeks to hoard water resources for alleged recharge purposes. In truth, however, given the “immediate impact on surface water resources,” all that the Applications will accomplish is a shifting of surface water. Such actions conflict with the local public interest.

It should be noted further, that IMS is not a water user. It is only a private company seeking to hoard the Wood River Valley’s water resources for the purpose of profiting off of a potential, future and uncertain recharge credit system. As such, the applications should be dismissed.

### **III. The Applications Should be Dismissed Because They Conflict with the Conservation of Water Resources.**

Finally, the Department may reject any applications that are found to be “contrary to the conservation of water resources within the state of Idaho.” I.C. § 42-203A(5)(f). For the following reasons, discussed in more detail above, the Applications fail to meet this standard and should be dismissed:

1. There is no mechanism in Idaho authorizing the development and/or marketing of credits for recharge activities. *Supra* Part I.B. It is contrary to the conservation of water resource to allow IMS to hoard water resources in hopes that such a program may be developed.

2. There are existing water rights for seepage loss in the Hiawatha Canal. *Supra*. Part II.C. It is contrary to the conservation of water resources to allow further diversions seeking to recharge in that same canal.




3. The intended use of recharge credits to mitigate for new consumptive uses will effectively make these Applications fully consumptive water rights in violation of long-standing Department policies and practices. *Supra* Part II.B.

### CONCLUSIONS

IMS has failed to satisfy the requirements necessary for the development of a new water right in Idaho. IMS cannot meet the burdens required by Idaho law. Since IMS has failed to secure proper authority to conduct recharge activities, failed to show the Applications were filed in good faith and not for speculative purposes, and failed to show the Applications are consistent with the local public interest, the Hearing Officer should dismiss the Applications as a matter of law.

DATED this 16 day of April, 2015.

**BARKER ROSHOLT & SIMPSON LLP**

  
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Travis L. Thompson  
Paul L. Arrington

*Attorneys for Lower Snake River Aquifer Recharge  
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### CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of April, 2015, I served a true and correct copy of the foregoing, via email to the following:

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